

NO. 39575-4-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

Edward Dupuy and Elvira Dupuy, Appellants,

v.

Petsmart, Inc., Respondent.

BRIEF OF APPELLANT

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STATE OF WASHINGTON
BY [Signature] DEPUTY
COURT OF APPEALS
DIVISION II

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I. Introduction

Petsmart is a unique retail chain in that it allows customers to bring their pets with them into the store. Petsmart places “Oops Stations” in several locations throughout the store, stocked with items for customers and/or employees to clean up after the pets urinate and defecate on the floor, which Petsmart conceded is a common occurrence. Edward Dupuy slipped and fell on a “wet floor” sign from one of these “Oops Stations” that had been knocked over, which Petsmart also conceded is a common occurrence.

Under *Pimentel v. Roundup Co.* and subsequent decisions, if a business’ operating procedures are such that unreasonably dangerous conditions are continuous or reasonably foreseeable, the plaintiff does not need to establish actual or constructive notice. This is known as the mode of operation rule. In such circumstances the store is considered to be on constant notice that hazards will occur. Here, the Dupuys presented enough evidence to show that Petsmart’s mode of operation allowing pets throughout the self-service store made it reasonably foreseeable that dangerous conditions such as this would exist. Therefore, Petsmart did not need to have actual or constructive notice of this hazard in order to be liable for the damages that resulted. Issues of material fact remain, such as whether Petsmart took adequate precautions in light of the hazards

involved in its mode of operation, and summary judgment for the Defendant was inappropriate.

II. Assignments of Error

A. Assignments of Error

The trial court erred by granting Defendant's Motion for Summary Judgment heard in open court on December 11, 2006.

B. Issue Pertaining to Assignments of Error

Whether a hazard that is within a self-service area and is clearly related to that store's self-service, pet-welcoming mode of operation is reasonably foreseeable under *Pimentel v. Roundup Co.* and subsequent decisions.

III. Statement of the Case

A. Procedural History

Edward and Elvira Dupuy filed a complaint against Petsmart, Inc. in the Superior Court of Washington in Kitsap County on August 14, 2007.¹ Defendant Petsmart brought a Motion for Summary Judgment that was heard on June 19, 2009.² The trial judge granted Petsmart's Motion.³ The judge found that the Dupuys failed to establish that Petsmart had actual or constructive notice of the hazard that caused Mr. Dupuy's injury, and that

¹ CP 1-5.

² CP 9-46; RP 1-26.

³ CP 100-101; RP 24-25.

if the *Pimentel* exception did apply, there was insufficient evidence to raise an issue of fact regarding whether the periodic inspections done by Petsmart were insufficient.⁴ This appeal followed.⁵

B. Factual History

The following facts were undisputed for the purpose of the Defendant's Motion for Summary Judgment. On February 10, 2007, Edward Dupuy entered Petsmart to shop for something for his dog.⁶ Petsmart is primarily a self-service store, with aisles of merchandise for sale that customers may browse and then carry to the registers at the front of the store to purchase.⁷

Petsmart allows customers to bring their pets into the store. Petsmart concedes that pet accidents (including urination and defecation) are common and accepted, and it would not be unusual for such accidents to happen more than ten times a day.⁸

Each Petsmart store is required to have a minimum of three "Oops Stations" strategically placed throughout the store.⁹ These "Oops Stations" are marked with a sign and contain "wet floor" warning signs, a

⁴ RP 19-25.

⁵ CP 102-105.

⁶ CP 23 (Dep. Of Edward Dupuy 94:13-15).

⁷ There are areas of the store, such as the pet grooming area, that are not self-service. However, it is not disputed that it is primarily a self-service operation and that Mr. Dupuy was within a self-service area. See, RP 5:4-5; RP 7:9-17.

⁸ CP 61 (Dep of L. Palmer 19:12-20:7).

⁹ CP 89.

trash can, paper towels, cleaning spray, pick up bags and hand sanitizer.¹⁰ According to Petsmart documents, “the Oops Station is a self-service clean up station for Pet Parents as well as a convenience for associates to quickly clean up a pet mess on the sales floor.”¹¹ The “wet floor” signs are not limited for use in the “Oops Station” area, but are used in any part of the store where there is an accident or spill.¹² According to the Petsmart Manager, the “wet floor” signs get knocked over “**all the time... usually [by] dogs running into them . . .**”¹³

The record is unclear on how often Petsmart employees inspect the aisles for hazards. There is no formalized floor inspection process other than at closing and prior to opening.¹⁴ Other than that, the store manager does a “circle” of the store hourly to sign off on the well-being of the animals.¹⁵ Every hour the manager must sign off at the grooming section to make sure the pets are okay, and then at the aquatics section to sign off for the animals there. Between these stops he or she also goes to the back of the store to see if any customers need assistance, and to the front of the

¹⁰ Clerk’s Papers 89.

¹¹ CP 89.

¹² CP 65 (Dep. Of L. Hackett at 26:20-25).

¹³ CP 68-69 (Dep of L. Hackett, 45:21-46:6)(emphasis added). The Petsmart Clerk also testified that she had seen the “wet floor” signs get knocked over, and that it was not at all unusual. CP 60 (Dep of L. Palmer at 15:10-15).

¹⁴ CP 60 (Dep of L. Parmer at 14:2-11); CP 69 (Dep. Of L. Hackett at 46:12 – 47:11)

¹⁵ CP 65 (Dep of L. Hackett at 29:22-23)

store to watch the cashiers.¹⁶ The Manager stated that during these rounds she'll also check the floor to make sure everything's okay.¹⁷ However, there's no set procedure for walking each aisle, or for signing off on a floor inspection report.¹⁸ The only hourly reports required are the animal sign-off sheets.¹⁹

Mr. Dupuy spent several minutes browsing the dog toy aisle.²⁰ He walked toward the end of the aisle and slipped on something yellow.²¹ He did not realize there was a "wet floor" sign lying flat on the ground, until after he had stepped on it and it was too late.²² He slipped and fell, injuring himself.

Mr. Dupuy admits that his eyes had caught sight of something yellow; however, he never looked down at the floor to see that it was a sign lying flat in the aisle, because he was paying attention to the items in front of him on the shelves.²³ Mr. Dupuy testified that after his fall, a Petsmart employee assisted him, and apologized that the sign had been knocked down.²⁴

¹⁶ CP 65-66 (Dep. Of L. Hackett at 29:11 – 30: 19).

¹⁷ *Id.*

¹⁸ CP 65-66, 69 (Dep. of L. Hackett at 29:11-30:19, and 46:12-47:11)

¹⁹ *Id.*

²⁰ CP 16 (Dep. of E. Dupuy at 56:22- 57:6)

²¹ CP 15 (Dep. of E. Dupuy at 49: 1-12)

²² CP 15 (Dep. of E. Dupuy at 49:1-21, 52:4-8, 53:3- 54:15)

²³ CP 15, 17 (Dep. of E. Dupuy at 52:4-8, 53:3-21, 59:19 – 60:8)

²⁴ CP 19 (Dep. of E. Dupuy at 66:6 – 68:7)

On June 19, 2009, at the hearing on Defendant's Motion for Summary Judgment, the trial judge found that the Dupuys failed to establish actual or constructive notice of the hazard, and that even if the *Pimentel* exception applied, there was no issue of material fact regarding whether the periodic inspections done by Petsmart were insufficient under the circumstances.²⁵

IV. Summary of Argument

A. The *Pimentel* Exception Applies and Whether Petsmart Acted Reasonably is an Issue for the Jury

Petsmart is considered to be on constant notice of a hazard on its premises if the hazard was reasonably foreseeable based on the store's mode of operation. The Plaintiffs demonstrated that Petsmart's self-service mode of operation combined with its policy of allowing pets created reasonably foreseeable hazards, including that the floor might be wet and that pets, especially dogs, might knock the "wet floor" signs onto the floor. The sign on which Mr. Dupuy slipped was a reasonably foreseeable hazard because it was directly related to Petsmart's self-service mode of operation and it was within the self-service area to which it was related. Contrary to the trial court's holding, the issue of whether Petsmart took reasonable precautions in light of the foreseeable hazards

²⁵ RP 16-25.

involved in its operations is a question for the jury. Summary judgment for Petsmart was therefore inappropriate.

B. The Standard of Review is *De Novo*.

“When reviewing a summary judgment order, an appellate court engages in the same inquiry as the trial court.”²⁶ Because Summary Judgment deprives the nonmoving party of a trial, it is only appropriate if the court finds, after viewing all of the pleadings, affidavits, depositions, admissions and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party, that there is no genuine issue as to any material fact, that all reasonable persons could reach but one conclusion, and that the moving party is entitled to judgment as a matter of law.²⁷ Upon *de novo* review, this Court will see that the evidence presented by the Dupuys did raise issues of material fact, and that summary judgment was inappropriate.

V. Argument

A. Actual or Constructive Notice of a Hazard is Not Required for Premises Liability Under the *Pimentel* Exception

Generally, a possessor of land is not liable to a business invitee for an unsafe condition caused by another, unless the possessor either knew or

²⁶ *Brown v. Stevens Pass, Inc.*, 97 Wn. App. 519, 522, 984 P.2d 448 (1999) quoting *ReynoldsReynolds v. Hicks*, 134 Wn.2d 491, 495, 951 P.2d 761 (1998).

²⁷ CR 56; *Higgins v. Stafford*, 123 Wn.2d 160, 169, 866 P.2d 31, 36 (1994).

should have known of the unsafe condition.²⁸ However, the Supreme Court of Washington created an exception to this rule, holding that actual or constructive knowledge of the hazard is not necessary if the existence of the hazard was reasonably foreseeable.²⁹ This “*Pimentel*” exception to the notice requirement applies where “the nature of a proprietor’s business and his methods of operations are such that the existence of unsafe conditions on the premises is reasonably foreseeable.”³⁰ In such cases, the store is considered to be on **constant notice** that spills and hazards will occur in the normal course of business.³¹

Here, not only does Petsmart have a self-service operation, but it also welcomes pets into the store. This unique policy of Petsmart caters to its pet-owning customers. However, it also creates another set of foreseeable hazards, based on animals being allowed in the store. The animals have accidents on the floor, sometimes more than ten times a day.³² And, even if those messes are cleaned up, the “wet floor” signs that are posted get knocked over “**all the time**” usually by “dogs running into them or [a] shopping cart knocks them over...”³³

²⁸ *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 654, 869 P.2d 1014 (1994).

²⁹ *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 666 P.2d 888 (1983).

³⁰ *Pimentel*, 100 Wn.2d at 40; *Ingersoll*, 123 Wn.2d at 653.

³¹ *Wiltse v. Albertson’s Inc.*, 116 Wn.2d 452, 461, 805 P.2d 793 (1991) (emphasis added).

³² CP 61 (Dep of L. Palmer 19:12-20:7)

³³ CP 68-69 (Dep of L. Hackett, 45:21-46:6) (emphasis added)

In *Pimentel*, the Supreme Court concluded that a plaintiff's burden "may be established by the operating methods of the proprietor and the nature of his business."³⁴ The notice requirement is not eliminated as a matter of law for all self-service establishments, and *Pimentel* did not create strict liability for self-service establishments. It is only eliminated where the mode of operation of the defendant is shown to be such that the existence of unsafe conditions is reasonably foreseeable. Plaintiff has met this burden.

B. The Requirements Under Subsequent Case Law Limiting the *Pimentel* Exception Were Satisfied By Plaintiff

The *Pimentel* exception has been narrowly interpreted and limited in subsequent cases. Courts have found that it does not necessarily apply to all areas of a self-service business, but only to those areas where risk of injury is foreseeable.³⁵ That is to say, only areas of the store that are actually self-service areas. For example, in *Coleman v. Ernst*, the Court found that even though Ernst was a self-service store, the carpeting in the entryway where the hazard was located was not part of Ernst's self-service area, and therefore *Pimentel* did not apply.³⁶

Courts have also limited *Pimentel* in holding that there must be a relation between the hazardous condition and the self-service mode of

³⁴ *Pimentel*, 100 Wn.2d at 48-49.

³⁵ *Coleman v. Ernst*, 70 Wn.App 213, 853 P.2d 473 (1993); *Ingersoll*, 123 Wn.2d at 653.

³⁶ *Coleman v. Ernst*, 70 Wn.App 213

operation of the business.³⁷ For example, in *Wiltse v. Albertsons*, the plaintiff slipped in water that had dripped from a leak in the roof. The Court found that even though the plaintiff was in a self-service area, the hazard was in no way related to the store's self-service operation, it was not foreseeable as a result of the self-service operation, and therefore *Pimentel* did not apply.³⁸

In *O'Donnell v. Zupan*, a Division II case decided in 2001, the Court created a three-part test stating that the *Pimentel* exception applies if the plaintiff can show that (1) the area was self-service, (2) it inherently created a reasonably foreseeable hazardous condition, and (3) the hazardous condition that caused the injury was within the self-service area.³⁹

Plaintiff met the requirements of all of the cases limiting the *Pimentel* exception. Mr. Dupuy was within a self-service area where customers not only handle goods but where customers' pets can create messes on the floor. Furthermore, the hazard causing his injuries, the "wet floor" sign lying flat in the aisle, was obviously related to the store's particular mode of operation of allowing pets and providing self-service clean-up stations.

³⁷ *Wiltse v. Albertson's Inc.*, 116 Wn.2d 452, 461, 805 P.2d 793; *Carlyle v. Safeway*, 78 Wn.App 272, 277, 896 P.2d 750 (1995).

³⁸ *Wiltse*, 116 Wn.2d at 461.

³⁹ *O'Donnell v. Zupan*, 107 Wn.App. 854 at 856, 28 P.3d 799 (2001)

C. Additional Proof Of Foreseeability Is Required Only When the Hazard Is Not In A Self-Service Area, Or Not Related To The Self-Service Operation.

The cases relied upon by the Defendant at the trial court level require evidence of foreseeability only when the hazard is not in a self-service area, or is not related to that self-service operation.⁴⁰ In *Arment v. K-Mart Corp.*, the plaintiff slipped in a spilled drink on the floor of the menswear department of K-Mart. The Court found that although K-Mart had a self-service cafeteria, the plaintiff was not in that area of the store, but rather was in the retail clothing area of the store, where such a hazard was not reasonably foreseeable. The Court stated,

[w]hile certain departments of a store, such as a produce department, are ‘areas where hazards [are] apparent and therefore the owner [is] placed on notice by the activity,’ it does not follow that specific unsafe conditions associated with a self-service business are reasonably foreseeable in all areas of the business.⁴¹

Because the plaintiff was in the menswear department rather than the self-service cafeteria, it was not reasonably foreseeable that spills would occur there, and the store was not considered to be “on notice” that spills would occur there. Therefore, some other evidence of foreseeability of the hazard was needed for the store to be liable.

⁴⁰ See, *Wiltse v. Albertson's Inc.*, 116 Wn.2d 452 (summarized above), *Arment v. K-Mart Corp.*, 79 Wn.App. 694, 902 P.2d 1254 (1995); *O'Donnell v. Zupan*, 107 Wn.App. 854 at 856, 28 P.3d 799 (2001); *Carlyle v. Safeway*, 78 Wn.App 272, 896 P.2d 750 (1995); *Frederickson v. Bertolino's*, 131 Wn.App 183, 127 P.3d 5 (2005).

⁴¹ *Arment v. K-Mart Corp.*, 79 Wn.App. 694, at 698, 902 P.2d 1254 (1995)

In *Carlyle v. Safeway*, the plaintiff slipped in spilled shampoo in the coffee aisle.⁴² The Court cited *Ingersoll v. DeBartolo*, a case involving a slip in the common area of Tacoma Mall, in finding that there was no “evidence from which it could reasonably be inferred that . . . unsafe conditions are reasonably foreseeable in the area in which she fell.”⁴³ They noted that the hazard did arise out of the self-service operation, but nevertheless found that spilled shampoo in the coffee aisle was not reasonably foreseeable. The coffee aisle is not the area where customers would foreseeably be handling shampoo and transferring it to their carts. Therefore, a hazard must not only be within a self-service area, but must also be related to that nearby self-service operation in order to be reasonably foreseeable.

The Court reiterated the *Wiltse* premise that “certain departments of a store, such as the produce department, are areas where hazards are apparent and therefore the proprietor is placed on notice by the activity.”⁴⁴ In the case at hand, Petsmart admits that pet accidents occur throughout the store, and that the “wet floor” signs may be placed anywhere in the store.⁴⁵ They also admit that the signs get knocked over “all the time.”⁴⁶

⁴² *Carlyle v. Safeway*, 78 Wn.App 272, 896 P.2d 750 (1995)

⁴³ *Id.* at 277 (citing *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652, 869 P.2d 1014 (1994))

⁴⁴ *Id.* at 276-277 (citing *Wiltse v. Albertson's Inc.*, 116 Wn.2d 452)

⁴⁵ CP 65 (Dep. Of L. Hackett at 26:20-25).

Therefore, the “wet floor” sign lying in the toy aisle is akin to spilled produce in the produce aisle - it is an inherent risk directly related to the self-service mode of operation in that area, rather than an unforeseeable circumstance such as spilled shampoo in the coffee aisle.

While it is true that *Pimentel* is a narrow exception to the notice requirement, the cases reiterate that in self-service areas where there are foreseeable risks involved with the mode of operation, the owner is considered to be on constant notice that those foreseeable hazards will occur in the normal course of business.⁴⁷

D. Whether Petsmart Took Reasonable Precautions In Light of the Foreseeable Hazards Inherent in its Operation is An Issue of Fact

Once it is established that a dangerous condition was reasonably foreseeable, the issue remaining is whether the defendant failed to take reasonable care to prevent the injury.⁴⁸ In the exercise of reasonable care, a store proprietor must inspect for dangerous conditions and provide such repair, safeguards, or warning as may be reasonably necessary to protect its customers under the circumstances.⁴⁹ “The type of precautions that are

⁴⁶ CP 68-69 (Dep of L. Hackett, 45:21-46:6).

⁴⁷ See *i.e. O'Donnell v. Zupan*, 107 Wn.App. 854 at 856, 28 P.3d 799 (2001); *Wiltse v. Albertson's Inc.*, 116 Wn.2d 452, 461, 805 P.2d 793 (1991).

⁴⁸ *Pimentel*, 100 Wn.2d at 49.

⁴⁹ *Iwai v. State*, 129 Wn.2d 84, 96, 915 P.2d 1089 (1996).

‘reasonable’ depend on the ‘the nature and the circumstances surrounding the business conduct,’ including the mode of operation.”⁵⁰

The self-service mode of operation might require a proprietor to implement protections that are not necessary under other circumstances, such as installing special types of flooring or implementing housekeeping or inspection procedures that reduce the risk of harm and enable the proprietor to discover and remove hazardous conditions customers create.⁵¹ One way a plaintiff can establish liability is by showing that inspections were not conducted with the frequency required by the foreseeability of the risk.⁵²

The reasonableness of a proprietor’s methods of protection is a question of fact.⁵³ Here, the precautions taken by Petsmart were severely lacking, given the nature of the operation and the employees’ testimony on the frequency with which pet accidents occur. Not only is there a constant risk of pet accidents on the floor, but there is also the risk of animals running into things and knocking things over. Wet floors ten times per day and items being knocked over in the aisle “all the time” are such an obvious danger to customers that it seems many more precautions should

⁵⁰ *O’Donnell v. Zupan*, 107 Wn.App. 854, 860, 28 P.3d 799 (2001) (citing *Ciminski v. Finn Corp.*, 13 Wn.App. 815, 819, 537 P.2d 850 (1975)).

⁵¹ *O’Donnell*, 107 Wn.App. at 860.

⁵² *Carlyle v. Safeway*, 78 Wn.App 272, 276-277, 896 P.2d 750 (1995) (citing *Wiltse*, at 461 and *Pimentel*, at 49).

⁵³ *Ciminski*, 13 Wn.App at 820-821.

have been taken, such as constant monitoring of the area, sturdier signage, etc. Inviting customers to clean up after their own pets, and circling the store for hourly animal well-being checks do not seem reasonable measures in such a situation. Nevertheless, this is an issue of fact for the trier of fact to determine.

VI. CONCLUSION

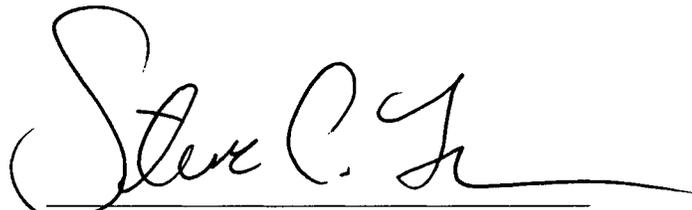
Owners are charged with knowledge of reasonably foreseeable risks that are inherent in their chosen mode of operation. Since the *Pimentel* exception was created, Washington cases have limited the exception to require that a plaintiff show not only: 1) a self-serve mode of operation, but also, 2) that the hazard was within a self-service area where such hazards are inherently foreseeable, and 3) the hazard was directly related to that self-service operation. Mr. Dupuy demonstrated that the aisle in which he fell was within a self-service area where customers not only handle merchandise, but where they bring their pets whom frequently have accidents, and frequently knock down the signs put up as a result of those accidents. The hazard causing Mr. Dupuy's fall was directly related to that specific self-serve operation. No additional proof of notice or foreseeability was required. Additional issues of material fact remain including whether Petsmart took adequate precautions to prevent injuries

to customers in light of the foreseeable hazards. Therefore, summary judgment was inappropriate.

The trial court's decision granting the Defendant's Motion for Summary Judgment should be reversed and remanded to Superior Court for trial on the remaining issues.

Dated this 27th day of October, 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steve C. Franklin". The signature is written in a cursive style with a long horizontal line extending to the right.

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COURT OF APPEALS, DIVISION II,
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EDWARD DUPUY and
ELVIRA DUPUY, husband and
wife and the marital community
thereof,

Appellants,

v.

PETSMART, INC., a Delaware
corporation doing business in the
State of Washington,

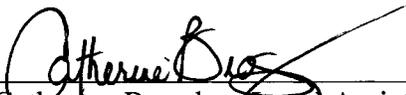
Respondent.

CERTIFICATE OF SERVICE

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STATE OF WASHINGTON
BY  DEPUTY

COURT OF APPEALS
DIVISION II

I, Catherine Brogdon, do hereby declare pursuant to the laws of the State of Washington and under penalty of perjury that on the 23rd day of October, 2009, I sent the original Brief of Appellant to the Court of Appeals Division II for filing.


Catherine Brogdon, Legal Assistant to
Steve C. Franklin, WSBA No. 36422

NO. 39575-4-II

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EDWARD DUPUY and
ELVIRA DUPUY, husband and
wife and the marital community
thereof,

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PETSMART, INC., a Delaware
corporation doing business in the
State of Washington,

Respondent.

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The undersigned, being first duly sworn on oath, deposes and says:

On October 23, 2009, I mailed a copy of the attached Brief of

Appellant with proper postage prepaid to Defendant's attorneys whose names
and addresses are as follows:

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Catherine Brogdon, Legal Assistant to
Steve C. Franklin, WSBA No. 36422

SUBSCRIBED AND SWORN to before me this 23rd day of October, 2009.

Sue A. Hall



NOTARY PUBLIC in and for the
State of Washington
Residing at: Port Orchard
Commission Expires: 1/19/2012
Printed Name: Sue A. Hall