LEO A. FISHER III *v.* BIG Y FOODS, INC.
(SC 18406)

Rogers, C. J., and Palmer, Vertefeuille, Zarella and McLachlan, Js.*

Argued January 5—officially released September 21, 2010

Sandra Rachel Stanfield, with whom, on the brief, was *David A. Estabrook*, for the appellant (defendant).

Mark J. Migliaccio, for the appellee (plaintiff).

Jack G. Steigelfest and *Claudia Baio* filed a brief for the Connecticut Defense Lawyers Association as amicus curiae.

James G. Geanuracos filed a brief for the Stop and Shop Supermarket Company, LLC, as amicus curiae.

Opinion

ROGERS, C. J. This appeal requires us to decide what facts and circumstances give rise to a plaintiff's right to recover under the mode of operation rule, an exception to the traditional premises liability doctrine, which dispenses with the requirement that a plaintiff prove that a business owner had actual or constructive notice of the specific unsafe condition giving rise to the plaintiff's injury. The defendant, Big Y Foods, Inc., appeals from the judgment of the trial court, rendered after a jury trial, awarding damages to the plaintiff, Leo A. Fisher III, for injuries he sustained when he slipped and fell in a supermarket owned and operated by the defendant.[1] The defendant claims that the trial court improperly: (1) construed and applied Connecticut law on the mode of operation rule; (2) denied the defendant's motions for a directed verdict, to set aside the verdict and for judgment notwithstanding the verdict on the basis of its misconstruction of the law; and (3) confused the jury by instructing it on traditional premises liability principles because the plaintiff had abandoned any claim pursuant to those principles. We agree with the defendant's first two claims[2] and, accordingly, reverse the judgment of the trial court.[3]

The following facts, which are not materially disputed, are relevant to the present appeal. On July 24, 2005, the plaintiff was shopping at the defendant's East Windsor supermarket. As he walked down aisle seven toward the front of the store, looking for an item on the shelving, he slipped and fell on a puddle of liquid, injuring his knee and shoulder. The plaintiff described the puddle as being about one and one-half feet in diameter, and the liquid as clear and syrupy. There was no broken container near the puddle and the source of the liquid was not apparent,[4] but the plaintiff believed it was fruit cocktail syrup because the liquid contained colored particles and canned fruit was stocked in aisle seven.[5] At the time of the plaintiff's fall, the puddle of liquid appeared undisturbed, without footprints or shopping cart track marks running through it.[6]

The defendant employs porters whose duties include sweeping the floor with dry mops four times throughout the day, beginning at 10 a.m., 1 p.m., 4 p.m. and 7 p.m. A videotape admitted into evidence at trial showed that, seven minutes prior to the plaintiff's fall, porter John Kelley had passed through aisle seven during the course of the 4 p.m. sweep, and a sweep log confirmed that the sweep had been performed.[7] Kelley testified that he saw no spill at that time. Pursuant to the defendant's policy, porters are required to inspect each aisle as it is swept. The defendant's policy generally is to "inspect the store all the time."

The defendant operates its grocery stores in standard modern fashion. The East Windsor store is large, about

the size of a football field. Customers are permitted to roam freely about the premises, remove items from the shelves and place them into their carts or return them to the shelves. The store's aisles have shelving on both sides and signs hanging overhead that alert customers to the location of various products. Michael Messer, a store supervisor, agreed at trial that, "[m]ore or less, Big Y is a self-service type store." He confirmed that, at times, customers cause spills or messes as a result of mishandling items.[8] Messer testified, however, that spills similar to the one at issue were uncommon and that he would not expect the fruit products in aisle seven to break open if dropped. He acknowledged that a glass jar could break, but disagreed that it was foreseeable that a can or plastic cup could fall off a shelf and make a mess. No evidence was presented to the contrary.

On September 26, 2005, the plaintiff commenced this negligence action against the defendant. The operative complaint sounded in traditional premises liability[9] and sought monetary damages. By the commencement of trial, however, this court had issued its decision in *Kelly* v. *Stop & Shop, Inc.*, 281 Conn. 768, 791–92, 918 A.2d 249 (2007), recognizing for the first time the "mode of operation" rule, which provides an exception to the notice requirement of traditional premises liability doctrine.[10] Relying on *Kelly*, the plaintiff abandoned his original theory of the case and proceeded solely on a mode of operation theory.[11]

At the close of the plaintiff's case, the defendant moved for a directed verdict. The defendant argued that the plaintiff had failed to present any evidence of the cause or origin of the spill, or that spills of that liquid were a regularly occurring hazardous condition. According to the defendant, the plaintiff could not make out a prima facie case under the mode of operation rule simply by showing that the defendant was a retail store that permitted customers to handle items and that, as a general matter, items sometimes fell to the floor and spilled. Rather, the defendant claimed, the plaintiff needed to prove the existence of some particular method of doing business within the store that created a heightened risk of danger to customers. The defendant argued that the plaintiff had failed to show that there was anything particularly hazardous about the operation of aisle seven that had created a zone of risk and had led to the spilled liquid. The trial court denied the defendant's motion, reasoning that this court's decision in *Kelly* permitted the plaintiff to proceed under the mode of operation rule.[12]

The case was submitted to the jury solely on the mode of operation theory. The court charged the jury using a standard instruction designed to reflect the rule articulated in *Kelly*. See Conn. Civil Jury Instructions 3.9-17, available at http://www.jud.ct.gov/JI/Civil/part3/

3.9-17.htm (last visited September 7, 2010). In a blank space provided to identify the particular mode of operation at issue, the court inserted "self-service supermarket."[13] The defendant excepted to the charge, arguing again that the plaintiff, to invoke the mode of operation rule, needed to show something more than that the defendant's supermarket generally was a self-service establishment. The jury thereafter returned a verdict in favor of the plaintiff, awarding $54,197.53 in total damages.[14]

Thereafter, the defendant filed motions to set aside the verdict and for judgment notwithstanding the verdict, arguing that it was against the law and the evidence presented at trial. The defendant argued again that the plaintiff had slipped on a substance of unknown origin, that there was no evidence that there was anything particularly hazardous about aisle seven or any other part of the store and that the only claimed negligence was that the defendant "operate[d] as a supermarket and allow[ed] customers to enter the store and take items off the shelves." Accordingly, the defendant argued, the evidence was insufficient to establish the defendant's negligence under a mode of operation theory.

The trial court denied both of the defendant's postverdict motions, reasoning that *Kelly* applied to all "typical [supermarket spill] cases." In a later issued memorandum of decision, the court "concluded [that] the mode of operation rule [was] generally available for premises liability claims in self-service stores."[15] Moreover, according to the trial court, "[t]he jury could have reasonably concluded from the evidence that the liquid on which the plaintiff fell was spilled from a food container and dropped to the floor, as a result of the self-service nature of the defendant's operation. This spilled liquid would constitute an unsafe condition resulting from the self-service method of operation, requiring the mode of operation charge." This appeal followed.

I

The defendant claims first that the trial court improperly construed and applied Connecticut law on mode of operation. According to the defendant, the mode of operation rule is not triggered simply upon a showing that a retail establishment employs self-service marketing and spills generally occur, but rather, there must be some specific method of operation within the self-service retail establishment that creates a particular regularly occurring hazard and, therefore, a foreseeable risk of injury to customers. The defendant argues that to hold a retailer liable under the mode of operation exception simply because it is generally self-service would amount, in essence, to imposing strict liability upon business owners, effectively making them insurers of the safety of their customers. We agree that the mode of operation rule, as adopted in Connecticut, does

not apply generally to all accidents caused by transitory hazards in self-service retail establishments, but rather, only to those accidents that result from particular hazards that occur regularly, or are inherently foreseeable, due to some specific method of operation employed on the premises.[16]

We begin with the applicable 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. *Stop & Shop, Inc.*, supra, 281 Conn. 776. The parties do not disagree materially on the facts, but only on whether the mode of operation rule potentially could apply to those facts. According to the defendant, the evidence presented at trial implicated only traditional premises liability doctrine. Because the defendant claims that the trial court's rulings improperly permitted application of the wrong legal standard, our review is plenary. Id.

As an initial matter, we look to the language of the mode of operation rule as we stated it in *Kelly*. We summarized the plaintiff's burden of showing that the rule applies in a particular case 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 and that the plaintiff's injury was proximately caused by an accident within the zone of risk." Id., 791. Notably, we included the requirement that a plaintiff's injury occur within a "zone of risk." Id. 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.

We next consider the factual context of *Kelly* and the claims raised therein, as the scope of a rule necessarily is informed by the particulars of the case in which it is adopted.[17] Moreover, an opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding. See *Matza* v. *Matza*, 226 Conn. 166, 187, 627 A.2d 414 (1993). In *Kelly*, the plaintiff had slipped and fallen on a piece of wet lettuce on the floor near what repeatedly was described as a "self-service salad bar" within the defendant's supermarket. *Kelly* v. *Stop & Shop, Inc.*, supra, 281 Conn. 770. In the section of the opinion outlining the

factual underpinnings of the plaintiff's claim, we included a detailed description of the salad bar and the surrounding area, the manner in which store patrons served themselves from the salad bar; id.; and the store manager's characterization of the salad bar area as "precarious" and requiring special attention because of the frequency with which food fell to the floor. Id., 772.

When describing the procedural history of the case, we noted the plaintiff's allegation in her complaint that the dangerous condition of the wet lettuce "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." (Emphasis added.) Id., 774. Moreover, we observed that the plaintiff, when she urged the trial court to adopt the mode of operation rule, had argued 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." (Emphasis added.) Id.

Finally, in agreeing with the plaintiff that this court should adopt the mode of operation rule, we agreed "that she [had] adduced sufficient evidence at trial to support a finding in her favor under that rule." Id., 775. Specifically, there was testimony "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 . . . and that the plaintiff's fall had resulted from that dangerous condition*." (Citation omitted; emphasis added.) Id., 793.

Thus, in *Kelly*, we agreed with a claim that a particular method of operation *within* a generally self-service supermarket had created a regularly occurring hazardous condition, and our holding, which included the adoption of the mode of operation rule, necessarily corresponded to that claim.[18] In concluding that the mode of operation rule could apply to the facts of the case, we emphasized evidence that related to the particular method of operating the salad bar and showed that the salad bar was hazardous.

We acknowledge that, in discussing the policy underpinnings of the mode of operation rule, we quoted broad language from cases of other jurisdictions which, read in isolation, might suggest that the rule applies generally throughout self-service retail establishments, because

customers in such establishments must move throughout the premises and select items themselves, increasing the potential for spills, and they may be distracted by signs and merchandise displays and not notice such spills. We observed additionally that, in the modern retail environment, duties historically performed by employees now are undertaken by customers, resulting in certain cost savings to the business owner.[19] See id., 778, 781. The foregoing factors undoubtedly have influenced the decisions by many of our sister states to adopt the mode of operation rule or some variation thereof. A close examination of the cases cited in *Kelly* and additional, similar jurisprudence makes clear, however, that in most jurisdictions recognizing the mode of operation rule, it is not triggered by the mere presence of those factors, i.e., simply because the defendant is a retail store that allows customers to remove items from shelves and items sometimes are dropped, but only upon an additional showing that a more specific method of operation *within* a self-service retail environment gave rise to a foreseeable risk of a regularly occurring hazardous condition[20] similar to the particular condition that caused the injury.[21]

Accordingly, many of the authorities relied upon in *Kelly* involved produce displays or other instances of unwrapped and/or ready to eat food that customers were encouraged to handle, which, according to the courts, made the particular resultant hazard readily foreseeable.[22] See, e.g., *Jasko* v. *F. W. Woolworth Co.*, 177 Colo. 418, 419–20, 494 P.2d 839 (1972) (slice of pizza near counter where pizza was dispensed on sheets of wax paper and no seating was available); *Gump* v. *Wal-Mart Stores*, *Inc.*, 93 Haw. 417, 419, 5 P.3d 407 (2000) (french fry from fast-food restaurant located inside retail store); *McDonald* v. *Safeway Stores*, *Inc.*, 109 Idaho 305, 307, 707 P.2d 416 (1985) (melted ice cream on day store had conducted three ice cream displays that provided ice cream to customers, including children); *Jackson* v. *K-Mart Corp.*, 251 Kan. 700, 701, 840 P.2d 463 (1992) (spilled avocado juice from in-store cafeteria that permitted customers to carry food onto shopping floor); *Dumont* v. *Shaw's Supermarkets*, *Inc.*, 664 A.2d 846, 847 (Me. 1995) (chocolate-covered peanut from bulk, unwrapped candy bin); *Sprague* v. *Lucky Stores*, *Inc.*, 109 Nev. 247, 248, 849 P.2d 320 (1993) (grape on floor in produce section); *Nisivoccia* v. *Glass Gardens*, *Inc.*, 175 N.J. 559, 561, 818 A.2d 314 (2003) (grapes displayed in open-topped bags that permitted spillage); *Wollerman* v. *Grand Union Stores*, *Inc.*, 47 N.J. 426, 429, 221 A.2d 513 (1966) (green beans sold from "open bins on a self-service basis"); *Lingerfelt* v. *Winn-Dixie Texas*, *Inc.*, 645 P.2d 485, 486 (Okla. 1982) (strawberries heaped in uncovered containers); *Cobb* v. *Skaggs Cos.*, 661 P.2d 73, 74 (Okla. App. 1982) (grapes from open display); *Corbin* v. *Safeway Stores*, *Inc.*, 648 S.W.2d 292, 294 (Tex. 1983) (grape "directly in front

of the [slanted] self-service grape bin");[23] *Canfield* v. *Albertsons*, *Inc.*, 841 P.2d 1224, 1225 (Utah App. 1992) (lettuce leaf from open " 'farmer's pack display' " in which wilted outer leaves were left intact for customers to remove and discard), cert. denied, 853 P.2d 897 (Utah 1993); *Malaney* v. *Hannaford Bros. Co.*, 177 Vt. 123, 125, 861 A.2d 1069 (2004) (grapes from self-service display); *Strack* v. *Great Atlantic & Pacific Tea Co.*, 35 Wis. 2d 51, 56, 150 N.W.2d 361 (1967) (Italian prune from pile on table in aisle). Some cases did not involve unwrapped food, but still focused on particular hazardous conditions that, the evidence showed, were likely to recur repetitively under the circumstances. See, e.g., *F. W. Woolworth Co.* v. *Stokes*, 191 So. 2d 411, 416 (Miss. 1966) (rainwater regularly tracked inside store by customers on stormy day); *Mahoney* v. *J. C. Penney Co.*, 71 N.M. 244, 249–52, 377 P.2d 663 (1962) (gum or sticky substance on entryway steps frequently littered with gum and trash); *Ciminski* v. *Finn Corp.*, 13 Wn. App. 815, 817–18, 537 P.2d 850 (liquid on floor of self-service cafeteria in particular area where spills tended to occur when food trays were replenished or when customers dropped items), review denied, 86 Wn. 2d 1002 (1975); *Steinhorst* v. *H. C. Prange Co.*, 48 Wis. 2d 679, 681, 684, 180 N.W.2d 525 (1970) (shaving cream from tester cans on self-service cosmetic counter where children were spotted playing); *Buttrey Food Stores Division* v. *Coulson*, 620 P.2d 549, 550–51 (Wyo. 1980) (wet spot inside store entrance when melting snow and ice had accumulated in outside parking lot).[24]

In each of the foregoing cases, the court related the hazardous condition to the particular method of operation at issue, rather than attributing it solely to the general self-service nature of the business establishment. See *Jasko* v. *F. W. Woolworth Co.*, supra, 177 Colo. 420 ("defendant's method of selling pizza" created dangerous condition); *Gump* v. *Wal-Mart Stores*, *Inc.*, supra, 93 Haw. 418 (specifically limiting application of rule to circumstances of case, i.e., when "a commercial establishment, because of its mode of operation, has knowingly allowed the consumption of ready-to-eat food within its general shopping area"); *McDonald* v. *Safeway Stores*, *Inc.*, supra, 109 Idaho 307 (upholding trial court's denial of summary judgment to defendant on reasoning that "[t]he mode of operation of the ice cream demo on a very busy Good Friday, combined with the abnormally large crowds and other demos, in and of itself could constitute an act of negligence"); *Jackson* v. *K-Mart Corp.*, supra, 251 Kan. 702, 710–11 (questions for jury on remand were whether dangerous condition due to defendant's allowing customers to carry food and drink onto shopping floor was reasonably foreseeable and, if so, whether defendant had failed to exercise reasonable care); *Dumont* v. *Shaw's Supermarkets*, *Inc.*, supra, 664 A.2d 848 (holding mode of operation rule potentially applicable because defendant

knew "that items with similar characteristics to the chocolate-covered peanuts created an increased hazard to customers"); *Sprague* v. *Lucky Stores*, *Inc.*, supra, 109 Nev. 251 (noting evidence of "virtually continual debris on the produce department floor"); *Nisivoccia* v. *Glass Gardens*, *Inc.*, supra, 175 N.J. 565 (method of packaging grapes made it "foreseeable . . . that loose grapes would fall to the ground . . . creating a dangerous condition"); *Wollerman* v. *Grand Union Stores*, *Inc.*, supra, 47 N.J. 429 ("When greens are sold from open bins on a self-service basis, there is the likelihood that some will fall or be dropped to the floor. If the operator chooses to sell in this way, he must do what is reasonably necessary to protect the customer from the risk of injury *that mode of operation* is likely to generate . . . ." [Emphasis added.]); *Mahoney* v. *J. C. Penney Co.*, supra, 71 N.M. 260 (observing that defendant "knew the propensities of its customers to litter the floors and stairway with dangerous substances such as chewing gum"); *Lingerfelt* v. *Winn-Dixie Texas*, *Inc.*, supra, 645 P.2d 489 (key element of evidence was testimony of three employees that strawberries normally were covered with cellophane for safety reasons); *Cobb* v. *Skaggs Cos.*, supra, 661 P.2d 76–77 (jury could "find that [the defendant] created and maintained a foreseeable, unreasonable risk by displaying the grapes in such a manner without the protection of a table guard or other protective scheme"); *Corbin* v. *Safeway Stores*, *Inc.*, supra, 648 S.W.2d 294 (noting defendant's awareness "that the grape bin was an unusually hazardous and continual source of slippery material on which customers may fall"); *Canfield* v. *Albertsons*, *Inc.*, supra, 841 P.2d 1227 (when defendant "chose a method of displaying and offering lettuce for sale where it was expected that third parties would remove and discard the outer leaves from heads of lettuce they intended to purchase . . . [i]t was reasonably foreseeable that . . . some leaves would fall or be dropped on the floor by customers thereby creating a dangerous condition"); *Malaney* v. *Hannaford Bros. Co.*, supra, 177 Vt. 135 (plaintiff had submitted sufficient evidence to avoid directed verdict on issue of "the reasonableness of the steps taken by [the] defendant to address the known hazard posed by the grape display"); *Ciminski* v. *Finn Corp.*, supra, 13 Wn. App. 823 (plaintiff survived summary judgment by submitting "evidence that there tended to be spills *in the area where she fell*, and that the floor *in this area* was sometimes greasy" [emphasis added]); *Steinhorst* v. *H. C. Prange Co.*, supra, 48 Wis. 2d 684 ("unsafe condition here was substantially caused by the method used to display merchandise for sale," namely, the self-serve shaving soap counter); *Strack* v. *Great Atlantic & Pacific Tea Co.*, supra, 35 Wis. 2d 56 (defendant's liability rested on, inter alia, "the manner in which the Italian prunes were displayed"); *Buttrey Food Stores Division* v. *Coulson*, supra, 620 P.2d 553 ("existence of water on the floor of the store premises

was a reasonable probability because of the weather conditions").

We acknowledge that, in a handful of the cases cited in *Kelly*, courts held that the mode of operation rule, or something analogous, was applicable generally to transitory hazardous conditions in self-service retail establishments.[25] See *Safeway Stores, Inc.* v. *Smith*, 658 P.2d 255, 258 (Colo. 1983); *Owens* v. *Publix Supermarkets, Inc.*, 802 So. 2d 315, 331 (Fla. 2001); *Golba* v. *Kohl's Dept. Store, Inc.*, 585 N.E.2d 14, 17 (Ind. App. 1992); *Lanier* v. *Wal-Mart Stores, Inc.*, 99 S.W.3d 431, 436 (Ky. 2003); *Gonzales* v. *Winn-Dixie Louisiana, Inc.*, 326 So. 2d 486, 488 (La. 1976); *Sheil* v. *T.G. & Y. Stores Co.*, 781 S.W.2d 778, 780 (Mo. 1989). In two of the foregoing jurisdictions, however, the courts' decisions subsequently were overruled legislatively, and in two others, the jurisprudential underpinnings for the decisions were weakened substantially by subsequent case law.[26]

When the question has presented itself directly, several courts have clarified that the mode of operation rule is not triggered simply upon a showing that a retail establishment, as a general matter, is self-service. For example, in *Hembree* v. *Wal-Mart of Kansas*, 29 Kan. App. 2d 900, 903, 35 P.3d 925 (2001), the Court of Appeals of Kansas concluded that the mode of operation rule did not apply to a plaintiff's slip and fall at a department store in what was believed to be spilled Noxema skin cream, even though the store "was the type . . . where shoppers were invited to come in and pick up, carry, examine, and purchase merchandise for themselves." Id., 904. It concluded that "[t]he 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 customer could have conceivably produced the hazardous condition." (Internal quotation marks omitted.) Id., 903. In short, "[*t*]*he rule is not intended to uniformly cover all self-service situations*." (Emphasis added.) Id., 904.

In *Chiara* v. *Fry's Food Stores of Arizona, Inc.*, 152 Ariz. 398, 401, 733 P.2d 283 (1987), the Supreme Court of Arizona stated that application of the mode of operation rule was not limited "to produce or pizza" and potentially was implicated by spilled creme rinse, but *only* if the plaintiff could show that it was reasonably foreseeable that *creme rinse* would be spilled on a regular basis. In other words, the mode of operation rule did not apply upon a showing that spills generally occurred due to customer activity and that the plaintiff slipped in a spilled substance. See also *Contreras* v. *Walgreens Drug Store No. 3837*, 214 Ariz. 137, 138, 140, 149 P.3d 761 (App. 2006) (mode of operation rule inapplicable

to plaintiff's fall on slimy blue substance in drugstore; although store manager had testified that spills generally happened twice weekly, no specific evidence was presented as to types, locations of spills).

The law on the scope of the mode of operation rule is perhaps most developed in the state of Washington. In *Ciminski* v. *Finn Corp.*, supra, 13 Wn. App. 818–19, the case in which the Washington courts first recognized the rule, the Court of Appeals discussed the shift in merchandising methods from individualized clerk-based assistance to a self-service model, how that shift was accompanied by a greater incidence of spilled substances and distracted customers prone to stepping in them and how it resulted in pecuniary benefit to the business owner, making reallocation of risk a matter of fairness.[27] Subsequent Washington jurisprudence made clear, however, that although the foregoing circumstances were factors underlying the jurisdiction's decision to adopt the mode of operation rule, the modern, generally self-service method of merchandising *itself* was not a "mode of operation" that triggers the application of the rule and dispenses with traditional notice requirements.[28]

Specifically, in *Pimentel* v. *Roundup Co.*, 100 Wn. 2d 39, 49, 666 P.2d 888 (1983), the Supreme Court of Washington repudiated the Court of Appeals' language in *Ciminski* "suggest[ing] that the requirement of showing notice is eliminated as a matter of law for all self-service establishments," and instead held that "the requirement of showing notice will be eliminated only if the *particular* self-service operation of the defendant is shown to be such that the existence of unsafe conditions is reasonably foreseeable." (Emphasis added.) Id., 50; see also *White* v. *Safeway, Inc.*, Court of Appeals of Washington, Docket No. 35960-0-II, 2008 Wn. App. LEXIS 456, *4 (February 26, 2008) ("[t]hat a business is a self-service operation is insufficient, standing alone, to bring a claim for negligence within the [mode of operation] exception"); *Carlyle* v. *Safeway Stores, Inc.*, 78 Wn. App. 272, 277, 896 P.2d 750 (mode of operation rule "does not apply to the entire area of the store in which customers serve themselves"), review denied, 128 Wn. 2d 1004, 907 P.2d 297 (1995).

Instead, the exception is meant to be a narrow one, and "applies only to those areas where risk of injury is continuous or foreseeably inherent in the nature of the business or mode of operation. . . . Thus a plaintiff who slips and falls in a grocery store cannot survive summary judgment by merely raising the inference that the substance causing her fall came from within the store; rather, the plaintiff must show that such spills were *foreseeable in the specific area where she fell*." (Citation omitted; emphasis added; internal quotation marks omitted.) *White* v. *Safeway, Inc.*, supra, 2008 Wn. App. LEXIS *5. Accordingly, in *Carlyle* v. *Safeway*

Stores, *Inc.*, supra, 78 Wn. App. 277, the mode of operation rule did not apply to a leaking bottle of shampoo on the floor in the coffee section of a supermarket, because that type of spill was not shown to be reasonably foreseeable. See also *Schmidt* v. *Coogan*, 135 Wn. App. 605, 612, 145 P.3d 1216 (2006) (same), rev'd on other grounds, 162 Wn. 2d 488, 173 P.3d 273 (2007); *Linehan* v. *Safeway Stores*, *Inc.*, Washington Court of Appeals, Docket No. 49947-5-I (February 18, 2003) (reversing trial court's denial of summary judgment to defendant when plaintiff, who had slipped on spilled sugar, failed to present "some evidence indicating that the spill was inherently foreseeable in the area where the injury occurred"); *Ingersoll* v. *DeBartolo*, *Inc.*, 123 Wn. 2d 649, 654–55, 869 P.2d 1014 (1994) (mode of operation rule inapplicable to spilled substance in common area of mall because plaintiff failed to show that vendors' methods of operation resulted in debris or substances on floor). Conversely, in *White* v. *Safeway*, *Inc.*, supra, *6–8, the mode of operation rule was held applicable to chicken grease on the floor near a self-serve roasted chicken cart in a supermarket. Because the evidence showed that customers were invited to serve themselves, and the chickens were hot, greasy and packaged in unsealed containers, slippery spills in the vicinity of the cart were reasonably foreseeable.

We conclude by noting that a rule that presumptively established a storekeeper's negligence simply for having placed packaged items on shelves for customer selection and removal, without requiring any evidence that they were displayed in a particularly dangerous manner,[29] would require us to ignore the modern day reality that *all* retail establishments operate in this manner and, given competitive considerations and customer demands, they have no other choice. The North Carolina Court of Appeals, in rejecting a plaintiff's claim that a movie theater's darkened state was a "mode of operation" that had made his trip and fall reasonably foreseeable, made the following salient observation: "[The] plaintiff's argument must fail—for the simple reasoning that, movie theatres could not do business at all if they could not be darkened." *Kearns* v. *Horsley*, 144 N.C. App. 200, 205, 552 S.E.2d 1, review denied, 354 N.C. 573, 559 S.E.2d 179 (2001). Consequently, the claimed " 'mode of operation' is a theatre's *only* method of operation and as such, the theatre cannot be considered negligent [for employing it] but instead, its patrons must be considered to have assumed the risk in order to take part in the activity provided." (Emphasis in original.) Id. Similarly, 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.

When a "dangerous condition arises through means other than those reasonably anticipated from the mode

of operation, the traditional burden of proving notice remains with the plaintiff." *Gump* v. *Wal-Mart Stores, Inc.*, supra, 93 Haw. 420; see also *Jackson* v. *K-Mart Corp.*, supra, 251 Kan. 710; *Ingersoll* v. *DeBartolo, Inc.*, supra, 123 Wn. 2d 655. Consequently, when a plaintiff injured by a transitory hazardous condition on the premises of a self-service retail establishment fails to show that a particular mode of operation made the condition occur regularly or rendered it inherently foreseeable, the plaintiff must proceed under traditional premises liability doctrine, i.e., he must show that the defendant had actual or constructive notice of the particular hazard at issue.[30] On the basis of the foregoing analysis, we conclude that the trial court's construction of the mode of operation rule was improper.

II

The defendant claims next that the trial court improperly denied its motions for directed verdict, to set aside the verdict and for judgment notwithstanding the verdict on the basis of its misconstruction of the law concerning mode of operation. It argues that, because the plaintiff failed to present evidence to support application of the mode of operation theory, the only theory on which the plaintiff chose to try the case, the trial court should have granted its motions. We agree.

"The standards for appellate review of a directed verdict[31] are well settled. Directed verdicts are not favored. . . . A trial court should direct a verdict only when a jury could not reasonably and legally have reached any other conclusion. . . . In reviewing the trial court's decision [to deny the defendant's motion for a directed verdict] we must consider the evidence in the light most favorable to the plaintiff. . . . Although it is the jury's right to draw logical deductions and make reasonable inferences from the facts proven . . . it may not resort to mere conjecture and speculation. . . . A directed verdict is justified if . . . the evidence is so weak that it would be proper for the court to set aside a verdict rendered for the other party." (Internal quotation marks omitted.) *Riccio* v. *Harbour Village Condominium Assn., Inc.*, 281 Conn. 160, 163, 914 A.2d 529 (2007). Additionally, if, as a matter of law, the mode of operation rule was not implicated by the circumstances of this case, then the trial court was required to direct a verdict in the defendant's favor. See *Krawczyk* v. *Stingle*, 208 Conn. 239, 244, 543 A.2d 733 (1988); see also *Lin* v. *National Railroad Passenger Corp.*, 277 Conn. 1, 6, 889 A.2d 798 (2006) ("[t]he court has a duty to submit to the jury no issue upon which the evidence would not reasonably support a finding" [internal quotation marks omitted]).

The evidence presented at trial, viewed in the light most favorable to the plaintiff, reasonably supported a finding that the plaintiff had slipped on fruit cocktail syrup that somehow had leaked from a product originat-

ing in the defendant's store. Although circumstantial, the evidence in this regard was substantial. Accordingly, we reject the defendant's argument that the plaintiff's failure to prove the precise cause or origin of the spill was fatal to his case. Nevertheless, because no evidence was presented to show that there was anything particularly dangerous about the defendant's method of offering packaged fruit products for sale, making their spillage inherently foreseeable or regularly occurring, the plaintiff failed to make out a prima facie case of negligence under the mode of operation rule. Because the jury could not properly find for the plaintiff on that theory, the only theory on which the plaintiff had proceeded, the trial court's refusal to direct a verdict for the defendant was improper.

The judgment is reversed and the case is remanded with direction to set aside the jury's verdict and to render judgment in favor of the defendant.

In this opinion VERTEFEUILLE, ZARELLA and McLACHLAN, Js., concurred.

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

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

[2] In light of our resolution of the defendant's first two claims, we need not reach the third. It is clear from the record, and the plaintiff's counsel confirmed at oral argument, that the case was tried solely on a mode of operation theory. Because we agree with the defendant that the evidence was insufficient for the case to go to the jury on that theory, the issue of whether the jury was confused by an improper instruction is moot.

[3] Due to the importance of the issue raised by this appeal and the frequency with which it potentially may arise, we granted the requests of The Stop and Shop Supermarket Company, LLC, and the Connecticut Defense Lawyers Association to appear as amicus curiae and to submit briefs in support of the position advocated by the defendant. To the extent the amici have argued new claims not raised by the parties at trial or on appeal, however, we do not address them.

[4] Although the defendant's employees searched for one-half hour, they could not ascertain the source of the liquid. The employees testified that this was "odd" and "unusual."

[5] The plaintiff's wife, who was shopping with him on the day he fell, also believed the liquid to be fruit cocktail syrup. John Kelley, a porter employed by the defendant, testified that fruit in cans, jars and plastic containers could be found in aisle seven. He believed the liquid looked like juice but acknowledged it could have been fruit cocktail syrup.

[6] Photographs of the spill taken after the plaintiff's fall were admitted into evidence. They depict a puddle consistent with the witnesses' descriptions.

[7] Although the plaintiff presented evidence showing that Kelley performed his sweeping duties faster than some of his colleagues and had not swept every aisle during the 4 p.m. sweep, there is no dispute that he had passed through aisle seven.

[8] There is no evidence in the record indicating precisely how often spills occur at the East Windsor store or the relative frequency with which they occur in various locations. Although Messer testified that about six "incident reports" are completed over the course of one year, there is no indication that those reports necessarily concern slip and fall incidents. The only incident report admitted into evidence was the one recording the plaintiff's slip and fall. Kelley also testified that he had witnessed spills, but provided no detail as to their location or frequency.

[9] Typically, under traditional premises liability doctrine, "[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." (Internal quotation marks omitted.) *Kelly* v. *Stop & Shop, Inc.*, 281 Conn. 768, 776, 918 A.2d 249 (2007); see also 2 Restatement (Second), Torts § 343, pp. 215–16 (1965).

[10] "The mode of operation rule . . . 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." (Internal quotation marks omitted.) *Kelly* v. *Stop & Shop, Inc.*, supra, 281 Conn. 777. Pursuant to the 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." Id., 791. That prima facie case may be defeated, however, if the defendant produces evidence that it took reasonable measures to prevent accidents such as the one that caused the plaintiff's injury, and the plaintiff fails to establish that those measures did not constitute reasonable care under the circumstances. Id., 791–92. As with traditional premises liability doctrine, the plaintiff bears the ultimate burden of proving negligence. Id.

[11] In *Kelly*, we stated that the newly adopted mode of operation rule "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." *Kelly* v. *Stop & Shop, Inc.*, supra, 281 Conn. 794 n.9.

[12] The defendant renewed its motion for a directed verdict during jury deliberations, and the trial court again denied the motion.

[13] The court charged the jury, in relevant part, as follows: "*The plaintiff has alleged that his injuries were caused by the mode by which the defendant operated the business, in particular, by the way the defendant designed, constructed or maintained* [*its*] *self-service supermarket.* This is called the mode of operation rule. Under this rule, the plaintiff need not show that the defendant had notice of the particular item or defect that caused the injury. In order to obtain damages under this rule, the plaintiff must prove [first] that the mode of operation of the defendant's business gave rise to a foreseeable risk of injury to customers such as the plaintiff and a foreseeable risk would be something that could regularly occur. Two, that the plaintiff's injury was proximately caused by an accident within that zone of risk.

"The defendant may rebut the plaintiff's evidence by producing evidence that it exercised reasonable care under the circumstances. The defendant has presented evidence that it undertook measures to avoid accidents like the accident that resulted in the plaintiff's injury. Since the defendant has done so, in order to prevail, the burden is on the plaintiff to establish that those steps taken by the defendant to prevent the accident were not reasonable under the circumstances.

"Ultimately the burden is upon the plaintiff to prove that the defendant's mode of operation created a foreseeable risk of injury. It is not the defendant's burden to disprove it. It is not the law that the defendant who runs a business guarantees the safety of those who come to the premises. If a customer, an invitee, is injured because of a negligent act that the defendant cannot reasonably be expected to foresee or guard against, then the defendant is not liable.

"[If] in considering all the credible evidence, you find . . . one, the plaintiff has proved that the defendant's mode of operation gave rise to a foreseeable risk of injury; and two, that the injury of the plaintiff was caused by an accident within the zone of risk; and three, that the steps taken by the defendant to prevent the accident were not reasonable under the circumstances, then you must find for the plaintiff and consider damages.

"If you find the plaintiff has not proved that the defendant's mode of operation gave rise to a foreseeable risk of injury or you find that the injury to the plaintiff was not caused by an accident within that zone of risk or you find that even though the defendant's mode of operation gave rise to a foreseeable risk of injury and the injury of the plaintiff was caused by an accident within the zone of risk but the defendant exercised reasonable care under the circumstances, then you must find for the defendant.

"So there are three elements that the plaintiff must prove to make the

mode of operation claim and they'll be on the verdict form. And they must prove all three—the plaintiff must prove all three of those.

"If the defendant can demonstrate that the liquid or spill on which the plaintiff allegedly slipped had fallen to the floor moments before the plaintiff's accident, you should find for the defendant." (Emphasis added.)

[14] The damages award was reduced to $40,178.58 by a collateral source offset.

[15] The trial court was not persuaded by the defendant's argument that, if the court's reasoning was correct, *Kelly* had eliminated the notice requirement for slip and fall cases in virtually all retail establishments, essentially rendering stores strictly liable for slip and fall injuries and insurers of their customers' physical safety.

[16] We disagree, however, that when the mode of operation rule does apply, it amounts to the imposition of strict liability on business owners. The rule permits a plaintiff to make out a prima facie case of negligence without the necessity of proving that the defendant had actual or constructive notice of the transitory hazardous condition that caused the plaintiff's injury. A defendant may rebut that case, however, with evidence that it exercised reasonable care under the circumstances, and the plaintiff retains the burden of proving that the steps taken by the defendant were not reasonable. *Kelly* v. *Stop & Shop, Inc.*, supra, 281 Conn. 791–92. In short, although the mode of operation rule, when it applies, eases substantially a plaintiff's burden of proof in a premises liability matter, it does not eliminate it.

Nevertheless, it is clear that invocation of the mode of operation rule tilts the scale decidedly in a plaintiff's favor. The present case is illustrative. Specifically, the evidence suggested strongly that the substance on which the plaintiff had slipped was freshly spilled. Furthermore, there was unrefuted testimony that fruit cocktail was not likely to spill, and aisle seven indisputably had been swept and inspected minutes before the plaintiff's fall. The jury still found, however, that the defendant had not taken reasonable measures to prevent the plaintiff's accident.

The defendant argues additionally that the trial court improperly applied the mode of operation rule because the plaintiff failed to allege it in his complaint. Because we agree with the defendant's argument that the mode of operation rule was not implicated by the evidence presented in the case; see part II of this opinion; we need not reach this additional argument.

[17] Judicial holdings must be read with reference to the underlying facts of the case. Indeed, any "discussion in a judicial opinion that goes beyond the facts involved in the issues is mere dictum and does not have the force of precedent." *Valeriano* v. *Bronson*, 209 Conn. 75, 91, 546 A.2d 1380 (1988).

[18] At the outset of the opinion in *Kelly*, we identified the issue to be resolved as whether, pursuant to the mode of operation 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 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." (Emphasis added.) *Kelly* v. *Stop & Shop, Inc.*, supra, 281 Conn. 769–70. Consistent with this framing, we concluded that the plaintiff, who was injured by slipping on salad material, could recover without proof that the defendant had notice of that material because she had proven that the defendant's method of operating its salad bar created a foreseeable risk that *salad material* regularly would be dropped to the floor and the defendant had failed to take reasonable measures to discover and remove it. In short, the plaintiff had proven that the *particular hazard* which had caused her injury was a regularly occurring condition.

[19] The lattermost point is debatable. It seems at least equally likely that the cost savings resulting from self-service merchandising have led to lower prices for the consumer rather than increased profits to the business owner. See *Kelly* v. *Stop & Shop, Inc.*, supra, 281 Conn. 794–95 n.1 (*Zarella, J.*, concurring).

[20] A plaintiff may invoke the mode of operation rule by showing either that the hazardous condition that caused his injury had occurred regularly in the past, or that it was inherently foreseeable due to a particular method by which the defendant operated its business.

[21] Although we noted in *Kelly*, after citing cases from twenty-two jurisdictions that had adopted some variation of the mode of operation rule, that there was "a distinct modern trend favoring the rule"; *Kelly* v. *Stop & Shop, Inc.*, supra, 281 Conn. 783; we did not elaborate on the breadth with which the rule had been applied in those jurisdictions. As explained herein, the

vast majority of those jurisdictions applied it narrowly.

The dissent argues that fidelity to the policy underpinnings of the mode of operation rule requires that we apply the rule broadly to all areas of a self-service establishment. We disagree. Those policy considerations, although significant, must be balanced against the reality that virtually all modern day retail merchandising is self-service and that any other model would be unworkable and unacceptable to most consumers, and the competing policy consideration, often cited in slip and fall jurisprudence, that businesses are not general insurers of their customers' safety. We conclude that a relaxation of the traditional rules of premises liability in certain circumstances, rather than a complete abrogation of those rules, strikes the fairest balance.

[22] The mode of operation rule most typically is applied in such circumstances. See *Nisivoccia* v. *Glass Gardens, Inc.*, 175 N.J. 559, 565, 818 A.2d 314 (2003) ("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 handling would create a hazardous condition."); *Schmidt* v. *Coogan*, 135 Wn. App. 605, 610, 145 P.3d 1216 (2006) (mode of operation rule typically applies "when the slip-and-fall happens in an area where there is constant handling of slippery products"), rev'd on other grounds, 162 Wn. 2d 488, 173 P.3d 273 (2007); *Carlyle* v. *Safeway Stores, Inc.*, 78 Wn. App. 272, 276, 896 P.2d 750 ("[c]ertain departments of a store, such as the produce department, are areas where hazards are apparent and therefore the proprietor is placed on notice by the activity"), review denied, 128 Wn. 2d 1004, 907 P.2d 297 (1995). We disagree with the dissent's assertion that "the only relevant distinction between the self-service merchandising employed in the produce department and that in the rest of the store is . . . the frequency with which accidents might occur." Displays of produce, as well as any other loose, unwrapped food items, are qualitatively different than displays of packaged items. Specifically, they are more readily dropped and, when present on a floor, are more likely to be unnoticed and/or slippery. In short, the potential for a hazardous condition in the area of such displays is more readily foreseeable than in an aisle containing items such as canned goods.

[23] In *H. E. Butt Grocery Co.* v. *Resendez*, 988 S.W.2d 218, 218–19 (Tex. 1999), the Supreme Court of Texas distinguished the holding of *Corbin*. It clarified that the "mere display of produce for customer sampling"; id., 218; in that case a bowl of loose grapes, did not necessarily constitute an unreasonable risk of harm to a store's customers. Rather, a plaintiff needed to show that the particular manner in which the store displayed grapes created an unreasonable risk of customers falling on them.

[24] Additional cases, not cited in *Kelly*, similarly are focused on a particular repetitive hazard. See, e.g., *McKillip* v. *Smitty's Super Valu, Inc.*, 190 Ariz. 61, 62, 945 P.2d 372 (App. 1997) (waxed paper used in bakery section of store that dispensed, inter alia, cookies to children); *Tom* v. *S. S. Kresge Co.*, 130 Ariz. 30, 31, 633 P.2d 439 (1981) (liquid on floor in store that sold soft drinks from two counters); *Bloom* v. *Fry's Food Stores, Inc.*, 130 Ariz. 447, 448, 636 P.2d 1229 (App. 1981) (grape from loosely stacked bunches piled high in display bin with low lip); *Brookshires Grocery Co.* v. *Pierce*, 71 Ark. App. 203, 205–206, 29 S.W.3d 742 (2000) (grapes on floor in poorly maintained produce department); *Sheehan* v. *Roche Bros. Supermarkets, Inc.*, 448 Mass. 780, 781, 863 N.E.2d 1276 (2007) (grapes from easily opened bags on tiered display table); *Garcia* v. *Barber's Super Markets, Inc.*, 81 N.M. 92, 93, 463 P.2d 516 (App. 1969) (water near display of watermelons sitting in ice water); *Wal-Mart Stores, Inc.* v. *Rangel*, 966 S.W.2d 199, 201 (Tex. App. 1998) (water and ice on floor of store with snack bar that sold fountain drinks customers were permitted to carry away), overruled by *Wal-Mart Stores, Inc.* v. *Diaz*, 109 S.W.3d 584, 589 (Tex. App. 2003) (reinstating requirement of proving notice); *Forcier* v. *Grand Union Stores, Inc.*, 128 Vt. 389, 394, 264 A.2d 796 (1970) (banana near self-service, open bins of fruit and vegetables); *Thomason* v. *Great Atlantic & Pacific Tea Co.*, 413 F.2d 51, 53 (4th Cir. 1969) (loose bunches of grapes; applying Virginia law); *White* v. *Safeway, Inc.*, Court of Appeals of Washington, Docket No. 35960-0-II, 2008 Wn. App. LEXIS 456, *1 (February 26, 2008) (chicken grease on floor in vicinity of self-service roasted chicken cart); *Rhoades* v. *K-Mart Corp.*, 863 P.2d 626, 631 (Wyo. 1993) (spilled cup of water on floor in store having two separate locations at which customers could purchase beverages).

[25] The dissent discusses these holdings at length. It is clear, however, that they comprise a distinct minority in a well developed area of law, and that

in some instances, their holdings subsequently were rejected. See footnote 26 of this opinion.

[26] *Owens* was abrogated in part, shortly after it was decided, by the passage of 2002 Fla. Laws, c. 2002-285, § 1, codified at Fla. Stat. § 768.0710 (2007), which eliminated the rebuttable presumption of negligence established by the decision; see footnote 17 of Justice Palmer's dissenting opinion; and replaced it with the rule that the plaintiff in a business premises liability action has the burden of proving that the defendant "acted negligently by failing to exercise reasonable care in the maintenance, inspection, repair, warning, or mode of operation of the business premises." Fla. Stat. § 768.0710 (2) (b) (2007). Subsequently, *Owens* was overruled completely, and traditional premises liability doctrine was reinstated. Specifically, Fla. Stat. § 768.0755, which took effect on July 1, 2010, provides in relevant part: "(1) If a person slips and falls on a transitory foreign substance in a business establishment, the injured person must prove that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it. Constructive knowledge may be proven by circumstantial evidence showing that:

"(a) The dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition . . . ."

Gonzales was overruled by the passage of Louisiana Revised Statutes § 9:2800.6 (C) (1) in 1988 and its amendment in 1990; see 1990 La. Acts 1025; which reinstated the requirement that actual or constructive notice for premises liability cases be proven by evidence "that the [hazardous] condition existed for such a period of time that it would have been discovered if the merchant had exercised reasonable care." La. Rev. Stat. Ann. § 9:2800.6 (2009); see also *Welch* v. *Winn-Dixie Louisiana, Inc.*, 655 So. 2d 309, 314 (La. 1995) (explaining evolution of Louisiana premises liability law).

The courts in *Golba* and *Sheil* relied heavily on language from *Ciminski* v. *Finn Corp.*, supra, 13 Wn. App. 818–19, that appeared to support a broad application of the mode of operation rule. See *Golba* v. *Kohl's Dept. Store, Inc.*, supra, 585 N.E.2d 15–16; *Sheil* v. *T.G. & Y. Stores Co.*, supra, 781 S.W.2d 781. As explained hereinafter, however, Washington's appellate courts, subsequent to *Ciminski*, made clear that the mode of operation rule was a narrow exception to traditional premises liability doctrine and did not apply generally to all self-service operations.

[27] In deciding *Kelly*, we quoted heavily from *Ciminski*. See *Kelly* v. *Stop & Shop, Inc.*, supra, 281 Conn. 778, 781, 786.

[28] Indeed, in *Ciminski* itself, the Court of Appeals of Washington emphasized not only that the plaintiff had been injured by falling on a slippery substance in a self-service cafeteria, but also that there tended to be spills in the precise area where she had fallen because of the frequent transport of pans of food over that area and the fact that the food items offered to customers were the type that could fall, and furthermore, that the cafeteria was designed so that customers needed to traverse that area to access the restrooms. *Ciminski* v. *Finn Corp.*, supra, 13 Wn. App. 823–24.

[29] See generally annot., 61 A.L.R.4th 27 (1988).

[30] See footnote 9 of this opinion.

[31] We need not consider separately whether the trial court improperly denied the defendant's motions to set aside the verdict and for judgment notwithstanding the verdict on the basis of its misconstruction of the law concerning the mode of operation rule. Practice Book § 16-37 permits "a party whose motion for a directed verdict has been denied . . . [thereafter to] move to have the jury's verdict set aside and to have judgment rendered in accordance with its motion for a directed verdict." *Berry* v. *Loiseau*, 223 Conn. 786, 819, 614 A.2d 414 (1992). If the trial court improperly denied the defendant's motion for directed verdict, its denial of the defendant's subsequent motions, which reiterated the same arguments, necessarily was improper.