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Andrew Flach

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Missouri Removes a Tough Hurdle for "Slip and Fall" Plaintiffs

Sheil v. T.G. & Y. Stores Co.¹

INTRODUCTION

In Sheil v. T.G. & Y. Stores Co.² the Supreme Court of Missouri made it much easier for a plaintiff to make a submissible case in a negligence action arising from a "slip and fall" in a self-service retail store. To make a submissible case before Sheil the slip and fall plaintiff had to show how long the hazard causing the fall had been on the floor.³ Time evidence had been required because without it there was no way the jury could decide whether the hazard had been on the floor so long that it should have been found and cleaned up in the exercise of reasonable care. In Sheil the court embraced a growing minority view⁴ that in self-service stores, where owners know customers often place or drop merchandise on the floor, a jury may find that the storekeeper's failure to discover and eliminate the hazard violated his duty of care even if there is no evidence of how long the hazard existed before the fall.⁵

I. FACTS OF THE CASE

In Sheil the plaintiff testified that he was turning the corner into an aisle of defendant's store when "he tripped over a box that he had not seen before and fell to the floor."⁶ After he fell, someone, whom he thought had identified herself as the assistant manager, allegedly made the following statements: "I don't know why—I don't know why they leave these boxes laying around" or "I don't know why the thing was there."⁷ The plaintiff testified that the store manager later said to him "that shouldn't have been there," or "We have a place for those things."⁸

1. 781 S.W.2d 778 (Mo. banc 1989).
2. 781 S.W.2d 778 (Mo. banc 1989).
5. Id. at 780-81.
6. Id. at 779.
7. Id. at 779.
8. Id. at 780.
The assistant manager testified that when she inspected the area after the fall she did not see anything on the floor but the oil cans that the plaintiff had knocked down when he fell. The plaintiff presented no evidence that an employee of the store had placed the box in the aisle. The plaintiff also did not present any evidence concerning how long the box had been there. The jury found for the plaintiff with the award reduced by a finding of comparative fault. The court of appeals reversed on the grounds that the element of constructive notice of the hazard to the storekeeper had not been established by substantial evidence of how long the box was on the floor. The court of appeals accepted the defendant's argument that "there was no evidentiary basis for a reasonable inference that the box had been in the aisle for a sufficient length of time so that the storeowner should have known about the dangerous condition."

II. HISTORY

"Slip and fall" cases are based on the duty of care that a possessor of land owes to an invitee. An invitee is defined as follows:

(1) An invitee is either a public invitee or a business visitor. ... (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

The duty of care that a possessor of land owes to an invitee is:

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.

9. Id.
10. Id. at 779.
11. Id.
12. Id. at 780.
13. RESTATEMENT (SECOND) OF TORTS § 332 (1965). The Restatement's definition has been accepted by Missouri courts.
14. RESTATEMENT (SECOND) OF TORTS § 343 (1965) (emphasis added). The Restatement's definition has been accepted by Missouri courts.
Under this standard the business owner has an affirmative duty to exercise reasonable care to inspect for hazardous conditions,\(^\text{15}\) as well as protect against those hazards of which he has actual knowledge.

Traditionally courts have held that to make a submissible "slip and fall" case the plaintiff must show either that the storekeeper or his employee created the hazard, which gave the storekeeper actual notice, or that it was on the floor for so long that the storekeeper had constructive notice.\(^\text{16}\) Constructive notice was imputed where the hazard had been present for so long that the storekeeper should have discovered it in the exercise of ordinary care.\(^\text{17}\) Showing constructive notice, and thereby making a submissible case, thus took evidence of how long the dangerous condition existed on the floor. The time evidence provided the jury a basis for deciding whether the storeowner should have discovered the hazard in the exercise of ordinary care.\(^\text{18}\) Most states still require time evidence to prove constructive notice.\(^\text{19}\)

Missouri has repeatedly recognized the necessity of submitting time evidence in order to make a submissible case.\(^\text{20}\) There is even a solid body of authority, apparently unique to Missouri, which holds that fifteen\(^\text{21}\) or

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15. "The occupier must not only use care not to injure the visitor by negligent activities, and warn him of latent dangers of which the occupier knows, but he must also inspect the premises to discover possible conditions of which he does not know, and take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use. . . ." Prosser, Law of Torts 4th ed. § 61 (1971).


17. Id.

18. Id.


21. Robinson v. Great Atlantic & Pacific Tea Co., 347 Mo. 421, 147 S.W.2d 648 (1941) (held that box of sweet potatoes located on floor in middle of entrance area of store for 15 minutes was not there long enough to give constructive notice to owners); Brophy v. Clisaris, 368 S.W.2d 553, 558 (Mo. Ct. App. 1963) ("[A]s a matter of law . . . 10 to 15 minutes is not a sufficient length of time to charge a defendant with constructive knowledge of a foreign object on the floor."); Varner v. Kroger Grocery & Baking Co., 75 S.W.2d 585 (Mo. Ct. App. 1934) (in a busy store with only three clerks working behind counters 15 minutes was not long enough, as a matter of law, to discover banana on floor in exercise of ordinary care).
twenty minutes is not long enough, as a matter of law, to give a storekeeper constructive notice. These cases setting fifteen or twenty minute minimum times seem an unusual intrusion by appellate courts into the fact-finding province of the jury.

While Missouri courts were setting minimum times as a matter of law, some other states were abandoning the proof of time requirement in certain circumstances. Perhaps the first case was *Mahoney v. J.C. Penney Co.*, in which the plaintiff fell down a store's stairs after stepping on a wad of gum. No one had noticed how long that particular wad of gum had been present on the stairs. Because of the evidence that wads of gum were often found on the stairs by the storeowner the court characterized the situation as one "in which a defendant is aware that a third person may create a possibly dangerous condition." In restoring the jury's award to the plaintiff the court held:

> Where the dangerous condition is not an isolated one . . . but is foreseeable because part of a pattern of conduct, a recurring incident, a general condition, or a continuing condition then we hold that . . . absent a showing of due care, plaintiff need not prove that defendant had actual or constructive knowledge of the specific item forming part of that pattern of conduct, recurring incident, etc. . . . [C]onstructive knowledge may be presumed from the prior recurring conditions.

Thus the court simply transferred the required notice from notice of the specific wad of gum to notice that people often drop their gum on the stairs.

Shortly after *Mahoney* the New Jersey Supreme Court in *Bozza v. Vornado* similarly held:

> As we view the over all problem, notice is merely one factor for determining whether the defendant has breached his duty of care. . . . Thus, we believe that when plaintiff has shown that the circumstances were such as to create the reasonable probability that the dangerous condition would occur, he need not also prove actual or constructive notice of the specific condition. Factors bearing on the existence of such reasonable probability would include the nature of the business, the general condition of the premises, a pattern of conduct or recurring incidents.

22. Grant v. National Super Markets, Inc., 611 S.W.2d 357, 359 (Mo. Ct. App. 1980) ("[W]e hold that proof the grapes were on the floor for twenty minutes, absent other circumstances, was insufficient constructive notice as a matter of law.").

23. 71 N.M. 244, 377 P.2d 663 (1962).

24. *Id.* at 256, 377 P.2d at 671.

25. *Id.* at 259, 377 P.2d at 673.


27. *Id.* at 357, 200 A.2d at 780.
The plaintiff had slipped on a slimy substance in a store snack bar. The Bozza court also noted that their holding achieved a more equitable balance of the burden of proof.  

This theme was picked up again by the court two years later in the oft-cited Wollerman v. Grand Union Stores, Inc.:  

[W]here a substantial risk of injury is implicit in the manner in which a business is conducted, and on the total scene it is fairly probable that the operator is responsible either in creating the hazard or permitting it to arise and continue it would be unjust to saddle the plaintiff with the burden of isolating the precise failure. The situation being peculiarly in the defendant's hands, it is fair to call upon the defendant to explain, if he wishes to avoid an inference by the trier of fact that the fault was probably his.

In that case the plaintiff had slipped on a string bean in the store's self-service produce department.

Louisiana has gone the furthest in this direction, holding in Kavlich v. Kramer that once a plaintiff shows there was something on the floor of a store that caused her to fall "[t]he burden then shifts to the defendant to go forward with the evidence to exculpate itself from the presumption that it was negligent."

Some courts have taken a middle of the road approach, waiving the requirement of time-on-floor proof only when the plaintiff shows a particular unsafe display method which creates an unreasonable risk of items falling on the floor. In Lingerfelt v. Winn-Dixie Texas, Inc. the defendant had displayed unwrapped boxes piled high with strawberries because the store's cellophane wrapper was broken. The court refused to follow the cases holding that the fact of self-service marketing alone was sufficient to dispense with traditional constructive notice requirements:

Shopper... would have us hold Store strictly liable for injuries caused by spilled produce, regardless... of notice of the spillage and/or opportunity to clean it up, simply because Store adopted the self-service mode of display. This we cannot do.

28. Id.
30. Id. at 430, 221 A.2d at 515.
31. Id. at 429, 221 A.2d at 514.
32. 315 So.2d 282 (La. 1975).
33. Id. at 285.
34. 645 P.2d 485 (Okla. 1982).
35. Id. at 488. It is interesting to note that the court in Sheil cited Lingerfelt as being supportive of their position when, as shown by this quote, it would have been
But the court went on to hold that

[w]hen a shopper has shown that circumstances were such as to create the reasonable probability that a dangerous condition (e.g. uncovered, heaped strawberries), would occur, the invitee need not also prove that the business proprietor had notice of the specific hazard (spilled strawberries) in order to show the proprietor breached his duty of due care to the invitee.\textsuperscript{36}

The \textit{Lingerfelt} court required a showing of some particular unsafe method of display or packaging before the plaintiff could escape the requirement of showing the time-on-floor. The court refused to hold that self-service marketing inherently posed an unreasonable risk of harm but recognized that a specific method of display could itself be a condition posing an unreasonable risk of harm. Other courts have adopted this approach.\textsuperscript{37}

\textbf{III. HOLDING}

In \textit{Sheil} the court holds that a slip and fall plaintiff no longer needs to show, as part of a submissible case, the length of time the object causing the fall was on the floor if they can instead show that the defendant uses a method of marketing which creates a danger of objects being dropped or left on the floor.

The storeowner necessarily knows that customers may take merchandise and may then lay articles that no longer interest them in the aisles. . . The storeowner, therefore, must anticipate and must exercise due care to guard against dangers from articles left in the aisle.

Past cases have placed great emphasis on the length of time the dangerous item has been in the area in which the injury occurs. These cases culminate in holdings that a showing that the item was on the floor for as much as 20 minutes is insufficient to charge the storekeeper with constructive notice. [citations omitted] By our holding, the precise time [the item was on the floor] will not be so important a factor. More important will be the method of merchandising and the nature of the article causing injury.\textsuperscript{38}

We conclude that the jury could have found that the plaintiff was injured by a hazard that could have been expected in the store by reason of its

\textsuperscript{36} 645 P.2d at 488.
\textsuperscript{38} 781 S.W.2d 778, 780 (Mo. banc 1989).
method of merchandising and that the defendant was derelict in its duty to take reasonable steps to protect customers against the dangers presented by merchandise in the aisle.  

Because self-service customers handle goods and place them in dangerous places the storekeeper has actual notice that such behavior poses an ongoing hazard to his customers. Because the storekeeper has notice of this dangerous ongoing condition the only issue is whether the storekeeper exercised ordinary care to protect from the hazard of customer-misplaced items. The court also reasons that the disadvantage facing the plaintiff in gathering evidence, compared to the storekeeper, supports easing the requirements for making a submissible case.

There is a dissent by Special Judge Flanigan which is joined by Judges Robertson and Covington. The dissenter’s first points are that self-service merchandising is hardly a recent development and that the majority’s holding is contrary to Missouri precedent. The heart of the dissent is as follows:

As I construe the principal opinion, evidence that the defendant is a self service store is sufficient to support ... [jury] findings [that in the exercise of ordinary care the defendant should have known of the condition and remedied it]. This makes a self-service store an insurer with respect to injuries sustained by an invitee by reason of an unsafe object or substance on the floor without regard to why it was there or how long it had been there. This is consistent with the notion that when misfortune strikes a person there must be another person, however innocent, who must bear the financial consequences. The instant holding will increase lawsuits in a society now overly litigious.

Thus, the dissent does not attack the reasoning behind the majority’s position so much as the feared result of making storekeepers insurers of their patrons.

### IV. ANALYSIS

A possessor of a premises has a duty to exercise ordinary care to discover and remedy conditions that pose an unreasonable risk of harm to his invitees. The traditional approach in slip and fall cases, followed by most

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39. *Id.* at 782.
40. *Id.* at 782.
41. *Id.* at 783-84.
42. *Id.* at 783.
43. *Id.* at 784.
44. See note 14, *supra*, and accompanying text.
states,\(^{45}\) is that the item on the floor is the "dangerous condition" and the issue is whether the storekeeper fulfilled his duty to exercise reasonable care to discover and remedy this condition. A showing of how long the particular item was on the floor is required for a submissible case because without such evidence there is no basis for determining whether the "dangerous condition" should have been discovered in the exercise of ordinary care. Once the jury knows how long the dangerous condition was present it may find for the plaintiff if it believes the exercise of ordinary care would have resulted in discovery and clean-up of the item in that time.

The *Sheil* approach, which has been referred to as the mode-of-operation rule,\(^{46}\) changes what the "dangerous condition" is that must be guarded against. The "dangerous condition" is not the specific item on the floor, but rather the storekeeper’s whole mode of self-service operation, which creates an ongoing danger of invitees slipping or falling on customer misplaced items in the aisles. Because the "dangerous condition" is the mode of operation the issue of whether the storekeeper should have discovered the "dangerous condition" becomes a non-issue: the storekeeper knows that he uses self-service marketing and that this mode of operation results in customer misplaced items which cause falls. Thus, under *Sheil* there is no need for time-on-floor evidence because the only inquiry left for the jury is whether the storekeeper exercised ordinary care to protect against the "dangerous condition" that is self-service marketing.

A large problem with the holding in *Sheil* is that by getting rid of time-on-floor requirements the court has left the plaintiff with no burden of showing the defendant’s lack of care. Under the traditional rule, time-on-floor evidence served two purposes: 1) it showed how long the item was on the floor so that the jury could decide whether the storekeeper would have discovered it if he had been patrolling enough, and 2) it also showed that the interval between patrols was at least as long as the time the item was on the floor. Thus, the evidence was relevant not only to the issue of notice, but also to the issue of how often the storekeeper effectively patrolled; that is, what care he exercised. The *Sheil* court comes up with good arguments for why time-on-floor evidence is not needed for notice purposes, but without any explanation leaves the plaintiff with no burden of showing the defendant’s lack of care in patrolling. Under *Sheil* the plaintiff need only show a fall caused by misplaced merchandise in a self-service market in order to get to the jury. This violates the basic tort principle that the plaintiff must present evidence of what behavior of the plaintiffs failed to measure up to ordinary care.

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45. See cases cited *supra* note 19.

This drawback of the *Shell* holding is easily remedied. Future decisions could require that when a plaintiff invokes the *Shell* doctrine she must present evidence of how often the defendant patrols or fails to patrol his aisles. If this is required the jury will have evidence of the care exercised by the storekeeper and therefore will have a basis for deciding whether such care measured up to ordinary care. Without this modification *Shell* makes it possible for a jury to return a verdict based on pure conjecture.

At the core of the holding in *Shell* is the apparent ruling that self-service marketing is itself a condition that inherently poses an unreasonable risk of harm. As the court states:

> The storeowner necessarily knows that customers may take merchandise and may then lay articles that no longer interest them in the aisles... The storeowner, therefore, must anticipate and must exercise due care to guard against dangers from articles left in the aisle. 47

From this language it could be argued that the court is holding that as a matter of law all self-service operations pose an unreasonable risk of harm from customer misplaced items. For the reasons given below courts should take this language merely to mean that it is possible for self-service marketing to pose an unreasonable danger.

The issue of whether a condition poses an unreasonable risk of harm, and whether the possessor of the premises has constructive notice of this risk, is a fact question for the jury. *Shell* should not be interpreted to mean that this fact question can be decided, as a matter of law, merely by showing that the defendant uses self-service marketing. Such an interpretation would mean that a self-service storekeeper could be held liable regardless of whether his particular method of self-service operation actually posed an unreasonable risk and regardless of whether he had notice of this. In light of this concern the court in *Chiara v. Fry's Food Stores of Ariz., Inc.*48 held:

> [A] particular mode of operation only falls within the mode-of-operation rule when a business can reasonably anticipate that hazardous conditions will regularly arise. [citations omitted]. A plaintiff must demonstrate the foreseeability of third-party interference before ... courts will dispense with traditional notice requirements.49

This approach preserves the jury's role of deciding what is foreseeable and what poses an unreasonable risk of harm. Thus, Missouri courts should not

47. 781 S.W.2d 778, 780 (Mo. banc 1989).
49. Id. at 401, 733 P.2d at 286.
take Shel to mean that any self-service marketing automatically invokes the Shell doctrine. Instead, courts should follow Chiara and require plaintiffs to prove that the particular defendant knew or should have known of the danger from customer misplaced items.

By dropping the time-on-floor requirement the Shel court has made it possible for a negligent storekeeper to be held liable even though his negligence was not the cause of the fall. Before Shel, a jury would have to find in favor of even a highly negligent storekeeper if the item had been on the floor for such a short time that even the most zealous care would not have found it. There may have been negligence, but the evidence would show that the negligence was not the cause of that particular fall. Because Shel does not require time-on-floor evidence, a jury may hold a storekeeper liable simply because they believe he doesn’t exercise enough care and because a fall happened.

Although there are troubling aspects to the Shel holding the dissenters in Shel exaggerate their case:

[This holding] makes a self-service store an insurer with respect to injuries sustained by an invitee by reason of an unsafe object or substance on the floor without regard to why it was there or how long it had been there.\(^{50}\)

An insurer is someone who compensates all loss regardless of the circumstances. Shel does not hold that once the plaintiff shows a fall on a misplaced item the jury must find the defendant liable. The jury must still find that the storekeeper failed to exercise ordinary care before it can find for the plaintiff. If one believes that juries will find for plaintiffs whenever given the chance, then Shel would appear to make storekeepers insurers. If, however, one believes that juries generally behave responsibly and only hold truly negligent actors liable, then Shel does not seem to change the burden on careful storekeepers significantly.

As discussed earlier the potential problems in dispensing with the time-on-floor requirement can be avoided by 1) requiring the plaintiff to present evidence as to the inadequacy of the storekeeper’s precautions, and 2) requiring the plaintiff to show that the store’s particular mode of operation poses a foreseeable and unreasonable risk of harm from customer misplaced items. These substitute requirements for time-on-floor evidence will mean that the plaintiff still has the burden of proving notice and a lack of due care. The final issue is, given that Shel can be applied without too much injustice to storekeepers, whether there exists a good reason for providing alternatives to time-on-floor witnesses.

\(^{50}\) 781 S.W.2d at 784.
A substitute for requiring time-on-floor evidence is needed primarily because finding time-on-floor witnesses is so difficult; slip and fall plaintiffs do not have any meaningful chance for compensation, even when storekeepers are at fault. Few shoppers glance at their watches when they see a misplaced item on the floor. Many, if not most, shoppers who saw an item thirty minutes before a plaintiff's fall will have already left the store before the fall even occurs. If a fall causes any significant injury the victim will be hard pressed to interview shoppers to find the one who saw the misplaced item first. These considerations mean that under the traditional approach it is only the rare plaintiff who is lucky enough to have a submissible case, even if the storekeeper takes absolutely no precautions. It simply does not seem fair to make access to the jury dependant upon such an unlikely circumstance as finding a time-on-floor witness.

Andrew Flach