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A Comparison of Kentucky and Ohio's Approaches to the "Mode of Operation" Theory

by Patricia Trombetta and Tom Glassman

The Mode of Operation theory was prompted by changes in how America does business. Whereas products were once kept behind counters and purchases required a store employee's assistance, over time stores became self-service oriented. Customers now roam the aisles selecting merchandise. Similarly, there was a shift from full-service hotels to motels, giving guests greater unmonitored access to a hospitality provider's premises. From there, the Mode of Operation theory was born and this article is part of a continuing series addressing how the theory has been addressed across the nation. The theory presupposes the changing approach in retail and hospitality created by dangerous conditions to customers foreseeable to owners, by shifting the burden of proof in premises liability claims from the customer to the business.

Recently the Kentucky Supreme Court abruptly abandoned decades of precedent, pivoting to an approach inspired by the Mode of Operation theory. Claims professionals in Kentucky were forced to completely (and immediately) change how they evaluated liability. In contrast, Ohio has rejected efforts to adopt the theory. This article will address the Kentucky and Ohio approaches.

Kentucky

For many years Kentucky placed the burden of proof in a premises liability matter upon the plaintiff. Cases decided as early as 1939 held that customers must prove a dangerous condition resulted from the actions of the establishment's owner (or one of their employees) or that the condition was present long enough such that it should have been either removed or a warning thereof given. *Kroger Grocery & Baking Co. v. Spillman*, 279 Ky. 366, 130 S.E.2d 786 (1939).

This historical precedent changed with *Lanier v. Wal-Mart Stores, Inc.*, 99 S.W.3d 431 (Ky. 2003). *Lanier* did not wholly adopt the Mode of Operation theory. Rather, it memorialized a compromise between prior precedent which placed the burden of proof upon the customer and the strict liability imposed by the Mode of Operation theory. *Lanier* imposed a rebuttable presumption of negligence, shifting the burden of proof from the customer to the business owner.

The *Lanier* Court explained that a business proprietor, while not insuring the customer's safety, owes a duty to maintain the premises in a reasonably safe condition. The Court determined that precedent placed a "virtually insurmountable burden of proof" upon the customer, which was inconsistent with the owner's duty to keep its premises in a reasonably safe condition. Balancing between not insuring the safety of patrons and maintaining the premises in a reasonably safe condition for those patrons, the Court noted the burden of proof should be on the one with a duty to prevent the dangerous condition, i.e. the proprietor. The Court determined causation and notice should be treated as affirmative defenses available to the proprietor, not part of the customer's burden of proof. Justice Johnstone's dissent, perhaps presciently, noted that the burden shifting approach was, in effect, strict liability and would "fling open the gates to trial", eliminating a proprietor's ability to ever obtain summary judgment.

In 2017 there were several noteworthy decisions addressing the *Lanier* standard. In *CBL & Associates v. Kaoru Chatfield*, No. 2015-CA-000826 MR (April 28, 2017), plaintiff testified she slipped and fell on an oily liquid on a mall's floor. There was no independent verification of any substance on the floor, but the defendant's motion for directed verdict was denied. The Court of Appeals

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affirmed the ruling, stating plaintiff did not speculate as to what caused her fall; but, rather, her sworn testimony "established that she had indeed had an encounter with a foreign substance" and did not need to identify the nature or source of the substance. It was a jury question whether the plaintiff or the opposing witness (who saw nothing in the area of the fall) was more credible.

Johnson v. Circle K Stores Inc., Case No. 3:16-CV-0046-CRS (April 20, 2017), held it was sufficient for a plaintiff to prove there was a "foreign object" on the floor and that it was a substantial factor in causing injury. The defendant's motion for summary judgment was denied, based upon *Lanier*. The Court held that arguments relating to the open and obvious nature of the condition and superseding intervening cause defenses were jury questions, not bars to a plaintiff's recovery.

In *Queen v. Wal-Mart Stores East, L.P.*, Case No. 16-77-HRW (June 1, 2017), the Court explained *Lanier* still required a plaintiff to prove: (1) an encounter with a foreign substance or other dangerous condition on the premises; (2) that the foreign substance was a substantial factor in causing the accident and injuries; and (3) that as a result of the condition, the premises were not in a reasonably safe condition. The burden would then shift to the defendant to prove the exercise of reasonable care. The court found the plaintiff could not prove causation because possibility and conjecture were insufficient to meet her burden of proof.

Kentucky's approach has also eroded the "open and obvious" defense. In *Grubb v. Smith*, ___ S.W.3d ___ (Ky. 2017), the plaintiff tripped and fell in a pothole. The Court of Appeals overturned a verdict in plaintiff's favor, finding the condition was open and obvious. The Supreme Court, however, reinstated the verdict. As a result of this decision, an open and obvious condition can almost never be a complete bar to recovery and is instead an element of comparative fault to be assessed by the jury.

Kentucky still requires that a plaintiff show that something caused their injury, but the Courts vary as to what is sufficient to establish the foreign substance or hazardous condition on the property - is it enough to testify that "something" was there or is independent verification of that "something" necessary? The net effect of Kentucky's approach may be that summary judgment will be a rare remedy in premises liability cases, as judicial questions become jury questions.

Ohio

Although the Mode of Operation theory is gaining popularity in some parts of the country, Ohio's courts have rejected its adoption. The Ohio Supreme Court has not addressed the theory to date, but its adoption has been consistently rejected by lower appellate courts. In both *Stanton v. Marc's Store*, 7th Dist., Mahoning Cty.15-MA-49, 2015-Ohio-5551 and *Miranda v. Meijer Stores Ltd. Partnership*, 2nd Dist., Montgomery Cty. 23334, 2009-Ohio-6695, courts were asked to adopt the theory, but declined to do so. Neither court was willing to deviate from the traditional approach taken by Ohio courts, with each noting that any changes in the law must originate with the Ohio Supreme Court.

Accordingly, Ohio continues to recognize the traditional designations of invitees, licensees and trespassers. The duty owed to an invitee is to maintain one's premises in a reasonable condition and to warn of any latent defects. *Paschal v. Rite Aid Pharmacy, Inc.*, 18 Ohio St.3d 203, 480 N.E.2d 474 (1985). Ohio follows modified comparative fault. Therefore, plaintiffs are barred from recovering damages if they are more than 50% at fault. Ohio Rev. Code 2315.33.

In Ohio, a premises liability plaintiff must either prove that: (1) the business created the hazard; (2) the business (or its employees) had actual notice of the hazard and failed to warn of or promptly remove it; or (3) the hazard was present for long enough to infer that the failure to warn of or remove the hazard was due to a lack of ordinary care. *Anaple v. Standard Oil Co.*, 162 Ohio St. 537, 124 N.E.2d 128 (1955). How long the hazard existed is necessary to establish constructive notice. *Presley v. Norwood*, 36 Ohio St.2d 29, 303 N.E.2d 81 (1973).

Ohio treats the existence of a duty of care as a legal, as opposed to factual, issue. *Mussivand v. David*, 45 Ohio St.3d 314, 544 N.E.2d 265 (1989). This was the cornerstone of the decision in *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, which held a business owner owed no duty to a customer to either remove or warn of an open and obvious condition. In Ohio, an open and obvious condition is a complete bar to recovery, rather than an element of comparative fault.

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Paschal involved a customer who claimed to have slipped on tracked-in water, due to inclement weather. The Supreme Court declined to impose a duty on businesses to keep their premises free of tracked-in water, noting that a store owner is not an insurer of a customer's safety. Similarly, there is no duty to remove natural accumulations of snow and ice. *Debie v. Cochran Pharmacy-Berwick, Inc.*, 11 Ohio St.2d 38, 227 N.E.2d 603 (1967). Liability can attach if efforts at snow/ice removal make a condition worse than it was originally.

Conclusion

These jurisdictional differences are challenging for claims professionals handling multiple states. This difficulty arises particularly in border cities, where there may be two claims within a few miles of each other. Indeed, the practitioner may find that one case is a slam dunk summary judgment matter and the other should be settled early.

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