No. 1022581

SUPREME COURT
OF THE STATE OF WASHINGTON

MARTY MOORE, as personal representative of the estate of Rebecca Moore,

Respondent,

v.

FRED MEYER STORES, INC.; FRED MEYER, INC.; and THE KROGER CO.,

Petitioners.

ANSWER TO MEMORANDA OF AMICI CURIAE

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I. INTRODUCTION

Fred Meyer[1] is not alone in viewing the Court of Appeals' decision as a significant change in Washington law and a departure from a long line of decisions by this Court concerning the *Pimentel*[2] reasonable-foreseeability exception, culminating in *Johnson v. Liquor & Cannabis Board*, 197 Wn.2d 605, 486 P.3d 125 (2021). The three amici curiae—the Washington Defense Trial Lawyers (WDTL), the International Council of Shopping Centers (ICSC), and the Washington Retail Association (WRA)—uniformly agree. And their memoranda underscore why review by this Court is warranted.

Amici correctly and more fully explain why (1) Division Two's decision conflicts with *Wiltse v. Albertson's Inc.*,[3] *Johnson*, and other decisions of this Court and (2) Division

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[1] This answer will refer to Petitioners collectively as "Fred Meyer."

[2] *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 666 P.2d 888 (1983).

[3] 116 Wn.2d 452, 805 P.2d 793 (1991).

Two's holding that the pattern jury instruction on premises liability must be revised is an issue of substantial public interest that this Court should determine. In addressing the latter issue, both also clarify that this Court does not review pattern instructions proposed or adopted by the Washington Pattern Jury Instructions Committee, except in the context of a case.

II. DISCUSSION

Fred Meyer adopts the arguments of amici, and submits the following arguments to more fully develop that adoption.

A. Division Two's decision conflicts with *Wiltse* and with this Court's reaffirmance of *Wiltse* in *Johnson*.

Moore's answer fails to come to grips with this Court's careful limitation of its holding in *Johnson*. In *Johnson*, this Court emphasized the context of its decision within its *Pimentel* jurisprudence and confirmed the continuing validity of its holding in *Wiltse*.

Wiltse's facts and holding bear repeating. The plaintiff slipped on a puddle of water. *Wiltse*, 116 Wn.2d at 453–56. The water was there not because of the nature of the store's business

and methods of operation, but because of a leaky roof. *Id.* The trial court thus refused to instruct on the foreseeability exception first established in *Pimentel*. *Id.* Affirming the judgment on a defense verdict, this Court enforced the exception's limitation "to specific unsafe conditions that are continuous or foreseeably inherent in the nature of the business or mode of operation." *Id.* at 461. In doing so, it emphasized that "the actual cause of the hazard is relevant in establishing whether the unreasonably dangerous condition was continuous or reasonably foreseeable." *Id.* Because no evidence suggested that the business's nature and methods of operation caused the leaky roof, this Court held that there was "no factual basis for the court to give a *Pimentel* instruction." *Id.* at 462.

Division Two recognized here that this Court in *Johnson* "reaffirm[ed]... the holding in *Wiltse*." *Slip Op.* at 9. But it failed to apply that holding—and therein lies the problem with what Division Two has done in this case. No evidence suggests that Fred Meyer's nature and methods of operation caused the liquid

to be present in the aisle where the plaintiff encountered it. All the plaintiff offered was evidence that Fred Meyer has a policy to patrol against spills. But under *Wiltse*, as reaffirmed by *Johnson*, the plaintiff had the burden to connect the spill at issue with the nature of Fred Meyer's business and methods of operation.

Moore offered nothing to show that. The mere fact of a spill—particularly in an area of the store where Fred Meyer's operations (selling a bunch of dry goods) do not present a spill risk—is not enough. To be sure, Moore could still prevail and recover—but not based on the *Pimentel* exception. He would have to make his case based on the traditional rules of actual or constructive notice. The trial court properly let that claim go to the jury, and the jury rejected it.

The trial court's decision to instruct only on actual or constructive notice was mandated by *Wiltse* and this Court's reaffirmance of *Wiltse* in *Johnson*. Division Two's decision to mandate giving an instruction that would allow Moore to argue

an additional theory of liability, based on the nature of the business and methods of operation, contravenes the law as it stands, as established by this Court's decisions, most notably in *Wiltse* as reaffirmed in *Johnson*. The Court is thus presented with a classic case for review under RAP 13.4(b)(2).

B. Moore's claim that this Court should deny review because this Court ostensibly will review a possible new WPIC conforming the law to Division Two's holding actually provides an additional reason for granting review.

Moore's answer, although perhaps not intentionally, has presented an additional reason for granting review, involving the nature of this Court's relationship to the process by which pattern jury instructions are developed and promulgated for use by the bench and bar of this state.

Moore tries to wave this Court off from granting review because the Pattern Jury Instruction Committee is about to promulgate a new instruction embracing Division Two's decision in this case; Moore implies that this Court will review that instruction before its issuance and, by that process, can

decide the legal issue presented by Fred Meyer's petition. *See Answer* at 17 ("Moreover, this Court can and no doubt will confirm the WPIC through the usual processes of its Pattern Instruction Committee.").

This portrait of the process by which pattern instructions are developed and issued is wrong. In fact, this Court plays no role whatsoever in that process. The validity of a WPIC—specifically whether it is a correct statement of Washington law—comes before this Court only through the process of review in a case (e.g., through review of a Court of Appeals decision terminating review that implicates such a question).

Fred Meyer will acknowledge that this Court has never had occasion to *say* as much. That is because, as best Fred Meyer can tell, the issue of the institutional relationship between this Court and the Committee that develops and promulgates pattern instructions has never come before this Court in a case. But Moore's answer has now squarely put the matter to the Court, by arguing for a denial of review as if this Court had already decided

that the Committee is an arm of the Court, and that the validity of pattern instructions is something this Court determines by its review of proposed pattern instructions before their promulgation.

This Court has made no such decision. As to whether this Court should make such a decision and make the Committee an arm of the Court—suffice it to say that Fred Meyer believes that saying "yes" to such a change would radically change the way the pattern-instruction process has operated for decades, and in ways that are not self-evidently constructive.

The trial bench and bar, through the development and promulgation of pattern instructions, has played an important and *independent* role in the development of the law in which juries are instructed to resolve civil and criminal cases. Should the Court adopt Moore's apparent view of the pattern-instruction process, that independence would be lost, and this Court would thrust itself into the development of pattern instructions without

the benefit of a case record—*the* bedrock for the exercise of the judicial power.

That this Court has not chosen to address the matter to date presumably reflects this Court's recognition that this is a matter that should be addressed through the normal judicial process of deciding a case. Now that Moore has made the issue a basis for denying Fred Meyer's petition, Fred Meyer submits that the obvious public interest in a resolution of the issue, and Moore's raising of it, constitutes an additional reason for granting Fred Meyer's petition.

III. CONCLUSION

This Court should grant Fred Meyer's petition.

This document contains 1,284 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 1st day of November, 2023.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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