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NEW JERSEY DEFENSE

PRESIDENT'S LETTER

While several months remain before the calendar year turns a page, the 2023-2024 term year is now in full swing at the NJDA. It is with dutiful excitement that I thank the membership, the Board of Directors, and the nominating committee for providing me with the opportunity to serve as President of this great organization for the upcoming term.

I would like to thank our immediate Past President and new Chairperson of the Board, Michelle M. O'Brien, Esq., for her mentorship over the past year as well as to congratulate her on a successful term as president. Congratulations is also due to all our newly elected officers and directors, particularly our President-elect, Katelyn Cutinello, Esq., and Secretary/Treasurer, Juliann Alicino, Esq. And, of course, as inadequate as the words may be, a wholehearted thank you to our amazing Executive Director, Maryanne Steedle, for her tireless efforts on behalf of the organization.

I look forward to facilitating a year in which our members and friends can, and desire to, become more involved with the NJDA. Involvement leads to growth. Growth leads to pooling of resources. Resources allow our organization to provide members with valuable tools that they need to succeed in their endeavors. My request to you: Become Involved! Involvement can take the form of attending one of our more social gatherings such as the annual golf outing, our holiday party at Spring Lake Country Club on December 1, 2023, or the next annual convention at The Equinox in Manchester, Vermont in June 2024, or more substantively by joining an NJDA committee, attending a Board meeting, writing an article for the NJ Defense, or registering for one of our highly educational seminars. There are countless opportunities to get involved with the NJDA that will fit each and every one of you.

This year is already off to a fast start with initiatives meant to improve and expand the NJDA's Expert Database and ListServ. Join us in keeping the momentum moving forward as we dive headfirst into this term. Please do not hesitate to reach out to me at any time during this upcoming term at president@njdefense-association.com. Not only am I here for any thoughts, ideas, or questions that you may have, but I want to hear from each of you at some point this upcoming year. We are 600 members strong. And together we can continue to grow the NJDA to the benefit of each member individually and our defense community as a whole.

C. ROBERT LUTHMAN, ESQ.

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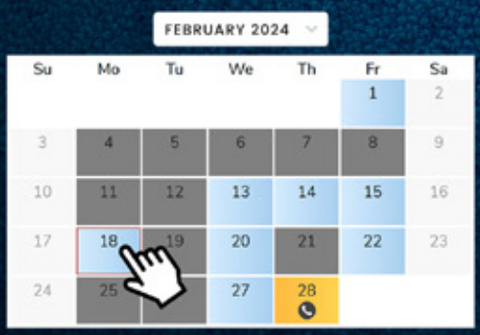

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ELECTRONICALLY STORED BUSINESS RECORDS: FAVORABLE PRESUMPTIONS AND MOTION PRACTICE

BY JOHN MEYER, ESQ.

Despite the ubiquity and routine usage of computers and electronic storage methods for everyday business activities, there remains a certain degree of inherent mistrust by both trial courts and opposing counsel when electronically stored business records are produced in discovery or are sought to be used at trial. The question remains: Why? As defense counsel, practitioners are often presented with sophisticated clients, both large and small, that rely on electronic systems to record, store, and compile thousands of everyday transactions stored not in the file rooms of old, but instead in databases, servers and various intangible folders. More and more, defense counsel present data of these everyday transactions in court or produce these in discovery. However, whether at the insistence of plaintiff's counsel, crying "unreliable," or "untrustworthy," or the court's reticence, there remains often times an uphill battle in admitting, without issue, a client's electronically stored business records. This is in spite of fifty years of precedent with a *presumption* in favor of reliability. It remains counsel's duty to remind all parties of the many years of precedent, and shore up the defenses for the client.

The business records exemption to the rule against hearsay is well known. N.J.R.E. 803(c)(6) provides that "[a] statement contained in a writing or other records of acts, events, conditions . . . made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy," is admissible as evidence as an exception to the prohibition against hearsay. As early as 1976, prior to the adoption of our modern rules of evidence and admission, our courts have held "as long as proper foundation is laid, a computer printout is admissible on the same basis as any other business record." Sears, Roebuck & Co. v. Merla, 142 N.J. Super. 205, 207 (App. Div. 1976) (emphasis added). Roughly forty-seven years later, it "is settled that there are no longer any special evidentiary requirements for computer-generated business records." Biunno, Weissbard & Zegas, New Jersey Rules of Evidence, cmt. 2 to N.J.R.E. 803(c)(6)(2). This proposition has been reiterated by our own Appellate Division on several occasions. See Carmona v. Resorts Intern. Hotel, 189 N.J. 354, 380 (App. Div. 2007) ("business records maintained in a computer system are not treated differently from hard copies merely because they are stored electronically."); Hahnemann Univ. Hosp. v. Dudnick, 292 N.J. Super. 11, 15 (App. Div. 1996) (supporting same). Recognizing the express provisions of N.J.R.E. 803(c)(6), that the records be made "at or near the time of observation," contemporaneous, or near contemporaneous recording has been noted as imperative for admissibility. See State v. Vogt, 130 N.J. Super. 465 (App. Div. 1974).

Having established that there is the ability to clear the initial hurdle of qualifying as business records, concerns are often raised by litigants as to whether the records being admitted need a specific kind of expertise to be admitted at time of trial and with the appropriate foundational knowledge to satisfy N.J.R.E. 901. Our Appellate Division has determined the individual seeking to admit the computer business records does not require "personal knowledge" of the creation of the record. Hahnemann Univ. Hosp. v. Dudnick, 292 N.J. Super. 11, 16 (App. Div. 1996) ("personal knowledge likewise would not be required when computer records were sought to be introduced."). Instead, the Appellate Division noted that a "witness is competent to lay the foundation for systematically prepared computer records if the witness (1) can demonstrate that the computer record is what the proponent claims and (2) is sufficiently familiar with the record system used and (3) can establish that it was the regular practice of that business to make the record." Id. at 18. Specifically, with respect to the lack of necessity of personal knowledge, the Court stated "[e]xpert testimony as to the reliability of the programs a computer uses or other technical aspects of its operation is unnecessary to find computer-generated records circumstantially reliable." Ibid.

Thus far, we have established computer records made at or near the time of "observation" qualify as business records, and that the records merely need the same foundation under N.J.R.E. 901, as other business records (i.e. broad knowledge of how the record keeping system works, establishment that the record is part of regular business, and someone who knows what the record is). The final twist, here, can serve to be a boon to defense counsel.

Biunno, Weissbard, and Zegas have observed that once cleared for admission, computer printouts of business records are "presumed to be reliable . . . ." Biunno, Weissbard & Zegas, New Jersey Rules of Evidence, cmt. 2 to N.J.R.E. 803(c)(6)(2). This is reflected in the verbiage of N.J.R.E. 803(c)(6), which permits admission of records "unless the sources of information or the *method, purpose or circumstances of preparation indicate* that it is not trustworthy." (emphasis added.) The proof, or even the specter of unreliability or lack of trustworthiness, to be established by the opponent of the proffered evidence is not a light burden. These records are *presumed* reliable. These oft-cited scholars go further than a mere presumption, and opine "[p]resumably the quantum of evidence required to be produced *is significantly greater for the opponent to a computer record* . . . ." Biunno, Weissbard & Zegas, New Jersey Rules of Evidence, cmt. 2 to N.J.R.E. 803(c)(6)(2) (emphasis added).

Although not explicitly established in any published precedent, the ultimate conclusion here, is that the opponent of a presumptively reliable business record, absent testimony of nefarious conduct or suspicious circumstances (more than a self-serving statement), must provide some form of expert testimony to overcome the presumed reliability. The validity of this assertion is found scattered in prior precedent. As explained in Hahnemann, "[w]ith the advent of computers has come an implicit trust in their dependability, owing primarily to the results they achieve. The mechanical (or electronic) explanation of computer workings would likely have been beyond the grasp of most jury members and would not have proved helpful in establishing the reliability of the records. . . . An explanation of the internal workings of a massive computer system belies common sense and judicial efficiency. Computer usage permeates every strata of society and is customary in modern life." Hahnemann, 292 N.J. Super. at 16 (quoting State v. Swed, 255 N.J. Super. 228 (App. Div. 1992)).

"There is no reason to believe that a computerized business record is not trustworthy unless the opposing party comes forward with some evidence to question its reliability." Id. at 18; See New Century Financial Servs. Inc., v. Oughla, 437 N.J. Super. 299, 329-30 (App. Div. 2014) ("Defendants express significant concern over admitting electronically-transmitted credit card account statements for accounts that have been assigned several times, but they have not pointed to anything in the record to suggest that the statements proffered by plaintiffs are not trustworthy. It is not lost on us that plaintiffs filed their complaints and summary judgment motions electronically in the Special Civil Part, and that the judges entered their orders granting the motions in the Judiciary Electronic Filing and Imaging System (JEFIS), where they are maintained in electronic case jackets. Like the litigants that appear in our courts, our courts are increasingly reliant on electronically filed and transmitted information").

The short of the matter is this: If counsel can produce electronically stored records, produce an individual with sufficient record keeping knowledge, and establish the records were stored/created at or near the time of occurrence, counsel has acquired a *presumptively reliable* statement. Once established, plaintiff needs to do more than argue that the records must be wrong. They must either produce an expert to show the unreliability of the data storage and recording, or must show strong proof of circumstantial unreliability. The result of the foregoing can be a wealth of *in limine* motions precluding the opposing party from providing testimony or evidence contrary to a presumptively reliable record. As mentioned above, the testimony otherwise could constitute inadmissible lay testimony. Hahneman, 292 N.J. Super. at 16. From payment statements, telemetric data, to work orders and more, the utility of these arguments and motions leading up to trial is only growing as businesses become more and more sophisticated. As defense counsel, our job is to not only keep up with our clients, but to ensure the time and energy they invest into creating sophisticated record keeping technology is rewarded and protected come the time of trial.

2023 NJDA ANNUAL CONVENTION HIGHLIGHTS

President Rob Luthman accepting the gavel from Chairperson Michelle O'Brien

2023 Officers - Chairperson Michell O'Brien, President Rob Luthman, President-Elect Katelyn Cutinello, Secretary/Treasurer Juliann Alicino

Michael Malia presenting the DRI Exceptional Performance Award to Michelle O'Brien

Ryan Richman presenting Michelle O'Brien with the NJDA Distinguished Service Award

Attorney of the Year - Michelle O'Brient

Young Lawyer of the Year - Sam James

Michelle O'Brien, Katelyn Cutinello, Marie Carey, Natalie Mantell

Past Presidents: Ryan Richman, Edward Fanning, Jr., Natalie Mantell, Roger Steedle, Marie Carey, Michael Malia, Peter Wilson, Kevin DeCoursey, Michael Leegan, Michelle O'Brien

IS THE MODE-OF-OPERATION DOCTRINE EVER CHANGING? SHOULD IT BE?

BY ROBIN SAMMER BEHN, ESQ.

Last week, I attended a Case Management Conference and the plaintiff's counsel said… "My client slipped and fell on his way back to his car after grabbing his takeout from the defendant's restaurant. He slipped on frozen food or snow and ice. Your Honor, this may be a mode-of-operation matter."

No. Stop. Just stop.

The Mode-of-Operation doctrine is not available merely because the accident occurred at a commercial premises.

In its most basic form, the Mode-of-Operation doctrine creates an inference of negligence which excuses a plaintiff from having to prove notice.[1] It is a special application for matters when the product is sold in an open manner, which allows the customer to handle the merchandise, and essentially exposes the customer to potential injury.

Originally created in Bozza v. Vornado Inc., the Court established that, if the plaintiff proved that the circumstances of the store created a reasonable probability that a dangerous condition would occur, then the plaintiff did not need to prove actual or constructive notice.[2] In Bozza, the plaintiff was leaving the counter of a self-service cafeteria slipping on a "sticky slimy substance" on the floor.[3] The Court held that, when the nature of the business created the hazard, the inference of negligence shifted the burden to the defendant to "negate the inference by submitting evidence of due care."[4]

Thereafter, the Wollerman Court further explained that the defendant's self-service method of operation required the store to anticipate the hazard because of carelessness of either customers or employees, "imposing upon the defendant the obligation to use reasonable measures promptly to detect and remove such hazards to avoid the inference that it was at fault."[5]

Over the years since Wollerman, the Court expanded the Mode-of-Operation doctrine beyond the produce aisle and cafeteria to the exterior of the building and even to how the product was displayed.[6] When it looked as if the Mode-of-Operation doctrine was moving toward strict liability for the store owners, the Supreme Court reigned it in in the Prioleau decision.[7] The Prioleau Court found that the "dispositive factor was not the label given to a particular location, but whether there is a nexus between self-service components of the defendant's business and a risk of injury in the area where the accident occurred."[8] In other words, ***the injury must be related to the self-service component of the defendant's business.***

Essentially, the plaintiff must identify the item he/she slipped on. Then, the plaintiff must show that the item was sold in such a manner that the customer was handling the product and that action exposed the customer to potential injury.

If those elements are met, then the Court may apply the Mode-of-Operation doctrine, allowing the inference of negligence and excusing the plaintiff from having to prove actual or constructive notice. The burden is then shifted to the defendant/store to show that it exercised due care.

However, the most recent Appellate decisions have been muddying the waters again. In Aly v. A & H Bagels & Deli Inc., the Court found that the brown unidentified substance on the floor near the trash receptacle would trigger the Mode-of-Operation doctrine.[9] In this matter, the plaintiff was a customer at A&H Bagels and when she went to throw out her trash, she slipped and fell on a brown substance. The Appellate Court found that A&H Bagels was a self-service business in that the customers purchased the sandwiches in closed containers at the counter, then carried their food to their seats to eat before disposing of their trash in the receptacles. According to the Court, because the customers waited on themselves after being served at the counter, it was a self-service establishment and, therefore, the Mode-of-Operation doctrine would apply. The Court believed that it was foreseeable for a customer to cause a substance to be on the floor near the trash receptacle, creating a condition where another customer was at risk of falling. The Court stated that "this is exactly the situation where the burden should shift to the defendant to show that they acted reasonably considering this specific business format."[10]

The Appellate Court kept the Mode-of-Operation doctrine narrow when it heard Miguez v. Shoprite of Kearny.[11] In Miguez, the Court stated that the refrigerator part that the plaintiff tripped over was not a "product sold", nor spillage from any food offered for sale and, therefore, the Mode-of-Operation doctrine did not apply.

Likewise, the Appellate Court in Racine v. Rite Aid Pharmacy concluded that the Mode-of-Operation doctrine did not apply when the plaintiff could not identify the substance he fell on.[12] The plaintiff in Racine v. Rite Aid described the spot on the floor as being "greasy" or "dirt mixed with hair gel", but there was no evidence that any products on the shelves, near the area where the plaintiff fell, were opened or in broken containers. As such, the Court noted that the evidence did not show that there was any evidence that some other customer may have caused the condition. Accordingly, the Mode-of-Operation doctrine did not apply and Summary Judgement was affirmed.

However, the Appellate Court applied the Mode-of-Operation doctrine when plaintiff slipped on the table cloth that had fallen from a display table in the vestibule of the store. In Jones v. Rite Aid & Rite Aid Corp, Rite Aid employees set up a table in the vestibule with a blue plastic tablecloth and brochures to promote flu vaccine held down by a heavy bottle of hand sanitizer.[13] Due to the strong winds, the tablecloth and brochures were blown off the table. Plaintiff's foot got tangled in the tablecloth on the ground, causing her to fall and sustain injuries. The trial judge found that the brochures were part of the "self-service" set up by Rite Aid to be used for business purposes, to sell flu shots. Therefore, the trial judge found a nexus between the self-service "touching of the items on the table," and the brochures blowing around which created a dangerous condition allowing the Mode-of-Operation charge. The Appellate Court affirmed that the Mode-of-Operation doctrine applied because the "brochure on the display table was part of the 'self-service' set up and used for the defendant's 'self-service purposes.'"

While the Jones v. Rite Aid matter does expand the Mode-of-Operation doctrine beyond the products being sold, there is a nexus between the injury and the "self-service component" of the defendant's business.

The good news is that these recent Appellate Division decisions are unpublished. Unpublished cases are of no import in the Court's decisions, as unpublished cases are neither binding nor precedential.[14] While we as defense counsel should be mindful of the cases and the Appellate Court's holdings, we must remain vigilant that Mode-of-Operation doctrine continue as a narrowly tailored doctrine to be used only in specific self-service claims.

TAKE AWAYS.

The Mode-of-Operation doctrine is not the equivalent of strict liability. The Mode-of-Operation doctrine is definitive. Overall, the New Jersey Supreme Court has consistently limited the use of the Mode-of-Operation doctrine to claims where there is a nexus between the injury and the self-service component of the defendant's business.

Do not fear though, even if the Mode-of-Operation doctrine is charged in the case, defendant has the opportunity to show that it acted reasonably and with due care under the circumstances.

[1] Prioleau v. Kentucky Fried Chicken, Inc. 223 N.J. 245 (2015).
[2] Bozza v. Vornado, Inc., 42 N.J. 355, 361 (1964).
[3] Id. at 358.
[4] Id. at 360.
[5] Wollerman v. Grand Union Stores, Inc., 47 N.J. 426, 429 (1966).
[6] See Craggan v. IKEA USA, 332 N.J. Super. 53 (App. Div. 2000); see also O'Shea v. K Mart Corp., 304 N.J. Super. 489 (App. Div. 1997).
[7] Prioleau v. Kentucky Fried Chicken, Inc., 223 N.J. 245 (2015).
[8] Id. at 262
[9] Aly v. A & H Bagels & Deli Inc., No. A-2726-21, 2023 N.J. Super. Unpub. LEXIS 695 (App. Div. May 8, 2023).
[10] Id. at *7-8.
[11] Miguez v. Shoprite of Kearny, No. A-3270-21, 2023 N.J. Super. Unpub. LEXIS 850 (App. Div. June 1, 2023).
[12] Racine v. Rite Aid Pharmacy, No. A-3816-21, 2023 N.J. Super. Unpub. LEXIS 959 (App. Div. June 14, 2023).
[13] Jones v. Rite Aid & Rite Aid Corp., No. A-2637-21, 2023 N.J. Super. Unpub. LEXIS 1201 (App. Div. July 17, 2023).
[14] See New Jersey Court Rule 1:36-3.

DEFENSE WINS

Cocca & Cutinello, LLP: – Cocca & Cutinello, LLP obtained a win for patient safety in the recent published decision, Keyworth v. Careone at Madison Ave., 476 N.J. Super. 86 (App. Div. 2023). The Appellate Division granted interlocutory appeal in two consolidated cases where the trial court released the health care facilities' incident reports and witness statements developed as part of its Patient Safety Plan, based on a finding that they were relevant and contained factual material only. On appeal, the Court reversed and held that both the factual findings of a health care facility as well as its conclusions and deliberative processes are entitled to the absolute protections of the Patient Safety Act privilege. As such, the Court held that the incident reports and witness statements enjoy the same protections under the Patient Safety Act as the materials reported to the State which are also absolutely privileged.

SAVE THE DATE / JUNE 27–30, 2024

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UPCOMING EVENTS

NOVEMBER 10, 2023

WOMEN & THE LAW SEMINAR
9 a.m. – 1:00 p.m.
APA Hotel Woodbridge
Iselin, New Jersey

NOVEMBER 21, 2023

NJDA/ICNJ JOINT AUTO LIABILITY SEMINAR
8:30 a.m. – 1:00 p.m.
APA Hotel Woodbridge
Iselin, New Jersey

DECEMBER 1, 2023

ANNUAL HOLIDAY PARTY
Spring Lake Golf Club
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