

NO NOTICE? NO PROBLEM.

T rue or false: a slip-and-fall victim must prove that the storekeeper had actual or constructive notice of the dangerous condition giving rise to his fall? Answer: it depends.

In *Kelly v. Stop & Shop*, the Supreme Court joined twenty-two sister states in adopting the so-called "mode-of-operation" rule in premise liability cases. According to the rule, 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, if the business's chosen mode of operation creates a foreseeable risk that the business fails to take reasonable measures to discover and remove.

The case arose when the plaintiff slipped and fell at a grocery store's self-service salad bar, injuring her shoulder. The salad bar had no railings and was framed by a ledge that was too narrow to accommodate trays or containers, resulting in patrons customarily holding their containers over the floor while serving themselves. After her fall, the plaintiff found a piece of wet lettuce stuck to her shoe. When she sued, she did not allege that the store had actual knowledge of the slippery lettuce. The trial court concluded that there was insufficient evidence to establish even constructive notice and, therefore, rendered judgment in the defendant's favor.

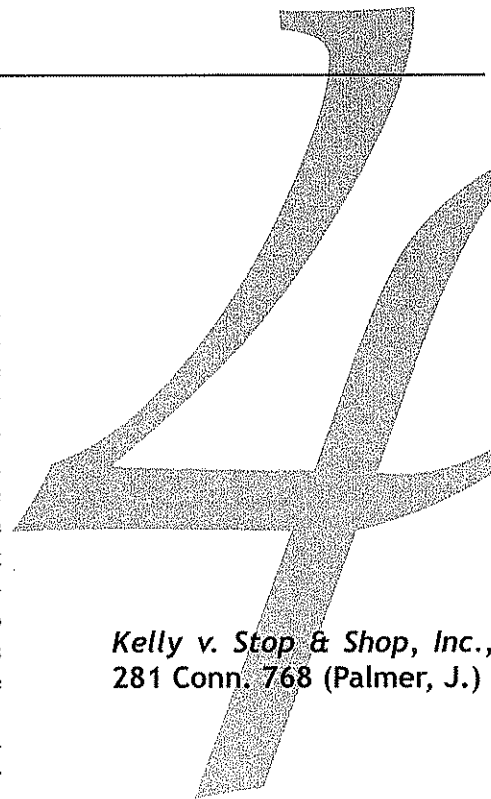
On appeal, the plaintiff argued that the trial court should have considered the mode-of-operation rule. The Court agreed.

The Court reviewed the reasoning of decisions from other jurisdictions that have adopted the rule. It noted that "[t]here is . . . a distinctive modern trend favoring the [mode-of-operation] rule, and it appears that most courts that have considered the rule have adopted it."

The Court also took direction from a recent Appellate Court decision, which implicitly used a mode-of-operation analysis. There, the plaintiff was injured at a Wal-Mart department store when two boxes containing aluminum tables fell on him while he was shopping. Despite the absence of actual or constructive notice, the Appellate Court affirmed the plaintiff's verdict, concluding that the evidence was sufficient to permit a finding that Wal-Mart had been negligent in stacking the boxes in the manner it did, because it was foreseeable that the boxes could be dislodged by customers with only minimal inspection or handling. The Appellate Court reasoned that when a business invitee alleges that her injuries were caused by an unsafe condition created by the business itself, proof that the business had actual or constructive notice of that unsafe condition is not necessary because knowledge of the condition reasonably may be inferred.

Influenced by both out-of-state and Appellate Court precedent, the Supreme Court adopted the rule, concluding that it "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." The Court offered four reasons for its decision. First, store owners who use a self-service mode of operation receive a pecuniary benefit from doing so; therefore, they should be responsible for any concomitant, foreseeable risks. Second, the existing rule requiring actual or constructive notice is not completely compatible with self-service methods of operation. When the operating methods of a storeowner are such that the dangerous conditions are continuous or easily foreseeable—because the customer is asked to serve himself, and perform tasks like pulling boxes off shelves and spooning food into a container—the logical basis for the notice requirement dissolves. Third, the requirement of actual or constructive notice places a difficult burden on an injured customer to establish when the unsafe condition arose. Finally, the mode-of-operation rule is most consistent with the general principle 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.

The Court summarized its newly adopted rule as follows: "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 in 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." ■



Kelly v. Stop & Shop, Inc.,
281 Conn. 768 (Palmer, J.)

“[The mode-of-operation rule] provides the most fair and equitable approach to the adjudication of premises liability claims brought by business invitees.”