

NO. 39575-4-II

COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

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Edward Dupuy and Elvira Dupuy, Appellants,

v.

Petsmart, Inc., Respondent.

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**REPLY BRIEF OF APPELLANT**

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J. MICHAEL KOCH  
Attorneys for the Dupuys, Appellants

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STATE OF WASHINGTON  
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COURT OF APPEALS  
DIVISION II

## I. Rebuttal Argument that the *Pimentel* Exception Applies

There is no question that Petsmart is a self-service store, and that Mr. Dupuy was in a self-service area when he fell. Nevertheless, in *Ingersoll v. Debartolo*, the Supreme Court stated,

**‘self-service’ is not the key to the exception. Rather, the question is whether ‘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.’<sup>1</sup>**

The Dupuys met this standard, as well as this Court’s three-part test from *O’Donnell v. Zupan*, for the *Pimentel* exception to apply. They have shown that (1) the area where Mr. Dupuy fell was self-service, (2) Petsmart’s self-service, pet-friendly mode of operation inherently created a reasonably foreseeable hazardous condition, and (3) the hazardous condition that caused the injury was within the foreseeable area.<sup>2</sup>

Mr. Dupuy was shopping in the toy aisle when he fell. Not only is it an area where customers handle and transfer goods from one place to another, but it also within an area where due to the frequency of pet accidents in the store, Petsmart furnishes self-service “Oops Stations” stocked with “Wet Floor” signs. Both of the Petsmart employees testified to the frequency of pet accidents in the store, and also to the frequency of

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<sup>1</sup> *Ingersoll v. Debartolo, Inc.*, 123 Wn.2d 649, 654 (1994) (emphasis added), citing *Pimentel v. Roundup Co.*, 100 Wn.2d 39, at 49 (1983)

<sup>2</sup> *O’Donnell v. Zupan*, 107 Wn.App. 854 at 856, 28 P.3d 799 (2001)

the “Wet Floor” signs being knocked over. According to the Petsmart employees, pet accidents occur up to ten times per day, and the “Wet floor” signs get knocked over “all the time... usually [by] dogs running into them . . .”<sup>3</sup>

Petsmart’s unique mode of operation, not only as a self-service store, but a self-service store that allows pets, inherently created a reasonably foreseeable hazardous condition – that the “Wet floor” signs from the “Oops Stations” would be knocked over after being placed on the floor in response to a customer or pet accident. And it was this foreseeable hazardous condition that caused Mr. Dupuy’s fall.

There is no requirement to show that similar customer slips happened in the past. Nor is there a requirement to show why the sign was placed on the floor, or how it got knocked to the floor on this occasion. Rather, what the cases require is evidence that the hazard itself was continuous or reasonably foreseeable. The Dupuys clearly met this burden.

## **II. Issues of Fact Remain**

Once it is established that a dangerous condition was reasonably foreseeable, an issue of fact remains on whether the defendant failed to

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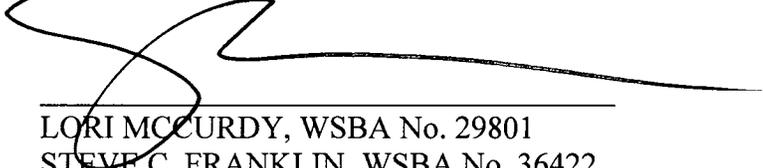
<sup>3</sup> CP 68-69 (Dep of L. Hackett, 45:21-46:6). CP 60-61 (Dep of L. Palmer 19:12-20:7). The Petsmart Clerk also testified that she had seen the “wet floor” signs get knocked over, and that it was not at all unusual. CP 60 (Dep of L. Palmer at 15:10-15).

take reasonable care to prevent the injury.<sup>4</sup> The reasonableness of a proprietor's methods of protection is a question of fact.<sup>5</sup> "The type of precautions that are 'reasonable' depend on the 'the nature and the circumstances surrounding the business conduct,' including the mode of operation."<sup>6</sup>

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. Wet floors ten times per day and signs being knocked over in the aisle "all the time" are such an obvious danger to customers that it seems many more precautions should have been taken, such as different flooring, more frequent inspections, sturdier signage, etc. Nevertheless, this is an issue of fact for the trier of fact to determine, and summary judgment was inappropriate.

Dated this 22<sup>nd</sup> day of December, 2009.

Respectfully submitted,



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<sup>4</sup> *Pimentel*, 100 Wn.2d at 49.

<sup>5</sup> *Ciminski v. Finn Corp.*, 13 Wn.App. 815, 820-821, 537 P.2d 850 (1975).

<sup>6</sup> *O'Donnell v. Zupan*, 107 Wn.App. 854, 860, 28 P.3d 799 (2001) (citing *Ciminski*, 13 Wn.App. at 819 (1975)).

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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

I, Sue A. Hall, do hereby declare pursuant to the laws of the State of Washington and under penalty of perjury that on the 22<sup>nd</sup> day of December, 2009, I sent the original Reply Brief of Appellant to the Court of Appeals Division II for filing.



Sue A. Hall, Legal Support Specialist to  
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AFFIDAVIT OF MAILING

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

On December 22, 2009, I mailed a copy of the attached Reply Brief  
of Appellant with proper postage prepaid to Defendant's attorneys whose  
names and addresses are as follows:

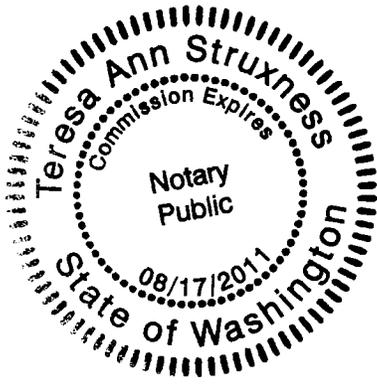
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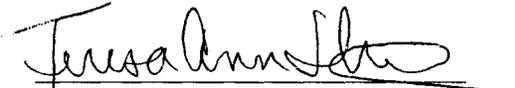
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J. Michael Koch, WSBA No. 4249

SUBSCRIBED AND SWORN to before me this 22<sup>nd</sup> day of December, 2009.



  
NOTARY PUBLIC in and for the  
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Residing at: Poulsbo  
Commission Expires: 8/17/2011  
Printed Name: Teresa Ann Struxness