

# Internally Yours? The Admissibility of Internal Store Policies

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In the past, retailers have asserted that internal store policies are inadmissible, citing law existing for over 100 years. However, a recent case from the Michigan Court of Appeals has made this argument more difficult for businesses to make.

The argument for the inadmissibility of internal policies can be traced back to a Michigan Supreme Court decision in 1904. In *McKernan v. Detroit Citizens' Street-Railway Co.*, 138 Mich. 519 (1904), a trolley car collided with a fire engine. The trolley company's internal policy required its cars to pass fire stations going no more than four miles per hour; the trolley involved in the accident violated this rule. The Michigan Supreme Court concluded that "[t]he existence of this rule did not add to the defendant's obligations to the public."

In a concurring opinion, Judge Frank A. Hooker opined that if internal rules heightened legal responsibilities, the result would be a reluctance to create them.

Four years later, in *Dixon v. Grant Truck WR Co.*, 155 Mich. 169, 173 (1908), the Michigan Supreme Court again refused to consider internal rules as a basis for finding negligence. Citing *McKernan*, the court confirmed that the existence of internal rules did not increase the obligations owed to the public, stating:

"They are essentially private regulations of the defendant in the orderly and prudent conduct of its business. These rules do not fix the obligations and liability of the defendant to its employees, nor even to third persons and the public. Those are fixed by law. They could not be diminished by such rules, neither are they increased ordinarily thereby."

This analysis was applied in a retail setting in *Buczkowski v. McKay*, 441 Mich. 96 (1992), in which K-Mart sold ammunition to an allegedly intoxicated person in violation of their store policies. The purchaser later accidentally shot another individual. In a footnote, the Michigan Supreme Court again concluded:

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"Imposition of a legal duty on a retailer on the basis of its internal policies is actually contrary to public policy. Such a rule would encourage retailers to abandon all policies enacted for the protection of others in an effort to avoid future liability."

Recently, however, in *Jilek v. Stockson*, 289 Mich. App. 291 (2010), the Michigan Court of Appeals viewed these cases in a different light. *Jilek* was a medical malpractice case, brought by the personal representative of a patient who died of a heart attack five days after he reported to an emergency clinic experiencing chest tightness and other heart symptoms that were not investigated. The plaintiff attempted to introduce internal guidelines, claiming that they were relevant to determining whether the clinic deviated from the standard of care, and the trial court ruled that they were inadmissible.

The appellate court reversed. It first noted that there was no statutory privilege barring the admission of internal guidelines. The court then considered the plaintiff's argument that internal policies should be admitted, not because they created a duty, but because they may be relevant to the jury's determination of what the duty was.

The court found that neither *Dixon* nor *McKernan* required an absolute exclusion of internal policies, and that the *Buczkowski* court did not determine the issue. The appellate court also rejected the argument that such policies should be excluded on public policy grounds, stating, "such an argument is better made to the Legislature, which, if it wishes, can adopt such a privilege." The court concluded that internal guidelines relevant to the applicable standard of care and the alleged injury should have been admitted at trial.

Although *Jilek* is a medical malpractice case, the ruling is not necessarily limited to that context. Future plaintiffs may argue that while internal policies of retailers do not "set" the negligence standard, they are admissible to determine whether a particular retailer's actions were in line with "standard" shopkeeper practices. Clearly, this is a fine-line distinction that may be blurred by a jury.

*Jilek* has been appealed to the Michigan Supreme Court, which has ordered oral argument in order to determine whether to grant the application. *Estate of Jilek, ex rel. Jilek v. Stockson*, 488 Mich. 1053 (2011).

The parties were specifically asked to address whether the ruling on the admissibility of internal policies by the appellate court was correct. Due to its potential impact outside of the medical malpractice context, the outcome of this case should be monitored.

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