COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

No. SJC – 11923

LINDA S. BOWERS,
PLAINTIFF-APPELLANT,

v.

P. WILE'S, INC.,
DEFENDANT-APPELLEE.

ON FURTHER APPELLATE REVIEW OF A
DECISION OF THE APPEALS COURT

BRIEF OF AMICUS CURIAE,
MASSACHUSETTS ACADEMY OF TRIAL ATTORNEYS

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INTEREST OF AMICUS CURIAE

The Massachusetts Academy of Trial Attorneys (Academy), amicus curiae, is a voluntary, non-profit, state-wide professional association of attorneys in the Commonwealth. The Academy's purpose is to uphold and defend the Constitutions of the United States and the Commonwealth of Massachusetts; to promote the administration of justice; to uphold the honor of the legal profession; to apply the knowledge and experience of its members so as to promote the public good; to reform the law where justice so requires; to advance the cause of those who seek redress for injury to person or property; steadfastly to resist efforts to curtail the rights of injured individuals; and to help them enforce their rights through the courts and other tribunals in all areas of law. The Academy has been actively addressing various areas of tort law in the courts and the Legislature of the Commonwealth since 1975.

The Academy encourages the Court to maintain the vitality of the mode of operation method of establishing notice of a defect, irrespective of whether that defect is an item for sale or not.

STATEMENT OF THE ISSUE

Owners are required to maintain their properties reasonably safe for lawful visitors in light of all circumstances. When a foreseeably dangerous condition arises out of one's self-service business or mode of operation, in and of itself that mode is notice to the owner of the danger presented to customers. If the condition did not include one of the wares for sale, however, does that distinction alone entitle the owner to contest notice?

STATEMENT OF THE CASE

The Academy is content with the statement of the case in the appellant's opening brief.

STATEMENT OF FACTS

The Academy is content with the statement of the facts in the appellant's opening brief

SUMMARY OF ARGUMENT

This is a garden-variety premises liability case that can and should be resolved with well-established principles of law when determining one simple question of fact: whether the defendant-landowner's conduct was reasonable under the existing circumstances (pp. 4 - 10).

Because the Court has asked for input from amici on the "mode of operation" method of showing notice, however, and because the parties and the trial court have briefed and argued that issue, the Academy does so too. That method is not restricted to situations where a defendant's product for sale creates the hazard; it applies to any setting in which the manner of conducting business creates a foreseeable risk of harm to visitors. The Appeals Court's conclusion is

sound; "it should not matter whether the item that migrates from the self-service display to the floor (thereby causing a slipping hazard) is a grape or a quantity of shaved ice from the bed keeping the grapes cool." (pp. 9 - 14).

ARGUMENT

I. The mode of operation approach to notice imposes nothing new on commercial landowners; it should be interpreted in accordance with general principles of premises liability law.

A. Commercial landowners are obliged to maintain their business premises in a reasonably safe condition for customers.

Since the end of the Civil War it has been settled law in the Commonwealth, and elsewhere, that a commercial property owner owes a duty to its customers to keep the premises in "safe and suitable condition for those who come upon and pass over them, using due care." Sweeny v. Old Colony & Newport R. Co., 92 Mass. (10 Allen) 368, 373 (1865). That duty includes the obligation to "maintain [the] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk." Mounsey v. Ellard, 363 Mass.

693, 708 (1978) (quoting Smith v. Arbaugh's Restaurant, Inc., 469 F. 2d 97, 100 (D.C. Cir. 1972)). It encompasses not only slipping hazards, but a wide variety of dangerous conditions. See e.g. Lawrence v. Kamco, Inc., 8 Mass. App. Ct. 854 (1979) (failure to repair broken window in customer area of bar); Kennedy v. Cherry & Webb Co., Lowell, 267 Mass. 217 (1929) (fall on raised platform without railing or warning); Phipps v. Aptucxet Post #5988 V.F.W. Building Ass'n, Inc., 7 Mass. App. Ct. 928 (1979) (rutted ice in parking lot); Pritchard v. Mabrey, 358 Mass. 137 (1970) (ice resulting from runoff from defendant's building). But see Glick v. Prince Italian Goods of Saugus, Inc., 25 Mass. App. Ct. 901 (1987) (restaurant owner not obligated to construct barrier to prevent unforeseeable occurrence of car crashing into wall).

It is equally well-established that a landowner may have an obligation to protect against harm caused by a third party. This Court has repeatedly held that a "possessor[] of real estate open to the public for business purposes, owed a duty to a paying patron to use reasonable care to prevent injury to him by third persons whether their acts were accidental, negligent, or intentional." Rawson v. Massachusetts Operating

Co., Inc., 328 Mass. 558 (1952). The duty typically arises from a combination of a special relationship between the landowner and the plaintiff together with the foreseeability of the harm caused by the third party. See Mullins v. Pine Manor College, 389 Mass. 47 (1983) (college's failure to provide security causing student rape); Carey v. New Yorker of Worcester, Inc., 355 Mass. 450 (1969) (tavern may be liable to one assaulted by fellow patron.)

The common thread running through this jurisprudence is the failure to use reasonable care to prevent foreseeable injury. Contrary to the repeated plaints of the defense bar, this standard has not (and does not) require property owners to insure or guarantee their patrons' safety; it merely obligates them to act reasonably under the circumstances, no more and no less.

Thus in Upham v. Chateau de Ville Dinner Theatre, 380 Mass. 350 (1980), the factors for jurors to consider in the negligence inquiry included the plaintiff's age, the lack of warnings, the absence of ushers, and the defendant's five weeks' notice that groups of elderly patrons would be attending the show, as well as the theater owner's need for darkness or

artistic lighting effects. Compare Young v. Atlantic Richfield Co., 400 Mass. 837 (1987) (service station owner not negligent in placement of air pump); Toubiana v. Priestly, 402 Mass. 84, 88 (1988) (building owner not obligated to supply place of "maximum safety").

B. The mode of operation approach is a response to the unduly narrow focus on proving notice of a risk instead of on its foreseeablity.

Over time, the law of foreign substances on a business's floor developed an unduly narrow focus; it obsessed with the owner's knowledge of the foreign matter, see e.g., Young v. Food Fair, Inc., 337 Mass. 323 (1958); Lajeunesse v. Tichon's Fish & Fillet Corp., 328 Mass. 528 (1952). That knowledge was either actual or constructive; that is, a plaintiff could still recover with evidence that the foreign matter had been present long enough such that one might reasonably infer that the proprietor knew, or should have known, that it was there (e.g., the dirty banana peel) -- a principle that led to many and subtle factual distinctions. Thus, this Court concluded in Oliveri v. Massachusetts Bay Transportation Authority, 363 Mass. 165 (1973) that "while melting ice cream

alone does not warrant an inference that enough time has passed ... where the melting ice cream is near an exit door and several of the defendant's employees work near the door, an inference of negligence is warranted." Id. at 168-169.

This notice test was applied repeatedly -- though at times inconsistently -- over the years, often to the exclusion of other factors such as foreseeability. In Gilhooley v. Star Market Co., Inc., 400 Mass. 205 (1987), a plaintiff who had slipped on a pepper claimed that the jury should have been instructed that the supermarket could be liable if its produce had been stacked so as to create a risk of spillage.

Rejecting that approach, this Court said that "even if the jury instructions be construed to mean that the only theory on which the plaintiff could recover was that the pepper had been on the floor long enough for the defendant reasonably to have seen and removed it, the instructions were correct." Id. at 208. Despite the court's observation in Gilhooley that "the keeper of a grocery store may be liable to a customer who slips on produce that is on the floor because of the storekeeper's negligent marketing and display thereof," id., that actual or constructive

notice of the foreign substance was required remained the law for the next twenty years.

Then came Sheehan v. Roche Brothers Supermarkets, Inc., 448 Mass. 780 (2007). That Court addressed the notice issue point-blank: in adopting the mode of operation approach, a plaintiff in a slip-and-fall case could prove the requisite notice by showing that "an unsafe condition on an owner's premises exists that was reasonably foreseeable, resulting from an owner's self-service business or mode of operation." Id. at 791. Although Sheehan describes the approach as satisfying the notice requirement, the triggering factor for imposing a duty on the owner remained as it had been for years: the probability that the risk would occur, and thus the foreseeability of harm to a customer. Id. at 786. The Court was careful to point out, however, that the mode of operation approach does not make the landowner "an insurer against all accidents." Id. at 790. A plaintiff still bears the burden of establishing the other elements of the tort.

Sheehan was hardly a landscape-altering extension of liability; it was a tacit recognition that the bedrock principles of reasonable care and foreseeability of risk which apply to other types of

premises liability actions should obtain in cases involving foreign matter.

Indeed, the Court came to a similar conclusion three years later in Papadopoulos v. Target Corp., 457 Mass. 368 (2010), when it abandoned the distinction between natural and unnatural snow and ice accumulations in favor of a general statement that a property owner must maintain its property in a reasonably safe condition. As with the foreign substance cases, the cardinal issue is not how or when the hazard came to be, but whether the landowner could reasonably have foresee its being there. Both Sheehan and Papadopoulos are contemporary exemplars of what the Great Chief taught us about the common law before the Civil War.[1]

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[1] "But it is the great merit of the common law, that it is founded upon a comparatively few broad, general principles of justice, fitness and expediency, the correctness of which is generally acknowledged, and which at first are few and simple; but which, carried out in their practical details, and adapted to extremely complicated cases of fact, give rise to many and often perplexing questions; yet these original principles remain fixed, and are generally comprehensive enough to adapt themselves to new institutions and conditions of society, new modes of commerce, new usages and practices, as the progress of society in the advancement of civilization may require." Commonwealth *v.* Temple, 80 Mass. (14 Gray) 69, 75 (1859) (Shaw, C.J.).

C. The mode of operation approach applies to all reasonably foreseeable risks, not simply to hazards created by a defendant's wares.

Just as their counterparts from an earlier era focused on an owner's notice of a condition to the exclusion of other foreseeable risks, or on the distinction between natural and unnatural accumulations of the effects of inclement winter weather, so too has today's defense bar crafted artificial and unreasoned restrictions on the application of the mode of operation concept.

Thus, in Sarkisian v. Concept Restaurants, Inc., 471 Mass. 679 (2015), the nightclub claimed that the novel approach to notice was unavailable to the plaintiff because the venue was not a self-service establishment. But that distinction failed because self-service is only one "situation in which the proprietor's 'operating methods' enhance the risk of recurring dangerous conditions brought about by third party interference . . . but it logically is not the only business method that can have such an effect." Id. at 684, citing Konesky v. Post Road Entertainment, 144 Conn. App. 128, 140-141 (2013).

Like Sheehan, Sarkisian relied on foreseeability principles to guide the application of the mode of

operation approach; it applies whenever "a business should reasonably anticipate that its chosen method of operation will regularly invite third-party interference resulting in the creation of unsafe conditions." Sarkisian v. Concept Restaurants, Inc., 471 Mass. 679, 684 (2015). This is another such case.

The Sarkisian Court rejected -- as this Court should -- the "parade of horribles" bemoaned by the defense and its amici in which their clients might be liable: for each and every conceivable harm occurring on their premises such that, effectively, they become general liability insurers.

That Court simply said that a plaintiff established notice if, as a "recurring feature" of the mode of operation, the defect (there, spillage) is sufficiently tied to the operations "in a manner that justifies placing the business on notice of the resulting unsafe condition." Id. at 687. Again, the essence of the basis for liability is no more than the foreseeability of harm arising out of the particular business model in play.

Similarly, the appellee and its amici protest that the mode of operation approach should not apply to conditions not caused by merchandise for sale. But

the Appeals Court correctly analyzed the reasoning in Sheehan, together with concepts later articulated in Sarkisian, noting that the basis of the Sheehan decision was the "foreseeable risk that customers' handling of merchandise or displays will cause disruption of the store's arranged display, to the end that hazardous conditions will result." Bowers v. P. Wile's, Inc., 87 Mass. App. Ct. 362, 367 (2015). That analysis was spot-on: "it should not matter whether the item that migrates from the self-service display to the floor (thereby causing a hazard) is a grape or a quantity of shaved ice from the bed keeping the grapes cools." Id. at 368.

Although operating without the benefit of this Court's Sarkisian decision, the Appeals Court correctly rejected the attempt to confine the mode of operation approach to hazards presented by merchandise offered for sale in self-service establishments. The source of the defect, the gravel area, was a self-service area offering wares for sale, the "manipulation of which foreseeably could (and often did) cause stones to move onto the sidewalk, creating a risk of tripping or falling." Id. That reasoning is a cogent and concise application of the foreseeability

test which has long been a hallmark of landowner liability in the Commonwealth.

Inevitably, cases will arise that do not follow the "spillage and breakage [of merchandise] paradigm" of Sheehan. They can and should be resolved by applying the general principles announced in Sweeny v. Old Colony & Newport R. Co., 92 Mass. (10 Allen) 368 (1865) together with those refined more recently in Sheehan and Sarkisian, and applied by the Appeals Court here, viz: 1) the operation of the business created a foreseeable risk, and 2) in light of that risk, the defendant failed to take reasonable steps to prevent the injury to its customer.

CONCLUSION

For the foregoing reasons, The Massachusetts Academy of Trial Attorneys, amicus curiae, urges the Court to reject the defendant's attempt to limit the mode of operations approach to "spillage and breakage" of merchandise for sale.

MASS. R. A. P. 16(k) CERTIFICATION

I hereby certify that this brief complies with the rules of Court including but not limited to Mass. R. A. P. 16, 18, and 20.

/s/ Thomas R. Murphy
Thomas R. Murphy, Esquire

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of this brief on counsel of record in this matter by priority mail, postage prepaid, on this 16th day of November, 2015.

/s/ Thomas R. Murphy
Thomas R. Murphy, Esquire