Supreme Court No. 102258-1

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 56950-7

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Appellant,

v.

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

Respondents.

RESPONDENTS' PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

Page

APPENDICES

Appendix A: Order Granting Motion to Publish, dated July 11, 2023

Appendix B: Court of Appeals' decision, dated May 2, 2023

TABLE OF AUTHORITIES

Page(s)

Washington Cases

Page(s)

Other State Cases

Constitutional Provisions, Statutes and Court Rules

Other Authorities

I. IDENTITY OF PETITIONERS

Petitioners Fred Meyer Stores, Inc., Fred Meyer, Inc., and The Kroger Co. (collectively, "Fred Meyer"), Respondents in the Court of Appeals, seek review of the decision identified in part II.

II. COURT OF APPEALS DECISION

Petitioners seek review of Division Two's published decision (1) reversing the judgment on the jury's verdict; (2) invalidating our state's principal pattern jury instruction on premises liability, which is based on *Restatement (Second) of Torts* § 343; (3) holding that courts must instruct on the *Pimentel*[1] foreseeability theory of notice in every case, even absent evidence to support it; and (4) remanding for a new trial. A copy of the order publishing the decision, dated July 11, 2023, is attached as Appendix A. A copy of the decision, dated May 2, 2023, is attached as Appendix B.

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

III. INTRODUCTION

To prove that a possessor breached a duty to exercise reasonable care to remedy an unsafe condition, a premises-liability plaintiff must establish that the possessor had notice of the condition and a reasonable opportunity to remedy it. Under the *Pimentel* exception, a plaintiff may establish notice based on reasonable foreseeability. But this theory requires substantial evidence that the condition was reasonably foreseeable from the business's nature and methods of operation. For instance, in *Wiltse v. Albertson's, Inc.*, 116 Wn.2d 452, 805 P.2d 793 (1991), the trial court refused to instruct on foreseeability absent a factual basis to find that the water on which the plaintiff slipped was reasonably foreseeable. *Id.* at 453–56. This Court affirmed the judgment on the defense verdict. *Id.* at 462.

Similarly, here, Plaintiff[2] presented no evidence raising a fact issue on foreseeability at trial. Rebecca Moore slipped and fell on a wet spot on the floor of a dry-goods (coffee and cereal) aisle in a Fred Meyer store. But no evidence identified the source of the moisture or connected it to the nature of Fred Meyer's business or its methods of operation. So, consistent with *Wiltse*, the trial court properly gave the general pattern jury instruction on premises liability, which includes actual and constructive notice but not foreseeability. And the jury returned a verdict for Fred Meyer.

Division Two of the Court of Appeals reversed the judgment on the jury's verdict in a published decision. It concluded that, under *Johnson v. Liquor & Cannabis Board*, 197 Wn.2d 605, 486 P.3d 125 (2021)—and contrary to *Wiltse*—a trial court must instruct the jury on a foreseeability theory of

[2] Unrelated to the incident, Ms. Moore died from cancer a few months before trial. Her estate's personal representative, Marty Moore, substituted as the plaintiff and was the appellant in the Court of Appeals. *See* CP 14–15.

notice in *every* premises-liability case—even if no substantial evidence supports it. Division Two thus concluded that the general pattern jury instruction on premises liability misstates the law and must be revised.

Division Two's holding conflicts with *Johnson* and *Wiltse*. Worse, it also conflicts with this Court's many decisions where it has explicitly held that instructing on a theory unsupported by substantial evidence is prejudicial error. *E.g.*, *Reynolds v. Phare*, 58 Wn.2d 904, 905, 365 P.2d 328 (1961). Review is thus warranted under RAP 13.4(b)(1).

But Division Two did not stop there. It went a step further and presumed to declare how a jury should be instructed on premises liability generally. Not only did Division Two misstate notice law, consistent with its misreading of *Johnson*, but it also omitted an essential requirement for liability—a reasonable opportunity to exercise reasonable care to remedy an unsafe condition, absent which there can be no negligence. This

omission conflicts with *Johnson*, *Wiltse*, and many other precedents, warranting review under RAP 13.4(b)(1).

Review is also warranted under RAP 13.4(b)(4) because the proper premises-liability instruction is an issue of substantial public interest that this Court should determine. This Court should grant review to clarify that courts should not instruct on a foreseeability theory of notice unless substantial evidence supports it and, if so, then the plaintiff must prove that the specific unsafe condition was reasonably foreseeable where the incident occurred because of the business's nature and methods of operation.

IV. ISSUES PRESENTED FOR REVIEW

1. Under *Wiltse* and *Reynolds*, a plaintiff is entitled to an instruction on a foreseeability theory of notice only if substantial evidence supports it. This Court did not overrule *Wiltse* or *Reynolds* in *Johnson*. Does Division Two's holding that a trial court must instruct on foreseeability in every case conflict with *Johnson*, *Wiltse*, *Reynolds*, and other precedents?

2. Under *Johnson*, *Wiltse*, and other precedents, a possessor is entitled to a reasonable opportunity to remedy an unsafe condition. In declaring how juries should be instructed on premises liability, Division Two omitted this requirement.

Does Division Two's articulation of premises-liability law conflict with *Johnson*, *Wiltse*, and other precedents?

3. Washington has never had a pattern jury instruction on the foreseeability exception to the notice requirement for premises liability. But Division Two concluded that the general pattern jury instruction on premises liability must be revised to include it. Is the proper premises-liability instruction an issue of substantial public interest that this Court should determine?

V. FACTS RELEVANT TO PETITION

For this petition, Fred Meyer adopts the statement of facts in Division Two's published decision.

VI. REASONS THIS COURT SHOULD ACCEPT REVIEW

A. The *Pimentel* foreseeability exception to the notice requirement for premises liability applies if substantial evidence shows that the specific unsafe condition was reasonably foreseeable where the incident occurred because of the business's nature and methods of operation.

Under traditional premises-liability law, a possessor may be liable to an invitee injured because of an unsafe condition only if the possessor (1) had actual or constructive notice of the condition and (2) failed to exercise reasonable care to prevent harm. *Johnson*, 197 Wn.2d at 612 (citing RESTATEMENT (SECOND) OF TORTS § 343 (1965)). Constructive notice arises if

the possessor "by the exercise of reasonable care would discover the condition." *Id.* at 612–13 (quoting RESTATEMENT § 343).

This Court adopted a limited exception to the notice requirement for premises liability in *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 666 P.2d 888 (1983). It held that notice may be established by showing 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 49.[3] The *Pimentel* exception (or foreseeability exception) essentially provides a way to prove constructive notice.

This Court first applied the foreseeability exception to unsafe conditions arising in a store's self-service areas because "certain departments of a store, such as the produce department, were areas where hazards were apparent and therefore the owner was placed on notice by the activity." *Wiltse*, 116 Wn.2d at 461.

[3] This Court added: "The exception…does not shift the burden to the defendant to disprove negligence. The plaintiff must still prove that defendant failed to take reasonable care to prevent the injury." *Pimentel*, 100 Wn.2d at 49.

Even in that limited context, the exception did not apply to every unsafe condition that arose in a self-service area. To invoke the exception, a plaintiff had to present evidence that the specific "unsafe condition causing the injury '[was] continuous or foreseeably inherent in the nature of the business or mode of operation.'" *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 653–54, 869 P.2d 1014 (1994) (quoting *Wiltse*, 116 Wn.2d at 461).

This Court later expanded the foreseeability exception in *Johnson*. It did so because it concluded that self-service is not the only aspect of a store's operations that may make an unsafe condition reasonably foreseeable. *See Johnson*, 197 Wn.2d at 614–18. The plaintiff in *Johnson* slipped and fell just inside a store entrance on a rainy day. *Id.* at 608. Even though the entrance was not a self-service area, this Court held that the foreseeability exception applied because "customers tracking water in through the entryway of a business where they are meant to enter…is inherent in a store's mode of operation." *Id.* at 621 (emphasis removed).

B. Division Two's published decision on the foreseeability exception conflicts with this Court's decisions, warranting review under RAP 13.4(b)(1).

1. Division Two's holding that every plaintiff is entitled to an instruction on a foreseeability theory of notice—even absent evidence to support it—conflicts with *Johnson v. Liquor & Cannabis Board*, *Wiltse v. Albertson's Inc.*, *Reynolds v. Phare*, and many other decisions.

Per this Court, a plaintiff is not entitled to an instruction on a foreseeability theory of notice absent evidence connecting the unsafe condition to the business's nature and methods of operation. *See Wiltse*, 116 Wn.2d at 458–61. Instructing on a theory unsupported by substantial evidence is prejudicial error. *Reynolds*, 58 Wn.2d at 905.

Wiltse controls this issue. The plaintiff in *Wiltse* slipped on a puddle of water. *Wiltse*, 116 Wn.2d at 453–56. But 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. *Id.* Affirming the judgment on a defense verdict, this Court noted that the exception is limited "to specific unsafe conditions that

are continuous or foreseeably inherent in the nature of the business or mode of operation." *Id.* at 461. It further noted 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.

Far from overruling or modifying *Wiltse* in *Johnson*, this Court reaffirmed it. This Court did not modify existing law but only confirmed that "[t]he self-service requirement of the exception no longer applies." *Johnson*, 197 Wn.2d at 618. It thus held that the foreseeability exception is now "a general rule that an invitee may prove 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). This Court did not hold that a plaintiff is entitled

to an instruction on this theory of notice absent evidence to support it.

Division Two recognized that *Johnson* "reaffirm[ed]…the holding in *Wiltse*." *Slip Op.* at 9. Yet it erroneously interpreted *Johnson* as holding—contrary to *Wiltse*—that a trial court must instruct on the foreseeability exception in every case, even absent evidence of foreseeability. *Slip Op.* at 9 n.4. Division Two reasoned that, under *Johnson*, raising a jury question on notice of *any* kind entitles a plaintiff to an instruction on actual notice, constructive notice, *and* foreseeability:

> [T]he opinion [in *Johnson*] suggests that, if the plaintiff has presented sufficient evidence to have the case decided by a jury, then all three alternatives of actual notice, constructive notice, and reasonable foreseeability should be given equal consideration. … Here, because there was sufficient evidence for the case to go to the jury, consistent with *Johnson's* analysis of reasonable foreseeability, the jury should have given equal consideration to actual notice, constructive notice, and reasonable foreseeability.

Id.

Division Two evidently concluded that Plaintiff somehow raised a jury question on actual or constructive notice, entitling

him to an instruction on foreseeability. *See id.* It thus did not reach whether Plaintiff presented substantial evidence of foreseeability (*see id.*)—which he did not. *See Br. of Respondents* at 31–32.

Division Two got it wrong. After *Johnson*, instructing on a foreseeability theory of notice remains appropriate only if substantial evidence supports it. In characterizing the foreseeability exception as a "general rule," *Johnson*, 197 Wn.2d at 618, this Court was merely describing its application beyond the self-service context. *See id.* at 614 ("The foreseeability exception to the notice requirement applies beyond the self-service context."). This Court did not otherwise modify the exception or suggest that foreseeability is a viable theory of notice in every case. The theory was in play in *Johnson* only because substantial evidence supported an inference that the specific unsafe condition was reasonably foreseeable—customers entering the liquor store on rainy days was inherent in its business, and uncontroverted testimony established that

"'[r]ainy days always bring muddy footprints' into the entry of the store." *Johnson*, 197 Wn.2d at 620–21.

Where, instead, evidence of foreseeability is missing, an instruction on the theory is ruled out. *See Wiltse*, 116 Wn.2d at 454–55. Not only that, but if a plaintiff cannot otherwise establish notice, the negligence claim must be dismissed as a matter of law. *Ingersoll*, 123 Wn.2d at 654–56 (affirming summary judgment for shopping mall absent evidence of actual or constructive notice or connecting slippery substance on floor to mall's mode of operation).[4]

Division Two's decision conflicts with *Johnson*, *Wiltse*, *Reynolds*, and many other decisions concerning notice, and review is warranted to resolve those conflicts.

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[4] *See also Arment v. Kmart Corp.*, 79 Wn. App. 694, 902 P.2d 1254 (1995) (affirming summary judgment for store absent evidence connecting liquid on floor in clothing section with store's mode of operation); *Carlyle v. Safeway Stores, Inc.*, 78 Wn. App. 272, 896 P.2d 750 (1995) (affirming summary judgment for store absent evidence connecting shampoo on floor in coffee aisle with store's mode of operation).

2. Notice alone does not establish negligence. Division Two's articulation of how a jury should be instructed on premises liability conflicts with basic negligence law under *Johnson*, *Wiltse*, and many other precedents by omitting a reasonable time to remedy the unsafe condition.

Proof of notice does not itself establish negligence. More is required because, absent an opportunity to exercise reasonable care, no breach of duty occurs. *Gordon v. Deer Park Sch. Dist. No. 414*, 71 Wn.2d 119, 122, 426 P.2d 824 (1967). Once a possessor has notice of an unsafe condition, the possessor is entitled to a reasonable opportunity to exercise reasonable care to eliminate the condition before a breach of duty occurs. *Wiltse*, 116 Wn.2d at 457–58, 461–62; *see also* 6 WASH. PRAC., WASH. PATTERN JURY INSTR. CIV. WPI 120.06.02 (7th ed. 2019) (explaining that a duty arises only after the possessor has notice of the condition). This is basic negligence law.

This Court has consistently recognized this principle in its premises-liability decisions. For instance, in *Wiltse*, this Court held that a proprietor must remedy an unsafe condition "*[o]nce discovered*." *Wiltse*, 116 Wn.2d at 461 (emphasis added). This

Court observed that a proprietor would not be negligent "[i]f a customer had knocked over merchandise in the aisle and the next customer had immediately tripped over that merchandise[.]" *Id.* at 461–62. "[T]he storekeeper is allowed a reasonable time, under the circumstances, to discover *and correct* the condition[.]" *Id.* at 453–54 (emphasis added).[5]

This Court made clear in *Johnson* that the same rule applies if the plaintiff advances a foreseeability theory of notice: "There must be evidence of actual or constructive notice *or foreseeability*, *and a reasonable time to alleviate the situation*." *Johnson*, 197 Wn.2d at 617 (quoting *Mucsi v. Graoch Assocs.*

[5] *Accord Kerr v. City of Salt Lake*, 322 P.3d 669, 679 (Utah 2013) ("In the case of either actual knowledge or constructive knowledge, the plaintiff must also show that the defendant had sufficient notice of the unsafe condition 'that in the exercise of reasonable care [the defendant] should have remedied it.'"). This Court applies the same principle in the analogous context of municipal liability for an unsafe roadway, requiring evidence of "(a) notice of a dangerous condition…, and (b) a reasonable opportunity to correct it before liability arises for negligence from neglect of duty to keep the streets safe." *Niebarger v. City of Seattle*, 53 Wn.2d 228, 229, 332 P.2d 463 (1958).

Ltd. P-ship No. 12, 144 Wn.2d 847, 863, 31 P.3d 684 (2001)) (emphasis supplemented). The plaintiff must thus establish that the condition "existed for such time as would have afforded [the proprietor] sufficient opportunity, in the exercise of ordinary care, …*to have removed the danger*." *Johnson*, 197 Wn.2d at 612 (quoting *Ingersoll*, 123 Wn.2d at 652 (quoting *Smith v. Manning's, Inc.*, 13 Wn.2d 573, 580, 126 P.2d 44 (1942)) (emphasis added).

Division Two presumed to declare how a jury should be instructed on premises-liability law, based on its misinterpretation of the principles set forth in *Johnson*. *Slip Op.* at 8–9. But it omitted the essential requirement—also set forth in *Johnson*---of a reasonable opportunity to remedy the unsafe

condition. *See id.*[6] This Court should accept review to resolve this conflict with *Johnson*, *Wiltse*, and other decisions and clarify how juries should be instructed on premises-liability law.

C. The proper jury instruction on premises liability is an issue of substantial public interest that this Court should determine, warranting review under RAP 13.4(b)(4).

Premises-liability cases are among the most common types of civil litigation. And premises-liability law applies not only to slip-and-fall accidents in stores but to all manner of accidents on public and private property. This Court has not hesitated to review premises-liability cases where appropriate to develop and clarify the law in this important, frequently litigated area. Review is warranted because Division Two's conclusion that the general pattern jury instruction on premises liability must

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[6] Division Two's omission was seemingly intentional. It modified its quotation of *Johnson* to replace the words "and a reasonable time to alleviate the situation" with an ellipsis: "The *Johnson* court endorsed *Mucsi*'s statement that '[t]here must be evidence of actual or constructive notice *or foreseeability***....**'" *Slip Op.* at 7 (quoting *Johnson*, 197 Wn.2d at 617 (quoting *Mucsi*, 144 Wn.2d at 863)) (bold-underline added)).

be revised. The proper jury instruction on premises-liability law is an issue of substantial public interest that this Court should determine. RAP 13.4(b)(4).

1. Division Two misread *Johnson* in concluding that the general pattern jury instruction on premises liability must be revised to include the foreseeability exception in all cases.

Washington has never had a pattern jury instruction on the foreseeability exception. Division Two concluded that, given *Johnson*, the general pattern jury instruction on premises liability, WPI 120.07, must be revised to include the exception. That instruction is based on *Restatement (Second) of Torts* § 343. *Compare* WPI 120.07, *with* RESTATEMENT § 343 (1965). It does not mention foreseeability. It states:

> An [owner of premises] [occupier of premises] [operator] is liable for any [physical] injuries to its [business invitees] [public invitees] [customers] caused by a condition on the premises if the [owner] [occupier] [operator]:
>
> (a) knows of the condition or fails to exercise ordinary care to discover the condition, and should realize that it involves an unreasonable risk of harm to such [business invitees] [public invitees] [customers];

(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 ordinary care to protect them against the danger; and

(d) the dangerous condition is within those portions of the premises that the invitee is expressly or impliedly invited to use or might reasonably be expected to use.

WPI 120.07; *see* CP 728.

In addition, Washington has a pattern jury instruction specific to temporary unsafe conditions, also given here, which Division Two did not mention. It, too, omits any mention of foreseeability. It states:

> An [owner] [occupier] of premises has a duty to correct a temporary unsafe condition of the premises that was not created by the [owner] [occupier], [and that was not caused by negligence on the part of the [owner] [occupier],] if the condition was either brought to the actual attention of the [owner] [occupier] or existed for a sufficient length of time and under such circumstances that the [owner] [occupier] should have discovered it in the exercise of ordinary care.

WPI 120.06.02; *see* CP 727. This Court approved this instruction in *Wiltse*. *Wiltse*, 116 Wn.2d at 462.

Division Two premised its conclusion that the general pattern instruction must be revised on its misreading of *Johnson*. As discussed above, Division Two mistakenly concluded that *Johnson* requires that a jury be instructed on the foreseeability exception in every case. Again, such an instruction is appropriate only if substantial evidence supports the theory. *See Wiltse*, 116 Wn.2d at 461–62; *see also Reynolds*, 58 Wn.2d at 905. Review is warranted to decide whether the pattern jury instructions—which trial courts routinely use—should be revised and, if so, how.

2. This Court should confirm that, to invoke the foreseeability exception, a plaintiff must prove that the specific unsafe condition was reasonably foreseeable in the area where the incident occurred because of the business's nature and methods of operation.

Under Plaintiff's proposed instruction on the foreseeability exception, notice is established if the jury finds that "the nature of the proprietor's business and its methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable[.]" *Slip Op.* at 4 (citing

CP 155). Although this language is found in *Johnson* and *Pimentel*, *see Johnson*, 197 Wn.2d at 613 (quoting *Pimentel*, 100 Wn.2d at 49), it is not a proper instruction by itself because it omits required threshold elements to apply the foreseeability exception.

When a plaintiff seeks to establish notice based on foreseeability, it is not enough to prove that unsafe conditions generally were reasonably foreseeable within the store. Instead, the plaintiff must prove that the specific unsafe condition was reasonably foreseeable (1) because of "the nature of the proprietor's business and methods of operation," and (2) "in the area in which [the plaintiff] fell." *Johnson*, 197 Wn.2d at 615 (quoting *Ingersoll*, 123 Wn.2d at 654); *see also Slip Op.* at 9 ("[T]here 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 Court in *Johnson* did not eliminate those requirements. Even when previously limited to self-service

areas, the foreseeability exception did not apply to all unsafe conditions that arose in those areas. Instead, it applied to conditions that arose because of the self-service mode of operation. *Ingersoll*, 123 Wn.2d at 653–54; *Wiltse*, 116 Wn.2d at 461. When the exception is applied outside a self-service area as in *Johnson*, the plaintiff still must establish that the specific unsafe condition arose from the business's nature or mode of operation in the area where the incident occurred. *See Johnson*, 197 Wn.2d at 620–21 (concluding that evidence specific to the condition and location was sufficient to invoke the exception).

Ingersoll is instructive. The plaintiff there slipped on an unknown substance in the common area of a mall. *Ingersoll*, 123 Wn.2d at 650–51. This Court affirmed a summary judgment for the defendant. *Id.* This Court confirmed that the foreseeability exception does not apply just because an unsafe condition arose in a particular area of a store. "Rather, it applies if the unsafe condition causing the injury is 'continuous or foreseeably inherent in the nature of the business or mode of operation.'" *Id.*

at 653–54 (quoting *Wiltse*, 116 Wn.2d at 461). In other words, "[t]here must be a relation between the hazardous condition and the…mode of operation of the business." *Id.* at 654. This Court affirmed the summary judgment because no evidence connected the substance on which the plaintiff slipped with the business's nature and methods of operation "in the area in which [the plaintiff] fell." *Id.* at 654 (quoted in *Johnson*, 197 Wn.2d at 615).

Plaintiff argued to the Court of Appeals that foreseeability may be established with general evidence about the frequency of slip-and-fall accidents in stores. *See Br. of Appellant* at 14; *Reply Br.* at 13–15. But *Ingersoll* teaches that a plaintiff must prove that the specific unsafe condition was reasonably foreseeable in the area where the injury occurred, because of the business's nature and methods of operation. *Ingersoll*, 123 Wn.2d at 653–54. So where, as here, no evidence exists on the cause of the unsafe condition, a plaintiff cannot present a foreseeability theory to the jury. *See id.* at 654–56; *see also Wiltse*, 116 Wn.2d at 461 (affirming the refusal to instruct on foreseeability absent

a factual basis). This Court did not modify these principles in *Johnson*; it merely extended the foreseeability exception to apply regardless of why the unsafe condition was foreseeable—whether because of a store's self-service mode of operation for some other reason.

Given Division Two's published decision, review is warranted to confirm the elements that must be included in a jury instruction on the foreseeability exception in cases where it properly applies.

VII. CONCLUSION

This Court should grant review under RAP 13.4(b)(1) and (b)(4) because Division Two's published decision conflicts with multiple precedents and invalidates a pattern jury instruction on premises liability.

This document contains 4,139 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 10th day of August, 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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DATED this 10th day of August, 2023.

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

July 11, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARTY MOORE, as personal representative of the Estate of Rebecca Moore, Appellant, v. FRED MEYER STORES, INC., a foreign corporation, registered and doing business in Washington; FRED MEYER, INC., a corporation, registered and doing business in Washington; THE KROGER CO., a foreign corporation, registered and doing business in Washington; each of them d/b/a FRED MEYER; and BLACK AND WHITE I-V, businesses licensed to conduct business in the state of Washington, DOES I-V, employees and/or agents of defendants FRED MEYER, INC., Respondents.	No. 56950-7-II ORDER GRANTING MOTION TO PUBLISH

Appellant moves for publication of the Court's May 2, 2023, opinion. Upon consideration, the Court grants the motion to publish. Accordingly, it is

SO ORDERED.

PANEL: Jj. MAXA, VELJACIC, PRICE

FOR THE COURT:

PRICE, J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

May 2, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARTY MOORE, as personal representative of the Estate of Rebecca Moore, Appellant, v. FRED MEYER STORES, INC., a foreign corporation, registered and doing business in Washington; FRED MEYER, INC., a corporation, registered and doing business in Washington; THE KROGER CO., a foreign corporation, registered and doing business in Washington; each of them d/b/a FRED MEYER; and BLACK AND WHITE I-V, businesses licensed to conduct business in the state of Washington, DOES I-V, employees and/or agents of defendants FRED MEYER, INC., Respondents.	No. 56950-7-II UNPUBLISHED OPINION

PRICE, J. — Marty Moore, as personal representative of the estate of Rebecca Moore, appeals the judgment entered in favor of Fred Meyer Stores Inc. following a defense jury verdict in this personal injury case.[1] Marty argues that the trial court erred by refusing to give his proposed instruction on notice and by giving, instead, Fred Meyer's proposed instruction on notice. Following our Supreme Court's opinion in *Johnson v. Liquor & Cannabis Board*, 197 Wn.2d 605,

[1] Because the Moores share the same last name, we refer to them by their first names for clarity. We intend no disrespect.

486 P.3d 125 (2021), the trial court's instructions were a misstatement of the law. Accordingly, we reverse the jury's verdict and remand for further proceedings consistent with this opinion.

FACTS

On August 5, 2019, Rebecca filed a complaint for damages against Fred Meyer. The complaint alleged that Rebecca was injured after she slipped and fell while shopping in a Fred Meyer store. Prior to trial, Rebecca passed away and Marty, the personal representative of Rebecca's estate, was substituted as a plaintiff. The case proceeded to a jury trial.

Rebecca's deposition testimony was read to the jury. Rebecca testified that in August 2016, she went shopping at the Fred Meyer in Sumner. It was sunny when she went to the store. After Rebecca entered the Fred Meyer, she went to the coffee and cereal aisle. Rebecca was walking down the aisle a few steps behind two women shopping with a child. As she was walking down the aisle, she slipped in a puddle of water and landed on her side. Rebecca did not see anything on the floor besides a puddle of water. Rebecca also testified that there were paper towels and a folded-up, yellow, plastic wet floor sign on the store shelf near where she fell. Rebecca did not know where the water came from or how it got on the floor.

After Rebecca fell, one of the women in front of her left to get the attention of a Fred Meyer employee. The employee helped Rebecca up and gave her some paper towels to dry the water off her arm. Then the employee went to get a manager. Rebecca testified that she sat with the manager for approximately 10 minutes, filling out an incident report. Rebecca then drove herself home from the Fred Meyer. Later, Rebecca went to urgent care.

Ryan Johnson testified at trial. In August 2016, Johnson was an assistant grocery manager at the Sumner Fred Meyer. Johnson testified that he was notified by a cashier that a customer had

fallen while shopping. He went to speak to the customer he later learned was Rebecca. When Johnson contacted Rebecca, she was no longer in the aisle of the fall, and he asked her if she was okay. Rebecca said that she was. After speaking with Rebecca, Johnson went to the aisle to look for the spill, but the water had already been cleaned up. A few days later, Johnson completed an incident report.

Johnson explained that the aisle where Rebecca fell contained both whole and ground coffee as well as breakfast cereal. According to Johnson, there were only dry goods on either side of the aisle. There were no refrigerated cases, freezers, or coolers in any of the nearby aisles. There was also no water stocked in the coffee and cereal aisle.[2]

Fred Meyer proposed a pattern jury instruction on liability which included an actual or constructive notice requirement:

> An owner of premises is liable for any physical injuries to its business invitees caused by a condition on the premises if the owner:
>
> *(a) knows of the condition or fails to exercise ordinary care to discover the condition, and should realize that it involves an unreasonable risk of harm to such business invitees*;
>
> (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 ordinary care to protect them against the danger; and
>
> (d) the dangerous condition is within those portions of the premises that the invitee is expressly or impliedly invited to use or might reasonably be expected to use.

[2] Johnson's testimony also casts doubt on whether any wet floor sign could have been on a nearby shelf as described by Rebecca. Johnson explained that the standard wet floor signs are three legs that open up into a cone shape known as caution cones. The caution cones are the only type of wet floor signs that Johnson had ever seen in Fred Meyer stores. Caution cones are kept in tubes at various places throughout the store. Johnson testified that he did not believe a caution cone could fit on a store shelf.

Clerk's Papers (CP) at 124 (emphasis added). Based on *Pimentel*[3] and *Johnson*, Marty proposed a modified version of the instruction that changed the language in only section (a) of the instruction to include reasonable foreseeability, rather than actual or constructive notice:

> (a) the nature of the proprietor's business and its methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable;

CP at 155.

In its ruling on the jury instructions, the trial court first explained its understanding of the case law, including its view of the effect of the recent *Johnson* case:

> Just by way of reminder, what *Johnson* did -- what the holding in *Johnson* did was remove the self-service aspect of what *Piment[e]l* created so many years ago. *Johnson* did not change the traditional rule of notice.

Verbatim Rep. of Proc. (VRP) (Oct. 28, 2021) at 326. Then the trial court reviewed the evidence to determine whether giving the instruction based on *Johnson* was appropriate. The trial court recognized there was some evidence establishing that Fred Meyer was aware that slips and falls were a general risk inside the store, but it ruled that the evidence did not support giving the instruction based on *Johnson* because Moore did not establish the water on the floor was related to the store's business and its method of operation. The trial court gave Fred Meyer's proposed pattern instruction with its traditional standard of actual or constructive notice.

The jury returned a verdict finding that Fred Meyer was not negligent.

Marty appeals.

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

ANALYSIS

Marty argues that the trial court's jury instructions were a misstatement of the law. We agree that the trial court's jury instructions were not an accurate statement of the law following our Supreme Court's opinion in *Johnson*. Accordingly, we reverse.

"Jury instructions are generally sufficient if they are supported by the evidence, allow each party to argue its theory of the case, and, when read as a whole, properly inform the trier of fact of the applicable law." *Helmbreck v. McPhee*, 15 Wn. App. 2d 41, 57, 476 P.3d 589 (2020), *review denied*, 196 Wn.2d 1047 (2021). We review a trial court's instructions for legal error de novo. *Id.*

Traditional standards of premises liability require proof of actual or constructive notice of a dangerous condition. *Johnson*, 197 Wn.2d at 612. "Actual notice is the same as 'knowing' that the condition exists." *Id.* " '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.* (alteration in original) (internal quotation marks omitted) (quoting *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652, 869 P.2d 1014 (1994)).

In *Pimentel*, our Supreme Court created an exception to the notice requirement for self-service areas of stores. 100 Wn.2d at 49-50. The *Pimentel* court "held that when an invitee is injured at a self-service business, the traditional notice requirement is eliminated 'when 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.' " *Johnson*, 197 Wn.2d at 613 (quoting *Pimentel*, 100 Wn.2d at 49). However, the *Pimentel* court expressly limited the exception, stating that "the requirement of showing notice will be eliminated only if the particular self-service

operation of the defendant is shown to be such that the existence of unsafe conditions is reasonably foreseeable." *Pimentel*, 100 Wn.2d at 50.

In *Johnson*, our Supreme Court analyzed whether the self-service aspect was a necessary requirement for the reasonable foreseeability exception identified in *Pimentel* to apply. 197 Wn.2d at 614. Our Supreme Court started by tracing the prior case law on the reasonable foreseeability exception. *Id.* at 614-18. First, in *Wiltse*, the court refused to apply the reasonable foreseeability exception to an unsafe condition that was not inherent in a store's mode of operation. *Id.* at 614 (citing *Wiltse v. Albertson's, Inc.*, 116 Wn.2d 452, 461, 805 P.2d 793 (1991)). Then, in *Ingersoll*, the court refused to expand the exception again because the Plaintiff " 'failed to produce any evidence from which the trier of fact could reasonably infer that the nature of the business and methods of operation of the mall are such that unsafe conditions are reasonably foreseeable in the area in which she fell.' " *Id.* at 615 (quoting *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 654, 869 P.2d 1014 (1994)).

However, the *Johnson* court recognized that since *Ingersoll*, the foreseeability exception had been expanding. *Id.* at 616. In *Iwai*, the four-justice lead opinion eliminated the self-service requirement; the unsafe condition was required to be connected to the nature of the business and methods of operation but not necessarily connected to the self-service area of a store. *Id.* (citing *Iwai v. State*, 129 Wn.2d 84, 100, 915 P.2d 1089 (1996) (plurality opinion)). Further, the *Johnson* court noted that the one-justice concurrence "indirectly supported the expansion of the exception" by viewing the expansion of the reasonable foreseeability exception as unnecessary because it was already consistent with established rules of premises liability. *Id.* (citing *Iwai*, 129 Wn.2d at 103 (Alexander, J., concurring)).

Finally, the *Johnson* court recognized that the expansion of the reasonable foreseeability exception was completed by *Mucsi v. Graoch Associates Ltd. Partnership No. 12*, 144 Wn.2d 847, 31 P.3d 684 (2001). *Id.* at 617. The *Johnson* court endorsed *Musci*'s statement that " '[t]here must be evidence of actual or constructive notice *or foreseeability* . . . .' " *Id.* (quoting *Mucsi*, 144 Wn.2d at 863). The *Johnson* court recognized that *Mucsi* "indicated that upon remand the trial court *must* equally consider foreseeability of the condition as it would actual or constructive notice." *Id.* Based on its review of prior case law, the *Johnson* court concluded,

> Our precedent has made the exception from *Pimentel* into a general rule that an invitee may prove 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." 100 Wn.2d at 49. The self-service requirement of the exception no longer applies.

Id. at 618.

In applying reasonably foreseeability to the case in front of it, the *Johnson* court explicitly harmonized its current holding with *Wiltse*. *Id.* at 621. The *Johnson* court explained,

> This conclusion does not run afoul of *Wiltse*. There, we held that "[r]isk of water dripping from a leaky roof is not inherent in a store's mode of operation." *Wiltse*, 116 Wn.2d at 461. This, however, is distinct from the situation before us here. While water dripping from a leaky roof is entirely incidental to a business's operations, customers tracking water in through the entryway of a business where they are meant to enter the store is *not*: that *is* inherent in a store's mode of operation.

Id. (alteration in original).

Here, Marty argues that *Johnson* has eliminated actual or constructive notice altogether and replaced it with the reasonable foreseeability exception. In contrast, Fred Meyer argues that *Johnson* did nothing but recognize that the self-service requirement was no longer necessary to apply the reasonable foreseeability exception. We reject both Marty's overly broad and Fred Meyer's overly narrow reading of *Johnson*. Instead, viewing the opinion as a whole, *Johnson* establishes reasonable foreseeability as equal to traditional notice requirements and whether it applies is fundamentally a question of fact for the jury.

This requires revision of the jury instructions regarding the traditional requirement of notice. The current pattern instruction on premises liability provides,

> An *[owner of premises] [occupier of premises]* [_____ operator] is liable for any *[physical]* injuries to its *[business invitees] [public invitees] [customers]* caused by a condition on the premises if the *[owner] [occupier]* [_____ operator]:
>
> (a) knows of the condition or fails to exercise ordinary care to discover the condition, and should realize that it involves an unreasonable risk of harm to such *business invitees] [public invitees] [customers]*;

6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 120.07 (7th ed. 2022) (WPI). Following *Johnson*, this is no longer an accurate statement of the law because reasonable foreseeability is given equal consideration with the traditional notice requirements. Therefore, reasonable foreseeability—the nature of the proprietor's business and its method of operation are such that the existence of unsafe conditions on the premises is reasonably

foreseeable—should be included *alongside* rather than *in place of* the traditional notice requirements articulated in WPI 120.07.[4]

Further, the 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*.

Jury instructions that are consistent with our opinion reflect the law articulated in *Johnson*, that reasonable foreseeability is no longer an exception to traditional notice requirements but warrants equal consideration with traditional notice requirements.

The jury instructions given by the trial court were not an accurate statement of the law following *Johnson* (although we note that neither party in this case proposed accurate instructions). Because the jury instructions were not an accurate statement of the law, we reverse the jury's verdict. We remand to the trial court for further proceedings consistent with this opinion.

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[4] Fred Meyer also argues that an instruction on reasonable foreseeability must be supported by substantial evidence, and there was no evidence supporting the jury instruction. However, although *Johnson* involved the question of whether the trial court erred by denying the defendant's motion for judgment as a matter of law, the opinion suggests that, if the plaintiff has presented sufficient evidence to have the case decided by a jury, then all three alternatives of actual notice, constructive notice, and reasonable foreseeability should be given equal consideration. *See Johnson*, 197 Wn.2d at 617-18 ("We thus indicated that upon remand the trial court *must* equally consider foreseeability of the condition as it would actual or constructive notice;" "Our precedent has made the exception from *Pimentel* into a general rule that an invitee may prove 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 in reasonably foreseeable.' " (quoting *Pimentel*, 100 Wn.2d at 49)). Here, because there was sufficient evidence for the case to go to the jury, consistent with *Johnson's* analysis of reasonable foreseeability, the jury should have given equal consideration to actual notice, constructive notice, and reasonable foreseeability.

No. 56950-7-II

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.

PRICE, J.

We concur:

MAXA, P.J.

VELJACIC, J.

CARNEY BADLEY SPELLMAN

August 10, 2023 - 1:12 PM

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