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SUPREME COURT
STATE OF WASHINGTON
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No. 1022581

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.

MEMORANDUM OF AMICI CURIAE INTERNATIONAL COUNCIL OF SHOPPING CENTERS AND WASHINGTON RETAIL ASSOCIATION IN SUPPORT OF GRANTING REVIEW

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I. IDENTITY AND INTERESTS OF AMICI CURIAE

This memorandum is respectfully submitted on behalf of two associations representing grocery stores and other retailers.

International Council of Shopping Centers, Inc. dba ICSC ("ICSC") is the global trade association of the shopping center and retail real estate industry. Founded in 1957, the association represents developers and operators of retail properties across the globe, as well as the tenants who occupy them, ranging from shopping center owners, developers, managers, marketing specialists, investors, retailers and brokers, as well as academics and public officials. ICSC's mission is to advance the industry by promoting and elevating the marketplaces and spaces where people shop, dine, work, play, and gather as foundational and vital ingredients of communities and economies. In furtherance of this mission, ICSC represents its members through advocacy on important public policy issues and through filing amicus

curiae briefs in pending appeals on issues of importance to the retail real estate industry. Its more than 45,000 members represent approximately 115,000 marketplaces that generate about 30,000,000 jobs in the United States.

Formed in 1987, the Washington Retail Association ("WRA") represents over 3,500 retail stores, including pharmacies and family-owned businesses, in Washington.

These associations have a strong interest in the fair treatment of grocers and other retailers under Washington law.

II. STATEMENT OF THE CASE

Amici adopt the statement of facts in the published opinion by the Washington Court of Appeals, Division Two.

III. AUTHORITY AND ARGUMENT

A. Plaintiffs Are Not Entitled to Invoke the Reasonable Foreseeability Exception in Every Premises Liability Case.

Amici have a serious cause for concern that courts will misinterpret Washington law when issuing jury instructions

based on the published opinion in *Moore v. Fred Meyer Stores, Inc.,* 2023 Wash. App. LEXIS 867 (May 2, 2023), *publ'n granted,* 2023 Wash. App. LEXIS 1343 (July 11, 2023).

As a general rule, before a retailer may be held liable for failing to prevent an injury like a slip and fall, the plaintiff must prove that the retailer had actual or constructive *notice* of the unsafe condition and a reasonable opportunity to rectify it (by cleaning up the mess). *Johnson v. Wash. State Liquor & Cannabis Bd.,* 197 Wn.2d 605, 611-12 486 P.3d 125 (2021). Washington law has an exception to that rule, however—the *Pimentel* exception. *Pimentel v. Roundup Co.,* 100 Wn.2d 39, 666 P.2d 288 (1983).

Under the *Pimentel* exception, the plaintiff need not prove that the retailer actually knew about the unsafe condition in advance. *Id.* at 49. The plaintiff need only prove that the condition was reasonably foreseeable because of the nature of the business and how it operates. *Id.* For instance, if the retail

business is a grocery store and it allows customers to serve themselves by taking produce from the shelves, the store may be deemed to have had "constructive" notice if the plaintiff slips and falls on a produce item that has fallen onto the floor. This rule encourages retailers, such as grocery stores, to be vigilant in monitoring and cleaning up areas where slip-and-falls are common.

Prior to this case, Washington appellate courts had required that, before a trial court could instruct a jury on the *Pimentel* exception, the plaintiff had to present evidence to support that the unsafe condition (such as produce on the floor) was reasonably foreseeable under the circumstances. *Wiltse v. Albertson's, Inc.,* 116 Wn.2d 452, 461-62, 805 P.2d 793 (1991). In *Johnson*, this Court referred to the *Pimentel* exception at least 12 times as the "reasonable foreseeability exception"—emphasizing that it is indeed an exception triggered upon the plaintiff meeting the requisite burden of proof. *Johnson,* 197

Wn.2d at 607-622.

But, in *Moore*, the Washington Court of Appeals erroneously held that trial courts must instruct juries on the *Pimentel* reasonable foreseeability exception in *every* premises liability case—even if the plaintiff did not present evidence to support reasonable foreseeability. *Moore,* 2023 Wash. App. LEXIS 867 at *10. The Court of Appeals even went so far as to invalidate a longstanding pattern jury instruction on premises liability because it does not include the *Pimentel* reasonable foreseeability exception. *Id.*

Moore represents a significant change in Washington premises liability law. If the Washington Supreme Court does not intervene and reverse the Court of Appeals' decision in *Moore*, the decision will increase liability for grocers and other retailers because juries will be instructed on the *Pimentel* reasonable foreseeability exception in many cases where the evidence does not support that an unsafe condition was

reasonably foreseeable. Juries may be confused and find liability in cases that would otherwise result in defense verdicts. Amici share a concern that *Moore* lowers the burden of proof to hold a retailer liable for a slip and fall injury.

B. The Court of Appeals Misinterpreted this Court's Holding in *Johnson*.

Respondent's Answer states that "*Moore* simply followed this Court's decision in *Johnson v. Wash. State Liquor & Cannabis Bd.,* 197 Wn.2d 605, 486 P.3d 125 (2021)." Respondent's Answer at 1. Review is warranted, however, if Division Two purported to follow *Johnson* but *misinterpreted* that decision.

The Estate contends that *Johnson* held that the trial court "must equally consider foreseeability of the condition as it would actual or constructive notice." Respondent's Answer at 5. Respondent's Answer leaves out the critical qualifier, however—that substantial evidence of foreseeability must be

presented to invoke the reasonable foreseeability exception. *Johnson,* 197 Wn.2d at 619-22.

To invoke the exception, Respondent's Answer points to evidence that slip-and-falls are common in Fred Meyer stores (Respondent's Answer at 9), but such evidence is far too general to constitute substantial evidence of foreseeability. The condition must be foreseeable in the specific part of the store based on the nature of the business and methods of operation. *Johnson,* 197 Wn.2d at 620. As this Court has stated repeatedly, "The foreseeability standard requires that the plaintiff prove 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.'" *Johnson,* 197 Wn.2d at 620 (quoting *Pimentel*, 100 Wn.2d at 49).

The Estate argues that it would have presented additional foreseeability evidence had the trial court properly instructed the jury. Respondent's Answer at 12. But a party does not wait for

the jury instructions before presenting evidence. The trial court made its final decision on the jury instruction long after the plaintiff rested its case. Accordingly, the jury instructions did not prevent Plaintiff from presenting foreseeability evidence on the nature of the business and methods of operation.

Further, the Estate contends that *Moore* requires a reasonable foreseeability instruction "only where, as here, the evidence calls for it." Respondent's Answer at 12. But, that is not what *Moore* actually says. It requires the instruction in every case, even going so far as to mandate that it be included in the pattern instruction given in every premises liability case. *Moore,* 2023 Wash. App. LEXIS 867 at *10. Such mandate is contrary to this Court's decision in *Johnson,* 197 Wn.2d at 619-22.

Finally, the Estate argues that review is unwarranted because the Court "can and no doubt will conform the WPIC through the usual processes of its Pattern Instruction Committee." Respondent's Answer at 17. The Committee

evidently has drafted a revised pattern jury instruction for WPIC 120.06.02 and plans to cite *Moore* in the comment as support. In fact, the Committee chair emailed the parties about filing a motion to publish *Moore* for this purpose. *See* Respondent's Answer App. B. But this is putting the cart before the horse. Pattern jury instructions are not law. The Supreme Court's role is to declare the law, and the Committee's role is to draft pattern instructions that reflect that law. Although the Committee is under the Supreme Court's aegis, the Court does not itself approve pattern instructions in advance. 6 WASH. PRAC., WASH. PATTERN JURY INSTR. CIV. PRELIMINARY MATERIALS (7th ed. 2022). Review is warranted to correctly state the law, and this will allow the Committee to adopt a proper instruction.

IV. CONCLUSION

Amici respectfully request this Court to correct the *Moore* decision and clarify the reasonable foreseeability exception is

indeed an exception with a requisite burden of proof to invoke such an exception.

The undersigned hereby certifies under RAP 18.17(2)(b) that this document contains 1,364 words.

Respectfully submitted this 9th day of October, 2023.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am a member at **Real Property Law Group, PLLC**, over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 9th day of October, 2023, at Seattle, Washington.

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