

**Summary of SC94253, *Deborah Barkley v. McKeever Enterprises Inc. d/b/a Price Chopper***  
Appeal from the Jackson County circuit court, Judge James F. Kanatzar  
Argued and submitted November 13, 2014; opinion issued February 24, 2015

**Attorneys:** Barkley was represented by Robert E. Gould and Frederick G. Thompson IV of Gould, Thompson & Bucher PC in Kansas City, (816) 943-0010; and Price Chopper was represented by Jacqueline A. Cook and John G. Schultz of Franke Schultz & Mullen PC in Kansas City, (816) 421-7100.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** A woman appeals the judgment in favor of a store she sued for false imprisonment and battery after she was detained for shoplifting. In a decision written by Judge Paul C. Wilson, the Supreme Court of Missouri affirms the judgment. All seven judges agree that the law permits a merchant to detain a suspected shoplifter in a reasonable manner and for a reasonable time to investigate whether shoplifting occurred, to recover the merchandise and – even after the merchandise has been recovered – to continue the detention to conduct further investigation or to await the arrival of law enforcement officers to instigate criminal proceedings. Four judges agree that the woman failed to preserve her argument that the affirmative defense instruction the store submitted to the jury was not a proper modification of the Missouri approved instruction and was not supported by the evidence because it did not distinguish between batteries that occurred before and after she attempted to leave the security office in which she was being detained. Even if she had preserved this argument, it would fail because her battery claim only included events that occurred after she attempted to flee, and the instruction focused the jury’s attention on the central question of whether the force used to detain the woman was reasonable.

Judge Laura Denvir Stith concurs in part and dissents in part. She disagrees that the affirmative defense instruction the store submitted to the jury was authorized under the statute and, therefore, would reverse the judgment and remand the case for a new trial with instructions properly submitting the affirmative defenses. The instruction the store submitted improperly identified the woman’s conduct that was wrongful and the store’s justification for its employees using force. The distinction between the instruction and the statutory language could have been dispositive as to whether the use of force was necessary, particularly in light of the woman’s testimony.

**Facts:** During a May 2009 shopping trip to Price Chopper in Independence, Deborah Barkley and her husband had certain items in a grocery cart for which they paid and other items for which she did not pay in a reusable shopping bag Barkley was carrying next to her purse. Loss prevention employees who had been watching Barkley on the store’s surveillance system stopped her before she exited the store. They took her to the store’s security office and told her she was being detained on suspicion of shoplifting. She sat on a bench while the officers searched her purse, itemized and photographed the items in the reusable shopping bag, and began preparing a report. When the officers determined the value of the items exceeded the store’s threshold for prosecution, they summoned police to the store. Barkley stood and approached the officers from behind, and when she did not return to the bench per their instructions, they moved

to handcuff her, cuffing her hands in front per Barkley's request. When Barkley again did not comply with instructions to return to the bench, an officer reached for her arm, and Barkley opened the door to the office and attempted to leave. One officer swept her legs from under her, and officers recuffed Barkley's hands behind her. She remained sitting on the floor until the officers finished their report, when they recuffed Barkley in front of her body and assisted her to the bench. When police arrived, they escorted Barkley from the store. After she was acquitted of shoplifting in the municipal division, Barkley sued Price Chopper for actual and punitive damages arising from her detention in the store, ultimately asking the jury during the October 2012 trial to determine whether the store's employees committed battery and false imprisonment during her detention. The jury found for Price Chopper on both counts. Barkley appeals.

## **AFFIRMED.**

**Court en banc holds:** (1) Contrary to Barkley's argument, the merchant's privilege is available as an affirmative defense against a claim of battery. It is well-settled in Missouri that a merchant is privileged to retain a person – in a reasonable manner and for a reasonable period – if the merchant has reasonable suspicion or probable cause to believe the person is shoplifting. This law, first articulated in a 1941 decision of this Court, was codified by the legislature in 1961 in what is now section 537.125, RSMo. This privilege is not extinguished once the merchandise is recovered. Instead, the merchant is privileged to continue the detention to determine whether the person actually was shoplifting and, if so, to summon the police and instigate criminal proceedings. The privilege is not limited to claims of false imprisonment but protects the merchant from all civil and criminal liability to the person detained, including liability for an assault or battery committed to effectuate the detention.

(2) Barkley failed to preserve her argument that Price Chopper's instruction submitting its affirmative defense to the battery claim was not a proper modification of the Missouri approved instruction. She did not claim at trial that this instruction inaccurately stated the elements of the merchant's privilege that Price Chopper pleaded and that the trial court found adequate proof to submit as an affirmative defense to her battery claim. At trial, she argued only that the evidence was insufficient to support any affirmative defense to battery, which this Court rejects (as discussed in paragraph 1, above). It is not this Court's role to grant relief on an argument that was not presented to or decided by the trial court.

(3) Similarly, Barkley failed to preserve her argument that Price Chopper's instruction submitting its affirmative defense to the battery claim was not supported by the evidence because it did not distinguish between batteries that came before versus after her attempt to flee. Because this claim was not presented to or decided by the trial court, this Court is precluded from considering this argument. At trial, she argued the merchant's privilege ended when the store recovered the merchandise and, even if it continued, the privilege did not permit Price Chopper to use any force – even reasonable force – to detain her. To the extent Barkley raised a general objection to this instruction, nothing in the trial transcript or Barkley's motion for a new trial suggests that Barkley made – or that the trial court expressly rejected – a claim that this instruction failed to distinguish between those batteries occurring before and after she attempted to flee. Even if Barkley had preserved this argument, it would fail because the scope of the batteries at issue is determined by the verdict-directing instruction that Barkley submitted, which

did not draw any distinction between pre- and post-flight batteries. The single count of battery she describes in this instruction occurred when her hands were cuffed behind her back, after she attempted to flee. And even if the verdict director had encompassed actions occurring both before and after Barkley's attempt to flee, the affirmative defense instruction still excused any batteries occurring due to Barkley's attempted flight or her failure to follow the employees' commands. The question of whether the force used was reasonable was a question for the jury, not this Court, to decide, and the jury did decide this question after extensive argument from both Barkley and Price Chopper. Whatever the flaws in the affirmative defense instruction, it effectively focused the jury's attention on this central question, and there is no reason to reject the jury's answer.

(4) The trial court did not abuse its discretion in making certain evidentiary rulings. Letters from Barkley's physician describing her physical condition two years before and two years after the incident at Price Chopper were logically and legally relevant and were not unduly prejudicial. Even had there been a reasonable likelihood that the jury would misuse the evidence, the proper remedy would be a limiting instruction, not exclusion, but Barkley requested no such instruction. Further, the exclusion of one employee's personnel records and court records regarding a prior similar claim brought against the store did not prejudice Barkley. Because the jury found in favor of the store on both Barkley's battery and false imprisonment claims, the jury never reached the question of punitive damages or had occasion to consider the evidence relative to that claim.

**Judge Stith's opinion concurring in part and dissenting in part:** (1) The author agrees that the law permits a merchant to detain a suspected shoplifter in a reasonable manner and for a reasonable time to investigate whether shoplifting occurred, to recover the merchandise, and to conduct further investigation or to await the arrival of law enforcement officers to instigate criminal proceedings. The author also agrees this privilege protects the merchant from a lawsuit for unlawful arrest or detention.

(2) The author disagrees, however, that the affirmative defense instruction the store submitted to the jury was authorized under the statute and, therefore, would reverse the judgment and remand the case for a new trial with instructions properly submitting the affirmative defenses. Section 537.125 permits a merchant to use a reasonable manner of detention to continue to detain a person, after recovering taken property, to investigate whether the taking was wrongful or to await the arrival of law enforcement officers. Because there is no standard Missouri approved instruction for submitting such an affirmative defense, Price Chopper modified an approved instruction regarding battery. But the modification did not track the statutory language and, therefore, did not require the jury to find that physical force was necessary to recover the merchandise or to detain Barkley while waiting for authorities to arrive. This distinction could have been dispositive, especially in light of Barkley's testimony that she simply wanted to tell her husband where she was and what was happening. Instead, the modification instructed the jury that Barkley's wrongful conduct was not taking merchandise from the store without paying for it but instead was failing to follow the loss prevention officers' instructions and attempting to flee the loss prevention office and that the officers' use of force, therefore, was necessary. Neither these submissions nor the underlying concepts are authorized affirmative defenses under section 537.125, and Barkley's counsel raised this objection prior to submission. Refusing to follow the store employees' instructions or trying to leave a security office is not the same as

refusing to await law enforcement. Barkley's counsel's objection also was sufficient to preserve her claim that the instruction submitted facts not supported by the evidence – it submitted that Barkley was handcuffed to prevent her from fleeing, but it is undisputed that she first was handcuffed because she failed to follow the officers' instructions to remain seated and that only the placement of the handcuffs changed after she attempted to leave the office.