# Mode of Operation: Narrowed to Nothing? Relevant Authority, Pleading, and Practical Application

**March 31, 2021**

**1:00 p.m. – 2:00 p.m.**

**CT Bar Association**

**Webinar**

**CT Bar Institute, Inc.**

CT: 1.0 CLE Credit (General)
NY: 1.0 CLE Credit (AOP)

# Table of Contents

# LAWYERS' PRINCIPLES OF PROFESSIONALISM

As a lawyer, I have dedicated myself to making our system of justice work fairly and efficiently for all. I am an officer of this Court and recognize the obligation I have to advance the rule of law and preserve and foster the integrity of the legal system. To this end, I commit myself not only to observe the Connecticut Rules of Professional Conduct, but also conduct myself in accordance with the following Principles of Professionalism when dealing with my clients, opposing parties, fellow counsel, self-represented parties, the Courts, and the general public.

## Civility:

Civility and courtesy are the hallmarks of professionalism. As such,

- I will be courteous, polite, respectful, and civil, both in oral and in written communications;
- I will refrain from using litigation or any other legal procedure to harass an opposing party;
- I will not impute improper motives to my adversary unless clearly justified by the facts and essential to resolution of the issue;
- I will treat the representation of a client as the client's transaction or dispute and not as a dispute with my adversary;
- I will respond to all communications timely and respectfully and allow my adversary a reasonable time to respond;
- I will avoid making groundless objections in the discovery process and work cooperatively to resolve those that are asserted with merit;
- I will agree to reasonable requests for extensions of time and for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;
- I will try to consult with my adversary before scheduling depositions, meetings, or hearings, and I will cooperate with her when schedule changes are requested;
- When scheduled meetings, hearings, or depositions have to be canceled, I will notify my adversary and, if appropriate, the Court (or other tribunal) as early as possible and enlist their involvement in rescheduling; and
- I will not serve motions and pleadings at such time or in such manner as will unfairly limit the other party's opportunity to respond.

## Honesty:

Honesty and truthfulness are critical to the integrity of the legal profession – they are core values that must be observed at all times and they go hand in hand with my fiduciary duty. As such,

- I will not knowingly make untrue statements of fact or of law to my client, adversary or the Court;
- I will honor my word;
- I will not maintain or assist in maintaining any cause of action or advancing any position that is false or unlawful;

- I will withdraw voluntarily claims, defenses, or arguments when it becomes apparent that they do not have merit or are superfluous;
- I will not file frivolous motions or advance frivolous positions;
- When engaged in a transaction, I will make sure all involved are aware of changes I make to documents and not conceal changes.

**Competency:**

Having the necessary ability, knowledge, and skill to effectively advise and advocate for a client's interests is critical to the lawyer's function in their community. As such,

- I will keep myself current in the areas in which I practice, and, will associate with, or refer my client to, counsel knowledgeable in another field of practice when necessary;
- I will maintain proficiency in those technological advances that are necessary for me to competently represent my clients.
- I will seek mentoring and guidance throughout my career in order to ensure that I act with diligence and competency.

**Responsibility:**

I recognize that my client's interests and the administration of justice in general are best served when I work responsibly, effectively, and cooperatively with those with whom I interact. As such,

- Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the Court (or other tribunal) and my adversary of any likely problem;
- I will make every effort to agree with my adversary, as early as possible, on a voluntary exchange of information and on a plan for discovery;
- I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;
- I will be punctual in attending Court hearings, conferences, meetings, and depositions;
- I will refrain from excessive and abusive discovery, and I will comply with all reasonable discovery requests;
- In civil matters, I will stipulate to facts as to which there is no genuine dispute;
- I will refrain from causing unreasonable delays;
- Where consistent with my client's interests, I will communicate with my adversary in an effort to avoid needless controversial litigation and to resolve litigation that has actually commenced;
- While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation.

**Mentoring:**

I owe a duty to the legal profession to counsel less experienced lawyers on the practice of the law and these Principles, and to seek mentoring myself. As such:

- I will exemplify through my behavior and teach through my words the importance of collegiality and ethical and civil behavior;
- I will emphasize the importance of providing clients with a high standard of representation through competency and the exercise of sound judgment;
- I will stress the role of our profession as a public service, to building and fostering the rule of law;
- I will welcome requests for guidance and advice.

**Honor:**

I recognize the honor of the legal profession and will always act in a manner consistent with the respect, courtesy, and weight that it deserves. As such,

- I will be guided by what is best for my client and the interests of justice, not what advances my own financial interests;
- I will be a vigorous and zealous advocate on behalf of my client, but I recognize that, as an officer of the Court, excessive zeal may be detrimental to the interests of a properly functioning system of justice;
- I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;
- I will, as a member of a self-regulating profession, report violations of the Rules of Professional Conduct as required by those rules;
- I will protect the image of the legal profession in my daily activities and in the ways I communicate with the public;
- I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance; and
- I will support and advocate for fair and equal treatment under the law for all persons, regardless of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, gender identity, gender expression or marital status, sexual orientation, or creed and will always conduct myself in such a way as to promote equality and justice for all.

Nothing in these Principles shall supersede, supplement, or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which a lawyer’s conduct might be judged, or become a basis for the imposition of any civil, criminal, or professional liability.

# Faculty Biographies

**Philip M. Chabot**
Attorney Phil Chabot is a Senior Associate with Nuzzo & Roberts and has been with the firm since he graduated from Quinnipiac University School of Law in 2016. Phil primarily practices insurance defense litigation with a principal focus on premises liability and motor vehicle tort. Phil also represents injured persons after car accidents, slip and falls, dog bites and other various civil wrongdoing. No matter whether his clients are commercial or personal, Phil treats each client as his top priority, as navigating the civil terrain in Connecticut is always easier with a trusted hand. Phil offers free consultations to new clients.

Prior to joining the firm, Phil was Moot Court President at QU Law and argued a controversial criminal appeal in front of the Appellate Court. Phil graduated Cum Laude from QU Law, and Dean's List from The University of Rhode Island where he received his Bachelors in Psychology. Phil grew up in Smithfield, Rhode Island and visits frequently to see his family and friends.

Phil is an avid Patriots fan, and he played Division One Soccer and Baseball before attending law school. When he is not practicing law, Phil enjoys working on his house, attending concerts, skiing and playing softball.

**Education**
Quinnipiac School of Law, North Haven, Connecticut, Cum Laude, 2016
University of Rhode Island, Kingston, Rhode Island, Dean's List, 2013

**Admissions**
Connecticut, 2017 (July 2016 Bar)
U.S. District Court, District of Connecticut, 2018

**Professional Associations and Memberships**
Connecticut Bar Association
New Haven County Bar Association
New Haven County Young Lawyers Association
Young Lawyers, Personal Injury Section Executive Chair
Connecticut Defense Lawyers Association
American Bar Association

**Kevin C. Hines**
Kevin Hines is a partner who practices in the firm's General Liability group, primarily in Premises Liability and Construction Litigation. Kevin has defended hundreds of cases including everything from slip and falls to catastrophic workplace injuries on multi-employer construction sites involving death and debilitating injuries from falls, electrocutions and crush injuries. Kevin routinely handles premises liability claims for owners and other parties in control of property where injuries occur, including local businesses, and regional and national chains in the retail, grocery, restaurant and hospitality industry. Kevin has also successfully mediated several high-exposure construction injury cases including obtaining a withdrawal for his client without a contribution to a multi-million-dollar settlement. He often represents clients in third party litigation and risk transfer claims between general contractors, subcontractors, architects, engineers and property owners.

Kevin aggressively investigates claims to provide his clients accurate assessment of potential for risk transfer and liability and damages exposure. His clients benefit from constant communication and effort usually resulting in reasonable and efficient resolution of claims. He regularly directly negotiates settlements with opposing counsel. Kevin has vast experience in mediating and arbitrating claims. He has also won jury trials when his clients chose to defend through verdict or reasonable settlement was unattainable during the negotiating process because of the positions of opposing parties.

Prior to joining Nuzzo & Roberts, Kevin was a research clerk to the Judges of the Connecticut Superior Court. He now serves the town where he lives as a member of the Board of Ethics.

In earlier years, Kevin used to make it his priority to visit as many major sports venues around the country as possible. Today, though, he spends his free time spectating at a different level of sporting event, those participated in by his son and daughter. A dedicated family man, Kevin enjoys spending time each summer on the southern coast of Maine.

**Education**
Western New England College School of Law, Springfield, Massachusetts, *cum laude,* 2001
University of New Haven, West Haven, Connecticut, *summa cum laude,* 1997

**Admissions**
Connecticut, 2002
Massachusetts, 2002
United States District Court, District of Connecticut, 2003
U.S. Court of Appeals for the Second Circuit, 2010

**Peer Review Recognition**

AV Rated by Martindale Hubbell

Connecticut Super Lawyers® Rising Star (Civil Litigation, Construction Litigation, Personal Injury) 2009 – 2014

New England Super Lawyers® Rising Star (Civil Litigation, Construction Litigation, Personal Injury) 2009 – 2014

**Professional Associations and Memberships**

Kevin is a Past President of the New Britain Bar Association and is a member of the Connecticut Bar Association, Defense Research Institute, Claims & Litigation Management Alliance and Connecticut Defense Lawyers Association.

# Mode of Operation: Narrowed to Nothing? Relevant Authority, Pleading, and Practical Application (EYL210331)

## Agenda

I. What is the mode of operation rule, and how does this affect premises liability?
II. Understand how the rule has changed since its adoption in Kelly, and what cases are relevant?
III. How can we apply this knowledge practically in our daily practice?

# Mode of Operation: Narrowed to Nothing? Relevant Authority, Pleading & Practical Application

March 31, 2021: 1:00-2:00 p.m.

(EYL210331)

CLE Credits: CT 1.0; NY 1.0

Presented by Philip M. Chabot & Kevin C. Hines

On behalf of the Young Lawyers Society

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# A bit about us…

## Philip M. Chabot

Education:

- University of Rhode Island, Dean's List, 2013; BA
- Quinnipiac University School of Law, *cum laude*, 2016; JD

Work Experience:

- Nuzzo & Roberts, LLC: Senior Associate

Admissions & Professional Associations:

- Connecticut, 2017
- United States District Court, District of Connecticut, 2003
- Young Lawyers Section: Person Injury Executive Chair
- New Haven County Bar Association
- Connecticut Defense Lawyers Association
- American Bar Association

Areas of Practice:

- General Liability:
  - Premises Liability
  - Motor Vehicle Tort
  - Retail, Restaurant & Hospitality
  - Product Liability
  - Trucking and Transportation
  - Construction Litigation

Contact Information:
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(203) 250-2000

## Kevin C. Hines

Education:

- University of New Haven, summa cum laude, 1997; BA
- Western New England College School of Law, cum laude, 2001; JD

Work Experience:

- Nuzzo & Roberts, LLC: Partner
  - AV Rated by Martindale Hubbell
  - Connecticut Super Lawyers 2009-2014

Admissions & Professional Associations:

- Connecticut, 2002
- Massachusetts, 2002
- U.S. Court of Appeals, 2nd Circuit, 2010
- United States District Court, District of
- Connecticut, 2003
- New Britain Bar Association
- Connecticut Defense Lawyers Association

Areas of Practice:

- General Liability:
  - Premises Liability
  - Construction Litigation
  - Motor Vehicle Tort
  - Product Liability
  - Retail, Restaurant & Hospitality
  - Trucking and Transportation

Contact Information:
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(203) 250-2000

# What Will We Cover & Practical Takeaways

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## The Big Three

- What is the mode of operation rule, and how does this affect premises liability?
- Understand how the rule has changed since its adoption in *Kelly*, and what cases are relevant?
- How can we apply this knowledge practically in our daily practice?

Index of Pertinent Slides:

I. Basics of mode and controlling authority:



II. Practical Application:

# Basic Tenets of Premises Liability

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Basics of Premises Liability: Duty-Breach-Causation

- The possessor of land owes a duty, generally, to those persons legally upon that land.[1]
- The duty owed depends on the classification of the individual:
  - Trespassers[2]
  - Licensees[3]
  - *Invitees*
- A business that is open to the public has a duty to keep the premises in a reasonably safe condition for the benefit of its customers (business invitees).[4]
- To prove breach of this duty, a plaintiff must prove:
  1. Existence of a defective/unsafe condition; and
  2. Notice of the specific condition.[5]
- Notice can be actual or constructive:
  - Actual: Did an agent of the defendant create the condition or know if its existence prior to the incident?[6]
  - Constructive: Had the condition existed for such a length of time that the defendant should have, in the exercise of reasonable care, discovered it in time to remedy.[7]

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https://giphy.com/gifs/Lewis1946-ice-wet-bloopers-MDlWsK8JsiqyC9xtnM

1. *Baptiste v. Better Val–U Supermarket, Inc.*, 262 Conn. 135, 140 (2002).
2. The possessor of land owes a duty to an adult trespasser to not intentionally injure him or her. There is generally no duty to warn trespassers of hidden dangers. However, the trespasser may be entitled to due care after his presence is actually known. A possessor of land who knows, or should know, that trespassers constantly intrude upon a limited area of land is liable for a trespasser's bodily injuries if: (1) the possessor created or maintained a condition likely to cause serious bodily injury; (2) the possessor had reason to believe that the trespasser would not discover the condition; and (3) the possessor failed to use reasonable care to warn the trespasser of the condition. *Maffucci v. Royal Park Ltd.*, 243 Conn. 552, 559–60 (1998).
3. A possessor of land does not have an obligation to keep his premises in a reasonably safe condition to a licensee because a licensee takes the premises as he finds it. *Dougherty v. Graham*, 161 Conn. 248, 251 (1971). However, a possessor owes licensees a duty to warn of hidden dangers about which the possessor knew or should have known. *Morin v. Bell Court Condominium Ass'n, Inc.*, 223 Conn. 323, 329 (1992).
4. *Kelly v. Stop & Shop, Inc.*, 281 Conn. 768, 776 (2007).
5. *Id.*
6. *Id.* at 777.
7. *Id.*

# What is mode and when does it apply?

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- Lets be honest, premises cases, generally, have lower exposure because notice is difficult to prove.
- The Connecticut Supreme Court in *Kelly v. Stop & Shop, Inc.*, formally adopted the mode of operation rule, which, if applicable, alleviates a plaintiff's requirement to prove notice.[8]
- Sounds pretty good… for plaintiff attorneys… but when and under what circumstances does the exception apply?
- First, lets look at *Kelly v. Stop & Shop, Inc.*


Hulu.tv/FutureMan
https://giphy.com/gifs/hulu-tv-show-xUOxfoOCQuKkcnSTEQ

The mode of operation rule is an exception to the notice requirement under premises liability.

8. *Id.* at 791.

# *Kelly v. Stop & Ship, Inc.*, 281 Conn. 768 (2007)

Facts: 6

- Premises liability claim alleging slip and fall on a piece of lettuce directly adjacent to the self-service salad bar. [9]
- Salad bar surrounded by a floor mat. [10]
- Characteristics of salad bar caused potential hazards. [11]
- Plaintiff couldn't prove notice. [12]
- Store policy established area around salad bar was "precarious."[13]
- Plaintiff alleged mode of operation as salad bar caused foreseeable hazards as customers often spilled food.[14]
- Citation in Casemaker wrong, citation here is proper.

## Procedural History:

- Superior Court found in favor of plaintiff, as notice was not established. [15]
- The court did not address the mode of operation claim, as Connecticut had not adopted this rule. [16]
- Plaintiff appealed: the court improperly declined to consider the mode claim. She did not contest the sufficiency of evidence with regards to notice. [17]

9. *Id.* at 770.
10. *Id.*
11. *Id.* at 770-71.
12. *Id.* 771.
13. *Id.* at 772.
14. *Id.* at 774.
15. *Id.* at 774-75.
16. *Id.* at 775.
17. *Id.*

# *Kelly v. Stop & Ship, Inc.*, 281 Conn. 768 (2007) [Detailed]

Facts: 7

- The plaintiff brought a premises liability claim alleging she was caused to slip and fall on a piece of lettuce directly adjacent to the self-service salad bar. [9]
- Salad bar was surrounded on both sides by a narrow floor mat. [10]
- Salad bar had a four inch ledge that was too narrow to place a container thereon; consequently, customers would hold their containers aloft, over the floor, while serving themselves. [11]
- The plaintiff did not see anything on the floor before she fell, did not see any employees around the salad bar before she fell and did not know how long the piece of lettuce was on the floor before she fell; ergo, she had no evidence to prove notice. [12]
- Store policy called for at least one full-time employee to tend the salad bar at all times. The employee's duties included, *inter alia*, restocking and cleaning the area around the salad bar as, pursuant to the manager's testimony, the salad bar was: "an area where people used to let . . . salads fall. It was precarious." [13]
- The plaintiff alleged in her complaint that the defendant was liable pursuant to the mode of operation, as its salad bar was offered and managed in such a way it was foreseeable that customers would spill/drop food causing hazards. [14]

Procedural History:

- After a bench trial, court found in favor of defendant, as the Plaintiff presented no evidence to support a finding of actual or constructive notice; specifically, there was nothing in the record to prove how long the lettuce was present. [15]
- The court did not address the mode of operation claims, as Connecticut had not adopted this rule. [16]
- Plaintiff appealed: the court improperly declined to consider the mode claim. She did not contest the sufficiency of evidence with regards to notice. [17]

9. *Id.* at 770.
10. *Id.*
11. *Id.* at 770-71.
12. *Id.* 771.
13. *Id.* at 772.
14. *Id.* at 774.
15. *Id.* at 774-75.
16. *Id.* at 775.
17. *Id.*

# CT adopts mode in *Kelly*

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Connecticut Supreme Court reverses trial court and holds that **Connecticut formally adopts the mode of operation**.[18]

- A plaintiff establishes a prima facie case of negligence upon presentation of evidence that the mode of operation of the defendant's business:
  1. Gives rise to a foreseeable risk of injury to customers; and
  2. That the plaintiff's injury was proximately caused by an accident within the zone of risk.[19]
- A defendant may rebut the plaintiff's evidence by producing evidence that it exercised reasonable care under the circumstances.[20]
- The court reasoned:
  - Area around salad bar was precarious due to customers regularly spilling food from the salad bar onto the floor;
  - Defendant was aware of the regularly occurring hazards as they placed out mats and had an employee stationed at the bar at all times;
  - Plaintiff slipped on a piece of lettuce that originated from the bar; and
  - Plaintiff fell directly adjacent to salad bar.[21]

18. *Id.* at 794.
19. *Id.* at 791.
20. Id.
21. Id. at 793.
22. Id. at 793-94.

Fun Fact: Justice Steven Ecker argued *Kelly* to the CT Supreme Court prior to his appointment.


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https://giphy.com/gifs/foxhomeent-3o7btTHG3ipVrXeJ2M

# CT adopts mode in *Kelly* [Detailed]

9

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  - Defendant was aware of the regularly occurring hazards as they placed out mats and had an employee stationed at the bar at all times;
  - Plaintiff slipped on a piece of lettuce that originated from the bar; and
  - Plaintiff fell directly adjacent to salad bar.[21]
- Therefore, the plaintiff established a prima facie case as she presented sufficient evidence to meet each element of mode:
  - Defendant's mode of operation of offering a self-service salad bar caused regularly occurring and foreseeable hazards;
  - Plaintiff was injured as a result of lettuce failing to the ground; and
  - The fall occurred within a limited zone of risk.[22]

Fun Fact: Justice Steven Ecker argued *Kelly* to the CT Supreme Court prior to his appointment.


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https://giphy.com/gifs/foxhomeent-3o7btTHG3ipVrXeJ2M

18. *Id.* at 794.
19. *Id.* at 791.
20. Id.
21. Id. at 793.
22. Id. at 793-94.

# Let's walk this back a bit…

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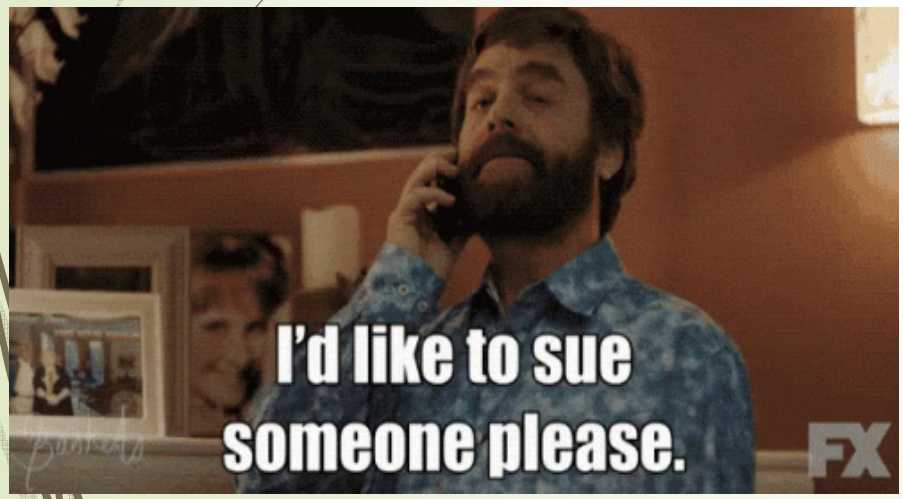
- Did *Kelly* leave trial courts with insufficient guidance as to when mode should be applied?
- Tidal wave of mode claims, but when does mode actually apply?
- Post *Kelly*, was a pretty good time for slip and falls…

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- After *Kelly*, the controlling courts consistently narrowed *Kelly*'s holding and the applicability of mode.
- An additional element was introduced to establish a prima facie case under mode.
- *Kelly*'s pertinent progeny we will cover:
  - *Fisher v. Big Y Foods, Inc.*, 298 Conn. 414 (2010);
  - *Konesky v. Post Rd. Entm't*, 144 Conn. App. 128 (2013);
  - *Porto v. Petco Animal Supplies Stores, Inc.*, 167 Conn. App. 573 (2016); and
  - *Hill v. OSJ of Bloomfield, LLC*, 200 Conn. App. 149 (2020);

# *Fisher & Konesky:*

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*Fisher v. Big Y Foods, Inc.*, 298 Conn. 414 (2010):

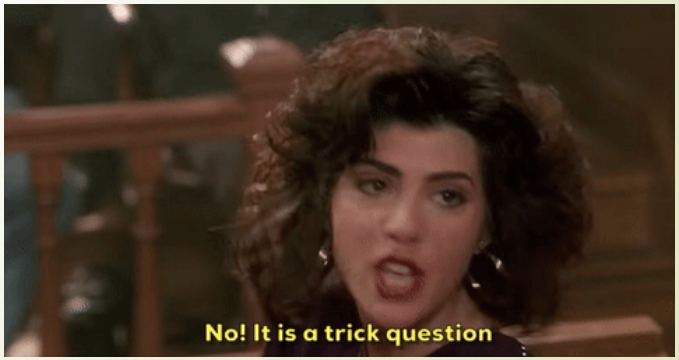
- Plaintiff alleges slip and fall on cocktail juice at Big Y falls under mode of operation; trial court permits mode claim to go to jury.[23]
- Defendant appeals arguing:
  - Mode doesn't apply generally to all transitory hazards in self-service retail stores; rather, there must be a more specific method of operation[24]
  - Holding in favor of the plaintiff would, essentially, impose strict liability on self-service retail stores.[25]
- CT Supreme Court reverses trial court holding:
  - Mode is meant to be a narrow exception; and
  - Mode does not apply generally to transitory hazards in retail stores, there must be a more specific method of operation that creates regularly occurring hazards, which made it foreseeable.[26]
- Reasoning: Unfair to hold business liable when normal business operation is utilized."[27]

23. *Fisher v. Big Y Foods, Inc.*, 298 Conn. 414, 415-16 (2010).
24. *Id.* at 422-23.
25. *Id.* at 423.
26. *Id.* at 438-39.
27. *Id.* at 438.

*Konesky v. Post Rd. Entm't*, 144 Conn. App. 128 (2013):

- Plaintiff alleges slip and fall on water at nightclub under mode. Trial court permitted mode claim to jury.[29]
- Defendant appeals as applying mode was improper.[30]
- Appellate Court reverses trial court holding:
  - The mode of operation alleged was not significantly different than mode used by similarly situated businesses; and
  - If mode was applied, it would render the requirement that the incident occur within a limited zone of risk to be superfluous.[31]

Okay… But what does this mean? What is the new standard:

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https://giphy.com/gifs/my-cousin-vinny-3oKlPqgSSYAsUVXKiQl

28. *Konesky v. Post Rd. Entm't*, 144 Conn. App. 128, 139 (2013).
29. Id. at 130-31.
30. Id. at 134.
31. Id. at 142-43.

# *Fisher & Konesky: [Detailed]*



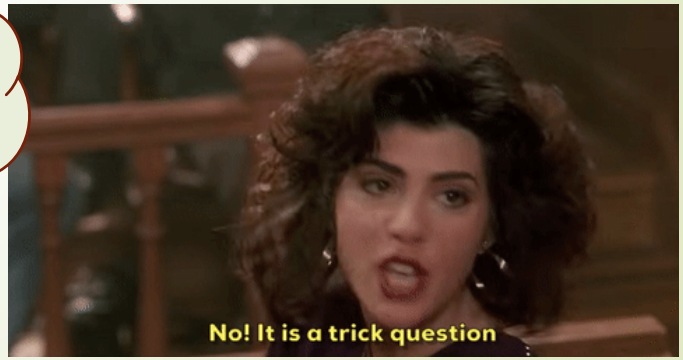
*Fisher v. Big Y Foods, Inc.*, 298 Conn. 414 (2010):

- Plaintiff alleges slip and fall on cocktail juice at Big Y falls under mode of operation; trial court permits mode claim to go to jury.[23]
- Defendant appeals arguing mode doesn't apply generally to all transitory hazards in self-service retail stores; rather, there must be a specific method of operation within the self-service atmosphere that creates regularly occurring hazards.[24]
  - Holding in favor of the plaintiff would, essentially, impose strict liability on self-service retail stores.[25]
- CT Supreme Court reverses trial court holding:
  - Mode is meant to be a narrow exception; and
  - Mode does not apply generally to transitory hazards in retail stores, there must be a more specific method of operation that creates regularly occurring hazards, which made it foreseeable.[26]
- Reasoning: "a modern supermarket's only method of operation is to place items on shelves for customer selection and removal. Accordingly, a defendant cannot be considered negligent solely on the ground that it has employed that method."[27]
- A supermarket that sells groceries in the usual self-service fashion is not engaged in a specific mode of operation; it is simply in the business of selling groceries.[28]

*Konesky v. Post Rd. Entm't*, 144 Conn. App. 128 (2013):

- Plaintiff alleges slip and fall on water at nightclub falls under mode, as it allowed customers to take beers out of ice tubs, which caused water to accumulate on floor. Trial court permitted mode claim to jury.[29]
- Defendant appeals arguing, *inter alia*, applying mode was improper as alleged mode, permitting customers to take beers from tubs, is not significantly different from essential nightclub functions.[30]
- Appellate Court reverses trial court holding:
  - The service of cold drinks to patrons will inevitably result in slippery services, as drinks are regularly spilled and puddles accumulate. The fact beer was offered under a self-service method is insufficient to apply mode as "a nightclub does not create liability under mode of operation doctrine simply by serving [drinks to patrons.]" The plaintiff merely described the customary transactions that occur at a bar, which is not a specific method of operation sufficient to apply mode; and
  - If mode was applied, it would render the requirement that the incident occur within a limited zone of risk to be superfluous.[31]

Okay… But what does this mean? What is the new standard:

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23. *Fisher v. Big Y Foods, Inc.*, 298 Conn. 414, 415-16 (2010).
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27. *Id.* at 438.
28. *Konesky v. Post Rd. Entm't*, 144 Conn. App. 128, 139 (2013).
29. Id. at 130-31.
30. Id. at 134.
31. Id. at 142-43.

# *Porto* clarifies the standard; three requirements!

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*Porto v. Petco Animal Supplies Stores, Inc.*, 167 Conn. App. 573 (2016):

- Plaintiff alleges slip and fall as a result of dog urine on floor of pet under mode.[32]
- Trail court held mode did not apply and found in favor of defendant. Plaintiff appealed.[33]
- Appellate Court articulates three overarching requirements for mode to apply based on holdings of *Kelly*, *Fisher* and *Konesky*:
  1. The defendant must have a particular mode of operation distinct from the ordinary operation of a related business;
  2. That mode of operation must create a regularly occurring or inherently foreseeable hazard; and
  3. The injury must happen within a limited zone of risk.[34]
- Holding: Plaintiff failed to meet all three requirements of mode of operation, as:
  - Mode was not dissimilar;
  - Defect was foreseeable;
  - No limited zone of risk.[35]

32. *Porto v. Petco Animal Supplies Stores, Inc.*, 167 Conn. App. 573, 574-75 (2016).
33. *Id.* at 575.
34. *Id.* at 581.
35. *Id.* at 581-84.

Three requirements:

1. Particular mode distinct from ordinary operation of similar businesses;
2. Mode creates regularly occurring & foreseeable hazard; and
3. Limited zone of risk.


https://www.reddit.com/r/reactiongifs/comments/4eoevr/mrw_editingandlayout_is_done_with_the_randy/
Guardians of the Galaxy, Marvel Studios

# *Porto* clarifies the standard; three requirements! [Detailed]

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*Porto v. Petco Animal Supplies Stores, Inc.*, 167 Conn. App. 573 (2016):

- Plaintiff alleges slip and fall as a result of dog urine on floor of pet store falls under mode of operation, as permitting pets into store constitutes dangerous mode of operation.[32]
- Trail court held mode did not apply and found in favor of defendant. Plaintiff appealed.[33]
- Appellate Court articulates three overarching requirements for mode to apply based on holdings of *Kelly*, *Fisher* and *Konesky*:
  1. The defendant must have a particular mode of operation distinct from the ordinary operation of a related business;
  2. That mode of operation must create a regularly occurring or inherently foreseeable hazard; and
  3. The injury must happen within a limited zone of risk.[34]
- Holding: Plaintiff failed to meet all three requirements of mode of operation, as allowing leashed animals into a pet store was not dissimilar from similar businesses, pet messes were not inherently foreseeable conditions resulting from a pet-friendly business, and there was no identifiable zone of risk where risk of injury was continuous or foreseeably inherent.[35]

32. *Porto v. Petco Animal Supplies Stores, Inc.*, 167 Conn. App. 573, 574-75 (2016).
33. *Id.* at 575.
34. *Id.* at 581.
35. *Id.* at 581-84.

Three requirements:

1. Particular mode distinct from ordinary operation of similar businesses;
2. Mode creates regularly occurring & foreseeable hazard; and
3. Limited zone of risk.


https://www.reddit.com/r/reactiongifs/comments/4eoevr/mrw_editingandlayout_is_done_with_the_randy/
Guardians of the Galaxy, Marvel Studios

# *Hill v. OSJ of Bloomfield, LLC*

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- *Hill v. OSJ Bloomfield, LLC*, 200 Conn. App. 149 (2020):
  - Most recent decision by Appellate Court regarding mode.
  - Clarifies and articulates the three elements.[36]
  - Great overview & analysis of mode since Kelly.[37]
  - Plaintiff's allegations that stacking/storing reserve product/boxes above product for sale did not fall under mode.[38]
  - Holding: Plaintiff's claim fails to meet three essential elements of mode.[39]
  - Narrowed further: the holding further narrows mode as the reasoning set forth in *Fisher* now extends to all self-service product retail sellers.
    - Specifically, a retail self-serve establishment cannot be liable under mode when their mode of operation was selling the product.

36. *Hill v. OSJ Bloomfield, LLC*, 200 Conn. App. 149, 157 (2020).
37. *Id.* at 159-61.
38. *Id.* at 160.
39. *Id.* at 161.

# Narrowed to nothing?



Discussion & Questions:

- Each controlling opinion further narrows application?
- Does mode only apply to fact patterns similar to *Kelly*?
- Under what circumstances does mode apply?
- Have the controlling courts effectively reversed the holding in *Kelly*?

# ~Practical Application~

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**Plaintiffs**: Effective representation for each client while balancing business interests?

- Want to take advantage of mode while avoiding costly/timely motion practice:
- Does this fact pattern support a potential mode claim?
- Properly pleading mode: (2 points)
  - Mode is not a separate cause of action, must be pled under negligence cause of action; and
  - Plead sufficient facts that hit each essential element to avoid motion to strike based on insufficiently pled claim.
    - Want to get past pleading stage.

CBS.com/Bull
https://giphy.com/gifs/cbs-bull-michael-weatherly-cbs-SwUIFDuDGH3Ho300dJ

**Defendants**: Effective litigation decisions to lower potential value while not overbilling clients to ensure continued business.

- Want to rid the matter of mode of operation to defend matter based on notice:
- Does this fact pattern support a potential mode claim?
- Vehicles to challenge insufficient/inapplicable mode claims:
  - Request to Revise;
  - Motion to Strike;
  - Motion for Summary Judgment; and/or
  - Motion in Limine.


@memcandy; Seinfeld
https://giphy.com/gifs/memecandy-WmWs9Ge8mIpMtRPf7m

# Properly Pleading Mode

- Must hit each essential element:
  - Specific mode utilized that caused regularly occurring and foreseeable hazards;
  - That is significantly different than similar businesses; and
  - Incident happened within limited zone of risk.
- How can you distinguish your case from *Fisher*, *Konesky*, *Porto* and *Hill*?
- In addition to proper pleading, may get argument mode doesn't apply as a matter of law.

# Improper Mode Claim? Our Recommendation: MTS

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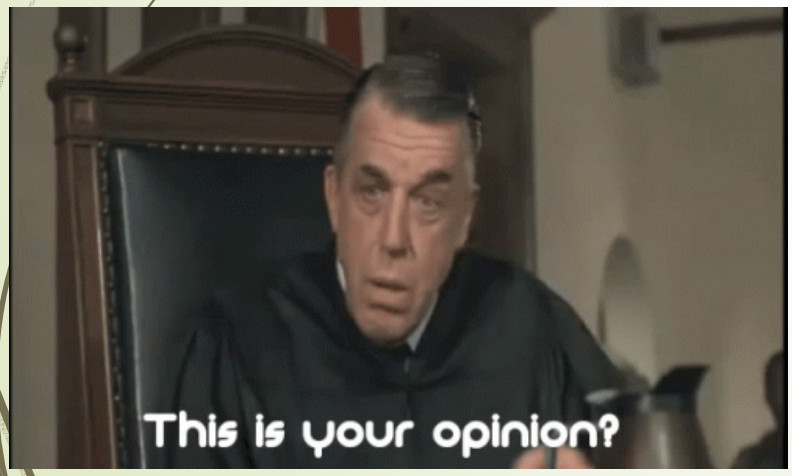
- We recommend a motion to strike:
  - RTR: lower standard and usually aren't granted
  - MSJ: mode already in case and is expensive
  - MTS: Can get rid of claim prior to discovery; argument is guaranteed; more stringent standard than RTR; cost effective; supports accurate valuation of claim after adjudication.




https://tenor.com/view/marisa-tomei-my-cousin-vinny-gif-19459434
My Cousin Vinny; Fox

- Potential drawback: MTS improper to challenge sufficiency of single allegation?
- Could file RTR? Sure, but:
  - Additional motion practice;
  - Costly;
  - Courts are permitting MTS on mode claims;
  - Judicial resources;
  - Mode claims are unique and courts recognize this;
  - Strategy decision.

# Our Experience



Pleading:

- Have had good luck with striking mode claims:
  - Insufficiently pled; and/or
  - Doesn't apply as a matter of law.
- Courts recognized MTS proper as mode claims are unique…

Trial:

- Motion in limine granted prior to evidence.

Discovery:

- Nonstandard warranted?
- What evidence can I obtain to support "the big three" and is there any evidence similar to facts of Kelly that will support claim? Conversely, what evidence does plaintiff have to support burden?
- Depositions: most knowledgeable & parties.
- Requests for Admissions.

# Questions?


https://giphy.com/gifs/robert-downey-jr-question-excellent-dXICCcws9oxxK
Iron Man; Disney Studios


https://giphy.com/gifs/fargofx-thanks-for-coming-stopping-by-welp-okay-7lPcX84KOiitiEp12f
@Fargofx; Fx: Fargo

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**72 A.3d 1152 (Conn.App. 2013)**
**144 Conn.App. 128**
**SANDRA KONESKY**
**v.**
**POST ROAD ENTERTAINMENT ET AL**
**No. AC 34617**
**Court of Appeals of Connecticut.**
**July 16, 2013**

Argued February 7, 2013.

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Action to recover damages for personal injuries sustained by the plaintiff as a result of the named defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven, where Hula's New Haven, LLC, was substituted as the defendant; thereafter, the court, Wilson, J., granted in part the substitute defendant's motions in limine seeking to preclude certain evidence; subsequently, the matter was tried to the jury before Wilson, J.; verdict and judgment for the plaintiff, from which the substitute defendant appealed to this court.

Reversed; new trial.

**SYLLABUS**

The plaintiff sought to recover damages from the defendants for negligence in connection with personal injuries she had sustained when she slipped and fell in a nightclub. Thereafter, H Co., the owner of the nightclub, was substituted as the defendant. The plaintiff alleged that a step from the booth area where she was sitting to the dance floor was defective, that H Co. had caused the floor area where she had fallen to be slippery and hazardous, and that H Co.'s method of operating a portable bar on the floor and step area and selling beer from ice filled tubs was an inherently hazardous means of serving drinks. The matter was tried to a jury, which returned a verdict for the plaintiff. From the judgment rendered thereon, H Co. appealed to this court. On appeal, the plaintiff alleged that because her single count complaint asserted two distinct legal theories of recovery--the first, relating to the allegedly defective step, based on traditional premises liability law, and the second, relating to the operation of the beer tubs, based in part on the mode of operation doctrine--and because interrogatories were not submitted to the jury, there was no way of discerning on which basis the jury found in her favor and, thus, the general verdict rule applied. *Held* :

1. The plaintiff's claim that the general verdict rule was applicable here was unavailing; the various specifications of negligent conduct alleged by the plaintiff in her complaint all sounded in premises liability, and the plaintiff was seeking to vindicate the same essential right, even though she may have alleged somewhat different specifications of negligent conduct to advance each claim.

2. Although, contrary to H Co.'s claim, the mode of operation rule does not apply only to self-service businesses or businesses that include self-service components, the trial court here improperly applied the mode of operation rule and improperly concluded that H Co.'s sale of beer from the ice filled tubs constituted a particular method of operation within the nightclub that created an inherently foreseeable heightened risk; the plaintiff's allegations as to H Co.'s method of serving beer merely described the transaction that always takes place when a patron orders a bottle of beer at a bar or nightclub, namely, the service of cold drinks will inevitably result in slippery surfaces as the drinks are spilled or condensation accumulates, which would happen regardless of whether the nightclub chose to serve beer from a beer tub or from behind a more traditional bar.

Jan C. Trendowski, with whom was Gregory A. Allen, for the appellant (substitute defendant).

John J. Kennedy, Jr., with whom were Edward L. Walsh and, on the brief, Jennifer Antognini-O'Neill, for the appellee (plaintiff).

DiPentima, C. J., and Gruendel and Beach,

Js. In this opinion the other judges concurred.

**OPINION**

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[144 Conn.App. 130] BEACH, J.

The substitute defendant Hula's New Haven, LLC,[1] appeals from the judgment of the trial court, rendered after a jury trial, awarding damages to the plaintiff, Sandra Konesky. The defendant claims that the trial court improperly construed and applied the mode of operation rule.[2] We agree and, accordingly, reverse the judgment of the trial court.

The following facts, which reasonably could have been found by the jury, are relevant to the resolution of this appeal. On the evening of January 11, 2008, the plaintiff and her husband, Stanley Konesky, attended an event organized by the Walter Camp Football Foundation at Hula Hank's Island Bar (Hula Hank's), a nightclub in New Haven owned and operated by the defendant. The plaintiff's husband was a former president of the foundation, which each year honors college football players. The honored players spend a long weekend in Connecticut and participate in a variety of activities, ranging from visits to children's hospitals to a black-tie dinner. The Friday evening event is typically a party at a nightclub, which is attended by the players, foundation members and officers, and members of the

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general public. For several years, including 2008, this event was held at Hula Hank's.

The Walter Camp event filled Hula Hank's nearly to its 650 person capacity. As was its practice at events of this scale, the defendant supplemented its three permanent bars by stationing several " beer tubs" at additional locations throughout the venue, where patrons [144 Conn.App. 131] could buy a bottle or can of beer. Large plastic tubs were filled with ice and beer and replenished as the beer sold out. Each tub was set up on top of a large speaker box. A server stood on top of the speaker box and handed beers to patrons below.

One of the beer tubs was positioned near a booth where the plaintiff and her husband had sat down shortly after arriving at Hula Hank's. Their booth was one step up from the club's wooden dance floor. After sitting at the booth for one-half hour or less, the plaintiff got up to use the restroom. After taking a couple of steps, she slipped and fell. The plaintiff immediately felt intense pain in her shoulder and foot, and could not get up off the floor by herself. She noticed that her pants were wet and saw water on the floor near the beer tub area, on top of the step. The plaintiff was taken by ambulance to Yale-New Haven Hospital, where she was diagnosed with a fractured shoulder and foot. She needed surgery to repair her fractured foot; her recovery required that she stay off her foot for eight to twelve weeks.

The plaintiff thereafter commenced this negligence action against the defendant,[3] alleging, among other things, that the step from the booth area to the dance floor was defective, that the defendant had caused the floor area where the plaintiff had fallen to be slippery and hazardous, and that the defendant's chosen method of selling beer from the ice filled tubs was an inherently hazardous means of serving drinks. Following a jury trial, the plaintiff was awarded a total of $292,500 in damages, which reflected a 10 percent reduction of the award for the plaintiff's comparative negligence. This appeal followed. Additional facts and procedural history will be set forth as necessary.

[144 Conn.App. 132] **I**

The plaintiff preliminarily asserts that the general verdict rule applies in this case. She argues that if either of the defendant's two claims on appeal fails, we must affirm the judgment. Specifically, the plaintiff contends that her one count complaint, which sounded in negligence, asserted two distinct legal theories of recovery: the first, relating to the allegedly defective step, based on traditional premises liability law, and the

second, relating to the operation of the beer tubs, based, in part, on the " mode of operation" doctrine. Because interrogatories were not submitted to the jury distinguishing between these two purportedly distinct theories, the plaintiff claims that there is no way of discerning on which basis the jury found in her favor. We disagree with the assertion that the plaintiff's allegations established two separate legal bases for recovery for purposes of the general verdict rule.

" In a typical general verdict rule case, the record is silent regarding whether the jury verdict resulted from the issue that the appellant seeks to have adjudicated." *Curry v. Burns*, 225 Conn. 782, 790, 626 A.2d 719 (1993). " Under the general verdict rule, if a jury renders a general verdict for one party, and [the party raising a claim of error on appeal did not request] interrogatories, an appellate court will presume that the jury found every issue in favor of the prevailing party. . . .

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Thus, in a case in which the general verdict rule operates, if any ground for the verdict is proper, the verdict must stand; only if every ground is improper does the verdict fall." (Internal quotation marks omitted.) *Tetreault v. Eslick*, 271 Conn. 466, 471, 857 A.2d 888 (2004).

Even in a case with a single count complaint, the general verdict rule applies when " reliance is placed upon grounds of action . . . which are distinct, not because they involve specific sets of facts forming a [144 Conn.App. 133] part of the transaction but in the essential basis of the right replied upon . . . ." (Internal quotations marks omitted.) *Curry v. Burns*, *supra*, 225 Conn. 794. Thus, as our Supreme Court noted in *Curry*, the general verdict rule would apply in a case in which a single count of a complaint alleged both wanton misconduct and negligence. *Id*. The applicability of the general verdict rule " does not depend on the niceties of pleading but on the distinctness and severability of the claims and defenses raised at trial." (Internal quotation marks omitted.) *Id.,* 787.

The various specifications of negligent conduct alleged by the plaintiff in her complaint--including the two at issue on appeal--all sound in premises liability. *See Duncan v. Mill Management Co. of Greenwich, Inc*., 308 Conn. 1, 3-5, 60 A.3d 222 (2013); *Fisher v. Big Y Foods, Inc*., 298 Conn. 414, 419, 3 A.3d 919 (2010) (explaining that mode of operation rule provides " an exception to the notice requirement of traditional premises liability doctrine" ); *Kelly v. Stop & Shop, Inc*., 281 Conn. 768, 797, 918 A.2d 249 (2007) ( *Zarella, J*., concurring) (" the mode of operation rule . . . and traditional premises liability law require proof of essentially the same elements" ). Thus, a plaintiff who attempts, as here, to prevail under either common-law premises liability principles or the mode of operation rule is seeking to vindicate the same " essential right" ; *Curry v. Burns*, *supra*, 225 Conn. 794; even though she may allege somewhat different specifications of negligent conduct to advance each claim. *See Green v. H.N.S. Management Co*., 91 Conn.App. 751, 756, 881 A.2d 1072 (2005) (general verdict rule " does not apply if a plaintiff submits to the jury several different specifications of negligent conduct in support of a single cause of action for negligence" ), cert. denied, 277 Conn. 909, 894 A.2d 990 (2006).

[144 Conn.App. 134] The general verdict rule, then, does not apply and we are not precluded from reversing the judgment in favor of the plaintiff if we conclude that any ground on which the jury could have based its verdict was improper. *See Id.,* 757.

**II**

We next address the defendant's claim that the court misconstrued the mode of operation rule. The defendant contends that the mode of operation doctrine was erroneously applied for two reasons: (1) the particular business operation at issue was not self-service in nature, and (2) the only mode of operation that the plaintiff identified as being peculiar and inherently hazardous was the service of bottles and cans of beer from ice filled tubs, which, the defendant argues, is not significantly different from other means of

performing this essential nightclub function.

The following additional procedural history is relevant to the defendant's claim. The plaintiff alleged in her amended complaint that the defendant operated a " portable bar on the floor and step area in such a manner that it was foreseeable that the defendant's employees and patrons would spill or drop beverages, ice, water and drinks as they were working, dancing or congregating, thereby creating a dangerous

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condition in the immediate vicinity of the [portable] bar . . . ." The defendant filed a motion in limine to preclude the introduction of evidence related to the mode of operation theory of premises liability. The court heard arguments on the issue and denied the defendant's motion.[4] The court agreed with the plaintiff that the use of the portable bars constituted a " particular method of operation within a bar that creates an inherently foreseeable heightened risk . . . ." The court stated that its ruling [144 Conn.App. 135] was consistent with our Supreme Court's holding in *Fisher v. Big Y Foods, Inc*., *supra*, 298 Conn. 414.

Whether the trial court properly construed and applied the mode of operation rule is a question of law over which we exercise plenary review. *See Id.,* 424. The mode of operation rule is a relatively recent development in Connecticut negligence law. In *Kelly v. Stop & Shop, Inc*., *supra*, 281 Conn. 791, Connecticut's seminal mode of operation case, our Supreme Court held that " a plaintiff establishes a prima facie case of negligence 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." The crux of the analysis is whether the premises owner's " design or operation . . . created a foreseeable risk of harm, thus retaining the causal link between the actions of the premises owner in designing and operating [its business] and the injured invitee." *Id.,* 795 ( *Zarella, J*., concurring).[5]

[144 Conn.App. 136] The mode of operation rule was adopted in a slip and fall case that occurred at a self-service salad bar within a supermarket. *See Id.,* 768. Our Supreme Court explained that the rule " evolved in response to the proliferation of self-service retail establishments," in which patrons are encouraged " to obtain for themselves from shelves and containers the items they wish to purchase, and to move from one part of the store to another . . . thus increasing the risk of droppage and spillage." (Internal quotation marks omitted.) *Id.,* 778. In such an environment, proving that the premises owner, through its employees, had actual or constructive notice of a specific unsafe condition may prove

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" insuperable." *Id.,* 788. Moreover, an unattainable notice requirement would do little to incentivize businesses to implement reasonable policies designed to prevent injuries " caused by the foreseeable conduct of . . . customer[s] . . . ." *Id.,* 789. When the mode of operation rule applies, the plaintiff need not prove notice of the specific hazardous condition that caused his injury if he can show that the business engaged in a deliberate method of operation which would make the frequent occurrence of similar conditions reasonably foreseeable. *See Fisher v. Big Y Foods, Inc*., *supra*, 298 Conn. 419 n.10.

This altered notice inquiry under the mode of operation rule has been justified on two theories. First, when the owner of the premises increases the risk of " dangerous, transitory conditions" by the way particular aspects of the business have been designed, the owner may fairly be deemed to have constructive notice of those conditions when they become manifest. *Kelly v. Stop & Shop, Inc*., *supra*, 281 Conn. 780. Second, the premises owner may be imputed to have actual knowledge of the hazards that it has had a hand in creating by purveying merchandise or food in a manner that increases the likelihood of such hazards arising. *Id.,* [144 Conn.App. 137] 781. Either way, " the fundamental rationale underlying the rule is the same: Because the hazard is a foreseeable consequence of the

manner in which the business is operated, the business is responsible for implementing reasonable measures to discover and remedy the hazard." [6] *Id.*

The rule's application effects a burden shifting. Upon the plaintiff's prima facie showing of a negligent mode of operation, the burden shifts to " [t]he defendant [to] rebut the plaintiff's evidence by producing evidence that it exercised reasonable care under the circumstances." *Id.,* 791. The burden then shifts back to the plaintiff to " establish that those steps taken by the defendant to prevent the accident were not reasonable under the circumstances." (Internal quotation marks omitted.) *Fisher v. Big Y Foods, Inc*., *supra*, 298 Conn. 420 n.13. The ultimate burden of proof rests with the plaintiff. *Kelly v. Stop & Shop, Inc*., *supra*, 281 Conn. 792.

" The mode-of-operation rule is of limited application because nearly every business enterprise produces some risk of customer interference. If the mode-of-operation rule applied whenever customer interference was conceivable, the rule would engulf the remainder of negligence law. A plaintiff could get to the jury in most cases simply by presenting proof that a store's [144 Conn.App. 138] customer could have conceivably produced the hazardous condition. For this reason, a particular mode of operation only falls within the mode-of-operation rule when a business can reasonably anticipate that hazardous conditions will

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regularly arise. . . . A plaintiff must demonstrate the foreseeability of third-party interference before [a court] will dispense with traditional notice requirements." (Citations omitted.) *Chiara v. Fry's Food Stores of Arizona, Inc*., 152 Ariz. 398, 400-401, 733 P.2d 283 (1987).[7]

In *Fisher v. Big Y Foods, Inc*., *supra*, 298 Conn. 437, our Supreme Court expressed concern about an overly expansive application of the mode of operation rule and recognized limits on its application. In that case, a shopper at a Big Y supermarket slipped and fell in a puddle of syrupy liquid. *Id.,* 417. The source of the liquid was not definitively ascertained because there was no broken container in the vicinity of the puddle. *Id.,* 417 n.4. Video surveillance footage showed that the aisle in which the puddle was located had been swept seven minutes prior to the shopper's fall. *Id.,* 417. Rather than attempt to prove that the defendant store owner had actual or constructive knowledge of the apparent spill, the plaintiff shopper prevailed at trial by successfully invoking the mode of operation theory of premises liability as articulated in *Kelly* . *Id.,* 420.

The Supreme Court reversed the judgment, rejecting the proposition that " self-service merchandising itself" can be a negligent mode of operation.[8] *Id.,* 424. If that [144 Conn.App. 139] were so, the court reasoned, every aspect of a modern supermarket would be rendered a " 'zone of risk' due to the readily established fact that merchandise, as a general matter, sometimes falls and breaks." *Id*. The *Fisher* court further asserted that it would be unsound to characterize as inherently hazardous " a modern supermarket's *only* method of operation" --that is, permitting customers to serve themselves. (Emphasis in original.) *Id.,* 438. This would be similar to charging a movie theatre with employing a negligent method of operating by showing movies in a darkened space. *Id.*

The court in *Fisher* suggested that the mode of operation rule is applied appropriately only when a business employs " a more specific method of operation *within* " the general business environment that is distinct from the ordinary, inevitable way of conducting the sort of commerce in which the business is engaged. (Emphasis in original.) *Id.,* 427. Thus, a supermarket that sells groceries in the usual self-service fashion is not engaged in a specific " mode of operation" ; it is simply in the business of selling groceries. *See Id.,* 423 (" the mode of operation rule . . . 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" ). In order to invoke the mode of operation rule, and to satisfy her burden of establishing a prima facie case, then, the plaintiff must make an " additional showing that a more specific method of operation *within* a . . . retail environment gave rise to a foreseeable risk of a regularly occurring hazardous

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condition similar to the particular condition that caused the injury." (Emphasis in original.) *Id.,* 427. Merely describing the customary [144 Conn.App. 140] way of conducting a particular kind of business is not enough.[9]

**A**

We first address the defendant's claim that the mode of operation rule applies only to self-service businesses, or businesses that include self-service components. Although *Kelly* and *Fisher* both resolved slip and fall cases that occurred in contemporary self-service supermarkets, there is no reason for limiting application of the doctrine to only those scenarios. The dispositive issue is not the presence of self-service, but whether " the operating methods of a proprietor are such that dangerous conditions are continuous or easily foreseeable . . . ." (Internal quotation marks omitted.) *Kelly v. Stop & Shop, Inc*., *supra*, 281 Conn. 787. Self-service, in some circumstances, may present a situation in which the proprietor's " operating methods" enhance the risk of recurring dangerous conditions brought about by third party interference; *Chiara v. Fry's Food Stores of Arizona, Inc*., *supra*, 152 Ariz. 401; but it logically is not the only business method that can have [144 Conn.App. 141] such an effect.[10] Moreover, the Supreme Court in *Fisher* cited to cases from other jurisdictions where the mode of operation rule has been applied to myriad methods of operation apart from self-service retail enterprises. *See Fisher v. Big Y Foods, Inc*., *supra*, 298 Conn. 430. Therefore, the defendant's first challenge to the applicability of the mode of operation rule is unavailing.

**B**

The defendant additionally challenges the court's conclusion that the sale of beer from the ice filled tubs constituted a " particular method of operation within a bar that create[d] an inherently foreseeable heightened risk . . . ." The defendant specifically contends that the only " mode of operation" advanced by the plaintiff is the service of iced beer at a nightclub. Because the method of service utilized at Hula Hank's is not appreciably different from the methods necessarily employed by all bars that serve cold beverages, the defendant argues that the mode of operation

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rule is inapplicable. The plaintiff counters that the mode of operation rule applies to the defendant's " chosen method of selling dripping wet beers from beer tubs." She identifies several aspects of the beer tub method of service that supposedly distinguish it from more refined means of selling beer, namely, that the ice filled tubs were uninsulated; that they were elevated on speaker boxes, which required the server to hand the drink to the patron who stood several feet below; and that the beer was not wiped down before it was given to a customer.[11] [144 Conn.App. 142] According to the plaintiff, this creates the risk that patrons will " congregate [near the tubs] or move about the premises with the wet beer bottles or cans, thus causing water to pool on the floor . . . ."

We agree with the defendant that, although the plaintiff has gone to great lengths to distinguish the method of serving beer at issue here, when stripped of the embellishment, she has merely described the transaction that always takes place when a patron orders a bottle of beer at a bar, a nightclub, or a wedding reception. The bottle is removed by a server, either from a refrigerator or a cooler filled with ice, and handed to the patron, who is separated from the server by a bar or other service area. The service of cold drinks will inevitably result in slippery surfaces, as drinks are spilled or condensation from drinks accumulates, but this will happen regardless of

whether a nightclub chooses to serve beer from a " beer tub" propped on a speaker or from behind a more traditional bar.[12] Put [144 Conn.App. 143] simply, a nightclub does not create liability under the mode of operation doctrine simply by serving chilled beer. Cf. *Fisher v. Big Y Foods, Inc.*, *supra*, 298 Conn. 438 (" a modern supermarket's only method of operation is to place items on shelves for customer selection and removal" ; as such, that method of commerce cannot be considered negligent [emphasis in original]). Just as theatres must dim their lights to show movies, a nightclub likely could not do business at all if it could not serve cold drinks. *See Kearns v. Horsley*, 144 N.C.App. 200, 205, 552 S.E.2d 1,

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review denied, 354 N.C. 573, 559 S.E.2d 179 (2001).

Moreover, if we were to accept that the defendant's service of beer constituted an inherently hazardous mode of operation, virtually the entire nightclub would become a " zone of risk" simply because drinks do sometimes spill or otherwise produce slippery surfaces. *See Fisher v. Big Y Foods, Inc.*, *supra*, 298 Conn. 424. " Accordingly, the requirement of establishing that an injury occurred within some 'zone of risk' essentially would be rendered superfluous." *Id*. The result would be that any slip and fall on a wet surface, no matter how briefly the slippery condition existed, would shift the burden to the nightclub's owners to show that they had acted reasonably.[13] This would be inconsistent with [144 Conn.App. 144] the Supreme Court's admonition that the mode of operation rule is meant to be a narrow exception to the notice requirements under traditional premises liability law. *See Id.,* 437.

The application of the mode of operation rule in this case was flawed in another respect. The only customer interference alleged by the plaintiff was that patrons who purchased beer from the tubs would move around the bar, " carrying, consuming and discarding the wet beer bottles or cans . . . ." These allegations--if they amount to customer interference at all--fail for the same reason as the allegations with respect to the operation of the tub. If the mode of operation rule could be satisfied by bar patrons carrying wet glasses, there would be no effective limitation on the application of the rule.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other judges concurred.

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Notes:

[1]Hula's New Haven, LLC, was substituted as the defendant in this action for the original named defendants, Post Road Entertainment and Club, LLC. We therefore refer in this opinion to Hula's New Haven, LLC, as the defendant.

[2]The defendant also claims that the court improperly allowed evidence of subsequent remedial measures. Because we reverse the judgment on the defendant's mode of operation claim, we need not reach this second claim.

[3]See footnote 1 of this opinion.

[4]The court had heard largely undisputed evidence regarding the logistics of operating the beer tubs prior to ruling. We rely on the same facts.

[5]The Supreme Court noted in *Kelly* that there is a " close relationship between a defendant's affirmative act of negligence, which obviates the need for a business invitee to establish that the defendant had actual or constructive notice of a dangerous condition on the premises, and a defendant's liability to a business invitee under the mode of operation rule, pursuant to which notice of the dangerous condition also is unnecessary." *Kelly v. Stop & Shop, Inc.*, *supra*, 281 Conn. 785 n.6.

This " close relationship" between the two theories of liability is demonstrated in the present case. The jury was instructed that it could hold the defendant liable if it found " that the defendant created the unsafe condition of water on the floor by [its] actions" with respect to the service from the beer tub or if it found that the plaintiff's injuries " were caused by the mode of operation by which the defendant operated its business . . . ." At trial, in support of her theory that the defendant had affirmatively created the hazardous condition, the plaintiff argued that the defendant " created the defect by taking bottles of beer out of [the tub] that were in ice and water." In her appellate brief, the plaintiff argues that the mode of operation rule was properly invoked, in part, because of the " defendant's chosen method of selling dripping wet beers from beer tubs." If this were so, there would be no need to invoke the mode of operation rule.

[6]The Supreme Court in *Kelly* quoted with approval the Colorado Supreme Court's cogent explication of why, in certain situations, the notice requirements of common-law premises liability should give way to a different inquiry: " [T]he basic notice requirement springs from the [notion] that a dangerous condition, when it occurs, is somewhat out of the ordinary. . . . In such a situation, the storekeeper is allowed a reasonable time, under the circumstances, to discover and correct the condition, unless it is the direct result of his (or his employees') acts. However, when the operating methods of a proprietor are such that dangerous conditions are continuous or easily foreseeable, the logical basis for the notice requirement dissolves." (Internal quotation marks omitted.) *Kelly v. Stop & Shop, Inc*., *supra*, 281 Conn. 787, quoting *Jasko v. F. W. Woolworth Co*., 177 Colo. 418, 420-21, 494 P.2d 839 (1972).

[7] *Chiara* was cited with approval by our Supreme Court in *Kelly v. Stop & Shop, Inc*., *supra*, 281 Conn. 782, 792.

[8]In this regard, compare *Fisher* with *Wollerman v. Grand Union Stores, Inc*., 47 N.J. 426, 429, 221 A.2d 513 (1966) (mode of operation rule applied where " green beans are sold from open bins on a self-service basis" ), and *Chiara v. Fry's Food Stores of Arizona, Inc*., *supra*, 152 Ariz. 398 (mode of operation rule applied where creme rinse spill in a supermarket caused plaintiff's injury). Specifically, in some jurisdictions, an entire supermarket seemingly can be considered a " zone of risk."

[9]This idea was developed more thoroughly by the North Carolina Court of Appeals in *Kearns v. Horsley*, 144 N.C.App. 200, 552 S.E.2d 1, review denied, 354 N.C. 573, 559 S.E.2d 179 (2001), which was discussed with approval in *Fisher v. Big Y Foods, Inc*., *supra*, 298 Conn. 438-39. In *Kearns*, the court rejected the application of the mode of operation rule where a moviegoer tripped over torn carpeting in a darkened theatre. The court reasoned that showing movies in a dark space is a " theatre's *only* method of operation and as such, the theatre cannot be considered negligent but instead, its patrons must be considered to have assumed the risk in order to take part in the activity provided." (Emphasis in original.) *Kearns v. Horsley*, *supra*, 205. The court further observed that " the darkening of the area within the theatre where the movie is being shown, is an operation of practicality and compl[ies] with ordinarily used standards of care in [the] particular activit[y]." (Internal quotation marks omitted.) *Id*. Thus, the mode of operation rule did not apply and, in order to prevail, the plaintiff had to show that the theatre operator had actual or constructive notice of the tear in the carpeting. *Id.,* 207.

[10]The Supreme Court in *Fisher v. Big Y Foods, Inc*., *supra*, 298 Conn. 428, did observe that many mode of operation cases " involved produce displays or other instances of unwrapped and/or ready to eat food that customers were encouraged to handle . . . ." Indeed, the court stated that " [t]he mode of operation rule most typically is applied in such circumstances." *Id.,* 428 n.22.

[11]These aspects of the plaintiff's mode of operation claim, related to the allegedly careless service of beer from the tubs, assert affirmative negligent acts by employees of the defendant. In other words, the creation of hazardous, wet conditions in the vicinity of the beer tubs does not depend on further actions by customers. It is not clear under Connecticut law whether recurring, affirmative negligent acts by employees can be the basis for a mode of operation claim. The justification proffered for adopting the mode of operation rule in *Kelly*, however, suggests that third party interference is a necessary component of such a claim. *See Kelly v. Stop & Shop, Inc*., *supra*, 281 Conn. 786-90. *Fisher* forecloses application of the rule to these facts, and, in any event, because there is no requirement under traditional negligence law principles for a plaintiff to prove notice where the defect is directly caused by the owners of the premises, the invocation of the mode of operation rule in such circumstances is superfluous and unnecessary.

[12]In this context, it is significant that the complaint in this regard alleged, as an increased hazard, that drinks were more likely to be dropped or spilled when served from the beer tubs. The plaintiff has pointed us to nothing in the record that would substantiate such an increased risk. The plaintiff notes in her appellate brief that the " the defendant's policy of assigning a barback to identify and to clean spills in the area of the portable bars evidences that the hazard was inherently foreseeable and occurred regularly." This assertion, however, mischaracterizes the significance of the deployment of barbacks to the beer tub areas. A manager from the bar actually testified that barbacks were assigned not only to a particular beer tub, but also to the surrounding area, and that this staffing arrangement was consistent with the responsibilities of barbacks assigned to the permanent bars.

[13]We note that this result is not draconian. In many situations, traditional premises liability may afford relief. Nothing prevents recovery if the owner affirmatively creates the actual defect; *see Kelly v. Stop & Shop, Inc*., *supra*, 281 Conn. 785 n.6; and what constitutes reasonable inspection in such circumstances may result in a fairly low threshold in establishing constructive notice. If a bar employee is standing next to a puddle, a fact finder may find actual notice; such a showing would not be " insuperable."

It is, of course, possible that the jury in this case could have applied traditional notice standards and reached the same result. See part I of this opinion. In its instructions to the jury, the court charged that the defendant could be liable if it found the defendant's affirmative acts created the hazardous condition. The mode of operation rule aptly fills the narrow niche where the actual defect is caused by a third party in circumstances in which the defendant created a zone of danger with increased risk of frequently repeating hazardous conditions.

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Appellate Court of Connecticut08/16/2016 145 A.3d 283 167 Conn.App. 573

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**239 A.3d 345 (Conn.App. 2020)**
**Alicia HILL**
**v.**
**OSJ OF BLOOMFIELD, LLC.**
**AC 42397**
**Appellate Court of Connecticut.**
**September 15, 2020.**

Argued January 9, 2020.

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[Copyrighted Material Omitted]

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Appeal from the Superior Court in the judicial district of Hartford and tried to the court, Gordon, J.

Bruce H. Raymond, with whom was Evan K. Buchberger, Glastonbury, for the appellant (defendant).

Domenic D. Perito, with whom, on the brief, was Richard E. Joaquin, Manchester, for the appellee (plaintiff).

DiPentima, C. J., and Moll and Bear, Js.[*]

MOLL, J.

"Drawing logical deductions and making reasonable inferences from facts in evidence, whether that evidence be oral or circumstantial, is a recognized and proper procedure in determining the rights and obligations of litigants, but to be logical and reasonable they must rest upon some basis of definite facts, and any conclusion reached without such evidential basis is a mere surmise or guess." (Internal quotation marks omitted.) *Paige v. St. Andrew's Roman Catholic Church Corp.,* 250 Conn. 14, 34, 734 A.2d 85 (1999). This important principle lies at the heart of this premises liability appeal. The defendant, OSJ of Bloomfield, LLC, doing business as Ocean State Job Lot, appeals from the judgment of the trial court, rendered after a bench trial, in favor of the plaintiff, Alicia Hill, for injuries she sustained when two empty cardboard boxes fell onto her head and

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shoulder from the top shelf of the aisle she was browsing. On appeal, the defendant claims that the trial court (1) improperly applied the mode of operation rule as a basis for finding the defendant liable in negligence, and (2) erroneously found that the defendant's merchandise stacking methods caused the boxes to fall on the plaintiff.[1] The plaintiff argues that the judgment should be affirmed because she proved her premises liability claim under the affirmative act rule. We conclude that the evidence adduced at trial does not support the imposition of liability on the basis of the mode of operation rule or the affirmative act rule. Accordingly, we reverse the judgment of the trial court and remand the case with direction to render judgment for the defendant.

The trial court's memorandum of decision sets forth the following recitation, which is relevant to our resolution of this appeal. "The plaintiff testified that [on July 1, 2015] she was walking down the stationery aisle of the [defendant's] store when two empty boxes fell off of a shelf to her right and struck her in the head and right shoulder. [Devin] Gordon, [another shopper in the store], testified that he was in the same aisle and saw the boxes fall off the shelf and strike the plaintiff. The plaintiff testified that prior to the boxes falling on her, she saw two employees of the defendant stocking merchandise in the Internet coupon aisle directly adjacent to the stationery aisle. [The defendant's store manager, Aron Moore] admitted that he and another employee were stocking merchandise in the Internet coupon aisle in the moments preceding the incident, and that as soon as they heard a loud noise, they entered the stationery aisle where they saw the plaintiff and Gordon, who was holding one of the boxes.

"Moore testified that the top shelf of the Internet coupon aisle is seven feet tall and is used as a `profile shelf' to hold overstocked merchandise. According to Moore, the top shelf of the Internet coupon aisle is twelve inches wide and six inches higher than the top shelf of the stationery aisle. The plaintiff introduced a photograph that she took within minutes of the accident showing the top shelves of the stationery aisle and the Internet coupon aisle. The photograph shows a series of boxes containing nine inch fans stacked one on top of the other on the top shelf of the Internet coupon aisle. The photograph also shows one of the boxes containing the nine inch fans hanging over the box below it and cantilevered in the direction of the stationery aisle. The [photograph] also shows a gap in the top row of stacked nine inch fans in a location directly adjacent to the top shelf of the stationery aisle where the empty boxes had been displayed immediately before they fell. The [photograph] also shows one of the nine inch fan boxes in this precise location."

On June 13, 2017, the plaintiff commenced this action, alleging that she sustained injuries to her head, neck, and right shoulder as a result of the boxes falling onto her and that the incident was caused by the negligence of the defendant. On November 8, 2018, the case was tried to the court. Three witnesses testified: Moore (the store manager), Gordon (the eyewitness), and the plaintiff. Thereafter, the parties submitted posttrial briefs. On December 7, 2018, the trial court issued a memorandum of decision rendering judgment in favor of the plaintiff. Setting forth the principles from this court's decision in

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*Meek v. Wal-Mart Stores, Inc.,* 72 Conn.App. 467, 806 A.2d 546, cert. denied, 262 Conn. 912, 810 A.2d 278 (2002), the court concluded that the plaintiff "sustained her burden of proving by a fair preponderance of the evidence that the empty display boxes fell and struck the plaintiff as a result of the defendant's negligence." Specifically, the court found that "Moore and another employee of the defendant were stocking merchandise in the Internet coupon aisle when one of the nine inch fan boxes on the top shelf of the Internet coupon aisle toppled over and into the display boxes on the top shelf of the stationery aisle, thereby causing the display boxes to fall off the shelf and onto the plaintiff." The court awarded the plaintiff $23,001.96 in past medical expenses and $7500 for pain and suffering for a total of $30,501.96 in damages. This appeal followed. Additional facts will be set forth as necessary.

The defendant principally claims on appeal that the trial court improperly applied the mode of operation rule in finding the defendant liable. Specifically, the defendant maintains that the record is devoid of any evidence that (1) the defendant employed a particular mode of operation that is distinct from a similar business, (2) such mode of operation created a regularly occurring or inherently foreseeable hazard, and (3) the plaintiff's injury occurred within a limited zone of risk. We agree with the defendant and conclude that the evidence at trial did not support the application of the mode of operation rule.

We begin with the standard of review and general principles of premises liability. "[T]he scope of our appellate review depends [on] the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. When, however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Kelly v. Stop & Shop, Inc.,* 281 Conn. 768, 776, 918 A.2d 249 (2007). "A finding of fact is clearly erroneous when there is no evidence in the record to support it ... or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Lyme Land Conservation Trust, Inc. v. Platner,* 325 Conn. 737, 755, 159 A.3d 666 (2017). "In a case tried before a court, the trial judge is the sole arbiter of the credibility of the

witnesses and the weight to be given specific testimony.... On appeal, we will give the evidence the most favorable reasonable construction in support of the verdict to which it is entitled." (Internal quotation marks omitted.) *Coppedge v. Travis,* 187 Conn.App. 528, 532, 202 A.3d 1116 (2019).

"A business owner owes its invitees a duty to keep its premises in a reasonably safe condition.... In addition, the possessor of land must warn an invitee of dangers that the invitee could not reasonably be expected to discover.... Nevertheless, [f]or [a] plaintiff to recover for the breach of a duty owed to [her] as [a business] invitee, it [is] incumbent upon [her] to allege and prove that the defendant either had actual notice of the presence of the specific unsafe condition which caused [her injury] or constructive notice of it.... [T]he notice, whether actual or constructive, must be notice of the very defect which occasioned the injury and not merely of conditions naturally productive of that defect even though subsequently in fact producing it.... In the absence of

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allegations and proof of any facts that would give rise to an enhanced duty ... [a] defendant is held to the duty of protecting its business invitees from known, foreseeable dangers."[2] (Citations omitted; internal quotation marks omitted.) *DiPietro v. Farmington Sports Arena, LLC,* 306 Conn. 107, 116-17, 49 A.3d 951 (2012). As this court recently explained, to succeed in a traditional negligence action that is based on premises liability, "the plaintiff must prove (1) the existence of a defect, (2) that the defendant knew or in the exercise of reasonable care should have known about the defect and (3) that such defect had existed for such a length of time that the [defendant] should, in the exercise of reasonable care, have discovered it in time to remedy it." (Internal quotation marks omitted.) *Bisson v. Wal-Mart Stores, Inc.,* 184 Conn.App. 619, 628, 195 A.3d 707 (2018).

There exist at least two circumstances, however, in which a plaintiff, as a business invitee, may recover in a premises liability case without proof that the business had actual or constructive notice of a dangerous condition alleged to have caused the plaintiff injury. In connection with the first exception, in *Kelly v. Stop & Shop, Inc., supra,* 281 Conn. 768, 918 A.2d 249, our Supreme Court adopted "the so-called `mode of operation' rule, a rule of premises liability pursuant to which a business invitee who is injured by a dangerous condition on the premises may recover without proof that the business had actual or constructive notice of 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."[3] *Id.,* at 769-70, 918 A.2d 249. Under the mode of operation rule, "a plaintiff establishes a prima facie case of negligence 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. The defendant may rebut the plaintiff's evidence by producing evidence that it exercised reasonable care under the circumstances. Of course, the finder of fact bears the ultimate responsibility of determining whether the defendant exercised such care. We underscore, as most other courts have, that the defendant's burden in such cases is one of production, and that the ultimate burden of persuasion to prove negligence— in other words, that the defendant failed to take reasonable steps to address a known hazard— remains with the plaintiff." (Internal quotation marks omitted.) *Id.,* at 791-92, 918 A.2d 249.

On at least two occasions following our Supreme Court's decision in *Kelly,* our appellate courts have clarified the parameters of the mode of operation rule. First, shortly after *Kelly,* our Supreme Court refined its adoption of the rule, stating that "the exception is meant to be a narrow one ...." *Fisher v. Big Y Foods, Inc.,* 298 Conn. 414, 437, 3 A.3d 919 (2010). Specifically, in *Fisher,* the court clarified 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,

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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 423, 3 A.3d 919. Stated differently, "self-service merchandising itself" does not fall under the mode of operation rule. *Id.,* at 424, 3 A.3d 919. The rule applies only to specific areas of an establishment where the risk of injury is continuous or foreseeably inherent by virtue of the nature of the business or mode of operation. *Id.,* at 437, 3 A.3d 919. "Notably, [our Supreme Court] included the requirement that a plaintiff's injury occur within a `zone of risk.' ... If a `mode of operation' could be self-service merchandising itself, then an entire store necessarily would be rendered a `zone of risk' due to the readily established fact that merchandise, as a general matter, sometimes falls and breaks. Accordingly, the requirement of establishing that an injury occurred within some `zone of risk' essentially would be rendered superfluous." (Citation omitted.) *Id.,* at 424, 3 A.3d 919.

Second, in *Konesky v. Post Road Entertainment,* 144 Conn.App. 128, 72 A.3d 1152, cert. denied, 310 Conn. 915, 76 A.3d 630 (2013), this court clarified that the mode of operation rule requires not only an identifiable zone of risk but also a business mode of operation that is appreciably different from that of a similar business. *Id.,* at 144, 72 A.3d 1152. Applying these principles, in *Konesky,* this court rejected the proposition that a plaintiff, who was injured after she slipped and fell on a puddle of water created from "`beer tub[s]'" used by a nightclub to serve chilled beer, could prevail under the mode of operation rule. *Id.,* at 142-43, 72 A.3d 1152. This court reasoned that the defendant's "service of beer" did not constitute "an inherently hazardous mode of operation" because "the entire [premises] would become a zone of risk simply because drinks do sometimes spill or otherwise produce slippery surfaces." (Internal quotation marks omitted.) *Id.,* at 143, 72 A.3d 1152. The court explained that such an expansive zone of risk "would be inconsistent with the Supreme Court's admonition that the mode of operation rule is meant to be a narrow exception to the notice requirements under traditional premises liability law." *Id.,* at 143-44, 72 A.3d 1152.

As a result of those clarifications, this court has distilled three requirements for the mode of operation rule to apply: "(1) the defendant must have a particular mode of operation distinct from the ordinary operation of a related business; (2) that mode of operation must create a regularly occurring or inherently foreseeable hazard; and (3) the injury must happen within a limited zone of risk." *Porto v. Petco Animal Supplies Stores, Inc.,* 167 Conn.App. 573, 581, 145 A.3d 283 (2016). We return to these requirements subsequently in this opinion.

The second exception to the requirement in a premises liability case that a business invitee must prove that the business had actual or constructive notice of a dangerous condition alleged to have caused the plaintiff injury is the affirmative act rule. "Under an affirmative act theory of negligence, if the plaintiff alleges that the defendant's conduct *created* the unsafe condition [on the premises], proof of notice is not necessary.... That is because when a defendant itself has created a hazardous condition, it safely may be inferred that [the defendant] had knowledge thereof." (Emphasis added; internal quotation marks omitted.) *DiPietro v. Farmington Sports Arena, LLC, supra,* 306 Conn. at 122, 49 A.3d 951. "Rather than acting as an alternative to notice, the affirmative act rule allows an inference of notice when circumstantial evidence shows

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that the defendant knew or should have known of the dangerous condition because it was a foreseeably hazardous one that the defendant itself created." *Id.,* at 124, 49 A.3d 951. Although closely related, affirmative act cases involving injuries from negligently displayed merchandise are principally distinguishable from mode of operation cases in that the injury in an affirmative

act case "is not triggered by an intervening customer's act." *Id.,* at 122 n.10, 49 A.3d 951. "Analysis of the affirmative act rule as it has been applied shows that it permits the inference of actual notice only when the defendant or its employees created an obviously hazardous condition." *Id.,* at 123, 49 A.3d 951; see, e.g., *Tuite v. Stop & Shop Cos.,* 45 Conn.App. 305, 308, 696 A.2d 363 (1997) (slip and fall case in which employee left water in supermarket aisle after watering plants); *Fuller v. First National Supermarkets, Inc.,* 38 Conn.App. 299, 301-303, 661 A.2d 110 (1995) (slip and fall case in which employees left pricing stickers on floor).

At this juncture, we pause to observe the following with regard to the liability theory on which the plaintiff proceeded. First, our careful review of the record reveals that at no time did the plaintiff explicitly state before the trial court that she was seeking to establish the defendant's negligence on the basis of traditional premises liability doctrine, the mode of operation rule, or the affirmative act rule. During trial and in the plaintiff's posttrial brief, the plaintiff focused almost exclusively on *Meek v. Wal-Mart Stores, Inc., supra,* 72 Conn.App. 467, 806 A.2d 546, claiming that the *Meek* decision is "on all fours" with the present case. Our Supreme Court expressly has recognized *Meek* as a case applying the mode of operation rule; see footnote 3 of this opinion; see also *Kelly v. Stop & Shop, Inc., supra,* 281 Conn. at 785, 918 A.2d 249 ("[a]lthough the Appellate Court did not expressly adopt the mode of operation rule in *Meek,* the analysis and reasoning employed in that case is no different from the analysis and reasoning that the court would have used it if explicitly had adopted the mode of operation rule"). Thus, by relying, essentially exclusively, on this court's decision in *Meek,* we conclude that the plaintiff was proceeding under the mode of operation rule. Second, the trial court did not explicitly state whether it was finding in the plaintiff's favor on the basis of traditional premises liability principles, the mode of operation rule, or the affirmative act rule, and the trial court's memorandum of decision similarly is limited to a discussion of *Meek.* Here, too, in light of the trial court's exclusive reliance on *Meek,* we conclude that the trial court was applying the mode of operation rule in its liability finding against the defendant. Accordingly, we begin our analysis by considering the applicability of the mode of operation rule.[4]

Our review of the evidence presented at trial, viewed in the light most favorable to the plaintiff, reveals that the evidence did not support the application of the mode of operation rule. We address each requirement of the mode of operation rule with dispatch because, notably, the plaintiff does not contend in her appellate brief that the mode of operation rule was satisfied. *First,* there was no evidence that the defendant employed a particularized mode of operation with respect to the stacking of the fans or the empty cardboard boxes (1) that was distinct from the

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ordinary operation of a related business and (2) that either resulted in a regularly occurring hazardous condition or rendered some hazardous condition inherently foreseeable. See *Konesky v. Post Road Entertainment, supra,* 144 Conn.App. at 144, 72 A.3d 1152. In addition, as stated previously in this opinion, "self-service merchandising itself" cannot be a negligent mode of operation. *Fisher v. Big Y Foods, Inc., supra,* 298 Conn. at 424, 3 A.3d 919. Here, the record simply does not demonstrate a specific method of operation that is different from the general operation of a similar business. See *Porto v. Petco Animal Supplies Stores, Inc., supra,* 167 Conn.App. at 582, 145 A.3d 283 (concluding that first requirement was not met where defendant operated as any other pet store would by permitting leashed animals into store). *Second,* "the store's mode of operation [must invite] careless customer interference, creating an expected, foreseeable hazard." *Id.* Here, the only evidence about the regularity of any hazard came from Moore, who explained that he was unaware of merchandise ever falling onto a customer. Furthermore, even where there is a potential for hazard, "that potential alone does not give rise to a regularly occurring or inherently foreseeable hazard." *Id.,* at 583, 145 A.3d 283. *Third,* the mode of operation rule applies only to "those

areas where risk of injury is continuous or foreseeably inherent" as a result of the mode of operation at issue. (Internal quotation marks omitted.) *Fisher v. Big Y Foods, Inc., supra,* 298 Conn. at 437, 3 A.3d 919. In the present case, the record is devoid of evidence that the plaintiff's alleged injuries occurred within a *limited* zone of risk.[5] We also note at this juncture that the photograph of the shelving taken shortly after the incident, on which the trial court relied as described previously in this opinion, does not provide a sufficient evidential basis for any of these requirements.

In short, there was simply no evidence as to what caused the empty cardboard boxes to fall on the plaintiff (i.e., whether they had been stacked improperly by an employee of the defendant, whether the fans had been negligently stacked or handled in a manner that caused one or more of them to fall into the empty cardboard boxes that in turn fell on the plaintiff, and/or whether another customer had interfered with the placement of any of the foregoing merchandise leading to the incident at issue).[6]

In sum, the plaintiff failed to make out a prima facie case of negligence under the mode of operation rule and, as stated previously, she does not contend otherwise in her appellate brief. Instead, she asserts

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that the judgment should be affirmed on the basis of the affirmative act rule.[7]

Specifically, the plaintiff contends that there were two affirmative acts that support the court's conclusion: (1) the stacking of the fan boxes in a precarious manner, and (2) the defendant's employees moving merchandise in the adjacent aisle. The defendant argues that the court did not actually find that any affirmative act on the part of the defendant's employees caused the boxes to fall onto the plaintiff and that there was no evidence to support such a finding in any event. We agree with the defendant.

As an initial matter, we begin with the relevant language from the trial court's decision: "Moore and another employee of the defendant were stocking merchandise in the Internet coupon aisle when one of the nine inch fan boxes on the top shelf of the Internet coupon aisle toppled over and into the display boxes on the top shelf of the stationery aisle, thereby causing the display boxes to fall off the shelf and onto the plaintiff." A careful reading of the foregoing finding reveals that the trial court did not in fact make a finding that connects, other than temporally, the employees' activity in the Internet coupon aisle to the fall of the display boxes.

Even if such language could be construed, however, to reflect a finding of an affirmative act on the part of the defendant's employees that caused the empty cardboard boxes to fall on the plaintiff, the evidence presented at trial, viewed in the light most favorable to the plaintiff, was insufficient to support it. As stated previously in this opinion, three witnesses testified. Gordon, the sole eyewitness, testified that he saw two boxes fall from the top shelf of the stationery aisle onto the plaintiff, who was pushing a shopping carriage at the time, not reaching for or touching any merchandise on the shelving, and remained standing. With regard to any activity taking place in the adjacent aisle, Gordon testified that two male employees of the store had passed him, and he heard them talking in the adjacent aisle. He did not know why the boxes fell.

Moore, the store manager, testified that, on the day of the incident, he was training another employee, Kevin Reilly. Moore explained that he and Reilly were "[r]esetting" the Internet coupon aisle (i.e., the location in the store where items advertised for sale through the Internet are displayed).[8] Moore unequivocally testified that this "[r]esetting" activity did not involve merchandise on the top shelves; in Moore's words, "we don't touch the top shelves." He explained that the top shelf of the Internet coupon aisle did not contain merchandise that was taken on and off because it was a main aisle of the store and that it was used to display product that looked more appealing than so-called "top stock," meaning extra merchandise used to continuously

refill the aisles. Moore testified that he and Reilly were working in the Internet coupon aisle when they heard an unidentified sound in the stationery aisle and went around the corner, encountering the plaintiff and Gordon, who said that the boxes fell from the top shelf. Moore further testified that the "home location" of the empty cardboard boxes was the top shelf of the stationery aisle, which was approximately six and

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one-half feet tall and intentionally accessible to customers interested in interacting with the merchandise for sale. He could not explain how the boxes fell onto the plaintiff.

The plaintiff also testified in part as follows. Just prior to her arrival at the stationery aisle, she passed the Internet coupon aisle and saw two employees stocking merchandise there. Once in the stationery aisle, the plaintiff did not see the display boxes before they fell, nor did she see any employee handling the display boxes that fell. The plaintiff testified that the display boxes "flew off [the shelf] by themselves."

The evidence presented at trial, viewed in the light most favorable to the plaintiff, was insufficient to establish that an affirmative act on the part of the defendant caused the empty boxes to fall on the plaintiff. Moore's testimony that neither he nor Reilly ever touched the top shelf of the Internet coupon aisle was not contradicted by any other evidence. Although the court reasonably could find that Moore and Reilly were resetting the Internet coupon aisle at the time of the incident on the basis of the plaintiff's observations of two men stocking shelves just prior to the incident, there was no evidence to suggest that their specific actions in that aisle disrupted the fan boxes on the top shelf. Finding a negligent act on their part required the court to engage in impermissible speculation. Although the court was free to disbelieve Moore's testimony regarding the Internet coupon aisle's top shelf, it was not permitted to "draw a contrary inference on the basis of that disbelief." *Paige v. St. Andrew's Roman Catholic Church Corp., supra,* 250 Conn. at 18, 734 A.2d 85; see also *Novak v. Anderson,* 178 Conn. 506, 508, 423 A.2d 147 (1979). Therefore, Moore's uncontested statements that neither he nor Reilly handled the fan boxes on the top shelf of the aisle they were resetting— even if disbelieved— did not allow the court to infer the opposite proposition, much less infer that they negligently knocked over those boxes into the display boxes, which ultimately struck the plaintiff.[9] Moreover, the photograph of the shelving following

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the incident, on which the trial court relied in finding the defendant negligent, is insufficient to permit an inference that the defendant's employees engaged in an affirmative act that led to the display boxes falling on the plaintiff.

The judgment is reversed and the case is remanded with direction to render judgment for the defendant.

In this opinion the other judges concurred.

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Notes:

[*] The listing of judges reflects their seniority status on this court as of the date of oral argument.

[1] Because we consider these claims to be analytically related, we address them together.

[2] The parties do not dispute that the plaintiff was a business invitee of the defendant.

[3] As part of its analysis, the court stated that "in *Meek v. Wal-Mart Stores, Inc., supra,* 72 Conn.App. at 476-79, 806 A.2d 546, the Appellate Court recently employed a mode of operation analysis in the context of a claim arising out of the alleged negligence of a large, self-service department store." *Kelly v. Stop & Shop, Inc., supra,* 281 Conn. at 783, 918 A.2d 249.

[4] We also note that, at the commencement of trial, the trial court suggested, sua sponte, that the doctrine of res ipsa loquitur might apply. The trial court's decision does not address res ipsa loquitur, nor do the parties' appellate briefs. Thus, we do not address it further.

[5] In addition, the mode of operation rule, as it exists under Connecticut law, presumes that there was some customer interference. See *Kelly v. Stop & Shop, Inc., supra,* 281 Conn. at 786-90, 918 A.2d 249; *Konesky v. Post Road*

*Entertainment, supra,* 144 Conn.App. at 141-42 n.11, 72 A.3d 1152. Here, the plaintiff does not contend, and there was no evidence presented to suggest, that another customer interfered with the fans or empty cardboard boxes at all. Thus, the court's application of the mode of operation rule in this case was flawed for this independent reason. See *Konesky v. Post Road Entertainment, supra,* at 144, 72 A.3d 1152.

[6] Instead, Moore testified to the following. At some point immediately prior to the incident, Moore and another store employee, Kevin Reilly, had completed a safety walk, whereby they inspected the condition of various aisles in the store and discovered no hazards of any sort. No concern had ever been raised with respect to the display of the boxes that struck the plaintiff. Moreover, the shelving did not easily move, and bumping into the shelving in one aisle would not cause something to happen in the adjacent aisle.

[7] Although the plaintiff did not expressly rely on the affirmative act rule at trial, we nonetheless exercise our discretion to consider the merits of her argument, which we treat as an alternative ground for affirmance.

[8] Moore explained that "[r]esetting" the Internet coupon aisle meant removing merchandise from the shelves and replacing it with new merchandise.

[9] Affirmative act cases from other jurisdictions involving circumstances that are factually similar to the present case bolster our conclusion. The Supreme Court of South Carolina considered whether the evidence was sufficient to support the conclusion that the defendant store created a dangerous condition when the plaintiff, shortly after removing two cans from a shelf, was struck in the face by approximately fifteen falling cans. See *Garvin v. Bi-Lo, Inc.,* 343 S.C. 625, 627-28, 541 S.E.2d 831 (2001). The court explained that the only evidence produced by the plaintiff related to the cans' selling price and reflected that the cans were stacked in their original boxes and above the plaintiff's height. *Id.,* at 628, 541 S.E.2d 831. That evidence was insufficient as matter of law to establish that the defendant had created a dangerous condition because nothing indicated that the goods were defectively stacked, or that the defendant knew of any such defect. *Id.,* at 628-29, 541 S.E.2d 831; see also *Vallot v. Logan's Roadhouse, Inc.,* 567 Fed.Appx. 723, 726 (11th Cir. 2014) (restaurant patron who slipped and fell on liquid could not prevail in negligence action because evidence did not demonstrate that defendant knew of liquid or caused spill). In *Metts v. Wal-Mart Stores, Inc.,* 269 Ga.App. 366, 367, 604 S.E.2d 235 (2004), the plaintiff was injured when a number of boxes containing metal shelving units fell onto her from a display rack. The plaintiff did not know what caused the boxes to fall, nor did she observe any employees nearby. *Id.* The plaintiff produced no evidence with respect to the boxes' positioning prior to their fall. *Id.,* at 367-68, 604 S.E.2d 235. The court concluded that the defendant had no knowledge of the hazard because the evidence revealed that the boxes were stacked properly, and a safety inspection approximately fifteen minutes prior to the accident revealed no defect. *Id.,* at 367, 604 S.E.2d 235. Therefore, the court concluded that the defendant could not be held liable on the basis of any affirmative act.

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Citing References :

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**918 A.2d 249 (Conn. 2007)**
**281 Conn. 786**
**Maureen KELLY et al.**
**v.**
**STOP AND SHOP, INC.**
**No. 17404.**
**Supreme Court of Connecticut**
**April 3, 2007**

Argued February 7, 2006.

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[Copyrighted Material Omitted]

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Steve D. Ecker, Hartford, with whom, on the brief, were, James R. Smart, Michael A. Stratton, Joel T. Faxon and Michael R. Denison, New Haven, for the appellant (named plaintiff).

Suzannah K. Nigro, Trumbull, for the appellee (defendant).

NORCOTT, KATZ, PALMER, VERTEFEUILLE, ZARELLA, DiPENTIMA and McLACHLAN, Js.[1]

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**OPINION**

PALMER, J.

[281 Conn. 787] The principal issue raised by this appeal is whether this court should adopt the so-called "mode of operation" rule, a rule of premises liability pursuant to which a business invitee who is injured by a dangerous condition on the premises may recover without proof that the business had actual or constructive notice of that condition if the business' chosen mode of operation creates a foreseeable risk that the condition regularly [281 Conn. 788] will occur and the business fails to take reasonable measures to discover and remove it. The named plaintiff, [2] Maureen Kelly, commenced this action against the defendant, Stop and Shop, Inc., seeking compensation for injuries that she had sustained when, due to the defendant's alleged negligence, she slipped and fell on a piece of lettuce that had fallen to the floor from the self-service salad bar of a supermarket owned and operated by the defendant in Fairfield. After a bench trial, the trial court found that the plaintiff had failed to meet her burden of establishing that the defendant had actual or constructive notice of the piece of lettuce and, on that basis, rendered judgment for the defendant. On appeal, [3] the plaintiff contends that the trial court improperly declined to consider her claim of liability under the mode of operation rule. We agree with the plaintiff that this court should adopt the mode of operation rule and, therefore, reverse the judgment of the trial court.

The following evidence was adduced at trial. At approximately 11:30 a.m., on November 2, 1999, the plaintiff arrived at the defendant's supermarket in Fairfield to purchase groceries and to make herself a salad for lunch. Upon entering the store, she secured a shopping cart and went directly to the self-service salad bar located near the produce and floral departments of the store. The salad bar was surrounded on both sides by a narrow floor runner, approximately two to three feet wide, on which patrons stood while they served themselves. The floor itself was made of tile or linoleum. The salad bar had no railings and was framed by a four [281 Conn. 789] inch ledge that was too narrow to accommodate trays or containers. As a result, patrons customarily would hold their containers aloft, over the floor area, while serving themselves from the salad bar. The plaintiff parked her shopping cart alongside the salad bar, picked up an aluminum container and filled it with cottage cheese and fruit. When she was finished, she turned to get a lid and, while doing so, stepped off the runner to get around her shopping cart. As she stepped onto the tile or linoleum floor, her left foot began to slide, causing both of her feet to kick up into the air and the aluminum container to be dislodged from her grasp. The plaintiff landed on her left shoulder.

While the plaintiff was lying on the floor

following her fall, she observed a store employee, subsequently identified as Cecilia Stacey Bombero, cleaning the cottage cheese and fruit from around the plaintiff's feet. Another person helped the plaintiff up and then went to locate the store manager. While waiting for the manager to arrive, the plaintiff wiped off her shoes with a rag that she had obtained from Bombero. At that time, the plaintiff noticed

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"a wet, slimy piece of green lettuce" on the side of her shoe that, according to the plaintiff, had caused her to fall. The plaintiff, however, did not see any food or other substance on the floor near the salad bar Before the accident. [4] The plaintiff also did not observe any store employees in the area of the salad bar Before she fell.

The store manager, Nicholas J. Bishighini, arrived and asked the plaintiff if she was alright. The plaintiff responded that her shoulder hurt. Bishighini offered to [281 Conn. 790] call an ambulance, but the plaintiff declined. The plaintiff indicated that she had slipped and fallen on a piece of lettuce. Bishighini informed her that he would prepare an accident report that she could pick up the next day. The plaintiff tried to continue shopping but left the store shortly thereafter due to a throbbing pain in her left shoulder. As a consequence of her fall, the plaintiff tore her rotator cuff in her left shoulder. The injury causes the plaintiff to suffer chronic pain and has limited the plaintiff's ability to move her left shoulder and arm.[5]

According to Bishighini, the defendant's store policy called for at least one salad bar attendant to be on duty at all times. That attendant's job responsibilities included filling and maintaining the salad bar, and cleaning and patrolling the salad bar area. Typically, whenever the salad bar attendant took a break, another employee was assigned to cover the area until the attendant returned. Bishighini characterized the salad bar as "an area where people used to let . . . salads fall. It was precarious." As a consequence, Bishighini stated, "special porters" generally were stationed near the area of the salad bar.

Bishighini further explained that the defendant's store policy also required that a special report form be completed after any accident. The instructions on the front of the form provide in relevant part: "Answer all questions accurately, both sides. Have the employees fill out the reverse [side] independent of each other. Remember to sign and print your name on the bottom of this report. The maintenance report on the reverse side is to be filled out by the employee who last swept, cleaned and inspected [the area where the accident [281 Conn. 791] occurred]. Call the accident into corporate insurance immediately after obtaining the information. It is essential that the sweeping log and all photographs be attached to the report of accident or injury." Additionally, the store maintained an employee safety manual that provides in relevant part: "The way a customer accident is handled could be the difference between winning a court case or reducing an award [and] losing a case or sustaining punitive damages.... When an accident occurs ... [m]ake no statements to the injured individual. Do not make any remarks about our insurance.... Be courteous and helpful. If the injured individual says anything about responsibility, courteously inform [him or her] that the accident will be reported to the general office and an investigation will be made.... Make a personal detailed inspection of the area where the accident

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occurred with at least two other employees as witnesses. Secure names and addresses of customer and employee witnesses whenever possible.... Take photographs of the area where the accident occurred.... If a fall down . . . [take photographs of] the area of the fall down and any substance on the floor. (If no substance is there take a picture of the floor.). . . When taking the information, use the Report of Accident or Injury Form. Bring this form down to the accident scene and take all information on-the-spot."

Notwithstanding these requirements, the accident report that was completed in connection

with the plaintiff's fall was dated November 29, 1999, almost one month after the accident. Furthermore, the report contained no photographs or sweeping logs. The report did note, however, that the plaintiff had slipped "on [a] green [piece] of lettuce ...."

The following additional facts and procedural history are relevant to our resolution of this appeal. In her complaint, the plaintiff alleged, inter alia, that the defendant [281 Conn. 792] negligently had allowed "pieces of wet lettuce" to accumulate on the floor in the vicinity of the salad bar, creating a dangerous and defective condition that had caused her to slip and fall. The plaintiff further alleged that the dangerous condition was the result of the defendant's method of displaying produce for consumption and that the defendant had failed to make reasonable inspections of the salad bar and the surrounding area in order to discover and remove that condition.

At the conclusion of the trial, the plaintiff urged the court to apply the mode of operation rule. Specifically, the plaintiff maintained that the evidence established that the salad bar was operated in such a manner that it was foreseeable that customers would spill or drop food from the salad bar to the floor below, thereby creating a dangerous condition. The plaintiff further claimed that, although it was the defendant's policy to inspect and clean the salad bar area routinely, the evidence indicated that the defendant failed to follow that policy. The plaintiff asserted, in particular, that the defendant's failure to provide sweeping logs and photographs with the accident report, as specifically required in the instructions accompanying the accident report form, gave rise to an inference that the floor surrounding the salad bar had not been swept or inspected in accordance with store policy.

In its memorandum of decision, the trial court concluded, in accordance with then controlling case law, that, because the plaintiff was a business invitee, she was required to prove that the defendant had actual or constructive notice of the piece of lettuce that allegedly had caused the plaintiff's fall. In view of the fact that the plaintiff's complaint did not allege that the defendant had actual notice of the piece of lettuce, the trial court focused exclusively on whether the plaintiff had established that the defendant had constructive notice of the condition. The trial court noted that, to establish [281 Conn. 793] constructive notice, the plaintiff was required to adduce evidence sufficient to demonstrate that the lettuce had been on the floor long enough such that the defendant, in the exercise of reasonable care, should have discovered it. The trial court then concluded that, because the record was devoid of any evidence as to how long the piece of lettuce had been on the floor, the plaintiff's proof was inadequate to establish constructive notice, and, therefore, the defendant was entitled to judgment on that basis. In light of its determination regarding the requirement of actual or constructive notice and the plaintiff's failure to meet that requirement, the trial court did not address

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the plaintiff's claim regarding the mode of operation rule.

On appeal, the plaintiff does not challenge the trial court's finding that the evidence was insufficient to establish the defendant's constructive notice of the piece of lettuce on which she allegedly had slipped. Rather, she challenges the court's determination that she was required to prove that the piece of lettuce had been on the floor long enough to charge the defendant with constructive notice of its presence there. Specifically, the plaintiff maintains that the trial court improperly declined to consider her claim under the mode of operation rule, which allows a business invitee to recover for an injury sustained as a result of a dangerous condition on the premises of a business without a showing that the business had actual or constructive notice of that condition, if the condition was reasonably foreseeable and the business failed to take reasonable measures to discover and remove it. The plaintiff further contends that the evidence adduced at trial was sufficient to support a finding in her favor under that rule. We conclude that we should adopt the mode of operation rule and agree with the plaintiff that she adduced sufficient

evidence at trial to support a finding in her favor under that rule.

[281 Conn. 794] We begin our analysis by setting forth the standard of review. "[T]he scope of our appellate review depends [on] the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. When, however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Kelly v. New Haven,* 275 Conn. 580, 607, 881 A.2d 978 (2005). Because the plaintiff's sole claim on appeal is that the trial court applied the wrong legal standard to the facts, our review is plenary.

It is undisputed that the owner of a retail store has a duty to keep the premises in a reasonably safe condition for the benefit of its customers. See, e.g., *Baptiste v. Better Val-U Supermarket, Inc.,* 262 Conn. 135, 140, 811 A.2d 687 (2002). Recently, we reiterated the legal standard that this court ordinarily has applied to premises liability claims brought by business invitees: "Typically, [f]or [a] plaintiff to recover for the breach of a duty owed to [him] as [a business] invitee, it [is] incumbent upon [him] to allege and prove that the defendant either had actual notice of the presence of the specific unsafe condition which caused [his injury] or constructive notice of it.... [T]he notice, whether actual or constructive, must be notice of the very defect which occasioned the injury and not merely of conditions naturally productive of that defect even though subsequently in fact producing it.... In the absence of allegations and proof of any facts that would give rise to an enhanced duty ... [a] defendant is held to the duty of protecting its business invitees from known, foreseeable dangers." (Citations omitted; internal quotation marks omitted.) *Id.*

[281 Conn. 795] "If the plaintiff, however, alleges an affirmative act of negligence, [that is], that the defendant's conduct created the unsafe condition, proof of notice is not necessary.... That is because when a defendant itself has created a hazardous condition, it safely may be inferred that it had knowledge thereof." (Citations omitted; internal quotation marks omitted.) *Meek v. Wal-Mart Stores, Inc.,* 72 Conn.App. 467, 474, 806 A.2d 546, cert. denied, 262 Conn. 912, 810 A.2d 278 (2002);

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see also *Tuite v. Stop & Shop Cos.,* 45 Conn.App. 305, 308-309, 696 A.2d 363 (1997); *Fuller v. First National Supermarkets, Inc.,* 38 Conn.App. 299, 301, 661 A.2d 110 (1995). When, however, the plaintiff does not allege either that the defendant's conduct created the unsafe condition or that the defendant had actual notice of the condition, we have stated that "[t]he controlling question [becomes] that of constructive notice: whether the condition had existed for such a length of time that the [defendant's] employees should, in the exercise of due care, have discovered it in time to have remedied it." *Morris v. King Cole Stores, Inc.,* 132 Conn. 489, 492-93, 45 A.2d 710 (1946). "What constitutes a reasonable length of time is largely a question of fact to be determined in the light of the particular circumstances of a case. The nature of the business and the location of the foreign substance would be factors in this determination...." *Id.*, at 494, 45 A.2d 710. "To a considerable degree each case must be decided on its own circumstances. Evidence which goes no farther than to show the presence of a slippery foreign substance does not warrant an inference of constructive notice to the defendant." *Id.*

The mode of operation rule, however, which the plaintiff urges us to adopt, "allows a customer injured due to a condition inherent in the way [a] store is operated to recover without establishing that the proprietor had actual or constructive knowledge of the dangerous condition." *Jackson v. K-Mart Corp.,* [281 Conn. 796] 251 Kan. 700, 702, 840 P.2d 463 (1992). The rule, which evolved in response to the proliferation of self-service retail establishments, is rooted in the theory that traditional notice requirements are unfair and unnecessary in the self-service

context. "The modern self-service form of retail sales encourages ... patrons to obtain for themselves from shelves and containers the items they wish to purchase, and to move them from one part of the store to another in baskets and shopping carts as they continue to shop for other items, thus increasing the risk of droppage and spillage." *Lanier v. Wal-Mart Stores, Inc.,* 99 S.W.3d 431, 435 (Ky.2003); see also *Ciminski v. Finn Corp.,* 13 Wash.App. 815, 818, 537 P.2d 850 ("It is common knowledge that the modern merchandizing method of self-service poses a considerably different situation than the older method of individual clerk assistance. It is much more likely that items for sale and other foreign substances will fall to the floor."), review denied, 86 Wash.2d 1002 (1975). "It is also common knowledge that modern merchandising techniques employed by self-service retail stores are specifically designed to attract a customer's attention to the merchandise on the shelves and, thus, away from any hazards that might be on the floor." *Lanier v. Wal-Mart Stores, Inc.,* supra, at 436.

Thus, "modern-day supermarkets, self-service marts, cafeterias, fast-food restaurants and other business premises should be aware of the potentially hazardous conditions that arise from the way in which they conduct their business. Indeed, the very operation of many of these types of establishments requires that the customers select merchandise directly from the store's displays, which are arranged to invite customers to focus on the displays and not on the floors.... In each of these cases, the nature of the defendant's business gives rise to a substantial risk of injury to customers from slip-and-fall accidents...." [281 Conn. 797] *Owens v. Publix Super Inc.,* 802 So.2d 315, 330-31 (Fla.2001); see also *Wollerman v. Grand Union Stores, Inc.,* 47 N.J. 426, 429, 221 A.2d 513 (1966) ("since the patron's carelessness is to be anticipated in [a] self-service operation [involving open bins of vegetables], [the] defendant [supermarket was] liable,

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even without notice of the [vegetable's] presence on the floor, [when it] failed to use reasonable measures commensurate with the risk involved to discover the debris a customer might [have left] and to remove it Before it injure[d] another patron").

The Vermont Supreme Court recently summarized the genesis and rationale of the mode of operation rule. "With the advent of self-service marketing operations in retail stores ... courts across the country ... began to modify premises liability law in various ways to reduce or eliminate [a plaintiff's] burden of proving that the store had actual or constructive notice of the defective condition. See *Jackson v. K-Mart Corp.,* [supra, 251 Kan. at 705-10, 840 P.2d 463] (noting broad trend toward modifying premises liability law in retail establishments and discussing various ways in which traditional rule has been altered); see also *Owens v. Publix Supermarkets, Inc.,* [supra, 802 So.2d at 324-29] ... (noting modern jurisprudential trend of departing from the traditional rule of premises liability when a plaintiff slips and falls on a transitory foreign substance, and discussing various approaches taken by different courts); *Cobb v. Skaggs Cos.,* [661 P.2d 73, 76 (Okla.App.1982)] (noting that self-service marketing method has spawned a growing trend of cases that dispense with the traditional notice requirement in such business settings as discount department stores, restaurants, and supermarkets).... In modifying the traditional rule, these courts reasoned that while self-service operations give store customers additional freedom to browse and select the merchandise they desire, they also pose foreseeable [281 Conn. 798] hazards to those customers, who are generally less careful than store employees in handling the merchandise.... Essentially, the courts have recognized that stores engaging in foreseeably hazardous self-service operations may be deemed to have constructive notice of those conditions when they result in injury." (Citations omitted; internal quotation marks omitted.) *Malaney v. Hannaford Bros. Co.,* 177 Vt. 123, 127-28, 861 A.2d 1069 (2004).

Consistent with the observation of the Vermont Supreme Court, some courts that have

adopted the mode of operation rule have concluded that the owner of a self-service retail establishment reasonably may be deemed to have *constructive* notice of dangerous, transitory conditions that are likely to occur due to the manner in which the store is operated. See, e.g., *Blair v. West Town Mall,* 130 S.W.3d 761, 766 (Tenn.2004) ("This approach focuses directly on a principle firmly established in [the] case law--that a premises owner's duty to remedy a condition, not directly created by the owner, is based on that owner's actual or constructive knowledge of the existence of the condition. It simply recognizes the logical conclusion that, when a dangerous condition occurs regularly, the premises owner is on constructive notice of the condition's existence. This places a duty on that owner to take reasonable steps to remedy this commonly occurring dangerous condition."); *Strack v. Great Atlantic & Pacific Tea Co.,* 35 Wis.2d 51, 57-58, 150 N.W.2d 361 (1967) ("in circumstances [in which] there is a reasonable probability that an unsafe condition will occur because of the nature of the business and the manner in which it is conducted, then constructive knowledge of the existence of such an unsafe condition may be charged to the operator and such constructive notice does not depend [on] proof of an extended period of time within which a shop owner might have received knowledge of the condition in [281 Conn. 799] fact"). Other courts, however, have reasoned that, by selling merchandise or food in a manner that gives rise to regularly occurring

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hazards, the store itself has created the risk and, therefore, reasonably may be deemed to have *actual* notice of the hazard. See, e.g., *Canfield v. Albertsons, Inc.,* 841 P.2d 1224, 1226 (Utah App.1992) ("there is no logical distinction between a situation in which the storeowner directly creates the condition or defect, and where the store owner's method of operation creates a situation [in which] it is reasonably foreseeable that the expectable acts of third parties will create a dangerous condition or defect"), cert. denied, 853 P.2d 897 (Utah 1993); *Ciminski v. Finn Corp.,* supra, 13 Wash.App. at 819, 537 P.2d 850 ("The logic of [the] rule is obvious if it is remembered that if a clerk or other employee has been negligent, the employer is charged with the responsibility of creating a dangerous condition.... In a self-service operation, an owner has for his pecuniary benefit required customers to perform the tasks previously carried out by employees. Thus, the risk of items being dangerously located on the floor, which previously was created by employees, is now created by other customers. But it is the very same risk and the risk has been created by the owner by his choice of mode of operation. He is charged with the creation of this condition just as he would be charged with the responsibility for negligent acts of his employees." [Citation omitted.]). Whether a self-service business is deemed to have constructive or actual notice of hazards that occur regularly due to the fact that its customers are expected to serve themselves, the fundamental rationale underlying the rule is the same: Because the hazard is a foreseeable consequence of the manner in which the business is operated, the business is responsible for implementing reasonable measures to discover and remedy the hazard.

Although this court previously has not had occasion to consider the mode of operation rule, at least twenty-[281 Conn. 800] of our sister states have adopted the rule or some variation thereof. See, e.g., *Chiara v. Fry's Food Stores of Arizona, Inc.,* 152 Ariz. 398, 400-401, 733 P.2d 283 (1987); *Safeway Stores, Inc. v. Smith,* 658 P.2d 255, 257 (Colo.1983); *Owens v. Publix Supermarkets, Inc.,* supra, 802 So.2d at 330-31; *Gump v. Wal-Mart Stores, Inc.,* 93 Hawai'i 428, 441-45, 5 P.3d 418 (Ct.App.1999), aff'd in relevant part and rev'd in part on other grounds, 93 Hawai'i 417, 5 P.3d 407 (2000); *McDonald v. Safeway Stores, Inc.*, 109 Idaho 305, 308, 707 P.2d 416 (1985); *Golba v. Kohl's Dept. Store, Inc.*, 585 N.E.2d 14, 15-16 (Ind.App.1992); *Jackson v. K-Mart Corp.*, supra, 251 Kan. at 710-11, 840 P.2d 463; *Lanier v. Wal-Mart Stores, Inc.*, supra, 99 S.W.3d at 436-37; *Gonzales v. Winn-Dixie Louisiana, Inc.*, 326 So.2d 486, 488-89 (La.1976); *Dumont v. Shaw's Supermarkets, Inc.*,

664 A.2d 846, 848-49 (Me.1995); *F.W. Woolworth Co. v. Stokes*, 191 So.2d 411, 416-18 (Miss.1966); *Sheil v. T.G. & Y. Stores Co.*, 781 S.W.2d 778, 780-82 (Mo.1989); *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 251, 849 P.2d 320 (1993); *Jacobson v. Yoken's, Inc.*, 104 N.H. 331, 334-35, 186 A.2d 148 (1962); *Wollerman v. Grand Union Stores, Inc.*, supra, 47 N.J. at 429-30, 221 A.2d 513; *Mahoney v. J.C.* Penney Co., 71 N.M. 244, 260, 377 P.2d 663 (1962); Lingerfelt v. Winn-Dixie Texas, Inc., 645 P.2d 485, 489 (Okla.1982); *Blair v. West Town Mall*, supra, 130 S.W.3d at 766; *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 296-98 (Tex.1983); *Canfield v. Albertsons, Inc.*, supra, 841 P.2d at 1226-27; *Malaney v. Hannaford Bros. Co.*, supra, 177 Vt. at 132, 861 A.2d 1069; *Pimentel v. Roundup Co.*, 100 Wash.2d 39, 49-50, 666 P.2d 888 (1983); *Steinhorst v. H.C. Prange Co.*, 48 Wis.2d 679, 683-84, 180 N.W.2d 525 (1970); *Buttrey Food Stores Division v. Coulson*, 620 P.2d 549, 552-53 (Wyo.1980). A number of courts have rejected the

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mode of operation rule. See, e.g., *Richardson v. Kroger Co.,* 521 So.2d 934, 937-38 (Ala.1988); *Maans v. Giant of Maryland, LLC,* 161 Md.App. 620, 638, 871 A.2d 627, cert. denied, [281 Conn. 801] 388 Md. 98, 879 A.2d 43 (2005); *Wintersteen v. Food Lion, Inc.,* 344 S.C. 32, 35-36, 39, 542 S.E.2d 728 (2001); *Winn-Dixie Stores, Inc. v. Parker,* 240 Va. 180, 183 n. 3, 396 S.E.2d 649 (1990). There is, however, a distinct modern trend favoring the rule, and it appears that most courts that have considered the rule have adopted it.

Indeed, in *Meek v. Wal-Mart Stores, Inc.,* supra, 72 Conn.App. at 476-79, 806 A.2d 546, the Appellate Court recently employed a mode of operation analysis in the context of a claim arising out of the alleged negligence of a large, self-service department store. In *Meek*, the named plaintiff, Jeffrey Meek, was injured when two boxes containing aluminum folding camp tables fell on him while he was shopping at a Wal-Mart store in Waterford. *Id.*, at 469, 806 A.2d 546. Meek brought an action against Wal-Mart Stores, Inc. (Wal-Mart), and certain of its employees, claiming, inter alia, that Wal-Mart or its employees negligently had failed to secure the tables to the shelf on which they were displayed. *Id.*, at 470-71, 806 A.2d 546. A jury returned a verdict in favor of Meek, and Wal-Mart appealed. *Id.*, at 471-72, 806 A.2d 546. On appeal, Wal-Mart argued that the evidence was inadequate to establish that the manner in which the tables had been stacked for display constituted a dangerous condition. *Id.*, at 473, 806 A.2d 546. In particular, Wal-Mart maintained that it could not be held responsible for the accident because the evidence indicated that another customer had caused the tables to be moved into a position in which they were vulnerable to toppling. *Id.*

The Appellate Court rejected this claim, concluding that the evidence was sufficient to permit a finding that Wal-Mart and its employees had been negligent in stacking the boxes in the manner they did because it was foreseeable that the boxes could be dislodged by customers with only minimal inspection or handling. *Id.*, at 479, 806 A.2d 546. In reaching its conclusion, the Appellate Court noted, first, that when a business invitee alleges that her injuries were caused by an unsafe condition created [281 Conn. 802] by the business itself, proof that the business had actual or constructive notice of that unsafe condition is not necessary because, in such circumstances, knowledge of the condition reasonably may be inferred. *Id.*, at 474, 806 A.2d 546. The Appellate Court further explained that, "[w]hether a storekeeper has displayed merchandise in an unsafe manner such that injury to customers is foreseeable is for the fact finder to determine and is to be answered by considering all of the surrounding circumstances.... The merchant must use reasonable care in placing goods on the store shelves. Merchandise must not be stacked or placed at such heights, widths, depths, or in such locations which would make it susceptible to falling....

"Injuries also may result indirectly from a proprietor's defective or negligent display of merchandise that nonetheless are wholly to be

expected from the store's mode of operation and may be taken into account by the fact finder when it considers whether the method of display was unsafe. Thus, one of the factors to be considered in establishing and maintaining a display in a department store is that the merchandise is going to be inspected by the customers. A merchandise display constructed so that an inspection by a customer, in a foreseeable and reasonable manner, causes the merchandise to fall, is a negligently constructed display....

"The concept is no less applicable [when] it is the foreseeable action of another customer

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who rendered the display dangerous to the injured plaintiff." (Citations omitted; internal quotation marks omitted.) *Id.*, at 476-77, 806 A.2d 546. In other words, " *there is no logical distinction between a situation in which the storeowner directly creates the condition or defect, and where the storeowner's method of operation creates a situation [in which] it is reasonably foreseeable that the expectable acts of third parties will create a dangerous condition or defect.*" (Emphasis added.) *Id.*, at 478, 806 A.2d 546.

[281 Conn. 803] Although the Appellate Court did not expressly adopt the mode of operation rule in *Meek*, the analysis and reasoning employed in that case is no different from the analysis and reasoning that the court would have used if it explicitly had adopted the mode of operation rule. As the Appellate Court stated, "[w]here the storekeeper operates under a self-service system, he must take into account the possibility of shoppers disarranging the merchandise and possibly leaving it in a dangerous condition; therefore, [when] a storekeeper has no basis for believing that customers will discover a dangerous condition or realize the risk involved, he is under a duty to exercise ordinary care either to make the condition reasonably safe for their use or to give a warning adequate to enable them to avoid the harm." (Internal quotation marks omitted.) *Id.*, at 477-78, 806 A.2d 546. Indeed, the Appellate Court specifically noted that this principle "frequently has been applied in cases involving slip and fall accidents in self-service establishments that were caused by the foreseeable behavior of other customers dropping or spilling merchandise on the floor." *Id.*, at 478 n. 6, 806 A.2d 546. Consequently, we agree with the plaintiff that *Meek* lends considerable support to her contention that she was entitled to consideration of her claim under the mode of operation rule. [6]

[281 Conn. 804] For several reasons, we also agree with the plaintiff that the mode of operation rule provides the most fair and equitable approach to the adjudication of premises liability claims brought by business invitees seeking compensation for injuries arising out of a business owner's self-service method of operation. First, "[i]n a self-service operation, an owner has for his pecuniary benefit required customers to perform the tasks previously carried out by employees." *Ciminski v. Finn Corp.,* supra, 13 Wash.App. at 819, 537 P.2d 850; *Sheil v. T.G. & Y. Stores Co.,* supra, 781 S.W.2d at 781 (same). Although such businesses stand to realize savings from their self-service manner of operation, this merchandising technique also provides "increased opportunities for the creation of myriads of potential new hazards to customers, caused not only by the [commercial entity's] own employees, but by other customers as well." 1 N. Landau & E. Martin, Premises Liability

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Law and Practice (2002) ? 8A.03 [4]. In such circumstances, "[t]he measures taken by large, self-service retail merchandising establishments to protect their invitees must be commensurate with the risks inherent in that method of store operation.... [Thus] [a]ny economic loss resulting from the avoidance of those risks, if it exists, should be borne by such commercial enterprises as a cost of doing business." (Citations omitted; internal quotation marks omitted.) *Meek v. Wal-Mart Stores, Inc.,* supra, 72 Conn.App. at 481, 806 A.2d 546. In other words, because self-service businesses are likely to achieve savings by virtue of their method of operation, it is

appropriate to hold them responsible for injuries to customers that are a foreseeable consequence of their use of that merchandising approach *unless* they take reasonable precautions to prevent such injuries.

Second, the essential premise of the rule requiring a business invitee to prove actual or constructive notice of the unsafe condition is incompatible with the self-service method of operation. Actual or constructive [281 Conn. 805] notice is required because, as a general matter, it is unfair to hold a storeowner liable for injuries to customers resulting from an unsafe condition unless the storeowner knew or should have known of that unsafe condition. Self-service businesses, however, are aware that some customers will be injured due to the conduct of other customers because such injuries are a likely, and therefore foreseeable, consequence of the self-service method of operation. Thus, as the Colorado Supreme Court has explained, "[t]he basic notice requirement springs from the [notion] that a dangerous condition, when it occurs, is somewhat out of the ordinary.... In such a situation the storekeeper is allowed a reasonable time, under the circumstances, to discover and correct the condition, unless it is the direct result of his (or his employees') acts. However, when the operating methods of a proprietor are such that dangerous conditions are continuous or easily foreseeable, the logical basis for the notice requirement dissolves. Then, actual or constructive notice of the specific condition need not be proved." (Citations omitted.) *Jasko v. F.W. Woolworth Co.,* 177 Colo. 418, 420-21, 494 P.2d 839 (1972); accord *Gump v. Wal-Mart Stores, Inc.,* supra, 93 Hawai'i at 443-44, 5 P.3d 418; *Pimentel v. Roundup Co.,* supra, 100 Wash.2d at 47-48, 666 P.2d 888; see also S. Winegar, Comment, "Reapportioning the Burden of Uncertainty: Storekeeper Liability in the Self-Service Slip-and-Fall Case," 41 UCLA L.Rev. 861, 869-70 (1994) ("[I]t appears that the self-service method of operation in retail businesses is ... a modern development.... This ... suggests that the traditional rule of premises liability emerged when courts were either unaware of the higher tort risk associated with self-service businesses, or unwilling to craft a rule of liability that distinguished between self-service businesses and their clerk-service counterparts. Arguably, a modern rule of premises liability ought to account for the special [281 Conn. 806] risks inherent in self-service merchandising. Modern supermarkets are busy by design, with employees as well as customers handling merchandise. As a consequence, there is a greater likelihood that foreign objects will fall to the floor in these self-service businesses because of the carelessness of a storekeeper's employees or customers.").

Third, the requirement of actual or constructive notice places a difficult--and frequently insuperable--burden on injured customers to establish when the unsafe condition arose. "An injured customer is often at a decided disadvantage in determining what has happened. The fall

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victim may be dazed, helpless and friendless, unable to interview bystanders or to observe the scene carefully. The store [on the other hand] is able to make an immediate investigation, interviewing witnesses and diagramming the scene. Relative availability of evidence to the parties is a circumstance to be considered in determining what should be required for making a submissible case." *Sheil v. T.G. & Y. Stores Co.,* supra, 781 S.W.2d at 782; see also *Owens v. Publix Supermarkets, Inc.,* supra, 802 So.2d at 330 ("premises owners are in a superior position to establish that they did or did not regularly maintain the premises in a safe condition and they are generally in a superior position to ascertain what occurred by making an immediate investigation, interviewing witnesses and taking photographs"); *Wollerman v. Grand Union Stores, Inc.,* supra, 47 N.J. at 430, 221 A.2d 513 ("[When] a substantial risk of injury is implicit in the manner in which a business is conducted, and ... it is fairly probable that the operator is responsible either [for] creating the hazard or permitting it to arise or to continue, it would be unjust to saddle [a] plaintiff with the burden of isolating the precise failure. The situation being

peculiarly in the defendant's hands, it is fair to call [on] the defendant to explain, if he wishes to avoid an inference by the trier of the facts that the fault [281 Conn. 807] probably was his."); *Malaney v. Hannaford Bros. Co.,* supra, 177 Vt. at 132, 861 A.2d 1069 ("the modification of premises liability law in slip-and-fall cases involving self-service retail stores ... was aimed largely at relieving plaintiffs of the nearly insurmountable burden of proving exactly ... how long the dangerous condition had existed").

Finally, the mode of operation rule is most consistent with "the general rule that every person has a duty to use reasonable care not to cause injury to those whom he reasonably could foresee to be injured by his negligent conduct, whether that conduct consists of acts of commission or omission."[7] *Gazo v. Stamford,* 255 Conn. 245, 251, 765 A.2d 505 (2001). More specifically, the rule encourages self-service businesses to "exercise reasonable care in their dealings with customers ... [by] assigning liability as accurately as possible to those parties that reasonably may foresee harm on their premises." *Monk v. Temple George Associates, LLC,* 273 Conn. 108, 121 n. 11, 869 A.2d 179 (2005). By contrast, a rule requiring proof that a self-service enterprise had actual or constructive notice of an unsafe, transitory condition caused by the foreseeable conduct of a customer would provide little incentive for such an enterprise to adopt and implement policies designed to prevent injuries stemming from that unsafe condition because actual or constructive notice frequently is so difficult to prove. See, e.g., S. Winegar, supra, 41 UCLA L.Rev. at 862 ("[m]any courts have recognized that [the traditional notice] requirements can be tremendously [281 Conn. 808] difficult to satisfy if the condition causing the fall was temporary or transitory").

The defendant contends that the mode of operation rule effectively makes self-service businesses strictly liable for injuries to their customers. We disagree with this assertion. On the contrary, "it must be emphasized that 'a store owner is not an insurer of its customers' safety. Certainly, [when] ... a customer is injured by an independent act of negligence which the merchant cannot reasonably be expected to foresee or guard against, the merchant is not liable. However, ordinary and foreseeable activities of patrons, not amounting to independent acts of negligence, should not result in injury to fellow patrons or themselves; and a merchant is negligent if he has so arranged his merchandise that such activities can cause merchandise to fall resulting in injury.' " [8] *Meek v. Wal-Mart Stores, Inc.,* supra, [281 Conn. 809] 72 Conn.App. at 478-79, 806 A.2d 546, *quoting Fleming v. Wal-Mart, Inc.,* 268 Ark. 559, 564, 595 S.W.2d 241 (Ct.App.1980). In other words, under the mode of operation rule, a proprietor of a self-service retail operation "is [negligent] only if he fails to use reasonable care under the circumstances to discover the foreseeable dangerous condition and to correct it or to warn customers of its existence.... [I]t is unrealistic to require the victim of a fall resulting from a dangerous condition in a self-service grocery store to present evidence of the absence of reasonable care by the storekeeper.... The steps the storekeeper took to discover the condition and to correct or warn of it are peculiarly within his own knowledge." (Citations omitted.) *Safeway Stores, Inc. v. Smith,* supra, 658 P.2d at 258; see also *Ciminski v. Finn Corp.,* supra, 13 Wash.App. at 823, 537 P.2d 850 ("Requiring the owner of a self-service operation to exercise reasonable care in protecting his business invitees from the foreseeable risks of his method of doing business does not make such owner an insurer of those on his premises. If [the owner] has taken all precautions reasonably necessary to protect his invitees from injury, he is not liable merely because someone is injured on his property.").

To summarize, a plaintiff establishes a prima facie case of negligence 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. The defendant may rebut the plaintiff's evidence by producing evidence that

it exercised reasonable care under the circumstances. Of course, the finder of fact bears the ultimate responsibility of determining whether

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the defendant exercised such care. We underscore, "as most other courts have, that the defendant's burden in such cases is one of production, and that the ultimate burden of persuasion to prove negligence--in other words, that [281 Conn. 810] the defendant failed to take reasonable steps to address a known hazard--remains with the plaintiff." *Malaney v. Hannaford Bros. Co.,* supra, 177 Vt. at 132, 861 A.2d 1069; see also *Chiara v. Fry's Food Stores of Arizona, Inc.,* supra, 152 Ariz. at 401, 733 P.2d 283 ("[I]t [is] clear that the burden of proof in a mode-of-operation case is no different from the burden of proof in any other negligence case.... The plaintiff must still come forward with evidence supporting his case. He bears the burden of persuading the jury that the defendant acted unreasonably." [Citation omitted.]); *Nisivoccia v. Glass Gardens, Inc.,* 175 N.J. 559, 564-65, 818 A.2d 314 (2003) ("[t]he plaintiff is entitled to an inference of negligence, shifting the burden of production to the defendant, who may avoid liability if [he] shows that [he] did all that a reasonably prudent man would do in the light of the risk of injury [the] operation entailed" [internal quotation marks omitted]).

Thus, the plaintiff always bears the burden of establishing negligence under the mode of operation rule. In other words, although the plaintiff will make out a prima facie case upon the presentation of evidence from which the fact finder reasonably could find that the defendant's self-service mode of operation gave 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, the fact finder is not obliged to conclude that the defendant was negligent. Rather, the fact finder is free to find either that the plaintiff's evidence is sufficient to establish negligence by the defendant or that the plaintiff's evidence is insufficient to establish negligence. If the fact finder were to find that the plaintiff's evidence was sufficient to establish negligence, and the defendant presented no evidence, then the fact finder presumably would find in favor of the plaintiff. The defendant, however, is free to adduce evidence, in response to the plaintiff's evidence, that it undertook reasonable measures to avoid accidents like [281 Conn. 811] the accident that resulted in the plaintiff's injury. If the defendant presents such evidence, the burden is on the plaintiff to establish that the steps taken by the defendant to prevent the accident were not reasonable under the circumstances.

Applying the foregoing rule to the present case, we conclude that the plaintiff adduced evidence sufficient to establish a prima facie case of negligence by the defendant. Specifically, Bishighini, the store manager, testified that the area around the salad bar was "precarious" because customers regularly caused items from the salad bar to fall to the floor below. Indeed, because the defendant knew of the dangers associated with maintaining a self-service salad bar, the defendant had a policy of stationing an attendant at the salad bar for the purpose of keeping the area clean and safe. Moreover, the plaintiff testified that she fell when she slipped on a "wet, slimy piece of ... lettuce" while she was making a salad at the salad bar. This evidence was adequate to permit a finding that the salad bar created a foreseeable risk of danger to customers; see *Nisivoccia v. Glass Gardens, Inc.,* supra, 175 N.J. at 565, 818 A.2d 314 ("A location within a store where a customer handles loose items during the process of selection and bagging from an open display obviously is a self-service area. A mode-of-operation charge is appropriate when loose items that are reasonably likely to fall to the ground during customer or employee

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handling would create a dangerous condition."); and that the plaintiff's fall had resulted from that dangerous condition. Furthermore, although the defendant's policy required both that a maintenance report be completed by the employee who had "last swept, cleaned and inspected" the area where the accident occurred and that all relevant photographs and sweeping

logs be appended to the accident report, the defendant failed to comply with those directives. The plaintiff correctly asserts that the defendant's [281 Conn. 812] inability to produce the information required by its own guidelines permits an inference that the area had not been swept, cleaned or inspected in accordance with the defendant's store policies. Finally, according to the plaintiff, there were no porters or attendants in the vicinity of the salad bar while she was serving herself at the salad bar. Under the circumstances, therefore, a fact finder reasonably could have concluded that the plaintiff had slipped and fallen due to the defendant's failure to take adequate precautions in connection with its operation of the salad bar. [9]

The judgment is reversed and the case is remanded for a new trial.

In this opinion NORCOTT, KATZ, VERTEFEUILLE and DiPENTIMA, Js., concurred.

ZARELLA, J., with whom McLACHLAN, J., joins, concurring.

I agree with the result reached by the majority. I also agree with the majority that this court should reconsider its approach to premises liability law in cases involving self-service commercial establishments in which the plaintiff alleges that the mode of operation created a foreseeable risk of harm.[1] I write separately, [281 Conn. 813] however, to emphasize that the mode of operation rule that the majority articulates does not presume that all self-service operations are inherently dangerous and, therefore, does not relieve a plaintiff of the burden of proving that the self-service operation in question gave rise to a foreseeable risk of injury to its customers.[2]

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Applying the mode of operation rule in the present case, I emphasize that the focus of the analysis is not on how long the piece of lettuce was on the floor but on whether the design or operation of the salad bar created a foreseeable risk of harm, thus retaining the causal link between the actions of the premises owner in designing and operating the self-service facility and the injured invitee. If the plaintiff can prove that the salad bar operated by the defendant was designed, constructed or maintained in such a way as to give rise to [281 Conn. 814] a foreseeable risk that a hazardous condition was likely to result, and if the plaintiff also can prove that she fell as a result of slipping on the piece of lettuce, a jury reasonably could conclude that the salad bar, rather than the lettuce, was the proximate cause of her injury. It necessarily follows that the defendant, by the mere fact that it owns, operates and maintains the hazardous mode of operation, had actual notice of the defect. In other words, by placing a salad bar in a commercial setting and inviting customers to serve themselves, the defendant may be charged with the knowledge that foreseeable risks, including the possibility that food will fall to the floor, were inherent in the mode of operation.

The evidence required to prove that a particular mode of operation gave rise to a foreseeable risk of injury should be readily available to an injured party and, in this case, such evidence was adduced at trial. Specifically, the evidence established that the salad bar had no railings and that the four inch ledge was too narrow to accommodate trays or containers, thus requiring customers to hold their containers over the floor while serving themselves. The salad bar itself was located in the middle of a linoleum or tile floor and was surrounded on both sides by a narrow floor runner, approximately two to three feet wide. Furthermore, the store manager testified that the floor area surrounding the salad bar was ''precarious'' because customers regularly caused items from the salad bar to fall to the floor. In these circumstances, a fact finder reasonably could have concluded that, because the contents of the defendant's salad bar regularly fell to the floor as a result of poor construction, the salad bar created a dangerous condition of which the defendant had actual notice.

The rule that the majority announces results

in a mode of operation analysis that is consistent with principles of common-law negligence. In allowing a plaintiff to prove that the hazardous condition that caused her [281 Conn. 815] injuries was the specific mode of operation of the defendant's business, the rule alleviates any concerns regarding the difficulty in producing "time-on-the-floor" evidence. Moreover, if a plaintiff is unable to demonstrate that the defendant's business gave rise to a foreseeable risk of injury, he or she may elect to prove actual or constructive notice of

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the condition that caused her injury by reverting to ''time-on-the-floor'' evidence or other evidentiary means. Finally, the mode of operation rule that the majority adopts and traditional premises liability law require proof of essentially the same elements. The rule therefore results in some degree of certainty and consistency for both consumers and business owners. Accordingly, I agree with the majority that the judgment of the trial court should be reversed and that the case should be remanded for a new trial.

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Notes:

[1] This case originally was argued Before a panel of this court consisting of Justices Borden, Katz, Palmer, Vertefeuille and Zarella. Thereafter, the court, pursuant to Practice Book § 70-7 (b), sua sponte, ordered that the case be considered en banc. Accordingly, former Chief Justice Sullivan and Justice Norcott were added to the panel. Thereafter, former Chief Justice Sullivan and Justice Borden were disqualified from the case, and Judges DiPentima and McLachlan of the Appellate Court were added to the panel. They have read the record, briefs and transcript of oral argument.

[2] Larry Kelly, the named plaintiff's spouse, also was a plaintiff. He with drew from the action, leaving the named plaintiff as the sole remaining plaintiff. In the interest of simplicity, we refer to Maureen Kelly as the plaintiff throughout this opinion.

[3] The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[4] In a written statement dated February 29, 2000, Bombero indicated that she had been at the salad bar on her lunch break at the time of the accident and had witnessed the plaintiff's fall. Bombero further stated that the plaintiff appeared to have fallen for no reason and that, as far as she could tell, there was nothing on the floor in the area where the plaintiff had been standing that would have caused her to fall.

[5] Although the plaintiff, a dental hygienist, could undergo surgery to repair her rotator cuff, she has declined that option because, inter alia, she cannot afford to be out of work for the protracted period of recuperation that would be necessary following such surgery.

[6] *Meek* demonstrates the close relationship between a defendant's affirmative act of negligence, which obviates the need for a business invitee to establish that the defendant had actual or constructive notice of a dangerous condition on the premises, and a defendant's liability to a business invitee under the mode of operation rule, pursuant to which notice of the dangerous condition also is unnecessary. With respect to the former, proof of notice is not required because the defendant is presumed to be on notice of the conduct of its own employees; with respect to the latter, proof of notice is unnecessary because the defendant is presumed to be on notice of the foreseeable conduct of its customers in view of its manner of operation. Thus, in both cases, notice is not required because the defendant reasonably may be deemed to have created the unsafe condition, either directly, as in the case of an affirmative act of negligence, or indirectly, as in the case of foreseeable conduct by a customer acting in accordance with the proprietor's self-service method of operation.

[7] As the Restatement (Second) of Torts provides, ''[a] possessor of land who holds it open to the public is under a duty to members of the public who enter in response to his invitation." 2 Restatement (Second), Torts § 314A (3), p. 118 (1965). The duty "arise[s] out of special relations between the parties, which create a special responsibility ...." Id., § 314A, comment (b), p. 119. This ''duty to protect the other against unreasonable risk of harm extends to risks arising . . . from the acts of third persons, whether they be innocent, negligent, intentional, or even criminal." Id., comment (d).

[8]We recognize that the mode of operation rule has been criticized because, under the rule, a defendant potentially may be held liable for the plaintiff's injuries even though the defendant's negligence was not the cause of those injuries. Indeed, one court recently has stated that, "[d]oing away with the requirement that the invitee must prove how long the dangerous condition existed pre-injury is the functional equivalent of doing away with the requirement that the plaintiff prove that the defendant's negligence was the proximate cause of the plaintiff's injury.... Without 'time on the floor' evidence, the storekeeper would be potentially liable even though there is no way of telling whether there was anything [the storekeeper] could have done that would have avoided the injury." *Maans v. Giant of Maryland, LLC,* supra, 161 Md.App. at 640, 871 A.2d 627. We acknowledge that this criticism of the rule has some validity. Therefore, if a

storekeeper can establish to the satisfaction of the fact finder that its negligence was not a cause in fact of the accident--for example, in the present case, if the defendant can demonstrate that the piece of lettuce on which the plaintiff allegedly slipped had fallen to the floor only moments Before the plaintiff's accident--we see no reason why the storekeeper should be held liable notwithstanding proof that the storekeeper had failed to take appropriate measures to prevent such accidents generally. We also conclude, however, that a defendant who fails to take reasonable precautions to avoid dangers likely to arise from its self-service method of operation should bear the burden of demonstrating that its failure to take such precautions was not a proximate cause of any injuries resulting from those foreseeable dangers.

[9] The mode of operation rule that we adopt today shall be applied to all future cases and, as a general rule, to all previously filed cases in which the trial has not yet commenced as of the date of the release of this opinion. With respect to the latter category of cases, the trial court shall have discretion to bar invocation of the rule if there is an overriding reason to do so. In determining whether such a reason exists, the court may consider, among other things, any delay in the trial of the case that may be occasioned by allowing the plaintiff to raise a claim under the mode of operation rule (for purposes of additional discovery or otherwise), the length of time that the case has been pending and its proximity to trial.

[1] I do not agree, however, with one of the majority's principal reasons for its reconsideration. The majority states that, ''because self-service businesses are likely to achieve savings by virtue of their method of operation, it is appropriate to hold them responsible for injuries to customers that are a foreseeable consequence of their use of that merchandising approach unless they take reasonable precautions to prevent such injuries." This rationale assumes that any savings *realized* by the owner of a self-service business establishment results in increased profits rather than lower prices. I disagree. One need only compare the price of one gallon of gasoline at a self-service station with that of a full-service station to recognize the fallacy of this assumption. Nevertheless, if a fairer rule can be crafted that results in a store owner being held liable for operating or constructing a particularly hazardous business operation, I agree that we should adopt it.

[2] Because self-service retail operations have graced this country for almost one century; see E. Halper, "Supermarket Use and Exclusive Clauses," 30 Hofstra L.Rev. 297, 386 (2001) ("[t]he seeds of the shift from service-oriented grocery sales to self-service groceries were planted when Clarence Saunders opened the first Piggly Wiggly store ... in Memphis ... for business in 1916"); and this state since at least prior to World War II; see, e.g., *Nocera v. Great Atlantic & Pacific Tea Co.,* 15 Conn.Sup. 174, 174 (1947) (describing defendant's "self-service store" at which "[p]ackaged articles are displayed on shelves and customers take what they want from the shelves and take them to the cashier, who collects the purchase price and delivers the articles purchased to the customer"); *Bernhard v. Great Atlantic & Pacific Tea Co.,* 10 Conn.Supp. 9, 10 (1941) (action for implied warranties of fitness and merchantable quality arising from purchase of corn at defendant's "self-service store"); *Alfonso v. Stavnitsky,* 8 Conn.Supp. 34, 37 (1940) (discussing "self-service chain store"); consumers are familiar with all aspects of this type of operation, including the generalized risks associated with using such a facility. Therefore, any new rule that this court adopts should not automatically include all self-service operations but only those that are improperly designed or operated.

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**72 A.3d 1152 (Conn.App. 2013), AC 34617, Konesky v. Post Road Entertainment**

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**72 A.3d 466 (Conn.Supp. 2011), CV-10-6003208-S, Tuite v. The Hospital of Central Connecticut**

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**72 A.3d 1152 (Conn.App. 2013)**
**144 Conn.App. 128**
**SANDRA KONESKY**
**v.**
**POST ROAD ENTERTAINMENT ET AL**
**No. AC 34617**
**Court of Appeals of Connecticut.**
**July 16, 2013**

Argued February 7, 2013.

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Action to recover damages for personal injuries sustained by the plaintiff as a result of the named defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven, where Hula's New Haven, LLC, was substituted as the defendant; thereafter, the court, Wilson, J., granted in part the substitute defendant's motions in limine seeking to preclude certain evidence; subsequently, the matter was tried to the jury before Wilson, J.; verdict and judgment for the plaintiff, from which the substitute defendant appealed to this court.

Reversed; new trial.

**SYLLABUS**

The plaintiff sought to recover damages from the defendants for negligence in connection with personal injuries she had sustained when she slipped and fell in a nightclub. Thereafter, H Co., the owner of the nightclub, was substituted as the defendant. The plaintiff alleged that a step from the booth area where she was sitting to the dance floor was defective, that H Co. had caused the floor area where she had fallen to be slippery and hazardous, and that H Co.'s method of operating a portable bar on the floor and step area and selling beer from ice filled tubs was an inherently hazardous means of serving drinks. The matter was tried to a jury, which returned a verdict for the plaintiff. From the judgment rendered thereon, H Co. appealed to this court. On appeal, the plaintiff alleged that because her single count complaint asserted two distinct legal theories of recovery--the first, relating to the allegedly defective step, based on traditional premises liability law, and the second, relating to the operation of the beer tubs, based in part on the mode of operation doctrine--and because interrogatories were not submitted to the jury, there was no way of discerning on which basis the jury found in her favor and, thus, the general verdict rule applied. *Held* :

1. The plaintiff's claim that the general verdict rule was applicable here was unavailing; the various specifications of negligent conduct alleged by the plaintiff in her complaint all sounded in premises liability, and the plaintiff was seeking to vindicate the same essential right, even though she may have alleged somewhat different specifications of negligent conduct to advance each claim.

2. Although, contrary to H Co.'s claim, the mode of operation rule does not apply only to self-service businesses or businesses that include self-service components, the trial court here improperly applied the mode of operation rule and improperly concluded that H Co.'s sale of beer from the ice filled tubs constituted a particular method of operation within the nightclub that created an inherently foreseeable heightened risk; the plaintiff's allegations as to H Co.'s method of serving beer merely described the transaction that always takes place when a patron orders a bottle of beer at a bar or nightclub, namely, the service of cold drinks will inevitably result in slippery surfaces as the drinks are spilled or condensation accumulates, which would happen regardless of whether the nightclub chose to serve beer from a beer tub or from behind a more traditional bar.

Jan C. Trendowski, with whom was Gregory A. Allen, for the appellant (substitute defendant).

John J. Kennedy, Jr., with whom were Edward L. Walsh and, on the brief, Jennifer Antognini-O'Neill, for the appellee (plaintiff).

DiPentima, C. J., and Gruendel and Beach,

Js. In this opinion the other judges concurred.

**OPINION**

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[144 Conn.App. 130] BEACH, J.

The substitute defendant Hula's New Haven, LLC,[1] appeals from the judgment of the trial court, rendered after a jury trial, awarding damages to the plaintiff, Sandra Konesky. The defendant claims that the trial court improperly construed and applied the mode of operation rule.[2] We agree and, accordingly, reverse the judgment of the trial court.

The following facts, which reasonably could have been found by the jury, are relevant to the resolution of this appeal. On the evening of January 11, 2008, the plaintiff and her husband, Stanley Konesky, attended an event organized by the Walter Camp Football Foundation at Hula Hank's Island Bar (Hula Hank's), a nightclub in New Haven owned and operated by the defendant. The plaintiff's husband was a former president of the foundation, which each year honors college football players. The honored players spend a long weekend in Connecticut and participate in a variety of activities, ranging from visits to children's hospitals to a black-tie dinner. The Friday evening event is typically a party at a nightclub, which is attended by the players, foundation members and officers, and members of the

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general public. For several years, including 2008, this event was held at Hula Hank's.

The Walter Camp event filled Hula Hank's nearly to its 650 person capacity. As was its practice at events of this scale, the defendant supplemented its three permanent bars by stationing several " beer tubs" at additional locations throughout the venue, where patrons [144 Conn.App. 131] could buy a bottle or can of beer. Large plastic tubs were filled with ice and beer and replenished as the beer sold out. Each tub was set up on top of a large speaker box. A server stood on top of the speaker box and handed beers to patrons below.

One of the beer tubs was positioned near a booth where the plaintiff and her husband had sat down shortly after arriving at Hula Hank's. Their booth was one step up from the club's wooden dance floor. After sitting at the booth for one-half hour or less, the plaintiff got up to use the restroom. After taking a couple of steps, she slipped and fell. The plaintiff immediately felt intense pain in her shoulder and foot, and could not get up off the floor by herself. She noticed that her pants were wet and saw water on the floor near the beer tub area, on top of the step. The plaintiff was taken by ambulance to Yale-New Haven Hospital, where she was diagnosed with a fractured shoulder and foot. She needed surgery to repair her fractured foot; her recovery required that she stay off her foot for eight to twelve weeks.

The plaintiff thereafter commenced this negligence action against the defendant,[3] alleging, among other things, that the step from the booth area to the dance floor was defective, that the defendant had caused the floor area where the plaintiff had fallen to be slippery and hazardous, and that the defendant's chosen method of selling beer from the ice filled tubs was an inherently hazardous means of serving drinks. Following a jury trial, the plaintiff was awarded a total of $292,500 in damages, which reflected a 10 percent reduction of the award for the plaintiff's comparative negligence. This appeal followed. Additional facts and procedural history will be set forth as necessary.

[144 Conn.App. 132] **I**

The plaintiff preliminarily asserts that the general verdict rule applies in this case. She argues that if either of the defendant's two claims on appeal fails, we must affirm the judgment. Specifically, the plaintiff contends that her one count complaint, which sounded in negligence, asserted two distinct legal theories of recovery: the first, relating to the allegedly defective step, based on traditional premises liability law, and the

second, relating to the operation of the beer tubs, based, in part, on the " mode of operation" doctrine. Because interrogatories were not submitted to the jury distinguishing between these two purportedly distinct theories, the plaintiff claims that there is no way of discerning on which basis the jury found in her favor. We disagree with the assertion that the plaintiff's allegations established two separate legal bases for recovery for purposes of the general verdict rule.

" In a typical general verdict rule case, the record is silent regarding whether the jury verdict resulted from the issue that the appellant seeks to have adjudicated." *Curry v. Burns*, 225 Conn. 782, 790, 626 A.2d 719 (1993). " Under the general verdict rule, if a jury renders a general verdict for one party, and [the party raising a claim of error on appeal did not request] interrogatories, an appellate court will presume that the jury found every issue in favor of the prevailing party. . . .

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Thus, in a case in which the general verdict rule operates, if any ground for the verdict is proper, the verdict must stand; only if every ground is improper does the verdict fall." (Internal quotation marks omitted.) *Tetreault v. Eslick*, 271 Conn. 466, 471, 857 A.2d 888 (2004).

Even in a case with a single count complaint, the general verdict rule applies when " reliance is placed upon grounds of action . . . which are distinct, not because they involve specific sets of facts forming a [144 Conn.App. 133] part of the transaction but in the essential basis of the right replied upon . . . ." (Internal quotations marks omitted.) *Curry v. Burns*, *supra*, 225 Conn. 794. Thus, as our Supreme Court noted in *Curry*, the general verdict rule would apply in a case in which a single count of a complaint alleged both wanton misconduct and negligence. *Id*. The applicability of the general verdict rule " does not depend on the niceties of pleading but on the distinctness and severability of the claims and defenses raised at trial." (Internal quotation marks omitted.) *Id.,* 787.

The various specifications of negligent conduct alleged by the plaintiff in her complaint--including the two at issue on appeal--all sound in premises liability. *See Duncan v. Mill Management Co. of Greenwich, Inc*., 308 Conn. 1, 3-5, 60 A.3d 222 (2013); *Fisher v. Big Y Foods, Inc*., 298 Conn. 414, 419, 3 A.3d 919 (2010) (explaining that mode of operation rule provides " an exception to the notice requirement of traditional premises liability doctrine" ); *Kelly v. Stop & Shop, Inc*., 281 Conn. 768, 797, 918 A.2d 249 (2007) ( *Zarella, J*., concurring) (" the mode of operation rule . . . and traditional premises liability law require proof of essentially the same elements" ). Thus, a plaintiff who attempts, as here, to prevail under either common-law premises liability principles or the mode of operation rule is seeking to vindicate the same " essential right" ; *Curry v. Burns*, *supra*, 225 Conn. 794; even though she may allege somewhat different specifications of negligent conduct to advance each claim. *See Green v. H.N.S. Management Co*., 91 Conn.App. 751, 756, 881 A.2d 1072 (2005) (general verdict rule " does not apply if a plaintiff submits to the jury several different specifications of negligent conduct in support of a single cause of action for negligence" ), cert. denied, 277 Conn. 909, 894 A.2d 990 (2006).

[144 Conn.App. 134] The general verdict rule, then, does not apply and we are not precluded from reversing the judgment in favor of the plaintiff if we conclude that any ground on which the jury could have based its verdict was improper. *See Id.,* 757.

**II**

We next address the defendant's claim that the court misconstrued the mode of operation rule. The defendant contends that the mode of operation doctrine was erroneously applied for two reasons: (1) the particular business operation at issue was not self-service in nature, and (2) the only mode of operation that the plaintiff identified as being peculiar and inherently hazardous was the service of bottles and cans of beer from ice filled tubs, which, the defendant argues, is not significantly different from other means of

performing this essential nightclub function.

The following additional procedural history is relevant to the defendant's claim. The plaintiff alleged in her amended complaint that the defendant operated a " portable bar on the floor and step area in such a manner that it was foreseeable that the defendant's employees and patrons would spill or drop beverages, ice, water and drinks as they were working, dancing or congregating, thereby creating a dangerous

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condition in the immediate vicinity of the [portable] bar . . . ." The defendant filed a motion in limine to preclude the introduction of evidence related to the mode of operation theory of premises liability. The court heard arguments on the issue and denied the defendant's motion.[4] The court agreed with the plaintiff that the use of the portable bars constituted a " particular method of operation within a bar that creates an inherently foreseeable heightened risk . . . ." The court stated that its ruling [144 Conn.App. 135] was consistent with our Supreme Court's holding in *Fisher v. Big Y Foods, Inc*., *supra*, 298 Conn. 414.

Whether the trial court properly construed and applied the mode of operation rule is a question of law over which we exercise plenary review. *See Id.,* 424. The mode of operation rule is a relatively recent development in Connecticut negligence law. In *Kelly v. Stop & Shop, Inc*., *supra*, 281 Conn. 791, Connecticut's seminal mode of operation case, our Supreme Court held that " a plaintiff establishes a prima facie case of negligence 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." The crux of the analysis is whether the premises owner's " design or operation . . . created a foreseeable risk of harm, thus retaining the causal link between the actions of the premises owner in designing and operating [its business] and the injured invitee." *Id.,* 795 ( *Zarella, J*., concurring).[5]

[144 Conn.App. 136] The mode of operation rule was adopted in a slip and fall case that occurred at a self-service salad bar within a supermarket. *See Id.,* 768. Our Supreme Court explained that the rule " evolved in response to the proliferation of self-service retail establishments," in which patrons are encouraged " to obtain for themselves from shelves and containers the items they wish to purchase, and to move from one part of the store to another . . . thus increasing the risk of droppage and spillage." (Internal quotation marks omitted.) *Id.,* 778. In such an environment, proving that the premises owner, through its employees, had actual or constructive notice of a specific unsafe condition may prove

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" insuperable." *Id.,* 788. Moreover, an unattainable notice requirement would do little to incentivize businesses to implement reasonable policies designed to prevent injuries " caused by the foreseeable conduct of . . . customer[s] . . . ." *Id.,* 789. When the mode of operation rule applies, the plaintiff need not prove notice of the specific hazardous condition that caused his injury if he can show that the business engaged in a deliberate method of operation which would make the frequent occurrence of similar conditions reasonably foreseeable. *See Fisher v. Big Y Foods, Inc*., *supra*, 298 Conn. 419 n.10.

This altered notice inquiry under the mode of operation rule has been justified on two theories. First, when the owner of the premises increases the risk of " dangerous, transitory conditions" by the way particular aspects of the business have been designed, the owner may fairly be deemed to have constructive notice of those conditions when they become manifest. *Kelly v. Stop & Shop, Inc*., *supra*, 281 Conn. 780. Second, the premises owner may be imputed to have actual knowledge of the hazards that it has had a hand in creating by purveying merchandise or food in a manner that increases the likelihood of such hazards arising. *Id.,* [144 Conn.App. 137] 781. Either way, " the fundamental rationale underlying the rule is the same: Because the hazard is a foreseeable consequence of the

manner in which the business is operated, the business is responsible for implementing reasonable measures to discover and remedy the hazard." [6] *Id.*

The rule's application effects a burden shifting. Upon the plaintiff's prima facie showing of a negligent mode of operation, the burden shifts to " [t]he defendant [to] rebut the plaintiff's evidence by producing evidence that it exercised reasonable care under the circumstances." *Id.,* 791. The burden then shifts back to the plaintiff to " establish that those steps taken by the defendant to prevent the accident were not reasonable under the circumstances." (Internal quotation marks omitted.) *Fisher v. Big Y Foods, Inc*., *supra*, 298 Conn. 420 n.13. The ultimate burden of proof rests with the plaintiff. *Kelly v. Stop & Shop, Inc*., *supra*, 281 Conn. 792.

" The mode-of-operation rule is of limited application because nearly every business enterprise produces some risk of customer interference. If the mode-of-operation rule applied whenever customer interference was conceivable, the rule would engulf the remainder of negligence law. A plaintiff could get to the jury in most cases simply by presenting proof that a store's [144 Conn.App. 138] customer could have conceivably produced the hazardous condition. For this reason, a particular mode of operation only falls within the mode-of-operation rule when a business can reasonably anticipate that hazardous conditions will

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regularly arise. . . . A plaintiff must demonstrate the foreseeability of third-party interference before [a court] will dispense with traditional notice requirements." (Citations omitted.) *Chiara v. Fry's Food Stores of Arizona, Inc*., 152 Ariz. 398, 400-401, 733 P.2d 283 (1987).[7]

In *Fisher v. Big Y Foods, Inc*., *supra*, 298 Conn. 437, our Supreme Court expressed concern about an overly expansive application of the mode of operation rule and recognized limits on its application. In that case, a shopper at a Big Y supermarket slipped and fell in a puddle of syrupy liquid. *Id.,* 417. The source of the liquid was not definitively ascertained because there was no broken container in the vicinity of the puddle. *Id.,* 417 n.4. Video surveillance footage showed that the aisle in which the puddle was located had been swept seven minutes prior to the shopper's fall. *Id.,* 417. Rather than attempt to prove that the defendant store owner had actual or constructive knowledge of the apparent spill, the plaintiff shopper prevailed at trial by successfully invoking the mode of operation theory of premises liability as articulated in *Kelly* . *Id.,* 420.

The Supreme Court reversed the judgment, rejecting the proposition that " self-service merchandising itself" can be a negligent mode of operation.[8] *Id.,* 424. If that [144 Conn.App. 139] were so, the court reasoned, every aspect of a modern supermarket would be rendered a " 'zone of risk' due to the readily established fact that merchandise, as a general matter, sometimes falls and breaks." *Id*. The *Fisher* court further asserted that it would be unsound to characterize as inherently hazardous " a modern supermarket's *only* method of operation" --that is, permitting customers to serve themselves. (Emphasis in original.) *Id.,* 438. This would be similar to charging a movie theatre with employing a negligent method of operating by showing movies in a darkened space. *Id.*

The court in *Fisher* suggested that the mode of operation rule is applied appropriately only when a business employs " a more specific method of operation *within* " the general business environment that is distinct from the ordinary, inevitable way of conducting the sort of commerce in which the business is engaged. (Emphasis in original.) *Id.,* 427. Thus, a supermarket that sells groceries in the usual self-service fashion is not engaged in a specific " mode of operation" ; it is simply in the business of selling groceries. *See Id.,* 423 (" the mode of operation rule . . . 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" ). In order to invoke the mode of operation rule, and to satisfy her burden of establishing a prima facie case, then, the plaintiff must make an " additional showing that a more specific method of operation *within* a . . . retail environment gave rise to a foreseeable risk of a regularly occurring hazardous

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condition similar to the particular condition that caused the injury." (Emphasis in original.) *Id.,* 427. Merely describing the customary [144 Conn.App. 140] way of conducting a particular kind of business is not enough.[9]

**A**

We first address the defendant's claim that the mode of operation rule applies only to self-service businesses, or businesses that include self-service components. Although *Kelly* and *Fisher* both resolved slip and fall cases that occurred in contemporary self-service supermarkets, there is no reason for limiting application of the doctrine to only those scenarios. The dispositive issue is not the presence of self-service, but whether " the operating methods of a proprietor are such that dangerous conditions are continuous or easily foreseeable . . . ." (Internal quotation marks omitted.) *Kelly v. Stop & Shop, Inc*., *supra*, 281 Conn. 787. Self-service, in some circumstances, may present a situation in which the proprietor's " operating methods" enhance the risk of recurring dangerous conditions brought about by third party interference; *Chiara v. Fry's Food Stores of Arizona, Inc*., *supra*, 152 Ariz. 401; but it logically is not the only business method that can have [144 Conn.App. 141] such an effect.[10] Moreover, the Supreme Court in *Fisher* cited to cases from other jurisdictions where the mode of operation rule has been applied to myriad methods of operation apart from self-service retail enterprises. *See Fisher v. Big Y Foods, Inc*., *supra*, 298 Conn. 430. Therefore, the defendant's first challenge to the applicability of the mode of operation rule is unavailing.

**B**

The defendant additionally challenges the court's conclusion that the sale of beer from the ice filled tubs constituted a " particular method of operation within a bar that create[d] an inherently foreseeable heightened risk . . . ." The defendant specifically contends that the only " mode of operation" advanced by the plaintiff is the service of iced beer at a nightclub. Because the method of service utilized at Hula Hank's is not appreciably different from the methods necessarily employed by all bars that serve cold beverages, the defendant argues that the mode of operation

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rule is inapplicable. The plaintiff counters that the mode of operation rule applies to the defendant's " chosen method of selling dripping wet beers from beer tubs." She identifies several aspects of the beer tub method of service that supposedly distinguish it from more refined means of selling beer, namely, that the ice filled tubs were uninsulated; that they were elevated on speaker boxes, which required the server to hand the drink to the patron who stood several feet below; and that the beer was not wiped down before it was given to a customer.[11] [144 Conn.App. 142] According to the plaintiff, this creates the risk that patrons will " congregate [near the tubs] or move about the premises with the wet beer bottles or cans, thus causing water to pool on the floor . . . ."

We agree with the defendant that, although the plaintiff has gone to great lengths to distinguish the method of serving beer at issue here, when stripped of the embellishment, she has merely described the transaction that always takes place when a patron orders a bottle of beer at a bar, a nightclub, or a wedding reception. The bottle is removed by a server, either from a refrigerator or a cooler filled with ice, and handed to the patron, who is separated from the server by a bar or other service area. The service of cold drinks will inevitably result in slippery surfaces, as drinks are spilled or condensation from drinks accumulates, but this will happen regardless of

whether a nightclub chooses to serve beer from a " beer tub" propped on a speaker or from behind a more traditional bar.[12] Put [144 Conn.App. 143] simply, a nightclub does not create liability under the mode of operation doctrine simply by serving chilled beer. Cf. *Fisher v. Big Y Foods, Inc.*, *supra*, 298 Conn. 438 (" a modern supermarket's only method of operation is to place items on shelves for customer selection and removal" ; as such, that method of commerce cannot be considered negligent [emphasis in original]). Just as theatres must dim their lights to show movies, a nightclub likely could not do business at all if it could not serve cold drinks. *See Kearns v. Horsley*, 144 N.C.App. 200, 205, 552 S.E.2d 1,

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review denied, 354 N.C. 573, 559 S.E.2d 179 (2001).

Moreover, if we were to accept that the defendant's service of beer constituted an inherently hazardous mode of operation, virtually the entire nightclub would become a " zone of risk" simply because drinks do sometimes spill or otherwise produce slippery surfaces. *See Fisher v. Big Y Foods, Inc.*, *supra*, 298 Conn. 424. " Accordingly, the requirement of establishing that an injury occurred within some 'zone of risk' essentially would be rendered superfluous." *Id*. The result would be that any slip and fall on a wet surface, no matter how briefly the slippery condition existed, would shift the burden to the nightclub's owners to show that they had acted reasonably.[13] This would be inconsistent with [144 Conn.App. 144] the Supreme Court's admonition that the mode of operation rule is meant to be a narrow exception to the notice requirements under traditional premises liability law. *See Id.,* 437.

The application of the mode of operation rule in this case was flawed in another respect. The only customer interference alleged by the plaintiff was that patrons who purchased beer from the tubs would move around the bar, " carrying, consuming and discarding the wet beer bottles or cans . . . ." These allegations--if they amount to customer interference at all--fail for the same reason as the allegations with respect to the operation of the tub. If the mode of operation rule could be satisfied by bar patrons carrying wet glasses, there would be no effective limitation on the application of the rule.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other judges concurred.

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Notes:

[1]Hula's New Haven, LLC, was substituted as the defendant in this action for the original named defendants, Post Road Entertainment and Club, LLC. We therefore refer in this opinion to Hula's New Haven, LLC, as the defendant.

[2]The defendant also claims that the court improperly allowed evidence of subsequent remedial measures. Because we reverse the judgment on the defendant's mode of operation claim, we need not reach this second claim.

[3]See footnote 1 of this opinion.

[4]The court had heard largely undisputed evidence regarding the logistics of operating the beer tubs prior to ruling. We rely on the same facts.

[5]The Supreme Court noted in *Kelly* that there is a " close relationship between a defendant's affirmative act of negligence, which obviates the need for a business invitee to establish that the defendant had actual or constructive notice of a dangerous condition on the premises, and a defendant's liability to a business invitee under the mode of operation rule, pursuant to which notice of the dangerous condition also is unnecessary." *Kelly v. Stop & Shop, Inc.*, *supra*, 281 Conn. 785 n.6.

This " close relationship" between the two theories of liability is demonstrated in the present case. The jury was instructed that it could hold the defendant liable if it found " that the defendant created the unsafe condition of water on the floor by [its] actions" with respect to the service from the beer tub or if it found that the plaintiff's injuries " were caused by the mode of operation by which the defendant operated its business . . . ." At trial, in support of her theory that the defendant had affirmatively created the hazardous condition, the plaintiff argued that the defendant " created the defect by taking bottles of beer out of [the tub] that were in ice and water." In her appellate brief, the plaintiff argues that the mode of operation rule was properly invoked, in part, because of the " defendant's chosen method of selling dripping wet beers from beer tubs." If this were so, there would be no need to invoke the mode of operation rule.

[6]The Supreme Court in *Kelly* quoted with approval the Colorado Supreme Court's cogent explication of why, in certain situations, the notice requirements of common-law premises liability should give way to a different inquiry: " [T]he basic notice requirement springs from the [notion] that a dangerous condition, when it occurs, is somewhat out of the ordinary. . . . In such a situation, the storekeeper is allowed a reasonable time, under the circumstances, to discover and correct the condition, unless it is the direct result of his (or his employees') acts. However, when the operating methods of a proprietor are such that dangerous conditions are continuous or easily foreseeable, the logical basis for the notice requirement dissolves." (Internal quotation marks omitted.) *Kelly v. Stop & Shop, Inc*., *supra*, 281 Conn. 787, quoting *Jasko v. F. W. Woolworth Co*., 177 Colo. 418, 420-21, 494 P.2d 839 (1972).

[7] *Chiara* was cited with approval by our Supreme Court in *Kelly v. Stop & Shop, Inc*., *supra*, 281 Conn. 782, 792.

[8]In this regard, compare *Fisher* with *Wollerman v. Grand Union Stores, Inc*., 47 N.J. 426, 429, 221 A.2d 513 (1966) (mode of operation rule applied where " green beans are sold from open bins on a self-service basis" ), and *Chiara v. Fry's Food Stores of Arizona, Inc*., *supra*, 152 Ariz. 398 (mode of operation rule applied where creme rinse spill in a supermarket caused plaintiff's injury). Specifically, in some jurisdictions, an entire supermarket seemingly can be considered a " zone of risk."

[9]This idea was developed more thoroughly by the North Carolina Court of Appeals in *Kearns v. Horsley*, 144 N.C.App. 200, 552 S.E.2d 1, review denied, 354 N.C. 573, 559 S.E.2d 179 (2001), which was discussed with approval in *Fisher v. Big Y Foods, Inc*., *supra*, 298 Conn. 438-39. In *Kearns*, the court rejected the application of the mode of operation rule where a moviegoer tripped over torn carpeting in a darkened theatre. The court reasoned that showing movies in a dark space is a " theatre's *only* method of operation and as such, the theatre cannot be considered negligent but instead, its patrons must be considered to have assumed the risk in order to take part in the activity provided." (Emphasis in original.) *Kearns v. Horsley*, *supra*, 205. The court further observed that " the darkening of the area within the theatre where the movie is being shown, is an operation of practicality and compl[ies] with ordinarily used standards of care in [the] particular activit[y]." (Internal quotation marks omitted.) *Id*. Thus, the mode of operation rule did not apply and, in order to prevail, the plaintiff had to show that the theatre operator had actual or constructive notice of the tear in the carpeting. *Id.,* 207.

[10]The Supreme Court in *Fisher v. Big Y Foods, Inc*., *supra*, 298 Conn. 428, did observe that many mode of operation cases " involved produce displays or other instances of unwrapped and/or ready to eat food that customers were encouraged to handle . . . ." Indeed, the court stated that " [t]he mode of operation rule most typically is applied in such circumstances." *Id.,* 428 n.22.

[11]These aspects of the plaintiff's mode of operation claim, related to the allegedly careless service of beer from the tubs, assert affirmative negligent acts by employees of the defendant. In other words, the creation of hazardous, wet conditions in the vicinity of the beer tubs does not depend on further actions by customers. It is not clear under Connecticut law whether recurring, affirmative negligent acts by employees can be the basis for a mode of operation claim. The justification proffered for adopting the mode of operation rule in *Kelly*, however, suggests that third party interference is a necessary component of such a claim. *See Kelly v. Stop & Shop, Inc*., *supra*, 281 Conn. 786-90. *Fisher* forecloses application of the rule to these facts, and, in any event, because there is no requirement under traditional negligence law principles for a plaintiff to prove notice where the defect is directly caused by the owners of the premises, the invocation of the mode of operation rule in such circumstances is superfluous and unnecessary.

[12]In this context, it is significant that the complaint in this regard alleged, as an increased hazard, that drinks were more likely to be dropped or spilled when served from the beer tubs. The plaintiff has pointed us to nothing in the record that would substantiate such an increased risk. The plaintiff notes in her appellate brief that the " the defendant's policy of assigning a barback to identify and to clean spills in the area of the portable bars evidences that the hazard was inherently foreseeable and occurred regularly." This assertion, however, mischaracterizes the significance of the deployment of barbacks to the beer tub areas. A manager from the bar actually testified that barbacks were assigned not only to a particular beer tub, but also to the surrounding area, and that this staffing arrangement was consistent with the responsibilities of barbacks assigned to the permanent bars.

[13]We note that this result is not draconian. In many situations, traditional premises liability may afford relief. Nothing prevents recovery if the owner affirmatively creates the actual defect; *see Kelly v. Stop & Shop, Inc*., *supra*, 281 Conn. 785 n.6; and what constitutes reasonable inspection in such circumstances may result in a fairly low threshold in establishing constructive notice. If a bar employee is standing next to a puddle, a fact finder may find actual notice; such a showing would not be " insuperable."

It is, of course, possible that the jury in this case could have applied traditional notice standards and reached the same result. See part I of this opinion. In its instructions to the jury, the court charged that the defendant could be liable if it found the defendant's affirmative acts created the hazardous condition. The mode of operation rule aptly fills the narrow niche where the actual defect is caused by a third party in circumstances in which the defendant created a zone of danger with increased risk of frequently repeating hazardous conditions.

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**145 A.3d 283 (Conn.App. 2016), AC 37516, Porto v. Petco Animal Supplies Stores, Inc.**

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**239 A.3d 345 (Conn.App. 2020), AC 42397, Hill v. OSJ of Bloomfield, LLC**

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**72 A.3d 1138 (Conn.App. 2013), AC 33546, Stone v. Pattis**

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**72 A.3d 1175 (Conn.App. 2013), AC 34238, Charlotte Hungerford Hospital v. Creed**

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**76 A.3d 630 (Conn. 2013), Konesky v. Post Road Entertainment**

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Supreme Court of Connecticut09/25/2013 76 A.3d 630 310 Conn. 915

**89 A.3d 993 (Conn.App. 2014), AC 34363, R.I. Pools, Inc. v. Paramount Concrete, Inc.**

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**471 Mass. 679 (2015), SJC-11786, Sarkisian v. Concept Restaurants, Inc.**

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Supreme Judicial Court of Massachusetts, Worcester06/23/2015 471 Mass. 679

**86 Mass.App.Ct. 1116 (2014), 13-P-154, Sarkisian v. Concept Restaurants, Inc.**

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Appeals Court of Massachusetts10/17/2014 86 Mass.App.Ct. 1116 18 N.E.3d 1135

**Hill v. OSJ of Bloomfield, LLC, 091520 CTCA, AC 42397**

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Court of Appeals of Connecticut09/15/2020

**Smith v. Whole Foods Market Group, Inc., 072616 CTDC, 3:14-cv-01954(JAM)**

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**145 A.3d 283 (Conn.App. 2016)**
**167 Conn.App. 573**
**KATERINA PORTO**
**v.**
**PETCO ANIMAL SUPPLIES STORES, INC**
**AC 37516**
**Appellate Court of Connecticut**
**August 16, 2016**

Argued May 18, 2016

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Action to recover damages for the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, Burke, J.; judgment for the defendant, from which the plaintiff appealed to this court; thereafter, the court, Burke, J., issued an articulation of its decision.

Affirmed.

**SYLLABUS**

The plaintiff sought to recover damages from the defendant pet store for personal injuries she sustained when she slipped and fell on a puddle of dog urine in the store, which regularly allowed customer's to bring leashed pets inside the store. The plaintiff claimed that the defendant was negligent in that it had failed to prevent, warn of, or clean up the urine on which she had slipped. At trial, the plaintiff provided no evidence that the defendant had actual or constructive notice of the urine puddle. She argued that proof of notice was unnecessary because, under the mode of operation rule, she only had to prove that the defendant's particular mode of operation created an inherently foreseeable or regularly occurring hazard, and the accident here occurred within an identifiable zone of risk. The trial court rendered judgment in favor of the defendant, concluding that the mode of operation rule was inapplicable under the facts of the case. *Held* that the plaintiff could not prevail on her claim that the trial court improperly determined that the mode of operation rule was inapplicable, the court having properly found that there was no identifiable zone of risk where the defendant should have been on notice of continuous or inherently foreseeable hazards, as there was nothing in the record to suggest that the leashed pets preferred a particular area of the store or that there was an area of the store where pet messes occurred frequently; moreover, the plaintiff's contention that leashed pets should be considered " moving targets," and that the zone of risk should be construed as where the pet messes occurred was without merit, as leashed pets were found throughout the store on a daily basis, and adopting the plaintiff's position would render the entire store a zone of risk; furthermore, the mode of operation rule requires foreseeable hazards, not merely possible ones, and pet messes are possible under a pet friendly mode of operation, but possibilities alone do not give rise to the type of regularly occurring or inherently foreseeable hazardous conditions required by the mode of operation rule.

Chet L. Jackson, for the appellant (plaintiff).

Kathleen M. Grover, with whom was P. Jo Anne Burgh, for the appellee (defendant).

DiPentima, C. J., and Alvord and Gruendel, Js. GRUENDEL, J. In this opinion the other judges concurred.

**OPINION**

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[167 Conn.App. 574] GRUENDEL, J.

Traditionally, in a premises liability case, a plaintiff must prove that the defendant had actual or constructive notice of the hazard that injured her. *Baptiste v. Better Val-U Supermarket, Inc.*, 262 Conn. 135, 140, 811 A.2d 687 (2002). Our Supreme Court adopted a narrow exception to that notice requirement in *Kelly v. Stop & Shop, Inc.*, 281 Conn. 768, 770, 918 A.2d 249 (2007), where in it held that a supermarket that operated a self-service salad bar was liable for [167

Conn.App. 575] slips and falls suffered by patrons near the service area because the store's self-service mode of operation created an inherently foreseeable hazard. In the present case, the plaintiff, Katerina Porto, seeks to extend that holding to pet stores that allow leashed animals inside its stores, arguing that their " pet-friendly mode of operation"

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caused her to slip and fall in dog urine while a customer at the store of the defendant, Petco Animal Supplies Stores, Inc.[1] The trial court held that the mode of operation rule did not apply under those facts and rendered judgment in favor of the defendant. We agree, and affirm the judgment of the trial court.

In its memorandum of decision the court found the following facts. The plaintiff is a healthy, twenty-eight year old woman employed as a registered nurse. On August 20, 2012, the plaintiff and her friend visited the defendant's Hamden location to return a bag of pet food. They entered the store, and on their way to the cash register, the plaintiff slipped on a puddle of liquid. The plaintiff believed that the liquid was dog urine based on her experience as a dog owner. During her fall, the plaintiff tried to catch herself, but rolled her ankle in the process and sustained several injuries.

The plaintiff was generally aware that the defendant allowed leashed animals in the store and she acknowledged at trial that " she should keep an eye out on the floor when walking in the defendant's store." She was unaware of any animals in the store on August 20, 2012, and has never seen any other puddles in the defendant's stores similar to the one she slipped on.

[167 Conn.App. 576] Following her fall, the plaintiff notified the defendant's cashier that " she had just fallen in what she believed was urine." The plaintiff was informed that someone would clean up the mess and that Timothy Smith, the store manager, would complete an accident report. On August 20, 2012, Smith was the assistant manager responsible for the defendant's Hamden store, and he had worked for the defendant in various locations and capacities throughout the prior nine years. The plaintiff testified that Smith saw her fall on the store's surveillance system, but Smith later testified that he was unsure if he had.

Smith completed the incident report electronically and described the cause as " Water/Ice." That categorization of the accident was predetermined by a drop-down menu and was not Smith's description. Smith also described the incident in his own words, stating that the plaintiff " had slipped in dog urine." Smith believed that the incident was not a " questionable case," and he indicated that in his report, stating that the plaintiff's description was credible.

At trial, Smith described the defendant as " a pet specialty store that attempts to foster relationships with its customers and assist them in providing a happy and healthy home for their pets." The defendant specifically permits " customers to bring any animal into its store as long as the animal is on a leash." Smith described the defendant's policy as an attempt to " foster a relationship" with customers and to " provide its customers with animal-specific assistance, such as determining the proper size product for an animal."

Smith testified that the defendant expects occasional pet messes and that there are sanitation stations throughout the store to address them. Although no single employee is responsible for cleaning up pet messes, employees regularly walk the

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store aisles to talk with [167 Conn.App. 577] customers, and the defendant's policy is for immediate cleanup when employees become aware of pet messes. Smith testified that " there were no further incidents or complaints regarding puddles in the store on August 20, 2012." Further, there were no similar accidents in the prior six years Smith worked at the store and pet messes occurred infrequently.[2]

On July 26, 2013, the plaintiff brought this action against the defendant, alleging that the store had negligently failed to prevent, warn of, or clean up the dog urine on which she slipped and fell. The defendant filed an answer, admitting that at all times it was " in the business of selling consumer/pet products and was acting through its agents, servants and/or employee." The defendant further admitted that it " maintained, controlled, and possessed the subject premises." The defendant denied the plaintiff's allegations of negligence and " pleaded insufficient knowledge to the remainder of the complaint's paragraphs, leaving the plaintiff to her proof." The matter was tried before the court on August 13, 2014.

At trial, the plaintiff provided no evidence that the defendant had actual or constructive notice of the puddle on the floor where she slipped and fell. She argued that proof of notice was unnecessary because, under the mode of operation rule, she need only prove that the defendant's particular mode of operation created an inherently foreseeable or regularly occurring hazard, and the accident occurred within an identifiable zone of risk.

In its memorandum of decision, the court reasoned that the mode of operation rule was inapplicable to the facts of this case because the " hazardous condition appear[ed] to have been brought into the store" from the [167 Conn.App. 578] outside, distinguishing this from the " typical case in which a hazardous condition is caused by the spilling or dropping of an item for sale" already within the store. Further, the court found that, even if the mode of operation rule applied, the defendant took reasonable precautions to " keep its premises free of hazardous conditions."

On appeal, the plaintiff claims that the court improperly held that the mode of operation rule did not extend to the defendant's " pet-friendly method of operation." She argues that her case falls under the rule because allowing leashed pets into the store created an inherently foreseeable risk of pet messes, and the leashed pets should be considered " moving" zones of risk. We disagree.

The plaintiff's principal claim concerns the proper construction and application of the mode of operation rule within premises liability. Whether the trial court properly construed and applied the mode of operation rule is a question of law over which we exercise plenary review. See *Fisher v. Big Y Foods Inc.*, 298 Conn. 414, 424, 3 A.3d 919 (2010).

It is undisputed that a retail store owes a duty to a business invitee to maintain its premises " in a reasonably safe condition." *Baptiste v. Better Val-U Supermarket, Inc.*, supra, 262 Conn. 140. Generally, to prevail on a negligence claim as a business invitee in a premises liability case, " it [is] incumbent upon [the plaintiff] to allege and prove that the defendant either had actual notice of the presence of the specific unsafe condition which caused [his injury] or constructive

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notice of it. . . . [T]he notice, whether actual or constructive, must be notice of the very defect which occasioned the injury and not merely of conditions naturally productive of that defect even though subsequently in fact producing it. . . . In the absence of allegations and proof of any [167 Conn.App. 579] facts that would give rise to an enhanced duty . . . [a] defendant is held to the duty of protecting its business invitees from known, foreseeable dangers." (Citations omitted; internal quotation marks omitted.) *Id.*

The mode of operation rule is a narrow exception to the traditional notice requirement and arose from our Supreme Court's decision in *Kelly v. Stop & Shop, Inc.*, supra, 281 Conn. 770. In *Kelly*, a supermarket patron slipped and fell on a piece of lettuce that dropped from a self-service salad bar located in the store. Id. Although there was no evidence that the store had notice of the fallen lettuce, the court held that " it is appropriate to hold [self-service businesses] responsible for injuries to customers that are a foreseeable consequence of their use of that merchandising approach unless they take reasonable precautions to prevent such injuries." (Emphasis omitted.) Id., 786. The court further stated that " a plaintiff establishes a prima facie case of

negligence 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." *Id*., 791.

Our Supreme Court in *Kelly* recognized that, in such circumstances, requiring a plaintiff to prove actual or constructive notice would be " unfair and unnecessary" because businesses " should be aware of the potentially hazardous conditions that arise from the way in which they conduct their business" and customer carelessness should be expected. Id., 778. The court reasoned that a store owner's mode of operation that increases the risk of " dangerous, transitory conditions" affords notice when the operation invites inherently foreseeable or regularly occurring hazards. *Id*., 780. " [S]elf-service operations give store customers additional freedom to browse and select the merchandise they desire, they also pose foreseeable hazards to those customers, who [167 Conn.App. 580] are generally less careful than store employees in handling the merchandise. . . . Essentially, the courts have recognized that stores engaging in foreseeably hazardous self-service operations may be deemed to have constructive notice of those conditions when they result in injury." (Internal quotation marks omitted.) Id., 779-80.

Two subsequent cases have clarified the scope of the mode of operation rule. First, in *Fisher v. Big Y Foods Inc.*, supra, 298 Conn. 437, our Supreme Court expressed a concern about an overly expansive application of the mode of operation rule, emphasizing that " the exception is meant to be a narrow one" because nearly every business enterprise produces some risk of customer interference. Id. In *Fisher*, a supermarket customer slipped and fell on a puddle of liquid located in one of the store's aisles. Id., 416-17. The puddle was purportedly from a fruit cocktail container that fell from the store's shelf. The plaintiff pursued a claim under the mode of operation rule and prevailed at trial. Id., 417.

On appeal, our Supreme Court reversed the judgment and held that " self-service merchandising itself" does not fall under the mode of operation rule. *Id*., 424. The court recognized that adopting such a rule would significantly broaden the rule's underlying intent. Id.

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The court reasoned that the rule applied to businesses that employed a more specific method of operation within the general business environment that is distinct from the ordinary, inevitable way of conducting the sort of commerce in which the business is engaged. *Id*., 427. The court emphasized that the rule does not extend 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*., 423.

[167 Conn.App. 581] Second, in *Konesky v. Post Road Entertainment*, 144 Conn.App. 128, 144, 72 A.3d 1152 (2013), this court clarified both that the mode of operation rule required an identifiable zone of risk and that it did not impose liability on a business if the business' mode of operation was not appreciably different from that of similar businesses. In *Konesky*, a bar patron was injured after she slipped and fell on a puddle of water. *Id*, 131. The puddle was created from " beer tubs" the bar used to serve cold drinks. *Id*. The service of beer from these tubs was presented as the defendant's mode of operation. *Id*. At trial, the plaintiff successfully claimed that the defendant's mode of operation created the " slippery and hazardous" condition. *Id.*

On appeal, this court disagreed, rejecting the notion that a defendant incurs liability " under the mode of operation doctrine simply by serving chilled beer." *Id*., 142-43. This court did not accept that the defendant's " ice tubs" constituted " an inherently hazardous mode of operation" because " the entire [premises] would become a zone of risk simply because drinks do sometimes

spill or otherwise produce slippery surfaces." (Internal quotation marks omitted.) *Id*., 143. We explained that such an expansive zone of risk " would be inconsistent with the Supreme Court's admonition that the mode of operation rule is meant to be a narrow exception to the notice requirements under traditional premises liability." *Id*., 143-44.

From these three cases, we distill three overarching requirements for the mode of operation rule to apply: (1) the defendant must have a particular mode of operation distinct from the ordinary operation of a related business; (2) that mode of operation must create a regularly occurring or inherently foreseeable hazard; and (3) the injury must happen within a limited zone of risk.

The facts of the present case do not meet any of these three requirements. First, the rule is inapplicable [167 Conn.App. 582] when a particular mode of operation is not considerably different from that of similarly operated businesses. See id., 141. The plaintiff here argues that the defendant's pet friendly mode of operation created a reasonably foreseeable pet mess hazard that caused the plaintiff's injuries. The rule applies when a business implements " a more specific method of operation within the general business environment that is distinct from the ordinary, inevitable way of conducting the sort of commerce in which the business is engaged." (Emphasis omitted; internal quotation marks omitted.) *Id*., 139. Here, the defendant operated as any other pet store would operate; it simply allowed leashed animals into the store. " Merely describing the customary way of conducting a particular kind of business is not enough." *Id*., 139-40. The record does not demonstrate a specific

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method of operation that deviates from the general operation of similar businesses.[3]

Second, the mode of operation rule may substitute for notice to a retailer when the store's mode of operation invites careless customer interference, creating an expected, foreseeable hazard. *Kelly v. Stop & Shop, Inc.*, 281 Conn., supra, 788. Here, the primary distinction from the typical mode of operation case is the lack of a causal connection between the store's conduct and [167 Conn.App. 583] foreseeable careless customer interference in a particular zone of risk.[4] Although the defendant's store allowed customers to bring their leashed pets inside and being pet friendly is one of their " core values," that policy alone does not sufficiently relinquish the plaintiff from proving actual or constructive notice of the hazard. See *Konesky v. Post Road Entertainment*, supra, 144 Conn.App. 137-38. In our view, animal messes are not inherently foreseeable hazardous conditions resulting from a pet friendly business policy, particularly when the record fails to show that injuries caused by pet messes occurred regularly. The plaintiff's injury was the only one that occurred during the responsible manager's tenure.[5] Although there is the potential for pet messes to occur under the defendant's mode of operation, that potential alone does not give rise to a regularly occurring or inherently foreseeable hazard. See *Id.*

Third, application of the mode of operation rule " is meant to be a narrow one, and applies only to *those areas where the risk of injury is continuous or foreseeably inherent* " as a result of a store's mode of operation. (Emphasis added; internal quotation marks omitted.) *Fisher v. Big Y Stores, Inc.*, supra, 298 Conn. 437. These " areas" have been construed as a zone of risk where an owner should take extra precautions based on its mode of operation. Id. The underlying rationale is to impose liability for specific areas where there is a reasonably foreseeable risk. Id. In *Kelly*, our Supreme Court stated that it is " unfair and unnecessary" [167 Conn.App. 584] to require proof of actual or constructive notice under the mode of operation rule; it would be equally unfair to impose liability under the mode of operation when there is no identifiable zone of risk of which proprietors should be on notice. *Kelly v. Stop & Shop, Inc.*, supra, 281 Conn. 778.

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The zone of risk identified in *Kelly* was the area located near the salad bar where the plaintiff's injury occurred. Id., 796. Salad bar customers frequently spilled lettuce onto the floor and thus created a zone of risk for grocery store patrons. Id., 774. Conversely, in *Konesky*, we held that there was no liability under the mode of operation rule because otherwise the entire establishment would be rendered a zone of risk, thus rendering the zone of risk requirement " superfluous." *Konesky v. Post Road Entertainment*, supra, 144 Conn.App. 143.

Under the circumstances before us, there is no identifiable zone of risk where the defendant should be on notice of continuous or inherently foreseeable hazards. The plaintiff contends that leashed animals should be considered " moving targets" and that the zone of risk should be construed as where the pet messes occurred. This simply does not comport with our understanding of the zone of risk requirement. Leashed animals are found throughout the store on a daily basis and adopting the plaintiff's position would render the entire store a zone of risk. Although we agree with the plaintiff that the zone of risk need not be limited to a precise, measurable area, some limitations are required. Here, nothing in the record suggests that the leashed pets preferred a particular area of the store, or that there was an area of the store where pet messes occurred frequently. Without specific proof of a particular zone of risk, we are unwilling to adopt the plaintiff's proposed standard.

In fact, the " moving target" theory raised by the plaintiff was discussed in *Konesky*, where patrons walked [167 Conn.App. 585] around the bar with cold drinks that dripped on the floor. *Konesky v. Post Road Entertainment*, supra, 144 Conn.App. 141. In *Konesky*, this court limited the zone of risk because " [i]f the mode of operation rule could be satisfied by [customers] carrying wet glasses, there would be no effective limitation on the application of the rule." Id., 144. Ultimately, the plaintiff's " moving target" theory fails for the same reasons; the zone of danger would encompass the entire store.

In sum, merely allowing a leashed pet into the defendant's store does not give rise to the conduct against which the rule intends to impose liability. See *Fisher v. Big Y Foods, Inc.*, supra, 298 Conn. 423. Proving actual or constructive notice of a hazard remains an element of a negligence action when a business is conducted in the ordinary manner of similar businesses, as here. Further, although the zone of risk need not be limited to a precisely measurable area, it cannot encompass the entire premises of a store. Finally, the rule requires foreseeable hazards, not merely possible ones. Pet messes are undoubtedly possible under a pet friendly mode of operation, but possibilities alone do not give rise to the type of regularly occurring or inherently foreseeable hazardous conditions required by the mode of operation rule.

The judgment is affirmed.

In this opinion the other judges concurred.

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Notes:

[1]The plaintiff raised three claims on appeal: (1) the court improperly held that the mode of operation rule did not apply at all on the facts of this case; (2) the court erroneously found that, even if the rule did apply, the plaintiff had not established a prima facie case of negligence under it; and (3) the court erroneously found that, even if the plaintiff had established prima facie negligence, the defendant rebutted it with evidence of reasonable precautions. In light of our resolution of the plaintiff's first claim, we need not address her second and third claims.

[2]Smith testified that " approximately one to two customers per week would report a puddle" caused by a pet.

[3]In her appellate brief, the plaintiff cites an unpublished Washington case, *Dupuy v. Petsmart*, 155 Wash.App. 1047 (Wash. Ct.App. 2010), for the proposition that it is instructive to the facts at issue. Notwithstanding the absence of any precedential value of the case in Connecticut, *Depuy* is categorically distinct from this case. The defendant in *Depuy* allowed pets into its store, but the pets roamed free without leashes. Further, the pets frequently knocked over wet floor signs and pet messes occurred at a substantially higher rate. The defendant's mode of operation diverged from the general operation of a pet store because it was aware of the hazards caused by its " autonomous pet" policy. The defendant operated its business in a way that invited customer carelessness and, as a result, regularly caused hazards. We do not find the case " instructive" as the plaintiff claims, nor

does it assist us in understanding the rule's application.

[4]The trial court also noted that the mode of operation rule typically involves hazardous conditions " caused by the spilling or dropping of an item for sale that is already within the store." Because that particular claim was not squarely raised in this case, we do not reach the question of whether that distinction is legally relevant.

[5]The court noted that " the evidence demonstrated that there were only approximately one to two animal messes per week in the defendant's store and that the plaintiff's was the only incidence of a slip and fall in animal urine during [the store manager's] six years at the store."

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Citing References :

**143 A.3d 698 (Conn.App. 2016), AC 38710, In re Danyellah S.-C.**

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Appellate Court of Connecticut08/02/2016 143 A.3d 698 167 Conn.App. 556

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Appellate Court of Connecticut07/19/2016 145 A.3d 266 167 Conn.App. 36

**168 A.3d 630 (Conn.App. 2017), AC 37864, Rockhill v. Danbury Hospital**

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Appellate Court of Connecticut08/29/2017 168 A.3d 630 176 Conn.App. 39

**239 A.3d 345 (Conn.App. 2020), AC 42397, Hill v. OSJ of Bloomfield, LLC**

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