COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

NO. SJC-11786

ANGELA SARKISIAN,
PLAINTIFF-APPELLEE,

v.

CONCEPT RESTAURANTS, INC. D/B/A LIQUOR STORE,
DEFENDANT-APPELLANT.

ON FURTHER APPELLATE REVIEW OF THE APPEALS COURT'S AFFIRMANCE OF THE APPELLATE DIVISION OF THE DISTRICT COURT DEPARTMENT

BRIEF FOR THE *AMICUS CURIAE*
MASSACHUSETTS DEFENSE LAWYERS ASSOCIATION

JOHN F. BROSNAN
BBO #556678
O'MALLEY AND HARVEY, LLP
155 Federal Street, 12th Floor
Boston, Massachusetts 02110-1735
TEL: (617) 357-5544
FAX: (617) 204-3477
JBrosnan@omalleyharvey.com

Dated: March 4, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

TREATISES:

STATEMENT OF THE INTEREST OF THE *AMICUS CURIAE*

The Massachusetts Defense Lawyers Association ("MassDLA"), *amicus curiae*, is a voluntary, non-profit, statewide professional association of trial lawyers who defend corporations, individuals and insurance companies in civil lawsuits. Members of the MassDLA do not include attorneys who, for the most part, represent claimants in personal injury litigation. The purpose of the MassDLA is to improve the administration of justice, legal education and professional standards, and to promote collegiality and civility among all members of the bar.

To promote its objectives, MassDLA participates as *amicus curiae* in cases raising issues of importance to its members, their clients and the judicial system. The MassDLA believes that this is such a case and that its perspective can assist the Court in resolving the important issues raised by this appeal. The MassDLA urges the Court to affirm the Appeals Court's upholding of the grant of summary judgment to the defendant-appellee because extension of the mode of operations approach beyond self-service establishments will completely supplant the traditional approach to premises liability, which requires actual or

constructive notice of an unsafe condition, and would improperly impose essentially strict liability on property owners, making them general insurers of their customers' safety.

STATEMENT OF THE ISSUES PRESENTED

I. Whether extending the mode of operation approach beyond self-service establishments will engulf the remainder of negligence law for premises liability cases and will improperly make property owners general insurers of their customers' safety?

II. Whether application of the mode of operation approach to this case will improperly make the entire nightclub a "zone of risk" simply because drinks might sometimes be spilled?

STATEMENT OF THE CASE

The MassDLA, as *amicus curiae*, adopts the defendant-appellee's statement of the case regarding the prior proceedings.

STATEMENT OF THE FACTS

The MassDLA, as *amicus curiae*, adopts the defendant-appellee's statement of the facts.

ARGUMENT

I. Extending the Mode of Operation Approach Beyond Self-Service Establishments Will Engulf the Remainder of Negligence Law for Premises Liability Cases and Will Improperly Make Property Owners General Insurers of Their Customers' Safety.

Historically, Massachusetts has followed the traditional approach governing premises liability. *Sheehan v. Roche Bros. Supermarkets, Inc.*, 448 Mass. 780, 783 (2007). A store owner has been required to maintain its 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." *Id.* at 783-84, *quoting Mounsey v. Ellard*, 363 Mass. 693, 708 (1973). However, the law has afforded store owners a reasonable opportunity to discover and correct any hazards before liability attaches. *Id.* at 784, *citing Barry v. Beverly Enterprises-Mass., Inc.*, 418 Mass. 590, 593 (1994), *Gilhooley v. Star Mkt. Co.*, 400 Mass. 205, 207-208 (1987) and *Oliveri v. Massachusetts Bay Transp. Auth.*, 363 Mass. 165, 166 (1973). Under the traditional approach, "premises liability attaches only if a store owner has actual or constructive notice of the existence of the dangerous condition,

sufficient to allow time for the owner to remedy the condition." *Id., citing Gallagher v. Stop & Shop, Inc.*, 332 Mass. 560, 563 (1955).

The RESTATEMENT (SECOND) OF TORTS, § 343 (1965), states:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

Id. at 782.

Under this traditional approach to premises liability, the plaintiff is required to prove a store caused a substance, matter or item to be on the floor; the store operator had actual knowledge of its presence; or the substance, matter or item had been on the floor so long that the store operator should have been aware of the condition. *Id.* at 782-83.

It is well-established that a property owner's duty of reasonable care does not make it an insurer of its property, "nor does it impose unreasonable maintenance burdens." *Papadopoulos v. Target Corp.*,

457 Mass. 368, 384 (2010), *quoting Mounsey*, 363 Mass. at 709. Similarly, a landowner is "not obliged to supply a place of maximum safety, but only one which would be safe to a person who exercises such minimum care as the circumstances reasonably indicate." *Barry*, 418 Mass. at 593, *quoting Toubiana v. Priestly*, 402 Mass. 84, 88 (1988). The traditional approach to premises liability is built on these bedrock tenets.

It is also settled that the mere happening of an accident does not establish negligence. *Reardon v. Boston Elev. Ry.*, 247 Mass. 124, 126 (1923). Rather, to prevail on a claim of negligence, a plaintiff must prove that the defendant owed the plaintiff a duty of reasonable care, that the defendant breached that duty, that damage resulted, and that there was a causal relation between the breach of the duty and the damage. *Lev v. Beverly Enterprises-Mass., Inc.*, 457 Mass. 234, 239-240 (2010).

In *Sheehan*, the Supreme Judicial Court refined the traditional approach to premises liability by adopting the "mode of operation" approach for cases involving "self-service grocery store[s]." *Id.* at 781, 790. *Sheehan* did not announce this "mode of operation" approach "as a wholly new law, but merely a

refinement of the elements of proof in premises liability cases." *Id.* at 791 n.9. This refinement of the elements of proof was "*based on the change in grocery stores from individualized clerk-assisted to self-service operations*." *Id.* at 784 (emphasis added). Under the mode of operation approach, if "the nature of the defendant's business . . . gives rise to a substantial risk of injury to customers from slip and fall accidents," and "the plaintiff's injury was proximately caused by such an accident within the zone of risk," *Sheehan* allows a customer to hold a self-service grocery store liable if that customer "proves that the store owner failed to take all reasonable precautions necessary to protect invitees from these foreseeable dangerous conditions." *Id.* at 785-86.

The *Sheehan* court specifically held that "[t]he adoption of the mode of operation approach will not modify the general rule governing premises liability requiring a plaintiff to prove that an owner had either actual or constructive notice of an unsafe condition on the premises." *Id.* at 791. "However, if a plaintiff proves 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, and the plaintiff slips as a result of the unsafe condition, the plaintiff will satisfy the notice requirement." *Id.* (Emphasis added.) The Supreme Judicial Court ruled "this new approach to premises liability does not make the owner of a self-service or modern grocery store an insurer against all accidents, but instead removes the burden on the victim of a slip and fall to prove that the owner or the owner's employee had actual or constructive notice of the dangerous condition or to prove the exact failure that caused the accident."[1] *Id.* at 790.

In *Sheehan*, the plaintiff shopping at a self-service grocery store slipped and fell after stepping on a grape that had fallen from a fruit display in the produce department. *Id.* at 781. "In this particular grocery store, all grapes were packaged in individually sealed bags, easily opened by hand, and placed in a wicker basket," and "[t]he grapes were

[1] As the *Sheehan* court noted, the mode of operation approach only modifies prong (a) of the requirements of the RESTATEMENT (SECOND) OF TORTS, § 343 (1965); therefore, in order for liability to attach, prongs (b) and (c) must also be satisfied. *Id.* at 792.

located on a tiered display table, surrounded by mats." *Id.*

The *Sheehan* court recognized that the self-service nature of the supermarket permitted other patrons to create hazardous conditions by dropping a grape on which the plaintiff slipped. *Id.* at 784. "*In a self-service grocery store, merchandise is easily accessible to customers, which results in foreseeable spillage and breakage that customers may encounter* while shopping, thus requiring store owners to use a degree of care commensurate with the risks involved." *Id.* (Emphasis added.) Therefore, based upon the foreseeable spillage and breakage resulting from customer self-service in the grocery store, the *Sheehan* court used the mode of operation approach, rather than the traditional approach. However, the *Sheehan* court recognized the limitations of the mode of operation approach and specifically cautioned that its adoption of the mode of operation approach for a self-service grocery would not supplant the "general rule governing premises liability" requiring the plaintiff to prove actual or constructive notice of an unsafe condition. *Id.* at 791.

Extending the mode of operation approach beyond self-service businesses would eviscerate the traditional approach – the "general rule governing premises liability" – which requires actual or constructive notice of an unsafe condition. As the Arizona Court of Appeals reasoned:

> The 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.

Borota v. University Med. Center, 176 Ariz. 394, 396, 861 P.2d 679 (1993), *quoting Chiara v. Fry's Food Stores of Arizona, Inc.*, 152 Ariz. 398, 733 P.2d 283 (1987)(emphasis added). The *Sheehan* court cited the Supreme Court of Arizona's decision in *Chiara* with approval throughout its opinion.

While there is a strong trend toward recognizing some form of a mode of operation rule, "most jurisdictions have applied it narrowly." *FGA, Inc. v. Giglio*, 278 P.3d 490, 496-97 (Nev. 2012). *See Fisher v. Big Y Foods, Inc.*, 298 Conn. 414, 3 A.3d 919, 928 n.21 (2010)(noting that although 22 jurisdictions have

adopted some variation of the mode of operation rule, "the vast majority of those jurisdictions applied it narrowly"). As the Appeals Court found "[m]any of the jurisdictions relied on in *Sheehan* had already begun refining the application of the mode of operation approach, or have since reevaluated their earlier analysis and limited their earlier holdings, or were, at least in two cases, overruled by their State legislature." *Sarkisian v. Concept Restaurants, Inc.*, 86 Mass. App. Ct. 1116, 2014 Mass. App. Unpub. LEXIS 1077, *6-7 (Oct. 17, 2014).

Furthermore, as the Appeals Court observed, since *Sheehan*, the Massachusetts courts, for the most part, have been unwilling to expand the holding of *Sheehan* to cases not involving slip and falls caused by an owner's self-service mode of operation.[2] *Id.* at *5.

[2] The Appeals Court noted that, in *Mills v. American Multi-Cinema, Inc.*, 30 Mass. L. Rptr. 535, 536 (Nov. 15, 2012), a Superior Court Justice applied the mode of operation test to a slip-and-fall case in a darkened movie theater auditorium. *Id.* at *5 n.3. However, this decision makes little sense since movies can only be shown in darkened theaters. In *Kearns v. Horsley*, 144 N.C. App. 200, 205, 552 S.E.2d 1, *rev. denied* 354 N.C. 573, 559 S.E.2d 179 (2001), the North Carolina Appeals Court held that movie theaters being darkened cannot be a dangerous mode of operation because the theater necessarily has to be darkened to show the movie. Simply put, "movie theaters could not

- footnote cont'd -

See, e.g., Yeshulas v. Macy's Retail Holdings, Inc., 30 Mass. L. Rptr. 167 (2012) (court held that *Sheehan* did not apply to slip and fall on water in the main aisle of a department store on a rainy day); *Felt Enters., Inc. v. Chau Chow, II, Inc.*, 28 Mass. L. Rptr. 252 (2011)(court held that *Sheehan* did not apply to restaurant because it was not a self-service establishment since patrons do not have independent access to alcoholic beverages).

Furthermore, even with respect to self-service supermarkets, the Massachusetts courts have concluded that *Sheehan* does not control unless the condition causing the fall "was the result of customer self-service." *Tavernese v. Shaw's Supermarkets, Inc.*, 72 Mass. App. Ct. 1107, 2008 Mass. App. Unpub. LEXIS 887, *1, *further app. rev. denied* 452 Mass. 1105 (2008) (unpublished Rule 1:28 decision). *See, e.g., Gurvich v. Stop & Shop Cos.*, 25 Mass. L. Rptr. 597 (2009) (court held that *Sheehan* did not apply to slip and fall on water near entrance of supermarket on a rainy day because the "attractive presentation of products

---

do business at all if they could not be darkened." *Id.* Further, applying a mode of operation rule to a movie theater would improperly make it a general insurer of its customers' safety.

on a supermarket's shelves no matter how alluring, does not constitute an inherently dangerous 'mode of operation'"); *Smart v. Demoulas Supermarkets, Inc.*, 2008 Mass. App. Div. 105 (court held that *Sheehan* did not apply to a slip and fall on water in the frozen foods section of a supermarket because the puddle of water could not be "connected to customers' careless handling of produce, or containers").

In *Tavernese*, the Appeals Court held that the mode of operation test did not apply to the supermarket where the accident was caused by slush in the vestibule of the store. *Tavernese*, 2008 Mass. App. Unpub. LEXIS 887 at *1. The *Tavernese* court found that the fact that patrons must enter the premises through the vestibule "does not transform the store's mode of operation into a 'self-service' model," because it had nothing to do with the "customers' ability to help themselves to goods," which is the hallmark of a self-service establishment to which the mode of operation test applies. *Id.*

Moreover, the Appeals Court recently held that in order for *Sheehan* to apply the plaintiff must produce evidence establishing a causal link between the self-service store's mode of operation and the condition

that caused the fall. *Curet v. Walgreens Co.*, 85 Mass. App. Ct. 1119, 2014 Mass. App. Unpub. LEXIS 619, *3-4 (2014) (unpublished Rule 1:28 decision). In *Curet*, "there was simply no evidence that the presence of any cream on the floor was in any way connected to Walgreen's self-service mode of operation" – there was no evidence of an open or broken container or testers or any means for the cream to get on the floor. *Id.*

The Connecticut Supreme Court cogently explained why the mode of operation rule must be applied narrowly, even when dealing with a self-service business, as follows:

> 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 customers, and the competing policy consideration, often cited in slip and fall jurisprudence, that businesses are not general insurers of their customers' safety. We concluded 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.

Fisher, 3 A.3d at 928 n.21.

Here, since the defendant nightclub was not a self-service establishment, the mode of operation rule should not be applied. Applying the mode of operation test would obliterate the traditional approach to premises liability, which requires actual or constructive notice of an unsafe condition, and it would convert the nightclub into a general insurer of its customers' safety and improperly impose unreasonable maintenance obligations. *See Papadopoulos*, 457 Mass. at 384. This is particularly so given the plaintiff's concession that the liquid had appeared within "under a minute" of her having traversed the same path on the dance floor, *Sarkisian*, 2014 Mass. App. Unpub. LEXIS 1077 at *10, and given that 13 nightclub employees (eight security staff members, three barbacks/bussers, the club manager and the general manager) were responsible for maintenance of the nightclub that night. (App. 43-44, 47, 59, 60-61, 67-68, 76.) Moreover, there was no evidence of any other slip-and-fall accidents on liquid on the nightclub's dance floor. (App. 102-103.)

Additionally, using the mode of operation approach would let the plaintiff get to a jury based upon utter speculation that a nightclub customer

caused the liquid to be on the floor. However, there is no evidence in the record that the liquid on which the plaintiff slipped and fell was, in fact, a spilled drink. Rather, the plaintiff testified that she fell on a "wet surface," and her companion testified that she had "no idea" what the liquid was. (App. 48, 49-50, 119.)

Furthermore, limiting the use of the mode of operation approach to self-service establishments would provide a bright-line rule and an objective test; whereas, extending the mode of operation rule beyond self-service establishments would undoubtedly result in subjective line-drawing. Any time customer interference with a business' operations was potentially conceivable, no matter how remote, the mode of operation test could be applied if the rule were to be applied outside the self-service context.

On the other hand, the hallmark of a self-service establishment to which the mode of operation test applies is the "customers' ability to help themselves to goods." *Tavernese*, 2008 Mass. Unpub. LEXIS 887 at *1. This hallmark is easily applied and will achieve uniform results. Additionally, this hallmark has the salutary effect of limiting the application of the

mode of operation within self-service establishments where the accident had nothing to do with a customer's ability to help himself or herself to goods in that self-service establishment.

In this case, the nightclub's customers were not permitted to serve themselves drinks. Rather, they were served drinks by the nightclub's bartenders. Therefore, the mode of operation approach should not be applied here since the nightclub was not a self-service operation.

Finally, if the mode of operation test is applied here outside the self-service context, where will it stop? Would it apply to slip and fall accidents at Fenway Park or Gillette Stadium where fans are permitted to walk to their seats with drinks and food that they purchased from the concession stands? If so, that would cause a sea change in premises liability law and would subject property owners to essentially strict liability. It would also greatly burden the trial courts by forcing cases to trial that otherwise would have been dismissed at the summary judgment stage under the traditional approach to premises liability. Significantly, neither the plaintiff nor the Massachusetts Academy of Trial

Attorneys offers any limiting principle as to why, under the plaintiff's theory, the mode of operation approach should not be applied to locations like Fenway Park or Gillette Stadium.

II. Application of the Mode of Operation Approach to this Case Would Improperly Make the Entire Nightclub a "Zone of Risk" Simply Because Drinks Might Sometimes Be Spilled.

A nightclub, such as the defendant-appellee, could not do business at all if it could not serve drinks. *See Konesky v. Post Road Entm't*, 144 Conn. App. 128, 72 A.3d 1152, 1161, *cert. denied* 310 Conn. 915, 76 A.3d 630 (2013). In *Konesky*, the Connecticut Court of Appeals held that the mode of operation test did not apply to the service of beer from ice-filled tubs in a nightclub. As the *Konesky* court reasoned:

> The service of cold drinks will inevitably result in slippery surfaces, as drinks are spilled or condensation from drink accumulates, but this will happen regardless of whether a nightclub chooses to serve beer from a "beer tub" propped on a speaker or from behind a more traditional bar. *Put simply, a nightclub does not create liability under the mode of operation doctrine simply by serving chilled beer*.

Id. (Emphasis added.) The *Konesky* court also found that if it adopted the plaintiff's theory, then the entire nightclub would constitute a "zone of risk," making the requirement for the plaintiff to establish

that her injury occurred within some specific zone of risk superfluous. *Id.* at 1162. As the *Konesky* court concluded:

> Moreover, if we were to accept that the defendant's service of beer constituted an inherently hazardous mode of operation, virtually the entire nightclub would become a "zone of risk" simply because drinks do sometimes spill or otherwise produce slippery surfaces. [Citation omitted.] "Accordingly, the requirement of establishing that an injury occurred within some 'zone of risk' essentially would be rendered superfluous." [Citation omitted.] The result would be that any slip and fall on a wet surface, no matter how briefly the slippery condition existed, would shift the burden to the nightclub's owners to show that they acted reasonably. This would be inconsistent with the Supreme Court's admonition that the mode of operation rule is meant to be a narrow exception to the notice requirements under traditional premises liability law.

Id. (Emphasis added.)

In *Konesky*, the "only customer interference alleged by the plaintiff was that patrons who purchased beers from the tubs would move around the bar 'carrying, consuming and discarding the wet beer bottles or cans. . . .'" *Id.* That allegation was insufficient to trigger the mode of operation rule because "[i]f the mode of operation rule could be satisfied by bar patrons carrying wet glasses, there

would be no effective limitation on the application of the rule." *Id.*

Here, as in *Konesky*, application of the mode of operation approach would turn the entire nightclub into a "zone of risk." The 50-foot dance floor comprises the majority of the nightclub. To access the seating area in the nightclub, one must traverse the dance floor. The nightclub could not do business if it could not serve drinks. Nor could it do business unless its patrons were permitted to move about the nightclub with any beverages they purchased. Therefore, the mode of operation test should not be applied here as it would effectively impose strict liability on the nightclub for conducting its business by serving drinks to its customers. Finally, as the *Konesky* court concluded, if the mode of operation rule were to be applied here, there would be no effective limitation on it.

CONCLUSION

For the reasons set forth above, the *amicus curiae*, MassDLA, respectfully requests that this Court affirm the Appeals Court's decision upholding the grant of summary judgment to the defendant-appellee.

Respectfully submitted,

MASSACHUSETTS DEFENSE LAWYERS ASSOCIATION,

By its attorneys,
O'MALLEY AND HARVEY, LLP,

/s/ John F. Brosnan

JOHN F. BROSNAN
BBO #556678
O'MALLEY AND HARVEY, LLP
155 Federal Street, 12th Floor
Boston, Massachusetts 02110-1735
TEL: (617) 357-5544
FAX: (617) 204-3477
JBrosnan@omalleyharvey.com

Dated: March 4, 2015

ADDENDUM

ADDENDUM TABLE OF CONTENTS

H

NOTICE: THIS IS AN UNPUBLISHED OPINION.

Appeals Court of Massachusetts.
Alejandro CURET
v.
WALGREENS COMPANY.

No. 13–P–1250.
May 12, 2014.

By the Court (GRASSO, GREEN & FECTEAU, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** Alejandro Curet appeals from a Superior Court judgment, entered on summary judgment, dismissing his negligence claim against the Walgreens Company. We affirm.

1. *Background.* On April 2, 2008, Curet went to Walgreens in the Roxbury section of Boston to pick up a prescription medication. He was walking on crutches as a result of an earlier fall and injury to his knees. He went down an aisle towards the pharmacy. Among the items for sale in that aisle were hand creams. As he walked down the aisle, he did not see anything on the floor.

He picked up the medication at the pharmacy, paid for it, and started walking back down the same aisle. He did not see anything on the floor before he fell. When he was on the floor, he did not feel any wetness or moisture.[FN1] 2. *Discussion.* Traditionally, in foreign substance slip and fall cases, to prove negligence a plaintiff had to "identify the hazardous condition that caused him to slip, prove that it was present prior to his injury, and demonstrate that the defendant either caused the substance to be there, had actual knowledge of its existence, or had a reasonable opportunity to discover and remedy it." *Thorell v. ADAP, Inc.*, 58 Mass.App.Ct. 334, 337 (2003). Even assuming Curet could introduce admissible evidence that there was, in fact, cream on the aisle floor that caused him to slip,[FN2] he cannot point to any evidence that Walgreens caused the cream to be there, knew of its existence, or had a reasonable opportunity to discover it.

FN1. In opposition to Walgreens's summary judgment motion, Curet filed an affidavit asserting that after he fell, he saw some white cream on the floor to his left. In his earlier deposition, he stated that a security guard came to his assistance and told him that there was liquid on the floor, but did not point it out to Curet, and Curet did not see it.

Curet does not challenge the judge's ruling striking that affidavit because it contradicted his deposition statement that he did not see anything on the floor. See *Ng Bros. Constr., Inc. v. Cranney*, 436 Mass. 638, 647–648 (2002). Accordingly, we do not consider the averments in that affidavit as part of our review. Even were we to do so, Curet would fare no better.

FN2. Even if Curet could introduce evidence of the security guard's statement as a statement of a party opponent, as the motion judge considered, other essential elements of Curet's proof were totally absent and unlikely to be forthcoming at trial.

Similarly unavailing is Curet's contention that under the "mode of operation" theory enunciated in *Sheehan v. Roche Bros. Supermkts., Inc.*, 448 Mass. 780, 788–790 (2007), Walgreens can be charged with having knowledge of a dangerous condition on its premise, because cream on the floor is a "reasonably foreseeable dangerous condition ... re-

lated to [Walgreens's] self-service mode of operation." *Id.* at 786.

Unlike in *Sheehan, supra*, where the presence of grapes on the floor was a reasonably foreseeable dangerous consequence of the grocery store's self-service mode of operation, here there was simply no evidence that the presence of any cream on the floor was in any way connected to Walgreens's self-service mode of operation. As the motion judge noted, "There is no evidence of an open or broken container or testers or any means for the cream to get to the floor." Likewise, Curet presented no evidence regarding the manner in which creams were displayed, shelved, or accessed that could amount to a "reasonably foreseeable dangerous condition" arising from Walgreens's method of operation. Absent any evidence establishing a link between Walgreens's mode of operation and the alleged cream on the floor, Curet had no reasonable expectation of proving an essential element of his case at trial. See *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 (1991).

Judgment affirmed.

Mass.App.Ct.,2014.
Curet v. Walgreens Co.
85 Mass.App.Ct. 1119, 7 N.E.3d 1122, 2014 WL 1874854 (Mass.App.Ct.)

END OF DOCUMENT

NOTICE: THIS IS AN UNPUBLISHED OPINION.

Appeals Court of Massachusetts.
Angela SARKISIAN
v.
CONCEPT RESTAURANTS, INC.[FN1]

FN1. Doing business as Liquor Store.

No. 13–P–154.
October 17, 2014.

By the Court (KAFKER, TRAINOR & MALDONADO, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** The plaintiff, Angela Sarkisian, appeals from a decision and order of the Appellate Division of the District Court affirming summary judgment in favor of the defendant entered in the District Court. The Appellate Division concluded that the "mode of operation" approach to slip and fall liability, which dispenses with the requirement that a plaintiff prove that the defendant caused or had actual or constructive knowledge of the spilled liquid, does not apply to the facts of this case. See *Sheehan v. Roche Bros. Supermarkets, Inc.*, 448 Mass. 780, 786 (2007).

On appeal, the plaintiff argues that the mode of operation approach to premises liability should apply because the defendant's chosen business mode of operation made it reasonably foreseeable that drinks would be spilled on the floor of the defendant's club, creating a dangerous condition.

Facts. We view the evidence in the light most favorable to the plaintiff. See *Augat, Inc. v. Mut. Ins. Co.*, 410 Mass. 117, 120 (1991). The Appellate Division's decision recited the following:

"On August 22, 2009, Sarkisian attended a bachelorette party at the Liquor Store in Boston, Massachusetts. The club contained a wooden dance floor, measuring fifty feet in length. There were two bars on the dance floor. To the rear of the dance floor, there were two steps leading to a lounge area. Patrons were permitted to bring their drinks onto the dance floor.

"Sarkisian and her friends arrived at the club around 9:45 *P.M.* As the night progressed, the club became busy and the dance floor crowded. The club was dimly lit, and strobe lights flashed onto the dance floor. At 1:30 *A. M.*, Sarkisian left a group of friends on the dance floor, walked six feet to the stairs, and ascended the two steps to the lounge area to look for other friends. Sarkisian reached the lounge area, looked for her friends for less than one minute, and returned down the stairs to the dance floor. She took a few steps toward her friends, and slipped on a 'little puddle,' the size of about 'half a cup' of liquid. Her pants were 'soaked.' She broke her leg in two places."

Discussion. Under the traditional approach to slip and fall premises liability, the plaintiff "must identify the hazardous condition that caused [her] to slip, prove that it was present prior to [her] injury, and demonstrate that the defendant either caused the substance to be there, had actual knowledge of its existence, or had a reasonable opportunity to discover and remedy it." *Thorell v. ADAP, Inc.*, 58 Mass.App.Ct. 334, 337 (2003).

The Supreme Judicial Court first acknowledged a dissatisfaction with the traditional approach to slip and fall liability in *Gilhooley v. Star Mkt. Co.*, 400 Mass. 205, 208 (1987), by observing that

"in an appropriate case, 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. It is not always necessary for liability that the

produce have been on the floor long enough for the storekeeper to have had a reasonable opportunity to have seen and removed it." FN2

FN2. A mode of operation exception to the traditional notice requirement had already been recognized in a number of jurisdictions before the *Gilhooley* decision. See, e.g., *Chiara v. Fry's Food Stores of Arizona, Inc.*, 152 Ariz. 398, 400 (1987); *Wollerman v. Grand Union Stores, Inc.*, 47 N.J. 426, 429–430 (1966); *Mahoney v. J.C. Penney Co.*, 71 N.M. 244, 259 (1962); *Worsham v. Pilot Oil Corp.*, 728 S.W.2d 19, 20 (Tenn.Ct.App.1987); *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 295 (Tex.1983); *Forcier v. Grand Union Stores, Inc.*, 128 Vt. 389, 394 (1970); *Steinhorst v. H.C. Prange Co.*, 48 Wis.2d 679, 683–684 (1970); *Buttrey Food Stores Div. v. Coulson*, 620 P.2d 549, 552–553 (Wyo.1980).

***2** Twenty years later, in *Sheehan v. Roche Bros. Supermarkets, Inc.*, 448 Mass. at 785–786, the Supreme Judicial Court adopted the mode of operation approach while modifying, but not eliminating, the traditional approach to slip and fall premises liability. The court observed that

"[t]he modification of the traditional premises liability approach is, in large part, based on the change in grocery stores from individualized clerk-assisted to self-service operations and focuses on the reasonable foreseeability of a patron's carelessness in the circumstances, instead of on constructive or actual notice."

Id. at 784.

In certain slip and fall cases, the plaintiff is relieved of the requirement to prove that "the owner or the owner's employees had actual or constructive notice of the dangerous condition or to prove the exact failure that caused the accident." *Id.* at 790. In such a case the plaintiff is now required to prove that "the owner could reasonably foresee or anticipate that a foreseeable risk stemming from the owner's mode of operation could occur." *Id.* at 791. Negligence still must be inferred from the defendant's unreasonable disregard of its mode of operation and inadequate steps taken to protect the plaintiff from injury. *Ibid.*

In *Sheehan*, the court acknowledged that other jurisdictions modified their premises liability laws for slip and fall cases in an attempt to accommodate modern merchandising techniques. *Id.* at 784. The court has given no further direction since *Sheehan* was published in 2007. For the most part our trial courts have limited the mode of operation approach to application in self-service grocery stores, but this is not universally so, and as more cases are being pleaded using the mode of operation approach, it is being applied to diverse and unexpected situations. FN3

FN3. The Superior Court has applied the mode of operation approach to movie theaters, generally holding that "the concept of mode of operation is the proper standard to be applied to the typical premises liability slip and fall case when the unique venue of a darkened movie theater auditorium is involved." *Mills v. American Multi–Cinema, Inc.*, 30 Mass. L. Rep. 535, 536 (Mass.Super.2012). Similarly, the mode of operation approach has been applied to a night club which may have handed beads to entering patrons and placed beads on club tables as part of a mardi gras event. "Just as the supermarket's mode of operation in providing a self-service grape display accessible to customers created a foreseeable risk that an errant grape would roll onto the floor and cause a hazardous condition, if L.J.B. placed several strings of beads on each table at the beginning of a Mardi Gras event, it could be reasonably foreseeable that patrons

> would pick up the beads and that, during the course of the festivities, beads would end up on the floor." *Vincequere, v. J.B. & Assocs., Inc.*, 26 Mass. L. Rep. 85, 86 (Mass.Super.2009). Of course, this logic implies that anything that does happen is always reasonably foreseeable.

Many of the jurisdictions relied on in *Sheehan* had already begun refining the application of the mode of operation approach, or have since reevaluated their earlier analysis and limited their earlier holdings, or were, at least in two cases, overruled by their State legislature. The *Sheehan* court relied primarily on State case law from Arizona, Kansas, Washington, Colorado, Connecticut, Florida and New Jersey when presenting our version of a mode of operation approach. Arizona, Kansas, Washington, and Connecticut courts have all clarified that there are limits to when their mode of operation approach applies.[FN4] Florida and Colorado have both abrogated the approach by statute. See Fla. Stat. § 768.0755 (2010); Colo. Rev. Stat § 13–21–115 (2006). Since the case law has evolved sufficiently, but with different emphasis and conditions of application depending on the jurisdiction considered, we hesitate to expand or refine the limited and specific holding in *Sheehan* without further direction from the Supreme Judicial Court.

> FN4. Arizona, which was relied upon primarily by the court in *Sheehan*, has expressed limitations to the mode of operation approach. They have since made an effort to define what "regularly" occurs means and have emphasized that the concept requires more than a showing that a few incidents occurred in the past. See *Borota v. Univiversity Med. Center*, 176 Ariz. 394, 396 (1993); *Contreras v. Walgreens Drug Store No. 3837*, 214 Ariz. 137, 139 (2006). Kansas case law now agrees that there must be evidence that the dangerous condition would regularly occur for the exception to apply. *Brock v. Richmond–Berea Cemetery Dist.*, 264 Kan. 613, 623–624 (1998). Kansas case law also holds that a self-service mode of operation is not inherently dangerous by itself and that the "rule is not intended to uniformly cover all self-service situations." *Hembree v. Wal–Mart of Kansas*, 29 Kan.App.2d 900, 904 (2001). The Washington Supreme Court has clarified the rule stating that it "should be limited to specific unsafe conditions that are continuous or foreseeably inherent in the nature of the business or mode of operation," *Wiltse v. Albertson's, Inc.*, 116 Wash.2d 452, 461 (1991), and that the "rule does not apply to the entire area of the store in which customers serve themselves." *Ingersoll v. DeBartolo, Inc.*, 123 Wash.2d 649, 653–654 (1994). The Connecticut Supreme Court has clarified the mode of operation approach to situations in which a specific dangerous mode of operation is alleged beyond simply self-service. *Fisher v. Big Y Foods, Inc.*, 298 Conn. 414, 419–420 (2010). Recently, in a situation similar to the one we consider here, the Connecticut Appeals Court expanded the mode of operation approach to businesses that are not strictly self-service but also clarified that the approach cannot be used if the alleged dangerous mode of operation is the "inevitable way of conducting the sort of commerce in which the business is engaged." *Konesky v. Post Rd. Entertainment*, 144 Conn.App. 128, 139, 142–143 (2013) ("The service of cold drinks will inevitably result in slippery surfaces, as drinks are spilled or condensation from drinks accumulates"). Similarly, the North Carolina Appeals Court, applying New Jersey law, held that movie theatres being darkened cannot be a dangerous mode of operation because the theatre has to be darkened to show the movie. *Kearns v. Horsley, Donaldson & Black*, 144 N.C.App. 200, 205 (2001).

We agree with the Appellate Division that the mode of operation approach to slip and fall cases does not apply to situations in which the defendant is not a self-service establishment. We also agree that the Liquor Store was not a self-service establishment within the meaning of *Sheehan.* The plaintiff therefore "must identify the hazardous condition that caused [her] to slip, prove that it was present prior to [her] injury, and demonstrate that the defendant either caused the substance to be there, had actual knowledge of its existence, or had a reasonable opportunity to discover and remedy it." *Thorell v. ADAP, Inc.*, 58 Mass.App.Ct. at 337 . The Appellate Division concluded, "[T]he evidence [does not] permit an inference that the Liquor Store was aware of the liquid or that the liquid had remained on the dance floor long enough so that, in the exercise of reasonable care, the Liquor Store should have discovered and remedied that condition." The plaintiff conceded that the liquid had appeared within "under a minute" of her having traversed the same path on the dance floor. We agree that "less than one minute could not provide a reasonable opportunity for staff to discover the spilled liquid."

***3** *Decision and order of the Appellate Division affirmed.*

Mass.App.Ct.,2014.
Sarkisian v. Concept Restaurants, Inc.
86 Mass.App.Ct. 1116, 18 N.E.3d 1135, 2014 WL 5285600 (Mass.App.Ct.)

END OF DOCUMENT

H

Only the Westlaw citation is currently available.NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Appeals Court of Massachusetts.
Barbara A. TAVERNESE
v.
SHAW'S SUPERMARKETS, INC.

No. 07–P–1829.
July 15, 2008.

By the Court (RAPOZA, C.J., GRAHAM & MEADE, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** The plaintiff, Barbara Tavernese, appeals from the allowance of the defendant's motion for summary judgment. She argues that the judge wrongly concluded that there was insufficient evidence as matter of law to permit a finding of negligence on the part of the defendant, Shaw's Supermarkets, Inc. (Shaw's). We affirm.

We agree with the Superior Court judge that the instant case is not controlled by *Sheehan v. Roche Bros. Supermarkets, Inc.*, 448 Mass. 780, 791 (2007), which adopted a "mode of operation" approach to premises liability, alleviating the plaintiff's burden to prove notice in instances where the dangerous condition stemmed from the self-service mode of operation of the store. The fact that the patrons of the Shaw's in question must enter the premises through the vestibule where the plaintiff fell does not transform the store's mode of operation into a "self-service" model versus any other model. Indeed, customers' ability to help themselves to goods, rather than be assisted by a store employee, did not factor into the condition at issue here, unlike the situation in *Sheehan*, which was the result of customer self-service. See *id.* at 781.

Furthermore, we conclude that the judge was correct in his assessment that *Wexler v. Stanetsky Memorial Chapel of Brookline, Inc.*, 2 Mass.App.Ct. 750 (1975), governs the analysis in this case. In *Wexler*, this court held that negligence on the part of the premises owner cannot be found where "transitory conditions ... due to normal use in wet weather, according to ordinary experience could not in reason have been prevented." *Id.* at 751, quoting from *Lanagan v. Jordan Marsh Co.*, 324 Mass. 540, 542 (1949). Notably, the plaintiff before us asserted that the weather conditions and the foot traffic that deposited slush from outside to the area just inside the store were the sole causes of the dangerous condition; no allegation was advanced that Shaw's actions contributed to the condition of the floor. (A.44, 45) The judge properly concluded that the facts here were, if anything, more favorable to the defendant than those recited in *Wexler*, which were insufficient as matter of law to find the defendant negligent.

The plaintiff's characterization of the conflicting accounts of the frequency with which Shaw's employees were dry mopping the area in question does not convince us otherwise. Even viewed in the light most favorable to the plaintiff, that evidence is insufficient to alter the application of the rule governing hazards caused by transitory conditions. This is particularly true where the plaintiff supplies no evidence—and indeed does not argue—that the water was of an unusual depth or extent, that the composition of the floor itself contributed to the dangerous condition by being uneven or particularly slippery, or that the water was deposited there other than by foot traffic. See *Wexler*, *supra* at 751–752.

Finally, the plaintiff has not adduced sufficient evidence that the condition at issue was not "open and obvious" such that the owner of the premises had no duty to warn. See *O'Sullivan v. Shaw*, 431

Mass. 201, 211 (2000). Indeed, by her own account, the water and slush was black, not clear, and she was aware of the slushy conditions outside that created the hazard on the floor. (A.41–42) We therefore affirm the allowance of the defendant's motion for summary judgment and the corresponding dismissal of the complaint.

***2** *So ordered.*

Mass.App.Ct.,2008.
Tavernese v. Shaw's Supermarkets, Inc.
72 Mass.App.Ct. 1107, 889 N.E.2d 982, 2008 WL 2726318 (Mass.App.Ct.)

END OF DOCUMENT

CERTIFICATE OF COMPLIANCE PURSUANT TO MASS. R. A. P. 16(k)

I, John F. Brosnan, counsel for the Massachusetts Defense Lawyers Association ("MassDLA"), *amicus curiae*, hereby certify, in accordance with Mass. R. App. P. 16(k), that the brief of the MassDLA complies with the rules of court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 16(a)(6); Mass. R. App. P. 16(e); Mass. R. App. P. 16(f); Mass. R. App. P. 16(h); Mass. R. App. P. 18 and Mass. R. App. P. 20.

/s/ John F. Brosnan

JOHN F. BROSNAN

CERTIFICATE OF SERVICE

I hereby certify that I have served two (2) true copies of this *amicus brief* on counsel of record:

Karen L. Stern, Esq.
Bernstein & Stern, LLC
10 Mechanic Street, Suite 150
Worcester, MA 01608
kls@bbtattys.com

William Joseph Flanagan, Esq.
Jessica M. O'Brien, Esq.
Morrison Mahoney LLP
250 Summer Street
Boston, MA 02210
jflanagan@morrisonmahoney.com
jobrien@morrisonmahoney.com

Thomas R. Murphy, Esq.
Law Offices of Thomas R. Murphy
133 Washington Street
Salem, MA 01970
trmurphy@trmlaw.net

by email and priority mail, postage prepaid, on this 4th day of March, 2015.

/s/ John F. Brosnan
JOHN F. BROSNAN

NO. SJC-11786

ANGELA SARKISIAN,
PLAINTIFF-APPELLEE,

v.

CONCEPT RESTAURANTS, INC. D/B/A LIQUOR STORE,
DEFENDANT-APPELLANT.

ON FURTHER APPELLATE REVIEW OF THE APPEALS COURT'S
AFFIRMANCE OF THE APPELLATE DIVISION OF
THE DISTRICT COURT DEPARTMENT

BRIEF FOR THE *AMICUS CURIAE* MASSACHUSETTS DEFENSE LAWYERS ASSOCIATION

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS