No. 1022581

Court of Appeals No. 56950-7

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 AMICI CURIAE MEMORANDA OF WASHINGTON DEFENSE TRIAL LAWYERS, INTERNATIONAL COUNCIL OF SHOPPING CENTERS & WASHINGTON RETAIL ASSOCIATION

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INTRODUCTION

As the Court of Appeals noted in ***Moore***,[1] ***Johnson***[2] itself explained how it is consistent with ***Musci***,[3] ***Iwai***,[4] ***Wiltse***,[5] ***Pimentel***,[6] and every other relevant precedent. Neither Fred Meyer nor its *amici* explain either how a decision that *reaffirms* all the relevant precedents, or one that *follows* that reaffirmation, could possibly *conflict* with those decisions. They cannot.

That is why Fred Meyer and its *amici* are forced to misstate the holdings in ***Moore*** and ignore the record. This Court should deny review.

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[1] ***Moore v. Fred Meyer Stores, Inc.***, 26 Wn. App. 2d 769, 774-78, 532 P.3d 165 (2023).

[2] ***Johnson v. Wash. State Liquor & Cannabis Bd.***, 197 Wn.2d 605, 486 P.3d 125 (2021).

[3] ***Mucsi v. Graoch Assocs. Ltd. P'ship No. 12***., 144 Wn.2d 847, 31 P.3d 864 (2001).

[4] ***Iwai v. State***, 129 Wn.2d 84, 915 P.2d 1089 (1996).

[5] ***Wiltse v. Albertson's, Inc.***, 116 Wn.2d 452, 805 P.2d 793 (1991).

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

ANSWER TO AMICI

A. To the extent that both *amici* simply repeat some of Fred Meyer's arguments, the Estate has already answered those arguments.

Both *amici* parrot some of Fred Meyer's arguments. The Estate has already responded to those arguments in its Answer to Fred Meyer's Petition for Review (PFR). There is no need to repeat those responses here.

B. Both *amici* misrepresent *Moore*'s holding regarding the question of fact underlying reasonable foreseeability.

Both *amici* claim that ***Moore*** eliminates the plaintiff's burden to show evidence that the particular danger was foreseeable to the defendant under the circumstances. WDTL 3-7; ICSC 2-6. That is simply false:

> [T]he jury instructions as a whole must make clear that in order to be entitled to recovery under a reasonable foreseeability theory, there must be a connection between the unsafe condition and the business's method of operation—the unsafe condition may not be merely incidental to the business's method of operation. This required nexus is consistent with *Johnson*'s express reaffirmation of the holding in *Wiltse*.

Moore, 26 Wn. App. 2d at 778. All *amici* arguments that ***Moore*** "conflicts with" ***Johnson***, ***Wiltse***, ***Mucsi***, and so forth, are thus baseless. ***Moore*** requires a nexus.

Neither *amici* cites the record for its assertion that no nexus evidence was presented here. Yet the Estate's PFR Answer cited some of that evidence. Answer 11-12 & n. 3 (citing BR at 6-8 (and RP cited therein); BA 5-6 (and RP cited therein); RP 97-123, 129-138, 143, 148-53, 160-63, 167-68, 219-28, 231-34, 240-41, 244-46).[7] Perhaps *amici* failed to read the Answer.

That would explain how both *amici* might fail to respond to the Answer's point that *the actual jury instructions given in this case* expressly placed the burden on the Estate to make that connection. Answer 15 (citing, quoting, and attaching Court's Inst. 13, CP 727):

> An owner of premises has a duty to correct a temporary unsafe condition of the premises that was not created by the owner, if the condition . . . ***existed***

[7] Some of this evidence is detailed *infra*, Answer § C.

> ***for a sufficient length of time and under such circumstances that the owner should have discovered it in the exercise of ordinary care***.

See also, Answer 16 (citing, quoting, and attaching to the BA, Court's Inst. 14, CP 728):

> An owner of premises is liable for any physical injuries to its customers caused by a condition on the premises if:
>
> . . .
>
> (c) ***the owner fails to exercise ordinary care to protect them against the danger*** . . .

Consistent with the above evidence and instructions, ***Moore*** also correctly rejected this entire line of argument, holding that here, "there was sufficient evidence for the case to go to the jury, consistent with *Johnson*'s analysis of reasonable foreseeability," requiring the jury to give "equal consideration to actual notice, constructive notice, and reasonable foreseeability." ***Moore***, 26 Wn. App. 2d at 777 n.4. Perhaps *amici* also failed to read the footnotes.

Simply put, ***Johnson*** "establishes reasonable foreseeability as equal to traditional notice requirements

and whether it applies is fundamentally a question of fact for the jury." *Id*. at 777. But here, the jury was not instructed that it could even *consider* reasonable foreseeability, so the instructions "were not an accurate statement of the law" following ***Johnson***. *Id*. at 778. Review is unnecessary.

C. Both *amici* misrepresent the Estate's position on the question of fact underlying reasonable foreseeability.

As noted, ***Moore*** specifically followed ***Johnson***'s holding that plaintiffs must show a nexus between the specific hazard that caused the injury and the nature of the proprietor's business making such incidents reasonably foreseeable. Both *amici* falsely claim the Estate argues either that no such nexus is required or that insufficient evidence was sufficient. WDTL 8-12; ICSC 6-8. Once again, this is simply false.

Neither *amici* appears to have sufficient familiarity with the record to address the Estate's *actual* argument, which is that ample evidence was presented on the nature

of Fred Meyer's operations making such hazards reasonably foreseeable, as the Court of Appeals held. This includes (*inter alia*) the following evidence:

> (a) Fred Meyer knows that many slip-and-falls happen in its stores (nationwide, one customer slips every half hour – three times as many customers than its *employees* who slip, but *they* are issued slip-resistant footwear) (*e.g.*, RP 102, 148-49);
>
> (b) nonetheless, its employees in *this* Fred Meyer store are *not* trained to regularly inspect the aisles for slipping hazards (RP 103-04; 162-63);
>
> (c) yet Fred Meyer does maintain anti-slip mats in the coffee aisle where this decedent fell (RP 89-91);
>
> (d) Fred Meyer also keeps spill kits *everywhere* in its stores, not just on so-called "wet" aisles (*e.g.*, RP 119, 123, 126-27);
>
> (e) this store was being remodeled when the decedent fell, including the skylights (RP 167; CP 351-52);
>
> (f) this may explain why a shelf adjacent to the water in which this decedent fell contained paper towels, a bucket, and a folded-up "Caution-Wet Floor" sign (RP 167-68; CP 338, 344-49, 353-56); and
>
> (g) the young employee who came into the aisle after decedent fell handed her a couple of paper towels from that shelf and went to get a manager (CP 359-60).

Under these (and other) facts, a jury must decide whether the hazard was reasonably foreseeable to Fred Meyer.[8]

WDTL seems to want to rehash its arguments that this Court rejected in ***Johnson***. WDTL 9-10. But ***Johnson*** simply recognized that the ***Pimentel*** exception had become the general rule under ***Musci*** and ***Iwai***. 197 Wn.2d at 615-18. That is, contrary to both *amici*'s claims, reasonable foreseeability has been part of Washington law for quite some time. ***Moore*** changes nothing.

D. Both *amici* prove too much regarding the *new forthcoming* WPIC: this Court *cannot* "approve" of it in *this* appeal, as it was not raised before the trial or appellate courts.

Both *amici* correctly assert the Estate mistakenly suggested that this Court might simply "approve" the forthcoming pattern jury instruction on this subject. WDTL

[8] It is also worth noting that Fred Meyer must have recognized a question of fact existed regarding its knowledge of the hazard: it never moved for summary judgment or for judgment as a matter of law.

12-15; ICSC 8-9. This Court apparently does not do that, as the WASH. PRAC. *amici* cite and/or attach confirms. The undersigned apologizes for his misunderstanding.

But the *amici* prove too much: if this Court agrees or disagrees with the *new forthcoming* WPIC on this subject – and the WPIC Committee may well have a draft ready for publication at this point – then this Court will have to wait until *the next case* to do so: it *cannot* do so here, as the next iteration was not raised in the trial or appellate court. While it may seem more efficient for this Court to review new pattern instructions before they are published – as it does with Court Rules, for example – this Court instead exercises restraint and waits until the issue is raised on appeal – which may well be years from now.

The upshot is that the nonconforming WPIC used in *this case* is now obsolete under ***Johnson*** (and ***Moore***). Unless this Court thinks its decision in ***Johnson*** should be reversed as incorrect and harmful – an argument neither

Fred Meyer nor its *amici* have raised – the propriety of the nonconforming WPIC is simply moot. There thus is no need for this Court to grant review, as there is no substantial public interest in an out-of-date WPIC that correctly has been repudiated under this Court's own valid and controlling precedent.

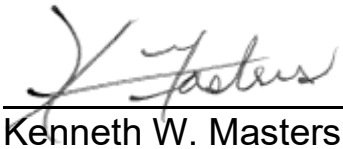
CONCLUSION

This Court should deny review.

The undersigned hereby certifies under RAP 18.17(2)(b) that this document contains **1,421** words.

RESPECTFULLY SUBMITTED this 1st day of November 2023.

MASTERS LAW GROUP, P.L.L.C.



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CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **ANSWER TO AMICI CURIAE MEMORANDA OF WASHINGTON DEFENSE TRIAL LAWYERS, INTERNATIONAL COUNCIL OF SHOPPING CENTERS AND WASHINGTON RETAIL ASSOCIATION** on the 1st day of November 2023 as follows:

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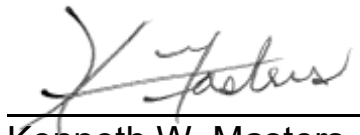

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