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Division II
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COURT OF APPEALS

DIVISION II

OF THE STATE OF WASHINGTON

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HWAYO JENNY GALASSI and MICHAEL GALASSI
Respondents,
v.

LOWE'S HOME CENTERS, LLC, et al.,
Petitioner.

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# LOWE'S HOME CENTERS, LLC's PETITION FOR DISCRETIONARY REVIEW IN SUPREME COURT

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## A. IDENTITY OF PETITIONER

Petitioner Lowe's Home Centers, LLC ("Lowe's"), is a home improvement retailer. Lowe's was a defendant in the trial court action and was the respondent before the Court of Appeals, Division II.

## B. CITATION TO COURT OF APPEALS DECISION

Lowe's respectfully requests that, pursuant to RAP 12.3(a), RAP 13.4 (a), and RAP 13.4 (b)(1), (2), and (4), the Washington Supreme Court grant discretionary review of Division II of the Court of Appeals' July 5, 2023 decision reversing the trial court's Order Granting Lowe's Motion for Summary Judgment, dated January 14, 2022, and remanding the case to the trial court for further proceedings. The Court of Appeals decision in question was published on August 29, 2023. A copy of the decision is attached to this petition at Appendix A.

## C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals decision conflict with the Washington Supreme Court's decision in *Pimentel v. Roundup*

*Co.*, 100 Wn. 2d 39, 666 P.2d 888 (1983) and *Ingersoll v. Debartolo, Inc.*, 123 Wn. 2d 649, 869 P.2d 1014 (1994)?

2. Did the Court of Appeals decision conflict with prior published Court of Appeals decisions in every division?

3. Does this case concern an issue of substantial public interest where the practical effect of the Court of Appeals decision is to create a per se rule that the danger of falling merchandise is always reasonably foreseeable?

## D. STATEMENT OF THE CASE

1. *Relevant Factual Background*

On May 3, 2017, Hwayo Galassi was shopping at Respondent Lowe's store in Olympia, WA. She was looking for a roll of wire fencing for her garden. CP 51. Mrs. Galassi found the roll she was looking for laying askew on a display shelf. CP 57. When she tried to retrieve it, it fell on to her right foot. *Id.* Photos taken on the day of the incident show that the rolls of wire fencing were displayed on a shelf behind a stop bar. CP 69.

It is undisputed that the incident was unwitnessed and was not captured on video. Respondent's employee, Tina Jenkins, was working in the garden center that day. CP 44. Ms. Jenkins

testified that the roll of wire fencing was located on a shelf in the rear of the garden center. *Id.* According to Ms. Jenkins, she was trained to look for and immediately correct unsafe conditions such as improperly stocked merchandise on display shelves. CP 45. Lowe's employees perform a daily safety walk to look for such items. *Id.* Ms. Jenkins did not notice any improperly stocked items on the wire fencing display shelf that day. CP 45. In addition, there were no other similar incidents at Respondent's store in the three years preceding the subject incident. CP 73.

2. *Relevant Procedural History*

The trial court entered its Order Granting Summary Judgment on January 14, 2022. CP 35-36. On July 5, 2023, the Court of Appeals, Division II, reversed the trial court's decision. On August 29, 2023, the Court of Appeals published its decision.

## E. ARGUMENT

1. *Review of the Court of Appeals' Decision is Proper Under RAP 13.4(b)(1) Because it Conflicts With the Supreme*

*Court's Holdings in Pimentel v. Roundup Co. and Ingersoll v. Debartolo*

The Supreme Court may grant discretionary review of a Court of Appeals decision if it is in conflict with a decision of the Supreme Court. RAP 13.4(b)(1). Here, the Court should grant review because the Court of Appeals decision conflicts with this Court's holdings in *Pimentel v. Roundup Co.*, 100 Wn. 2d 39, 666 P.2d 888 (1983) and *Ingersoll v. Debartolo, Inc.*, 123 Wn. 2d 649, 869 P.2d 1014 (1994).

For a possessor of land to be liable to a business invitee for an unsafe condition of the land, the possessor must have actual or constructive notice of the unsafe condition. *Smith v. Manning's, Inc.*, 13 Wn. 2d 573, 126 P.2d 44 (1942). Constructive notice arises where the condition "has existed for such time as would have afforded [the proprietor] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger." *Id.* at 580. The plaintiff must establish that the defendant had, or should have had, knowledge of the unsafe condition in time to remedy the situation before the injury or to

warn the plaintiff of the danger. *Brant v. Market Basket Stores, Inc.*, 72 Wn. 2d 446, 451-52, 433 P.2d 863 (1967); *Ingersoll v. Debartolo, Inc.*, 123 Wn. 2d 649, 652, 869 P.2d 1014, 1015 (1994).

In *Pimentel v. Roundup Co.*, 100 Wn. 2d 39, 666 P.2d 888 (1983), this Court created an exception to the traditional rule of notice, holding that "where the operating procedures of any store are such that unreasonably dangerous conditions are continuous or reasonably foreseeable, there is no need to prove actual or constructive notice of such conditions in order to establish liability for injuries caused by them." *Pimentel* at 44. In its inception, the *Pimentel* exception applied only to self-service businesses, but such a requirement no longer exists. *Johnson v. Liquor & Cannabis Bd.*, 197 Wn.2d 605, 618, 486 P.3d 125 (2021).

*Pimentel* is a limited rule, not a per se rule. *Johnson*, 197 Wn.2d at 615. The rule is 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 Wn. 2d 452, 461, 805 P.2d 793, 798 (1991). Accordingly, "to

invoke the *Pimentel* exception, a plaintiff must present **some evidence** that the unsafe condition **in the particular location of the accident** was reasonably foreseeable." *Arment v. Kmart Corp.*, 79 Wn. App. 694, 698, 902 P.2d 1254, 1256 (1995); *Carlyle v. Safeway Stores, Inc.,* 78 Wn. App. 272, 896 P.2d 750 (1995) (emphasis added).

*i. The Galassis Presented No Evidence That the Danger Posed By a Wire Fencing Roll Falling in the Garden Center Was Continuous or Reasonably Foreseeable*

In *Pimentel*, the plaintiff was injured when a paint can fell on her foot. *Pimentel*, 100 Wn. 2d at 41. The critical issue at trial was the cause of the paint can's descent on to the plaintiff's foot. *Id.* Plaintiff presented evidence that the store had a policy of keeping all containers well back on shelves and avoiding overhangs greater than one inch. *Id.* at 42. A store employee testified that he observed the paint can overhanging the shelf by one and a half to two inches. *Id.* at 41.

Unlike the plaintiff in *Pimentel*, the Galassis presented no evidence that the roll of wire fencing was situated on the display shelf in violation of Lowe's policies. They also failed to present

any evidence that Lowe's employees noticed the roll of wire fencing was lying askew. To the contrary, Lowe's presented evidence that its employees did not notice any improperly stocked items during the safety walk that day or at any time prior to the incident. CP 45. Accordingly, the *Pimentel* Court would have concluded, as the trial court did here, that there is insufficient evidence that the danger posed by the wire fencing roll was continuous or reasonably foreseeable.

This Court examined what additional types of evidence may suffice to invoke the *Pimentel* exception in *Ingersoll v. Debartolo, Inc.*, 123 Wn. 2d 649, 869 P.2d 1014 (1994). In *Ingersoll*, plaintiff was walking past a shoe store in a mall when she slipped and fell. Prior to the fall, she did not notice anything on the floor. When she stood up, she observed a smear on the floor. Plaintiff could not identify what the substance was, other than to speculate that it may have been an ice cream cone. *Ingersoll*, 123 Wn. 2d at 651.

In evaluating whether to apply the *Pimentel* exception, the *Ingersoll* Court listed a number of facts relevant in determining whether the danger of a foreign substance on the

floor near a shoe store was reasonably foreseeable in the business or mode of operation of a shopping mall. The Court determined that Ms. Ingersoll lacked such evidence because she did not present any proof of: (1) the actual number of food-drink vendors at the mall, other types of vendors, or what products they sell; (2) the location of the vendors in relation to the location of the fall; (3) the methods of operation of the various vendors, particularly whether the products and their consumption resulted in debris or substances on the floor; (4) whether patrons routinely brought products from outside the mall into the mall; and (5) the historical experience of slip and fall incidents in that area. *Ingersoll*, 123 Wn. 2d at 654-55. In evaluating whether Ingersoll presented this type of evidence, the *Ingersoll* Court held: "Plaintiff failed to present evidence that the nature of the Mall's business and its methods of operation are such that the existence of unsafe conditions is reasonably foreseeable. Without any evidence on which to make a determination that the *Pimentel* exception applies, Plaintiff had to show actual or constructive notice, a showing she did not even attempt to make." *Id.* at 655.

In the present case, just as in *Ingersoll*, the Galassis presented no evidence regarding whether the danger posed by a roll of wire fencing lying askew on a display shelf in the garden center is reasonably foreseeable in the business or mode of operation of the Olympia Lowe's. There is no evidence of how the roll of wire fencing came to be askew, or how long the roll of wire fencing was so situated on the display shelf. There is no evidence to suggest that any flaw in the Olympia Lowe's business or mode of operation created the likelihood that a roll of wire fencing would be lying askew on a display shelf. There is no evidence that displaying rolls of wire fencing on a display shelf behind a stop bar is unsafe. There is no evidence of how frequently items such as rolls of wire fencing lying askew on a display shelf fell in the garden center at the Olympia Lowe's. And there is no evidence that other similar incidents occurred at the Olympia Lowe's. To the contrary, the only evidence is that that no other similar incidents occurred at the Olympia Lowe's in the three years preceding this incident. In sum, there was no competent evidence presented by the Galassis on which the Court of Appeals should have relied to find a material issue of

fact regarding application of the *Pimentel* exception. Without such evidence the Galassis were required to show actual or constructive notice, which just as in *Ingersoll*, they did not even attempt to do.

*ii. The Court of Appeals Erred in Relying Upon Mrs. Galassi's Testimony and the Declaration of Tina Jenkins*

Instead of requiring the Galassis to make the proper showing necessary to invoke the *Pimentel* exception as discussed in *Ingersoll*, the Court of Appeals relied upon Mrs. Galassi's self-serving testimony and the Declaration of Tina Jenkins to determine that "[v]iewed in the light most favorable to Galassi, a trier of fact could reasonably infer that storage of the wire fencing rolls nearly six feet above ground was an unreasonably dangerous condition. A trier of fact could also reasonably infer that the store's policy of immediately correcting improperly stocked items on display shelves and doing daily safety walks at the beginning of the day reflect Lowe's belief that improperly stocked items may fall from the display shelves and create unsafe situations or cause dangerous outcomes. Further, Lowe's daily practices could show that it implicitly

knew that improperly stocked items were unsafe, and it was reasonably foreseeable that such items would fall. *Galassi v. Lowe's Home Ctrs., LLC*, No. 56715-6-II, 2023 Wash. App. LEXIS 1248, at *8-9 (Ct. App. July 5, 2023)

Mrs. Galassi testified that the roll of wire fencing was lying askew on the display shelf and that it fell on to her right foot when she tried to retrieve it. CP 57. To defeat a summary judgment motion, a nonmovant cannot rely upon "speculation, argumentative assertions, opinions, and conclusory statements[.]" *Sanders v. Woods*, 121 Wn. App. 593, 600, 89 P.3d 312, 315 (2004). Instead, the nonmovant must present "specific facts showing that there is a genuine issue for trial." *Young*, 112 Wn.2d 225-226; CR 56(e). Mrs. Galassi's testimony consists of self-serving and conclusory statements that do not comport with CR 56(e) and are insufficient to demonstrate that the condition she encountered was unreasonably dangerous or that it was reasonably foreseeable in the nature or mode of operation of the Olympia Lowe's. Her testimony is merely an unsupported allegation with no extrinsic evidence. Once again, there is no evidence of the frequency of wire fencing rolls, or

any improperly stocked item, falling from shelves at the Olympia Lowe's to support Mrs. Galassi's allegation. Based on this lack of evidence, the trial court properly concluded that, at best, Mrs. Galassi's testimony was a description of a one-time unsafe condition that is insufficient to overcome summary judgment. CP 102.

Regarding the Declaration of Tina Jenkins, as the party moving for summary judgment, the defense carried the initial burden of establishing the absence of a genuine issue of material fact on the issues for which Lowe's sought summary judgment. *Young v. Key Pharmaceuticals,* 112 Wn.2d 216, 225 and n.1, 770 P.2d 182 (1989). To meet its initial burden, Lowe's submitted the Declaration of Tina Jenkins, an employee of Lowe's working in the garden center on the date of the accident. Ms. Jenkins' declaration provides that Lowe's employees were trained to immediately look for and immediately correct unsafe conditions such as improperly stocked items on display shelves, and that Lowe's employees performed a safety walk at the beginning of each day looking for such items. CP 45. On the date of the incident, Ms. Jenkins did not notice any such

improperly stocked items. *Id.* By submitting Ms. Jenkin's Declaration, Lowe's met its initial burden of demonstrating it did not have actual or constructive notice of the allegedly unsafe condition. If Lowe's did not submit such a declaration, it could not have met its initial burden on summary judgment to show it did not have notice. For the Court of Appeals to utilize Ms. Jenkin's Declaration testimony that Lowe's did not have notice to create a genuine issue of material fact on application of the *Pimentel* exception excusing notice is circular reasoning. The practical effect of this holding is to impose the sort of per se or strict liability rule explicitly prohibited by *Pimentel* and *Ingersoll*. Accordingly, the Court of Appeals erred in finding that Ms. Jenkin's declaration created a genuine issue of material regarding the foreseeability of the danger posed by improperly stocked items.

In sum, the Court of Appeals holding in the present case conflicts with the Supreme Court holdings in *Pimentel* and *Ingersoll*. The Galassis presented no competent evidence to bring this case within the *Pimentel* exception, and the Court of Appeals erred in finding that evidence in Mrs. Galassi's

deposition testimony and Ms. Jenkin's declaration. Accordingly, this Court should grant review.

2. *Review of the Court of Appeals' Decision is Proper Under RAP 13.4(b)(2) Because it Conflicts With Prior Published Court of Appeals Decisions in All Divisions*

The Supreme Court may grant discretionary review of a Court of Appeals decision if it is in conflict with prior published decisions of the Court of Appeals. RAP 13.4(b)(2). Here, the Court should grant review because the Court of Appeals decision conflicts with decisions in all three divisions.

In *Arment v. Kmart Corp.*, 79 Wn. App. 694, 902 P.2d 1254, 1256 (1995), the plaintiff slipped on clear soda on the floor between two clothes racks in the menswear department of the Delridge Kmart. *Id.* at 695. Kmart moved for summary judgment, and the plaintiff produced her own affidavit and that of her husband. *Id.* at 697. The affidavits stated that Kmart operated a restaurant in its Delridge store, the restaurant had a soft drink dispenser, and the restaurant was in the same general area as the menswear department. *Id.* In deciding *Arment*, Division I of the Court of Appeals cited to the list of facts

relevant to a *Pimentel* claim as enumerated in *Ingersoll*, stating: "Although not an exhaustive or exclusive compendium of the evidence a plaintiff must produce to establish a *Pimentel* claim, this list illustrates the **type of facts a plaintiff must allege** to establish a prima facie case under the [*Pimentel*] rule. *Arment*, 79 Wn. App. 694, 699 (emphasis added). The *Arment* Court then held: "As was the case in *Ingersoll*, the record here is completely devoid of any such facts."

In the Division III case of *Carlyle v. Safeway Stores Inc.*, 78 Wn. App. 272, 274, 896 P.2d 750, 751 (1995), Ms. Carlyle slipped and fell while shopping in a Safeway store in Walla Walla. As she stepped forward and reached for a container of coffee on the top shelf of the coffee section, her right foot slipped out from under her. The supervisor on duty discovered she had stepped into a quarter-sized spot of shampoo. Although shampoo was stocked several aisles away, there was a bottle lying on the floor of the coffee section, partially under the four-inch overhang of the bottom shelf. The bottle was full and its screw cap was closed, but the cap's pop-top was open. *Carlyle* at 274. Evidence was presented that Safeway employees inspected

the aisles of the store as often as hourly, and on average found one dropped or spilled item per eight to nine hour shift. *Id.* at 278. Nonetheless, the *Carlyle* Court found that plaintiff "failed to produce any evidence from which it could reasonably be inferred that the nature of Safeway's business and its methods of operation are such that unsafe conditions are reasonably foreseeable in the area in which she fell. The mere presence of a slick or slippery substance on a floor is a condition that may arise temporarily in any public place of business. Under *Pimentel, Wiltse,* and *Ingersoll,* **something more is needed**." *Carlyle* at 277 (emphasis added).

Even Division II of the Court of Appeals, the same Court that decided this matter, previously analyzed the sufficiency of evidence necessary to trigger the *Pimentel* exception in *Tavai v. Walmart Stores, Inc.*, 176 Wn. App. 122, 131, 307 P.3d 811, 816 (2013). In *Tavai,* the plaintiff slipped and fell about 15 feet from a check-out counter and noticed water on the floor where she fell. *Id.* at 126. To support her contention that the *Pimentel* exception applied to excuse notice, Ms. Tavai relied on evidence that showed: (1) Walmart sold bottled water and groceries; (2) she

fell about 15 feet from a check-out counter; and (3) there were 51 other reported occurrences of slip-and-fall injuries at the store between 2005 and 2007. Of the 51 reported occurrences, 23 were related to liquid on the floor and seven of the complaints concerned slips on wet floors at a check-out lane. *Id.* at 131. Division II concluded that even the evidence presented by Ms. Tavai was insufficient to trigger the *Pimentel* exception because Ms. Tavai failed to present evidence sufficient to show that she fell in an area of the store where spills were reasonably foreseeable due to the mode of operation of the store. *Id.* at 132.

Similar to *Arment, Carlyle*, and *Tavai*, the Galassis presented no evidence whatsoever to establish that the hazard presented by improperly stocked items in the garden center was reasonably foreseeable due to the nature of the Olympia Lowe's business or its mode of operation. Although Mr. and Mrs. Galassi both submitted affidavits, neither affidavit sets forth any evidence to connect Mrs. Galassi's injury to the Olympia Lowe's business or mode of operation. Accordingly, the Galassis simply presented none of the types of evidence contemplated by *Arment, Carlyle,* or *Tavai*. Although Lowe's cited to *Tavai* in its

Respondent's Brief, Division II did not address how the present case is different in its holding in the case at bar. Because the holding in the present case conflicts with prior published Court of Appeals decisions in all three divisions, this Court should accept review.

3. *Review of the Court of Appeals' Decision is Proper Under RAP 13 (b)(4) Because it Involves an Issue of Substantial Public Interest*

The Supreme Court may grant discretionary review of a Court of Appeals Decision if it involves an issue of substantial public interest. RAP 13.4(b)(4).

The present case involves an issue of substantial public interest because the practical effort of the Court of Appeals decision is to create a per se rule that the danger of falling merchandise is always reasonably foreseeable in the business or mode of operation of a retailer. In other words, the Court of Appeals decision essentially crafts new law excusing the type of evidentiary showing required by *Ingersoll, Arment*, *Carlyle*, and *Tavai* simply because Mrs. Galassi was allegedly injured by falling merchandise. Although these prior cases were all slip and

falls, there is no principled reason to treat a falling merchandise case differently. Both are premises liability cases arising from the alleged existence of an unsafe condition and turn on the issue of whether that unsafe condition was reasonably foreseeable.

With regard to slip and fall cases, Washington law is clear that "the mere presence of a slick or slippery substance on a floor is a condition that may arise temporarily in any public place of business." *Carlyle*, 78 Wn. App. 272, 277. However, under *Pimentel*, *Wiltse* and *Ingersoll,* **something more** is needed to withstand summary judgment. *Id.* (emphasis added). The same is true of an item that has been placed askew on a display shelf. That too is a condition that can arise temporarily in any retail environment. Just like the presence of a slippery substance on the floor, *Pimentel* and its progeny require something more to apply excuse a showing of notice. That something is, as discussed above, some evidence tending to show a relationship between the unsafe condition and the character or mode of operation of the business. The Galassis presented no such evidence and should not be excused from doing so.

Moreover, the *Pimentel* exception "does not impose strict liability **or even shift the burden to the defendant to disprove negligence."** *Wiltse*, 116 Wn. 2d at 461 (emphasis added). Accordingly, it is not Lowe's burden to demonstrate that its mode of operation does not present hazards posed by falling merchandise, but rather it was the Galassis burden to present some evidence to justify application of the *Pimentel* exception. When they failed to do so, the trial court's entry of summary judgment was proper and should have been affirmed by the Court of Appeals. Accordingly, Lowe's now respectfully requests that this Court grant its petition and accept review.

## F. CONCLUSION

Although the Court of Appeals recognized that *Pimentel* was not a per se rule, its holding results in just that. To satisfy its initial burden in moving for summary judgment, Lowe's was required to set forth evidence that it did not have actual or constructive knowledge of the allegedly dangerous condition. It did so by presenting the Declaration of Tina Jenkins. Although the Court of Appeals determined that Mrs. Galassi's testimony and Ms. Jenkin's declaration created a

material issue of fact on whether the danger of falling merchandise was foreseeable, this was error because Mrs. Galassi's testimony was merely an unsupported allegation of a one-time unsafe condition, and Lowe's could not have met its initial burden without showing it did not have notice. *Pimentel* remains a limited rule, requiring some evidence that the unsafe condition was reasonably foreseeable in the nature or mode of operation of a defendant business. Because the Galassis failed to meet their evidentiary burden, summary judgment dismissal was proper and should have been affirmed by the Court of Appeals.

I certify that this document contains **3967** words, exclusive of the Title Page, Table of Contents and Table of Authorities from the word count requirement pursuant to Rules of Appellate Procedure 18.17.

Dated this 21st day of September 2023.

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LOWE'S HOME CENTERS, LLC

## CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that I caused a true and correct copy of the foregoing **PETITION FOR DISCRETIONARY REVIEW** to be served via the method below on September 21, 2023 on the following counsel/party of record:

| | |
|---|---|
| Gary A. Preble, WSBA #14758<br>Preble Law Firm, PS<br>2120 State Avenue NE, Suite 101<br>Olympia, WA 98506<br>Telephone: (360) 943-6960<br><br>***Attorney for Respondents*** | ☐ via U.S. Mail, first class, postage prepaid<br>☐ via Legal Messenger Hand Delivery<br>☐ via Facsimile (360) 943-2603<br>☒ via e-Service<br>☒ via E-mail: **Per E-Service Agreement**<br>gary@preblelaw.com<br>daniel@preblelaw.com |

Dated this 21st day of September 2023.

*s/ Janelle Bighinatti*
Janelle Bighinatti, Legal Assistant
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# APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

August 29, 2023

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| HWAYO JENNY GALASSI and MICHAEL GALASSI wife and husband,<br><br>Appellants,<br><br>v.<br><br>LOWE'S HOME CENTERS, LLC., A Foreign Limited Liability Company,<br><br>Respondent. | No. 56715-6-II<br><br>ORDER GRANTING MOTION TO PUBLISH AND PUBLISHING OPINION |

Appellants, Hwayo and Michael Galassi, filed a motion to publish this court's opinion filed on July 5, 2023 pursuant to RAP 12.3(e). Respondent, Lowe's Home Centers, LLC, filed a response on August 10, 2023. After consideration, the court grants the motion. It is now

**ORDERED** that the final paragraph in the opinion which reads "A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered." is deleted. It is further

**ORDERED** that the opinion will now be published.

**PANEL:** Jj. Maxa, Lee, Che

**FOR THE COURT:**

Che, J.

Che, J.

We concur:

Maxa, J.

Maxa, P.J.

J, J

Lee, J.

Filed
Washington State
Court of Appeals
Division Two

July 5, 2023

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
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| HWAYO JENNY GALASSI and MICHAEL GALASSI wife and husband,<br><br>Appellants,<br><br>v.<br><br>LOWE'S HOME CENTERS, LLC., a Foreign Limited Liability Company,<br><br>Respondent. | No. 56715-6-II<br><br><br><br>UNPUBLISHED OPINION |

CHE, J. — Hwayo Galassi appeals the grant of summary judgment in favor of Lowe's Home Centers, LLC (Lowe's) in her premises liability lawsuit. Galassi saw a roll of wire fencing laying askew on a shelf roughly six feet high behind a stop bar while shopping. Galassi desired to purchase the roll. But as soon as Galassi touched the roll of fencing, it immediately fell off the shelf and landed on her foot. Galassi filed a premises liability lawsuit against Lowe's to recover from the injuries she sustained in the incident.

We hold that there was a genuine issue of material fact regarding whether the *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 40, 666 P.2d 888 (1983), exception to traditional notice requirements applies, and Lowe's was not entitled to judgment as a matter of law. We decline to

review the moot issue of whether Thurston County Local Rule (TCLR) 56(1) is impermissibly inconsistent with Civil Rule (CR) 56(c). Consequently, we reverse the summary judgment order.

## FACTS

Galassi went to Lowe's to shop for wire fencing. She located a 2 foot by 2 foot roll of wire fencing on a shelf, roughly 6 feet above the floor. The shelf had a stop bar. The roll of wire fencing lay askew. Galassi alleged that as soon as she touched the roll of fencing, it immediately slid off the shelf and landed on her foot.

Galassi filed a premises liability lawsuit against Lowe's.[1] Lowe's moved for summary judgment, arguing that it did not have actual or constructive notice of the unsafe condition, and the *Pimentel* exception to the notice requirement did not apply. In its motion, Lowe's relied on *McPherson v. Wal-Mart Stores*, Inc., No. 34696-0-III, slip op. at 1 (Wash. Ct. App. Dec. 14, 2017) (unpublished), https://www.courts.wa.gov/opinions/pdf/346960_unp.pdf. But Lowe's did not identify the case as unpublished.

In support of its motion for summary judgment, Lowe's filed a declaration by Tina Jenkins, a Lowe's garden center employee on the day of Galassi's injury. Jenkins stated (1) employees are trained to immediately correct improperly stocked items on display shelves, (2) employees do a safety walk at the beginning of the day searching for improperly stocked items, (3) she did not see any improperly stocked items on the wire fencing display shelf prior to

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[1] Michael Galassi, Hwayo Galassi's husband, is a co-plaintiff seeking recovery for loss of consortium.

Galassi's incident, and (4) Galassi did not ask her for help before retrieving the wire fencing from the display shelf.

On November 1, 2021, Galassi filed a response in opposition to Lowe's motion for summary judgment. In reply, Lowe's argued that Galassi failed to timely file her response under TCLR 56(1), which required responses to summary judgment to be filed not later than 14 calendar days before the scheduled hearing. The motion was set to be heard on November 12, which meant Galassi's response was due on October 29.

At the summary judgment hearing, the trial court did not rule on whether Galassi's untimely response violated TCLR 56(1) because the hearing had been continued several times. Galassi noted that *McPherson* is unpublished. Galassi also emphasized that the roll of wire fencing fell on her foot five hours after the store opened, which would have been five hours after the safety walk allegedly occurred.

Before making its ruling, the trial court noted that it may consider *McPherson* as it is an unpublished case from 2017. The trial court granted summary judgment in Lowe's favor.

Galassi appeals the grant of summary judgment. [2]

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[2] Galassi argues that summary judgment was inappropriate because the trial court considered an unpublished opinion cited in violation of GR 14.1. There is nothing in GR 14.1 that indicates that a court may no longer consider an unpublished opinion as persuasive because a party failed to note that the case was unpublished. Moreover, the proper remedy for a GR 14.1 violation is sanctions. *See Johnson v. Allstate Ins. Co.*, 126 Wn. App. 510, 519, 108 P.3d 1273 (2005). As such, Galassi's argument on this ground fails.

Lowe's also argues that we should dismiss the appeal because Galassi failed to timely file the opening brief. We decline to dismiss this appeal for failure to comply with our *Conditional Ruling of Dismissal* (July 26, 2022). Galassi complied with our ruling, and therefore, dismissal is unwarranted.

ANALYSIS

I. LEGAL PRINCIPLES

We review a grant of summary judgment de novo. *Johnson v. Liquor & Cannabis Bd.*, 197 Wn.2d 605, 611, 486 P.3d 125 (2021). Summary judgment is appropriate if, as a matter of law, there is no substantial evidence or reasonable inference supporting a verdict for the nonmoving party. *Id.* Substantial evidence exists "'if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise.'" *Id.* (quoting *Brown v. Superior Underwriters*, 30 Wn. App. 303, 306, 632 P.2d 887 (1980)). When determining whether summary judgment was appropriate, we view all the evidence and reasonable inferences in the light most favorable to the nonmoving party. *Id.*

The plaintiff must establish the following elements to support a negligence action: "'(1) the existence of a duty owed, (2) breach of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the injury.'" *Id.* (quoting *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994)). Generally, "[F]or the possessor of land to be liable to invitees for the unsafe condition of his land, he must have actual or constructive notice of that unsafe condition." *Pimentel*, 100 Wn.2d at 44.

But "where the operating procedures of any store are such that unreasonably dangerous conditions are continuous or reasonably foreseeable, there is no need to prove actual or constructive notice of such conditions in order to establish liability for injuries caused by them." *Id.* at 40. Under the aforementioned exception, "[t]he plaintiff must still prove that defendant failed to take reasonable care to prevent the injury." *Id.* at 49. In its inception, the *Pimentel*

exception applied only to self-service businesses, but such a requirement no longer exists. *Johnson*, 197 Wn.2d at 618.

### II. APPLICATION OF REASONABLE FORESEEABILITY STANDARD

Galassi argues that there was a genuine issue of material fact regarding whether the *Pimentel* exception applied. We agree.

Here, it is undisputed that Lowe's had no actual or constructive notice of the dangerous condition. Therefore, Galassi must show substantial evidence supporting the application of the *Pimentel* exception. *Johnson*, 197 Wn.2d at 614. Specifically, Galassi must show "notice with evidence that the 'nature of the proprietor's business and his methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable.'" *Id.* at 618 (quoting *Pimentel*, 100 Wn.2d at 49). Of note, the question of whether a party has presented sufficient evidence to warrant the application of the exception appears to have been mostly litigated in the context of slip and fall cases, rather than falling merchandise cases.

In *Pimentel*, a paint can fell from a shelf injuring a customer, and the customer sued the store for her injuries. 100 Wn.2d at 41. The defendant acknowledged the paint can overhung the shelf, the defendant's expert stated the paint can was dangerous, and there was proof of store policies that prohibited such displays. *Id.* "[T]he trial court instructed the jury that it must find actual or constructive notice of a dangerous condition in order to impose liability on defendant." *Id.* at 42. Because that instruction omitted the *Pimentel* exception language referenced above, our Supreme Court remanded for a new trial so that the jury would be instructed properly. *Id.* at 50.

Where a patron sued a mall for injuries caused by slipping on a smear while walking in a common area in a mall, our Supreme Court affirmed the summary judgment order dismissing the action because the patron failed to present sufficient evidence to warrant the application of the *Pimentel* exception. *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d, 649, 654-55, 869 P.2d 1014 (1994). The court held that evidence that there was "more than one food-drink vendor service in the mall, that some such vendors do not provide seating and that some patrons carry the products to benches for consumption" did not show that unreasonably dangerous conditions were reasonably foreseeable. *Id.* at 654. The court emphasized that there must be a relationship between the mall's methods of operation and the hazardous condition. *Id.* at 654-55.

Where a customer sued a store owner for injuries caused by slipping on clear soda, the court affirmed the summary judgment order dismissing the action as the customer failed to present sufficient evidence to warrant the application of the *Pimentel* exception. *Arment v. Kmart Corp.*, 79 Wn. App. 694, 700, 902 P.2d 1254 (1995). The court held that the affidavits of the customer and her husband—maintaining "that Kmart operates a restaurant in its Delridge store, that the restaurant has a soft drink dispenser and that the restaurant is in the same general area as the menswear department"—were insufficient as a matter of law to show unsafe conditions were reasonably foreseeable because there was no evidence the Kmart allowed or encouraged customers to carry drinks around the store, undercutting a connection between spills in the retail area and Kmart's mode of operation. *Id.* at 697-98.

In contrast, where a customer sued a grocery store after slipping on a piece of lettuce in the checkout aisle, the court reversed the summary judgment order dismissing the action as the customer presented sufficient evidence to warrant the application of the *Pimentel* exception.

*O'Donnell v. Zupan Enters., Inc.*, 107 Wn. App. 854, 859, 28 P.3d 799 (2001). The court held that the store's knowledge that items occasionally fell from carts during the checkout process and the store's maintenance policies to mitigate this hazard were sufficient facts to warrant the application of the *Pimentel* exception. *Id.* at 859.

We find the present facts most like *O'Donnell*, where the store's knowledge that items occasionally fell from carts during checkout and the store's maintenance policies to mitigate the hazards were sufficient to warrant application of the *Pimentel* exception such that granting summary judgment was improper. 107 Wn. App. at 859. There are two key pieces of evidence—Galassi's testimony about the askew roll of wire fencing falling on her when she touched it and Jenkin's declaration that associates are trained to immediately correct improperly stocked items on display and do a safety walk at the beginning of the day.

Viewed in the light most favorable to Galassi, a trier of fact could reasonably infer that storage of the wire fencing rolls nearly six feet above ground was an unreasonably dangerous condition. A trier of fact could also reasonably infer that the store's policy of immediately correcting improperly stocked items on display shelves and doing daily safety walks at the beginning of the day reflect Lowe's belief that improperly stocked items may fall from the display shelves and create unsafe situations or cause dangerous outcomes. Further, Lowe's daily practices could show that it implicitly knew that improperly stocked items were unsafe, and it was reasonably foreseeable that such items would fall.

Finally, Galassi appears to argue that we should adopt a rule that when a plaintiff bases their personal injury claim on falling merchandise, we should not require the plaintiff to show that the store's mode of operation made unsafe conditions reasonably foreseeable because the

risk of unreasonably dangerous conditions is inherent in storing items on shelves. We decline to adopt such a rule. The *Pimentel* exception is not a per se rule. *Johnson*, 197 Wn.2d at 615.

Viewing the evidence and all reasonable inferences in the light most favorable to Galassi, there is a genuine issue of material fact regarding whether the *Pimentel* notice exception applies, and Lowe's was not entitled to judgment as a matter of law. Whether the *Pimentel* exception applies is a question for the jury.

### III. Local Rule Conflict with General Civil Rule

Galassi argues that TCLR 56(1) is invalid because it conflicts with CR 56(c). Galassi concedes that this issue is moot but argues that it is a matter of continuing and substantial public interest. We decline to reach this issue.

Where a court can no longer provide effective relief, the issue is moot. *Eyman v. Ferguson*, 7 Wn. App. 2d 312, 320, 433 P.3d 863 (2019). We may, in our discretion, review a moot issue when it involves "matters of continuing and substantial public interest." *Id.* We evaluate several factors in determining whether an issue involves such an interest:

> "(1) Whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur." A fourth factor may also play a role: "the level of genuine adverseness and the quality of advocacy of the issues." Lastly, the court may consider the "likelihood that the issue will escape review because the facts of the controversy are short-lived."

*Id.* (quoting *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 796, 225 P.3d 213 (2009)). "[I]ssues of statutory interpretation are generally matters of substantial public interest." *Id.* at 322.

Under TCLR 56(1), "[t]he adverse party to a summary judgment motion may file and serve opposing affidavits, memoranda of law, or other documentation not later than 14 calendar days before the hearing."[3] In contrast, CR 56(c) provides, "[t]he adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing." As such, the nonmoving party must file their responsive documents in a summary judgment proceeding three days earlier under TCLR 56(1) than under CR 56(c).

Galassi timely filed her response to Lowe's summary judgment motion under CR 56, but untimely under TCLR 56(1). Consequently, Lowe's asked the trial court to grant summary judgment in its favor because Galassi failed to comply with the local rule. But the trial court delayed the summary judgment hearing, making Galassi's response timely under both rules. As such, the timeliness issue regarding Galassi's response is moot.

Lowe's does not respond to this issue on appeal, and thus provides no argument supporting or undermining Galassi's argument that the local rule should be invalidated. And Lowe's did not press the issue at the summary judgment hearing. As such, this factor weighs against reviewing the moot issue of whether TCLR 56(1) is inconsistent with CR 56(c). We exercise our discretion to decline to invalidate a local rule on a moot issue.[4]

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[3] *Thurston Cty Super. Ct. Loc. Ct. Rules* at 26-27 (Sept. 1, 2022), https://s3.us-west-2.amazonaws.com/thurstoncountywa.gov.if-us-west-2/s3fs-public/2023-02/SC_ Thurston_County_Superior_Court_Local_Court_Rules_2022.pdf.

[4] TCLR 56(1) restricts the time the nonmoving party has to file responsive documents under CR 56(c). Thurston County Superior Court should consider reviewing its local rule.

CONCLUSION

We reverse the summary judgment order and remand the matter for proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Che, J.

We concur:

Maxa, P.J.

Lee, J.

## LEWIS BRISBOIS BISGAARD & SMITH LLP

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