October 25, 2013

There is a new appellate opinion, Arroyo v. Durling Realty, LLC, _____ N.J. Super. (App. Div. 2013), which upheld a summary judgment grant to the owner of a Quick Chek store which had been sued as a result of a plaintiff slipping on a pre-paid calling card on the sidewalk near the store entrance. The opinion was approved for publication on October 22, 2013.

At page 2 of the Arroyo opinion, the court noted,

> Plaintiff claims in this negligence action that the presence of the plastic card on the sidewalk created an unreasonably dangerous condition. In support of her theory, plaintiff notes that the phone cards are displayed on racks near the store's cash register and the exit doors. Given that proximity, plaintiff argues, in essence, that defendant should have foreseen that the purchased cards would be taken out of the store, immediately used, and discarded on the sidewalk.

Additionally, the plaintiff retained "a construction consultant" as a liability expert "who opined that the store should have had handy trash cans at the exit and also a regular sweeping schedule." [Page 3 of the opinion]. Finally, the plaintiff contended that the storeowner should be held liable under the mode-of- operation doctrine. Where the mode-of-operation doctrine is applicable, a plaintiff's obligation to prove either actual or constructive notice of a dangerous condition to a defendant is eliminated, an inference of negligence arises and the burden is shifted to the defendant to prove the defendant was not negligent.

In defense of the claims, Quick Chek's store manager "stated in his deposition that the front of the store is swept for cigarette butts and other miscellaneous debris 10 to 15 times daily, and that the entire front sidewalk and parking lot are swept twice each day. In addition, he indicated that at the end of each shift, the employees are required to sweep the area outside and make sure that it is clean. The area is also vacuumed every 2 or 3 days. On the night in question, a shift ended at 10:00 p.m., shortly before plaintiff and her friend arrived." [Opinion at pages 2 and 3]. The court's opinion in Arroyo further notes that "there is no proof that any store employee was aware of the presence of the card on the sidewalk in advance of plaintiff's mishap." [Opinion at page 3].

The storeowner's summary judgment motion was granted with the motion judge finding:

1. "…that plaintiff had failed to 'present evidence that the phone card that caused the slip and fall was present for an unreasonable amount of time.'…";

2. That there was no basis "…to extend the principles of mode-of-operation liability to this factual setting"; and,

3. Under the Brill standard, there was "no genuine issue of material fact [that existed such that] a rationale jury could find for the plaintiff." See Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995).

The plaintiff appealed and the appellate panel in Arroyo upheld the summary judgment grant. In so ruling, the appellate court held,

> We concur with Judge Santiago that, even if the record is construed in a light most favorable to plaintiff, there is no genuine issue as to whether defendant had actual or constructive notice of the presence of the discarded phone card on the sidewalk. The absence of such notice is fatal to plaintiff's claims of premises liability." [Opinion at page 4].

The appellate court also rejected the plaintiff's liability expert's opinion finding it inadmissible "net opinion,"

> …the conclusory statements of plaintiff's expert criticizing [Quick Chek's] procedures are not grounded in identified objective standards, and thus must be disregarded as inadmissible net opinion.… In both the expert's initial report and supplemental report, he presents opinions 'from my [meaning, his] experience' without ever stating what that experience is, or explaining how it is reflective of objective standards about convenience store operations or maintenance. Here…plaintiff has failed to show that her expert's opinions are "more than the expert's personal views." [citation omitted] The expert alludes to the fact that 'many stores' require an hourly "check sheet" for maintenance procedures, but he provides no substantiation for this assertion and does not indicate whether this is the prevailing or common practice in the industry. A net opinion is insufficient to satisfy a plaintiff's burden on a motion for summary judgment. [Opinion at pages 5 and 6].

Finally, the appellate court in Arroyo concluded that the motion judge did not err in refusing to give the plaintiff the benefit of the mode-of-operation doctrine under the facts of the case, noting,

> We further agree with Judge Santiago that this is not an appropriate case for the imposition of mode-of-operation liability. In certain distinctive

> instances, our courts have eliminated a tort plaintiff's requirement of proof of actual or constructive notice where, 'as a matter of probability, a dangerous condition is likely to occur as a result of the nature of the business, the property's condition, or a demonstrable pattern of conduct or incidents.'[citation omitted]. In such mode-of-operation cases, the courts 'have accorded the plaintiff an inference of negligence, imposing on the defendant the obligation to come forward with rebutting proof that it had taken prudent and reasonable steps to avoid the potential hazard.' [Opinion at pages 6 and 7, citing Model Jury Charge (Civil), 5.2F(11).

After discussing a number of decisions which applied the mode-of-operation doctrine, the appellate court in Arroyo found the doctrine inapplicable as the facts in Arroyo were "dissimilar." The Arroyo court noted in that regard,

> The phone card was not found inside defendant's store, but instead was on a sidewalk outside. Unlike the self-service cases where a mode-of-operation theory has been deemed viable, the retail chronology here includes an interaction with a store employee after an item has been taken by a customer from a self-service display. The patron who presumably bought the phone card would have had to take it off the display rack, presented to a cashier at checkout, had the card activated by the cashier, and paid for the card before taking it out of the store. The nexus between the self-service rack and the eventual presence of the card on the sidewalk outside is extremely attenuated.
>
> Furthermore, it cannot be reasonably asserted that the convenience stores 'method of doing business'…created the hazard encountered by plaintiff on the sidewalk. The transaction between the purchaser of the phone card in the store was fully concluded at the time of purchase. The purchased item did not have to be prepared for removal from the premises. What the purchaser chose to do with the card after leaving the store was not an integral feature of the store's retail operation. Consequently, there would have been no principled basis to apply the special elements of a mode-of-operation jury instruction here if the case had gone to trial. Instead, ordinary principles of premises liability, including the requirement of actual or constructive notice of a dangerous condition on the sidewalk, would pertain.

The Arroyo court also emphasized its finding that "…a phone card is not necessarily going to be used and discarded immediately by its purchaser. The card stores a designated amount of calling minutes. Those stored minutes conceivably can be applied to multiple calls, depending upon the length of the calls and the amount of time purchased. Because the card contains such stored value, it is not debris that would invariably be tossed aside when the card purchaser leaves the store." [Opinion at page 10]. As such, the Arroyo court distinguished its holding from a Louisiana appellate court ruling in

Kedia v. Brookshire Grocery Co., 752 So. 2d 944 (La. Ct. App. 1999) in which a plaintiff successfully established a grocery store's liability after slipping and injuring herself on a wet promotional leaflet distributed at the store because store management should have foreseen the actions of customers who would be expected to simply discard the worthless promotional leaflets.

The Arroyo opinion provides a sound discussion of the mode-of-operation doctrine and provides defendants with a supportive argument in challenging the application of the doctrine to situations beyond those where a store's actual operations create conditions or invite conduct which would be expected to present dangers to persons on the property thereby justifying the imposition of a negligence inference against the store requiring the storeowner to present evidence of conduct to establish that it had not been negligent. The Arroyo opinion also provides defendants with legal authority to challenge a plaintiff's liability expert whose opinions lack sufficient foundational support and constitute inadmissible net opinion.

Please let us know if you have any questions regarding the Arroyo decision. A copy of the 11 page opinion is attached.

Thanks,

Patrick A. Robinson, Esq.
Robinson Burns, LLC
586 East Main Street
Bridgewater, NJ 08807
(908) 526-7171
Fax (908) 526-4554
par@robinsonburns.com

Timothy P. Burns, Esq.
Robinson Burns, LLC
586 East Main Street
Bridgewater, NJ 08807
(908) 526-7171
Fax (908) 526-4554
tpb@robinsonburns.com

PAR:sd
Attach.