NO. 1024100

SUPREME COURT
OF THE STATE OF WASHINGTON

HWAYO JENNY GALASSI and MICHAEL GALASSI

Respondents

v.

LOWE'S HOME CENTERS, LLC

Petitioner.

ANSWER OF GALASSIS TO PETITION FOR DISCRETIONARY REVIEW

GARY A. PREBLE, WSB #14758
Attorney for Appellants,
Hwayo Jenny Galassi
Michael Galassi

PREBLE LAW FIRM, P.S.
2120 State Avenue NE, Suite 101
Olympia, WA 98506
(360) 943-6960
Fax: (360) 943-2603
gary@preblelaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Other State Cases

Washington Court Rules

A. STATEMENT OF THE CASE

On May 3, 2017 sometime around 1:00 p.m., CP 34, 56, Hwayo "Jenny" Galassi was shopping at Respondent Lowe's in Olympia, CP 56, looking for 2' x 25' wire fencing to keep animals out of her garden. CP 56. She located the product on a display shelf in the garden section of the store and noticed that the roll of wire on the second shelf from the top, CP 57:2–10; 66:12–20, at about the 5' 8" to 6' level, CP 63, was lying askew on the shelf. The roll was not situated properly, crookedly resting and sticking out at a slant resting on a restraining bar. CP 57:2–9; 62:21–25; *cf.* CP 69, 11.

Mrs. Galassi decided to select that roll, CP 63:2-13, but as soon as she touched the roll with her finger, it slid off the shelf, end down, CP 52, and fell directly onto the big toe of her right foot. CP 57. As she described it, she is a very careful person; and when she barely touched the roll, it popped out in the blink of an eye as if pushed, CP 65:20–24, all of a sudden coming off from

the shelf. CP 57. The photo below shows the display shelf shortly after the incident.[1] CP 11; *see* CP 69 for full height of shelf.

[1] A prior customer had likely taken the roll out and then just jammed it back onto the shelf at an angle rather than as it was supposed to be placed, leaving it sticking out over the retaining bar. The other rolls behind it on the shelf must have pressed on the roll and it "popped" out at the slightest touch of Mrs. Galassi.

Mrs. Galassi was in immediate pain when the fencing roll landed on her toe but she managed to struggle to replace the roll properly in the display out of concern for the safety of other customers. CP 58.

Lowe's employee Tina Jenkins was working in the garden center on May 3, 2017, where she was "the live nursery specialist". CP 45. The rolls of wire fencing were located in the rear of the garden center. *Id.* Ms. Jenkins stated that Lowe's employees are trained to correct unsafe conditions such as improperly stocked or improperly put away items on display shelves as soon as such a condition is brought to their attention or if they notice it on their own. CP 45. Ms. Jenkins stated: "The first thing employees do in the store every day is a safety walk. As part of the safety walk, we specifically look for improperly stocked or improperly put away items that could fall and injure customers." *Id.* She also said she had not seen any improperly stocked or put away items on the wire fencing display shelf on May 3 before she learned Mrs. Galassi had been injured. *Id.*

Ms. Jenkins "noticed" Mrs. Galassi limping toward her. CP 45:24–25, and that Mrs. Galassi was quite vocal in her pain. CP 45:2. One of Mrs. Galassi's characteristics is that when in great pain she gets upset and very loud. CP 18.[2]

Procedural History

Defendant Lowe's obtained an Order Granting Summary Judgment, CP 35–36. The Court of Appeals, Division II, reversed the trial court and subsequently published its opinion on August 29, 2023. *Galassi v. Lowe's Home Centers*, *LLC.*, — Wn. App. ___, 534 P.3d 354, 2023 WL 5540776 (2023). Lowe's seeks discretionary review and the Galassis answer herewith.

B. ISSUES

The Galassis answer no to each issue raised by Lowe's: (1) The COA opinion did not conflict with *Pimentel v. Roundup Co.*,

---

[2] Damages are not an issue on appeal, but as a result of the fencing roll dropping on Mrs. Galassi's toe, she developed complex regional pain syndrome (CRPS) resulting in daily pain, CP 34, and having significant impact upon her mobility and upon her ability to focus on tasks and express her thoughts. *Id.,* CP 18.

100 Wn.2d 39, 666 P.2d 888 (1983) or *Ingersoll v. DeBartolo*, *Inc*., 123 Wn.2d 649, 869 P.2d 1014 (1994); or (2) with published opinions in every division of the Court of Appeals, and (3) did not create a per se rule that the danger of falling merchandise is always reasonably foreseeable.

C. ARGUMENT

I. DEFENDANT LOWE'S FAILED TO MEET ITS INITIAL BURDEN IN ITS MOTION FOR SUMMARY JUDGMENT AND WOULD SHIFT THE BURDEN TO THE NONMOVING PARTY.

This case arose from a motion for summary judgment in which all evidence and all reasonable inferences therefrom should be considered in a light most favorable to the nonmoving party. *Iwai v. State*, *Employment Sec. Dep't*, 129 Wn.2d 84, 96, 915 P.2d 1089 (1996).

> In a summary judgment motion, the moving party must first show the absence of an issue of material fact. *Young v. Key Pharmaceuticals*, *Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The burden then shifts to the nonmoving party to set forth specific facts showing a genuine issue for trial. CR 56(e); *Young*, [*Id.*]

Id. at 95–96.

Lowe's claims it met its burden of showing no genuine issue of material fact as to an essential element of the opponent's case. Specifically it first stated it was undisputed—which is accurate—that Lowe's had no actual or constructive notice of the fencing roll lying askew on the display shelf. Lowe's then addressed the *Pimentel* exception to notice, quoting it as follows:

> "notice need not be shown . . . 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." *Pimentel* at 49.

CP 14. It then stated what is sees as the Galassis' position: "At best, Plaintiffs can argue that the danger of falling objects is reasonably foreseeable at a large warehouse hardware store such as Lowe's." CP 15. Lowe's then purported to meet its summary judgment burden of showing that the Galassis could not show that Lowe's' methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable.

The "proof" Lowe's provided was:

- The photo, *see* p. 2, *supra*, taken moments after the incident, shows no discernible defect in the display shelf or any issue with the merchandising
- There is no evidence to suggest how long the roll of wire fencing was lying askew.
- There is no evidence to suggest that any flaw in Lowe's mode of operation creates likelihood that wire fencing will be improperly stocked or put away such that it could constitute a hazard.
- There is also nothing inherently dangerous about displaying rolls of wire fencing behind a stop bar in the manner depicted in the photo.

CP 15. From the four foregoing statements, Lowe's proclaimed the *Pimentel* self-service exception does not apply to excuse Plaintiffs from showing that Lowe's had constructive notice of an unsafe condition. CP 15.

The purported proofs, however, reveal a misunderstanding of the *Pimentel* exception.

> " 'Self-service departments are areas of a store where customers service themselves. In such areas, where lots of goods are stocked and customers remove and replace items, hazards are apparent.' " *Ingersoll*, 123 Wn.2d at 653, 869 P.2d 1014 (internal quotation marks omitted) (quoting *Coleman v. Ernst Home Ctr., Inc.*, 70 Wn. App. 213, 218–19, 853 P.2d 473 (1993)).

Johnson v. Liquor & Cannabis Bd., 197 Wn.2d 605, 619, 486 P.3d 125 (2021). In addition, "it is unnecessary to prove the length of time that the dangerous condition had existed." *Wiltse v. Albertson's Inc.*, 116 Wn.2d 452, 461, 805 P.2d 793 (1991).

Lowe's "proofs" all beg the question. Lack of defect, length of time, proper stocking by employees and presence of a stop bar are not relevant to the question. Where customers remove and replace items, the hazard was apparent—it was reasonably foreseeable—that someone could jam a heavy item such as the fencing roll back into the shelf that was roughly six feet above the floor such that it popped out at Mrs. Galassi's mere touch.

> The realities of a self-service operation cannot be ignored . . . where the customers have access to every item for sale and are subject to the whims of all other customers in handling that merchandise.

Ciminski v. Finn Corp., *Inc.*, 13 Wn. App. 815, 819–20, 537 P.2d 850 (1975). Mrs. Galassi is a prime example of being subject to the whim of another Lowe's customer. Lowe's did not make a

showing that the existence of the unsafe condition of the fencing roll askew on the shelf was not reasonably foreseeable.

The Court of Appeals recognized nevertheless that Ms. Jenkins acknowledged reasonable foreseeability of improperly shelved items falling and harming Lowe's patrons.

> *Pimentel* realized that 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. Hence, the actual cause of the hazard is relevant in establishing whether the unreasonably dangerous condition was continuous or reasonably foreseeable because of the specific self-service operation.

Wiltse, 116 Wn.2d at 461 (1991). Lowe's certainly recognized the foreseeability because it saw the need to police the store daily to correct "improperly put away items that could fall and injure customers." CP 45. The actual cause of the hazard in this case was a thoughtless Lowe's customer. Lowe's would certainly agree because the alternative person would necessarily be a Lowe's employee.

II. THE COURT SHOULD NOT GRANT DISCRETIONARY REVIEW UNDER RAP 13.4(b)(1) BECAUSE *GALASSI* CONFLICTS WITH NEITHER *PIMENTEL* NOR *INGERSOLL*.

A. *Galassi* Does Not Conflict with *Pimentel*.

Lowe's claims there is no evidence presented that the wire fencing roll was situated on the shelf in violation of its policies. It is presumed Lowe's is referring to the roll before it was removed by another customer and jammed back in. It is true that *Pimentel* stated the following about policy:

> Other testimony relevant to defendant's liability in the record before this court indicates that defendant store had a policy of keeping all containers well back on shelves and avoiding overhangs greater than 1 inch.

100 Wn.2d at 42. The court's mention of the store's liability in conjunction with its shelving policy was most likely an acknowledgment that Fred Meyer was doing at least something to prevent what happened to Mrs. Pimentel.

However, policy itself does not solve the problem. It didn't protect Mrs. Pimentel and it did not protect Mrs. Galassi.

Assuming that Lowe's had a policy that shelving be done correctly, the fact that it is a self-service mode of operation with many fencing rolls on the shelves means it is an "apparent hazard" because the act which left the fencing roll askew was reasonably foreseeable. The pictures of the shelf are evidence of the mode of operation. CP 15, 69.

Lowe's then misstates Ms. Jenkins' testimony by saying "employees" did not notice improperly stocked items. Petition, 7. The Declaration of Tina Jenkins, the live nursery specialist, CP 45, actually stated, speaking only for herself, CP 45:

> 9. Safety is the number one priority at Lowe's. As associates, we are trained to immediately correct unsafe conditions such as improperly stocked or improperly put away items on display shelves as soon as such a condition is brought to our attention or if we notice it on our own.
>
> 10. The first thing employees do in the store every day is a safety walk. As part of the safety walk, we specifically look for improperly stocked or improperly put away items that could fall and injure customers.
>
> 11. I did not see any improperly stocked or improperly put away items on the wire fencing display shelf on May 3, 2017 prior to learning of Ms. Galassi's injury.

However, careful consideration of Ms. Jenkins' statement shows many gaps, such that there remain material issues of fact; and the Plaintiffs are entitled to every reasonable inference.

- The record does not indicate how large the garden center was.
- The record does not indicate how many employees worked in the garden center or how many were in the garden center at 1:00 p.m. on May 3, 2017.
- Lowe's presented no evidence of any other employees working in the garden center about 1:00 p.m. May 3, 2017 or if other employees even worked in the garden center.
- Ms. Jenkins had to contact the front end manager and assistant store manager to assist with the situation, CP 45, suggesting there were no other employees in the garden center at that time.
- The record does not indicate whether the live nursery area where Ms. Jenkins worked was near the rear of the garden center where the fence rolls were shelved.
- In addition, though she said Mrs. Galassi was quite vocal in her pain, CP 45:2, Ms. Jenkins does not state she initially *heard* Mrs. Galassi but only that she "*noticed*" her limping toward her. CP 45:24–25. That she did not hear the vocal Mrs. Galassi[3] before she saw her suggests Ms. Jenkins was not at that time near the wire fencing display shelf.

[3] Mr. Galassi also said one of his wife's characteristics is that when in great pain she gets upset and very loud. CP 18.

- The record does not indicate whether the work of Ms. Jenkins as the specialist for the live nursery would—or on May 3, 2017 did—take her in the vicinity of the wire fencing display shelf. CP 45.
- The record does not indicate, if the work of Ms. Jenkins as the live nursery specialist took her in the vicinity of the wire fencing display shelf, with what frequency she did so.
- Ms. Jenkins did not identify what time was the "first thing" that safety walks occurred on May 3, 2017, nor did she even state that she herself had done a safety walk that day.
- Even if Ms. Jenkins had done a safety walk that day, Ms. Jenkins did not say what time such walk had occurred or that her walk had included the wire fencing display shelf.
- Lowe's did not state that anyone had included the wire fencing display shelf in their first thing safety walk.
- Lowe's did not provide any store policy regarding checking the wire fencing shelving or other shelving with heavy items.
- There was no evidence there was any particular attention paid by any employee on May 3, 2017 to the wire fencing shelving or other similar shelving.
- Ms. Jenkins also did not state she had actually *seen* the wire fencing display shelf that day—only that she had *not seen* any improperly stocked or put away items on the wire fencing display shelf before she encountered Mrs. Galassi.
- Even if Ms. Jenkins had in fact seen the wire fencing display shelf that day, she does not state how much time had elapsed between such action and when she encountered Mrs. Galassi at about 1:00 p.m.
- And as in *Pimentel*, Ms. Jenkins did not state that an employee was specifically assigned to inspect the store.

Considering the above gaps in the record regarding Lowe's' care for its invitees, and all inferences therefrom in the light most favorable to the Galassis, there is no more evidence of reasonable care at Lowe's than was identified in *Pimentel* itself, 100 Wn.2d at 42—as shown clearly in the following comparison:

***Galassi*, 534 P.3d at 356**	***Pimentel*, 100 Wn.2d at 42**
[No explicit policy in record; but see items (1) and (2) below.]	[S]tore had a policy of keeping all containers well back on shelves and avoiding overhangs greater than 1 inch
(1) employees are trained to immediately correct improperly stocked items on display shelves	[A]ll employees were instructed to be alert for dangerous conditions.
(2) employees do a safety walk at the beginning of the day searching for improperly stocked items	The store was officially inspected for unsafe conditions before opening every morning
[*Infer from absence in Jenkins' testimony: During the day, no employee was specifically assigned to inspect the store*]	[D]uring the day, no employee was specifically assigned to inspect the store

***Galassi*, 534 P.3d at 356**	***Pimentel*, 100 Wn.2d at 42**
(3) she did not see any improperly stocked items on the wire fencing display shelf prior to Galassi's incident[4]	An hour before the incident, an employee saw that the paint can overhung the shelf but not dangerously[5]
(4) [Mrs.] Galassi did not ask her for help before retrieving the wire fencing from the display shelf	[Mrs. Pimentel did not notice the paint can, 32 Wn. App. at 648, to know to ask for help or avoid the paint can]

The only real difference between the facts of the two cases is that Mrs. Galassi did not ask for help and Mrs. Pimentel also did not know about the dangerous condition. *Pimentel v. Roundup Co.*, 32 Wn. App. 647, 648, 649 P.2d 135 (1982). But Mrs. Galassi's not asking for help is not a factor in whether Lowe's met its obligation to take reasonable care to prevent a dangerous condition.

Contrary to Lowe's' assertion, Petition, 7, the *Pimentel* court would not have concluded the danger posed by the mode of

---

[4] As noted above at p. 13

[5] The employee said the overhang was 1½–2 inches and the expert said the danger point was 3 ⅜ inches. 100 Wn.2d at 41.

shelving the fencing was not reasonably foreseeable. In fact, *Pimentel* did very little analysis. It was enough that the event happened in the self-service part of the store—just as what happened to Mrs. Galassi.

B. *Galassi* Does Not Conflict with *Ingersoll*.

It was reasonably foreseeable that Lowe's would continue to assert the need to get in lockstep with *Ingersoll*. Petition, 8. The only *Ingersoll* factor that could possibly apply to the *Pimentel* facts was whether there has historically been overhanging items falling on Fred Meyer patrons. That is a question that the court never considered. Again, the event happened in the self-service part of the store. That was enough. Reason said it was foreseeable. The activity itself was notice to Fred Meyer. Nor do the *Ingersoll* factors apply to *Galassi.*

Defendant's complaint against the facts in this case apply almost exactly to the facts in *Pimentel*. The figure below is an excerpt from page 9 of the Petition for Discretionary Review with

the *Pimentel* facts inserted in the place of the *Galassi* facts. As can be seen, *Pimentel* would fail Lowe's scrutiny as well. If *Galassi* is inconsistent with Ingersoll, just so is *Pimentel*.

> In the present case, just as in *Ingersoll*, the **Pimentels** presented no evidence regarding whether the danger posed by a **paint can overhanging** a shelf **near the magazine rack** is reasonably foreseeable in the business or mode of operation of **Fred Meyer**. There is no evidence of how the **paint can** came to **overhang**, or how long the **paint can** was so situated on the display shelf. There is no evidence to suggest that any flaw in **Fred Meyer's** business or mode of operation created the likelihood that a **paint can** would be **overhanging** a display shelf. There is no evidence that displaying **paint cans** on a display shelf **without a bar** bar is unsafe. There is no evidence of how frequently items such as **paint cans overhanging** a display shelf fell **by the magazines at Fred Meyer**. And there is no evidence that other similar incidents occurred at **Fred Meyer**.

C. *Lowe's inexplicably claims that the court erred in considering the evidence that Lowe's provided.*

Lowe's appears put out that the testimony it provided was used as evidence of genuine issues of material fact. In so doing it also denies the fundamental element of summary judgment that all facts—including the moving party's facts—and reasonable inferences are to be considered most favorably to the non-moving party, the Galassis.

Lowe's calls Mrs. Galassi's testimony "self-serving". Assuming for the moment that Lowe's is correct—which it is not in a summary judgment—counsel provides no evidence whatsoever for the pejorative comment, which carries with it the undertone of disregard of truth. Lowe's might just as well have said that Ms. Jenkins' testimony was self-serving. Lowe's went even further in its attack on Mrs. Galassi's testimony to claim her statements under oath were also "conclusory," and "an unsupported allegation with no intrinsic evidence" that did not

comport with CR 56(e) and did not provide "specific facts." Petition, 11.

Lowe's claim is so obviously wrong in a summary judgment motion as to warrant no response.[6] However, there was extrinsic evidence in that Ms. Jenkins saw Mrs. Galassi limping toward her and being vocal about her pain. CP 44–45, 18. Ms. Jemkins also repeated Mrs. Galassi's present sense impression and excited utterance, ER 803(a)(1) and (2), about the fencing falling on her toe. And there is nothing conclusory in Mrs. Galassi's eyewitness testimony about the wire roll popping off the shelf and landing on her toe.

---

[6] Counsel made similar statements in oral argument, https://tvw.org/video/division-2-court-of-appeals-2023021034/?eventID=2023021034, which caught the attention of the COA panel. *See* minutes 14:45–16:15.

> 15:18 Maxa, J. [Y]ou're suggesting Mrs. Galassi's saying that this was askew on the shelf is not good enough to establish for purposes of summary judgment that it was askew on the shelf, correct?
>
> 15:28 Missen: Your honor. I am saying that. . . .

Lowe's complains that it submitted Ms. Jenkins' declaration to show lack of notice, but the COA used her declaration to show reasonable foreseeability. But this is not the first such case to do so.

> The dangerous condition was created by the store's method of sale. The steps taken to constantly clean the floor show that the store owner recognized the danger.

Ciminski, 13 Wn. App. at 822 (quoting *Jasko v. F. W. Woolworth Co.*, 177 Colo. 418, 420, 494 P.2d 839 (1972)).

III. THE COURT SHOULD NOT GRANT DISCRETIONARY REVIEW UNDER RAP 13.4(b)(2) BECAUSE *GALASSI* DOES NOT CONFLICT WITH OTHER COA DECISIONS.

Lowe's relies on a subset of slip-and-fall cases where the plaintiffs have attempted unsuccessfully to come within the *Pimentel* exception and not have to prove notice. Those cases that do come within the exception are addressed as follows:

> Courts have applied this narrow [self-service] exception only when the slip-and-fall happens in an area where there is constant handling of slippery products. See, e.g., *Morton v. Lee*, 75 Wn.2d 393,

> 397–98, 450 P.2d 957 (1969) (outdoor produce display); *O'Donnell v. Zupan Enters., Inc.*, 107 Wn. App. 854, 856, 28 P.3d 799 (2001) (grocery store check-out aisle); *Ciminski v. Finn Corp.*, 13 Wn. App. 815, 823–24, 537 P.2d 850 (1975) (cafeteria buffet line);

Schmidt v. Coogan, 135 Wn. App. 605, 610, 145 P.3d 1216 (2006), *rev'd on other grounds*, 162 Wn.2d 488, 173 P.3d 273 (2007). See also *Jasko*, *supra*, a food counter selling pizza where customers would stand in the aisle eating pizza slices off waxed paper. It was reasonably foreseeable that some food—slippery products—would drop on the floor. In fact, when *Wiltse* said hazards were apparent in the produce aisle, there was no evidence presented of a produce aisle, just the acknowledgment that hazards were apparent and the owner was placed on notice by the activity itself. 116 Wn.2d at 461. "Hence, the actual cause of the hazard is relevant in establishing whether the unreasonably dangerous condition was continuous or reasonably foreseeable because of the specific self-service operation." *Id.* The same was true for *Pimentel.* Unlike the slip-and-fall cases cited by Lowe's,

the hazard was apparent by nature of Fred Meyer's mode of operation. The same is true for *Galassi*. Lowe's is placed on notice by the activity, by its mode of operation.

Just as the slip-and-fall cases within the Pimentel exception have to do with areas with slippery substance, *Pimentel* and *Galassi* have to do with objects which fall in the part of the store where such items are located.

The Defendant relies on cases that are thus distinguishable from the produce department, the meat counter, the pizza aisle, slip-and-fall cases where the unsafe condition of the stores' natures of business or modes of operation was foreseeably inherent.

IV. THE COURT SHOULD NOT GRANT DISCRETIONARY REVIEW UNDER RAP 13.4(b)(4) BECAUSE *GALASSI* DOES NOT CREATE A PER SE RULE AS TO FALLING MERCHANDISE.

This case fits squarely within the cases regarding the reasonable foreseeability exception and does not present a matter of public interest.

The pictures of the shelving, CP 15, 69, show Lowe's' mode of operation of some fencing—a lot of rolls put into one unit with shelves over six feet high. While some patrons would ask for help, others would not. But to know what the product is, some people might take outr a roll to consider it better than perhaps eye height or above. Putting it back would be a chore and a shorter person might just cram it back in as best as he or she could, unconcerned that it was not as they found it and regardless of seeking out an employee to let them know—if they could easily find one—that the roll was not put back right.

E. CONCLUSION

Based on the foregoing, Lowe's' Petition should be denied.

I certify this document contains 4073 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 24th day of October, 2022.

Gary Preble

GARY A. PREBLE, WSB# 14758
Attorney for Appellant

PREBLE LAW FIRM, P.S.

October 24, 2023 - 4:59 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,410-0
Appellate Court Case Title:	Hwayo and Michael Galassi v. Lowe's Home Centers, LLC
Superior Court Case Number:	20-2-01453-0

The following documents have been uploaded:

- 1024100_Briefs_20231024165807SC993478_7734.pdf
  This File Contains:
  Briefs - Other
  The Original File Name was ANS to Petition DR.pdf

A copy of the uploaded files will be sent to:

- Jonathan.Missen@lewisbrisbois.com
- Lynne.Crane@lewisbrisbois.com
- Michael.Jaeger@LewisBrisbois.com

Comments:

Sender Name: Gary Preble - Email: gary@preblelaw.com
Address:
2120 STATE AVE NE
OLYMPIA, WA, 98506-6515
Phone: 360-943-6960

Note: The Filing Id is 20231024165807SC993478