No. 1022581

Court of Appeals No. 56950-7

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondent,

v.

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

Petitioners.

ANSWER TO PETITION FOR REVIEW

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IDENTITY OF RESPONDENT, COURT OF APPEALS DECISION & INTRODUCTION

Respondent Marty Moore, PR of the Estate of his mother, Rebecca Moore, asks this Court to deny review of the Court of Appeals' decision in ***Moore v. Fred Meyer Stores, Inc.***, 2023 Wash. App. LEXIS 867 (May 2, 2023) (attached as Appendix A), *publ'n granted*, 2023 Wash. App. LEXIS 1343 (July 11, 2023).

In holding that Washington Pattern Jury Instruction – Civil [WPIC] 120.07 misstated the law, ***Moore*** simply followed this Court's decision in ***Johnson v. Wash. State Liquor & Cannabis Bd.***, 197 Wn.2d 605, 486 P.3d 125 (2021). App. A at *1 ("Following our Supreme Court's opinion in [***Johnson***,] the trial court's instructions were a misstatement of the law"). This Court's Pattern Instruction Committee has not yet conformed the WPIC, but it likely will. ***Moore*** does not conflict with ***Johnson*** or any relevant Washington authority. Review is unwarranted.

RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Can a Court of Appeals opinion that simply follows this Court's most recent decision on the relevant legal issue – controlling authority that harmonizes all relevant prior precedents – *conflict with* any precedent of this Court?

2. Should this Court consider an objection to a jury instruction never raised in the trial or appellate courts, particularly where another jury instruction that was not challenged by any party covered the precise point the Respondent now claims the appellate court "omitted"?

3. Can such an opinion be of substantial public interest, where it holds that a pattern instruction misstated the law, but that WPIC has not been conformed to this Court's recent authority, and this Court can (and likely will) amend the WPIC through its usual process for making such changes: the Pattern Jury Instruction Committee?

FACTS RELEVANT TO ANSWER

A. The Court of Appeals correctly states the facts, as does the Brief of Appellant.

The summary facts are correctly stated in the ***Moore*** opinion. *See* App. A at *1-*5. The detailed facts are delineated in the Brief of Appellant at 3-6, with citations to the record. Respondent relies upon those statements.

B. The Court of Appeals held that a jury instruction based on current WPIC 120.07 misstated the law, where the WPIC has not yet been conformed to this Court's most recent controlling authority on the subject, ***Johnson*****.**

As the ***Moore*** decision notes, "Fred Meyer proposed a pattern jury instruction on liability which included an actual or constructive notice requirement" (App. A at *3-*4):

> 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. [Emphasis added in ***Moore***,]

See CP 124. The Estate proposed largely the same pattern instruction, but with a different section (a) designed to conform to this Court's decision in ***Johnson*** (App. A at *4):

> (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;

See CP 155. As this Court is no doubt aware, its own Pattern Instruction Committee had not yet conformed WPIC 120.07 (7th Ed. 2019) to its 2021 decision in ***Johnson***. Indeed, while the undersigned understands that a revision is pending, this WPIC still has not been conformed to ***Johnson***. *See also infra,* § B (re: email from Chair Halpert attached as Appendix B).

The Court of Appeals thus reversed because the trial court's Instruction No. 14 misstated the law under ***Johnson***. App. A at *1. Specifically, ***Johnson*** established reasonable foreseeability "as equal to traditional notice requirements," so "whether it applies is fundamentally a question of fact for the jury." *Id.* at *10. Thus, the limitation of Inst. 14 (and WPIC 120.07) solely to traditional (actual and constructive) notice requirements directly contradicts ***Johnson***'s holding "'that upon remand the trial court *must* equally consider foreseeability of the condition as it would actual or constructive notice.'" *Id*. at *8 (quoting ***Johnson***, 197 Wn.2d at 617 (following ***Mucsi v. Graoch Assocs. Ltd. P'ship No. 12***., 144 Wn.2d 847, 863, 31 P.3d 864 (2001))). ***Moore*** is thus consistent with ***Johnson***.

The ***Moore*** court also remanded "because there was sufficient evidence for the case to go to the jury consistent with ***Johnson***'s analysis of reasonable foreseeability." App. A at *11 n.4.

REASONS THIS COURT SHOULD DENY REVIEW

A. The *Moore* decision simply follows this Court's *Johnson* decision – the most recent controlling authority on point – so it cannot and does not conflict with this Court's relevant decisions.

As the ***Moore*** decision expressly recognized, ***Johnson*** carefully analyzed and explained the evolution of Washington law regarding notice of a dangerous condition on business premises. App. A at *5-*9. Traditional standards of premises liability required actual or constructive notice to the owner. *Id*. at *5 (citing ***Johnson***, 197 Wn.2d at 612; ***Ingersoll v. DeBartolo, Inc.***, 123 Wn.2d 649, 652, 869 P.2d 1014 (1994)). But this Court established a self-service exception to the traditional notice requirements in ***Pimentel v. Roundup Co.***, 100 Wn.2d 39, 666 P.2d 888 (1983) – which involved a Fred Meyer store. *Id*. at *6-*7

Plaintiff Pimentel was shopping at Fred Meyer when a paint can fell on her foot. ***Pimentel***, 100 Wn.2d. at 40-41. Before it fell, the can was overhanging the shelf. *Id*. at 41.

Under instructions that Pimentel must show Fred Meyer's actual or constructive notice of an unreasonably dangerous condition, the jury returned a defense verdict for Fred Meyer. *Id*. at 42. But this Court reversed. *Id*. at 40.

This Court eliminated the traditional notice requirements where, as here, "the nature of [Fred Meyer's] business and [its] methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable." *Id*. at 49. ***Pimentel*** held that when an invitee is injured at a self-service business (like Fred Meyer) the traditional notice requirement is eliminated because the nature of the proprietor's business and its methods of operation make the existence of unsafe conditions on its premises reasonably foreseeable. App. A at *6-*7 (cleaned up) (quoting ***Johnson***, 197 Wn.2d at 613 (quoting ***Pimentel***, 100 Wn.2d at 49)).

Johnson held that the former ***Pimentel*** reasonable foreseeability *exception* has since become 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.'" 197 Wn.2d at 618 (quoting ***Pimentel***, 100 Wn.2d at 49). This is because cases like ***Wiltse***[1] and ***Ingersoll*** did not foreclose an expansion of ***Pimentel***'s reasonable foreseeability exception, and subsequent cases *did* expand it. *Id*. at 615-18 (citing ***Mucsi***, 144 Wn.2d at 863; ***Iwai v. State***, 129 Wn.2d 84, 100, 915 P.2d 1089 (1996)).

Johnson thus harmonized all relevant Washington precedents on this issue, so the "self-service requirement of the exception no longer applies." *Id*. at 618. Since this Court expressly eliminated the "self-service requirement" that had limited ***Pimentel***'s reasonable foreseeability exception, slips and falls are now reasonably foreseeable

[1] ***Wiltse v. Albertson's, Inc.***, 116 Wn.2d 452, 805 P.2d 793 (1991).

throughout Fred Meyer stores. Otherwise, the holdings in ***Johnson***, ***Iwai***, ***Mucsi***, and even ***Pimentel*** itself would be inapplicable *to their own facts*.

That is, a Fred Meyer customer (a/k/a business invitee) now may show that proprietor Fred Meyer had notice because the nature of its business and its methods of operation make such unsafe conditions on its premises reasonably foreseeable. In light of the overwhelming evidence that Fred Meyer *actually knows* slip-and-falls due to unsafe conditions on its floors are dangerously common throughout their stores, ample evidence warrants instructing the jury on this theory, as the ***Moore*** court held. App. A at *11 n.4; *see also, e.g.*, BA 5-6 (Fred Meyer is well aware that *many* people slip and fall throughout its stores); Exs 4 & 5. In sum, ***Moore*** correctly holds that ***Johnson*** established reasonable foreseeability "as equal to traditional notice requirements," so "whether it applies is fundamentally a question of fact for the jury." App. A at *9.

1. ***Moore*** **is consistent with** ***Johnson***, ***Wiltse,*** ***Reynolds*****, and every other relevant opinion.**

While Fred Meyer concedes much of the above analysis – as it must – it nonetheless claims that ***Johnson*** "expanded" the "foreseeability exception." PFR 6-8. It was ***Musci*** and ***Iwai*** that expanded the exception. ***Johnson***, 197 Wn.2d at 615-18. ***Johnson*** held that the "self-service requirement of the exception **no longer applies**." *Id*. at 618 (bold added). Reasonable foreseeability is now a general rule, yet the trial court refused to so instruct the jury.

Fred Meyer also argues that ***Moore*** conflicts with ***Johnson***, ***Wiltse***, and ***Reynolds***.[2] PFR 9-13. As for ***Johnson***, ***Moore*** expressly and precisely follows this Court's controlling precedent, as explained *supra*. Fred Meyer simply ignores this obvious fact.

[2] ***Reynolds v. Phare***, 58 Wn.2d 904, 365 P.2d 328 (1961).

2. Ample evidence supports instructing the jury regarding reasonable foreseeability, as *Moore* correctly held.

Fred Meyer says that the Estate failed to put on evidence supporting the reasonable foreseeability instruction – which Fred Meyer tacitly concedes is a correct instruction where the evidence justifies it. *Id*. Its substantial evidence argument is wrong for at least three reasons.

First, Fred Meyer is paradigmatic of self-service operations in which hazards like water and falling objects are reasonably foreseeable. *See generally* ***Pimentel*** (where **Fred Meyer**'s self-service operation justified adopting an exception to the traditional notice requirements). If **Fred Meyer**'s operations do not justify giving a reasonable foreseeability instruction, nothing will.

Second, as the Court of Appeals held, there was *at least* "sufficient evidence for [this] case to go to the jury consistent with ***Johnson***'s analysis of reasonable foreseeability." App. A at *11 n.4. Indeed, Fred Meyer's

self-service operation was extensively discussed at trial.[3] This evidence would have – and should have – justified giving a reasonable foreseeability instruction.

Third, Fred Meyer's sufficiency argument is a logical fallacy: affirming the consequent. That is, Fred Meyer successfully persuaded the trial court not to give the reasonable foreseeability instruction, so while substantial evidence was presented (*supra* n.2), much more could have and would have been presented but for the trial court's failure to properly instruct the jury under ***Johnson***.

The ***Moore*** decision does not conflict with ***Wiltse*** or ***Reynolds***, much less with ***Johnson***. Fred Meyer is thus wrong to say that ***Moore*** required the reasonable foreseeability instruction "in every case." PFR 11. ***Moore*** requires it only where, as here, the evidence calls for it.

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[3] *See, e.g.*, BR at 6-8 (and RP cited therein); BA 5-6 (and RP cited therein); RP 97-123, 129-138, 143, 148-53, 160-63, 167-68, 219-28, 231-34, 240-41, 244-46.

3. Fred Meyer's new fact-based instructional claim is both unpreserved and incorrect.

Fred Meyer also argues[4] that "notice does not itself establish negligence." PFR 14-17. Of course not. But this Court will search in vain for anywhere in this record, in the appellate briefing, or in the ***Moore*** decision, where Fred Meyer raised this argument. That is because *no one* argued that Fred Meyer is *not* entitled to a reasonable opportunity to correct an unsafe condition. Nor did the jury instructions – taken as a whole – "omit" this issue.

This argument was waived when Fred Meyer failed to object to the instruction – indeed, *proposed essentially the same instruction on this issue* – in the trial court, so it

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[4] While Fred Meyer cites two Court of Appeals decisions (PFR 13 n.4) it does not raise any argument under RAP 13.4(b)(2). This is significant: since ***Moore*** follows ***Johnson***, it *cannot* "conflict with" other Court of Appeals decisions in any meaningful way. Rather, ***Johnson*** changed the law – or confirmed a change this Court had already made – so "conflicting" Court of Appeals decisions are not good law. Fred Meyer thus tacitly concedes that no Court of Appeals decisions can or do conflict with ***Moore***.

cannot be raised here for the first time. *See, e.g.*, RAPs 2.5(a) & 13.7; ***LK Operating, LLC v. Collection Grp., LLC***, 181 Wn.2d 117, 126, 330 P.3d 190 (2014) (Court will not consider issues first raised on appeal); ***Young v. Grp. Health Coop.***, 85 Wn.2d 332, 339-40, 534 P.2d 1349 (1976) (Court will not consider instructional error first raised on appeal); ***Bich v. GE Co.***, 27 Wn. App. 25, 35-36, 614 P.2d 1323 (1980) (same for Court of Appeals). Indeed, this Court very recently carefully explained the importance of refusing to consider new factually based legal claims that were not first raised in the trial court. ***Dalton M. v. No. Cascade Tr. Servs., Inc.***, 2023 Wash. LEXIS 1 at *14-*23 (Aug. 31, 2023). This new fact-based issue is not properly before this Court.

Not only is this an improper new argument, but it was not raised below *because this issue was covered by another jury instruction, which Fred Meyer never challenged*: while Fred Meyer claims that "Division Two"

"omitted" this "essential requirement" (PFR 16), *a different instruction not addressed by Fred Meyer or the appellate court instructed the jury on this issue*. *See* CP 727 (Court's Inst. 13, attached as Appendix C) (emphasis added):

> An owner of premises has a duty to correct a temporary unsafe condition of the premises that was not created by the owner, if the condition . . . ***existed for a sufficient length of time and under such circumstances that the owner should have discovered it in the exercise of ordinary care***.

While this instruction might need to be modified on remand in light of the new ***Johnson*** reasonable-foreseeability instruction, the parties will no doubt propose additional instructions that properly set forth the relevant law on this issue under ***Johnson*** and ***Moore***. And since this issue was never raised before, it is so unripe as to pucker the mind.

Similarly, WPIC 120.07, the court's instruction, and an instruction based on ***Moore***, all did or will include that Fred Meyer need only exercise ordinary care:

> An owner of premises is liable for any physical injuries to its customers caused by a condition on the premises if:
>
> . . .
>
> (c) ***the owner fails to exercise ordinary care to protect them against the danger***; . . .

CP 155 (Estate's Proposed Inst. 6 (emphasis added)); *see also* CP 286 (Fred Meyer's Proposed Inst. 16); CP 728 (Court's Inst. 14, BA App. A). What constitutes ordinary care will likely again be the subject of proposed instructions on remand. But that issue has yet to be raised in the trial court, so it is not properly before this Court.

In short, trial judges are in the best position to decide in the first instance what their jury instructions should say. This Court does not issue advisory opinions on rulings the trial court may or may not be called upon to make. And taking up new fact-based arguments on appeal is unwise, as ***Dalton M*** correctly holds.

This Court should deny review.

B. There is no substantial public interest in an appellate decision that simply follows this Court's most recent controlling authority to hold that an outdated Pattern Instruction misstates the law, where that WPIC has not yet been conformed to controlling precedent, and where this Court can (and likely will) amend the Pattern Instruction in due course.

Fred Meyer also relies on RAP 13.4(b)(4), issues of substantial public interest that this Court should determine. PFR 17-24. But an appellate decision that simply follows this Court's most recent precedent holds no substantial public interest. And because this Court need not decide the same issue twice, this is not an issue it *should* decide.

Moreover, this Court can and no doubt will conform the WPIC through the usual processes of its Pattern Instruction Committee. Indeed, after ***Moore*** came down, the Chair of the WPIC Subcommittee for Part X – Owners and Occupiers of Land (the Honorable Helen Halpert, ret.) sent an email to all counsel inquiring whether anyone would move to publish ***Moore***. *See* App. B (5/10/2023

Email from Chair Halpert). If not, then the Chair herself would so move because, while her committee does not cite unpublished decisions, its ***Johnson*** update is pending, and "a citation to ***Moore*** will strengthen our Comment." *Id*.

Thus, a fix is in the works. Accepting review here may slow that process. The People of Washington, their counsel, and our Superior Court judges need pattern instructions on which they can rely. ***Moore*** fixes the problem, but even if this Court is not fully satisfied with that fix – contrary to what its Pattern Instruction Committee seems to believe – simply approving a proper correction is the most efficient and effective way to clarify the law. Granting a Petition for Review based on a non-conflict and an unpreserved issue is unlikely to help the situation. This Court should deny review.

1. The *Moore* court did not "misread" *Johnson*.

Fred Meyer argues that the ***Moore*** court "misread ***Johnson***." PFR 18-20. As discussed *supra*, it did not. It extensively *quoted* ***Johnson***. And as also discussed *supra*, Fred Meyer "misreads" both ***Johnson*** and ***Moore***.

2. This Court should not reach Fred Meyer's *second* unpreserved issue that would merely *confirm* what the appellate court and this Court have already held.

Fred Meyer raises a *second* unpreserved issue, this one seeking review without any legal basis. PFR 20-24. As Fred Meyer acknowledges, ***Moore*** holds that 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.'" PFR 21 (*quoting* ***Moore*** at 9). Since – as Fred Meyer concedes – ***Moore*** properly so held, this Court need not grant review: RAP 13.4(b) does not permit review "to

confirm" what the Court of Appeals – and this Court – have already held. *See* PFR 24.

But more importantly, this is yet another new issue yet to be litigated in the trial court. If such an issue arises on remand, the parties can brief and argue it. The Estate can thus have a *fair* opportunity to address the law and facts relevant to this newly raised issue. And the trial judge properly can determine what the Court's Instructions should say under the relevant facts of this case. Trial judges are undoubtedly in the best position to do this.

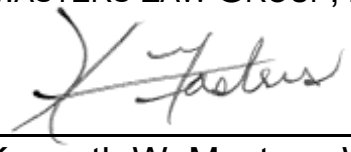
CONCLUSION

This Court should deny review.

The undersigned hereby certifies under RAP 18.17(2)(b) that this document contains **3,094** words.

RESPECTFULLY SUBMITTED this 15th day of September 2023.

MASTERS LAW GROUP, P.L.L.C.



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APPENDIX
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Moore v. Fred Meyer Stores, Inc.,
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Moore v. Fred Meyer Stores, Inc.

Court of Appeals of Washington, Division Two

May 2, 2023, Filed

No. 56950-7-II

Reporter
2023 Wash. App. LEXIS 867 *; 2023 WL 3197342

MARTY MOORE, *as Personal Representative*, *Appellant*, v. FRED MEYER STORES, INC., ET AL., *Respondents*.

Notice: Order Granting Motion to Publish July 11, ***2023***.

Subsequent History: Reported at *Moore v. Fred Meyer Stores, Inc., **2023** Wash. **App. LEXIS** 898 (Wash. Ct. **App.**, May 2, **2023**)*

Ordered published by *Moore v. Fred Meyer Stores, Inc., **2023** Wash. **App. LEXIS 1343** (Wash. Ct. **App.**, July 11, **2023**)*

Prior History: **[*1]** Appeal from Pierce County Superior Court. Docket No: 19-2-10000-7. Judge signing: Honorable Thomas Quinlan. Judgment or order under review. Date filed: 12/03/2021.

Core Terms

reasonably foreseeable, premises, unsafe condition, jury instructions, self-service, invitees, aisle, constructive notice, method of operation, trial court, requirement of notice, notice, foreseeability, proprietor's, customers

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Judges: Authored by Erik Price. Concurring: Bradley Maxa, Bernard Veljacic.

Opinion by: Erik Price

Opinion

[Published by order of the Court of Appeals July 11, ***2023***.]

¶1 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. Washington State Liquor & Cannabis Board, 197 **Wn**.2d 605, 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

¶2 On August 5, 2019, Rebecca filed a complaint for damages against Fred Meyer. The complaint **[*2]** 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.

¶3 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

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

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.

¶4 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 **[*3]** 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.

¶5 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.

¶6 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]

¶7 Fred Meyer proposed a pattern jury instruction on liability, **[*4]** 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.

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.

¶8 In its ruling on the **[*5]** 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. (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

[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.

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

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.

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

¶10 Marty appeals.

ANALYSIS

¶11 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 **[*6]** our Supreme Court's opinion in Johnson. Accordingly, we reverse.

¶12 "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.*

¶13 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)).

¶14 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 **[*7]** 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.

¶15 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, 123 Wn.2d at 654).

¶16 However, the Johnson court recognized that since *Ingersoll*, the **[*8]** 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)).

¶17 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). Johnson, 197 Wn.2d at 617. The Johnson court endorsed *Mucsi*'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 **[*9]** 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.

¶18 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).

¶19 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 **[*10]** 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.

¶20 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. 2019) (WPI) (emphasis added). 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 **[*11]** 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]

¶21 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.

[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 is 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.

¶22 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.

¶23 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. **[*12]** We remand to the trial court for further proceedings consistent with this opinion.

MAXA and VELJACIC, JJ., concur.

End of Document

Appendix B

Email from Chair of the Washington Pattern Instructions Subcommittee
for Part X – Owners and Occupiers of Land
(the Honorable Helen Halpert, ret.) (5/10/2023)

From:	Helen Halpert
To:	jesse@bastion.law; ken@appeal-law.com; shelby@appeal-law.com; charles.willmes@jmblawyers.com; owen.mooney@bullivant.com
Subject:	Moore v. Fred Meyer, et al
Date:	Wednesday, May 10, 2023 10:46:23 AM

Counsel:

I am the chair of the subcommittee of the Washington Pattern Jury Instruction Subcommittee for Part X-Owners and Occupiers of Land. We have drafted updates for the upcoming eighth edition of 6 Washington Practice-Pattern Jury Instructions, Civil. Our draft does include an update to 120. 06.020, reflecting *Johnson v. Washington State Liquor and Cannabis Board.* There is, however, a substantial lag time between the time we finish our work and the publication date. The Committee does not cite to unpublished opinions.

Is either party planning to file a motion to publish? If not, I will do so, as I believe a citation to *Moore* will strengthen our Comment.

I would appreciate hearing from all in enough time for me file a motion to publish, myself, if no one else will be pursuing this.

Helen L.Halpert, Judge (ret)

Appendix C

Court’s Instruction to the Jury, No. 13

INSTRUCTION NO. 13

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

CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **ANSWER TO PETITION FOR REVIEW** on the 15th day of September 2023 as follows:

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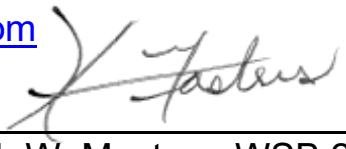

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