NO. 1024100

Court of Appeals No. 56715-6-II

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

HWAYO JENNY GALASSI and MICHAEL GALASSI,

Respondents,

v.

LOWE'S HOME CENTERS, LLC,

Petitioner.

AMICUS CURIAE MEMORANDUM OF WASHINGTON DEFENSE TRIAL LAWYERS

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I. IDENTITY AND INTEREST OF AMICUS

The Washington Defense Trial Lawyers Association (WDTL), established in 1962, includes more than 750 Washington attorneys engaged in civil defense litigation and trial work. The WDTL serves our members through education, recognition, collegiality, professional development and advocacy. The WDTL represents its members through amicus curiae submissions in cases that present issues of statewide concern to Washington civil defense attorneys and their clients. The petition in this case implicates applicable concerns for the WDTL, whose members have an interest in the preservation, clarity, and predictability of long-established common law principles of premises liability, which are greatly impacted by the Court of Appeals' decision.

II. ARGUMENT

Lowe's Home Centers, LLC's Petition for Review aptly summarizes the legal elements of premises liability, the general requirement for actual or constructive notice, and the evolution of the *Pimentel* reasonable foreseeability exception. This case fits into a chain of similar recent cases that reflect Washington

trial and appellate courts alike grappling with the outer contours of the *Pimentel* exception's applicability, including this Court's decision in *Johnson v. Liquor & Cannabis Bd.*, 197 Wn.2d 605, 486 P.3d 125 (2021), and Division Two's decision in *Moore v. Fred Meyer Stores, Inc.*, 26 Wn. App. 2d 769, 532 P.3d 165 (2023), *review granted*, 102258-1, 2023 WL 7402543 (2023).

Lowe's Petition asserts that Division Two's decision in this case is contrary to Supreme Court and published Court of Appeals decisions, and that the decision also implicates an issue of substantial public interest, because it creates what is effectively a per se rule that the danger of falling merchandise is always reasonably foreseeable in the business mode or mode of operation of a retailer. WDTL joins in these concerns, which are linked to comparable concerns raised previously in both *Johnson* and in *Moore*.

The decision in this case, like the analogous decision in *Moore* which this Court has granted review of—would both significantly increase the scope of liability for brick-and-mortar retailers, if left to stand. Requiring plaintiffs to prove a connection between the specific business operations and the

hazard has been a central imperative of the *Pimentel* exception from its inception. While the exception has now broadened beyond the self-service context, premises-liability plaintiffs are not absolved of their burden to present substantial evidence in support of this nexus before invoking the exception. Yet, the Court of Appeals decision here accomplished precisely that. This Court should grant the Petition for Review to address that error, and to address the fact that the decision in this case will be impacted by this Court's forthcoming decision in *Moore*.

A. Division Two's decision erroneously relieves plaintiff of the burden of proof in invoking the *Pimentel* exception.

As a general rule, a plaintiff in a premises liability case must show that the proprietor had actual or constructive notice of an unsafe condition on the premises before it can be held liable. The Court created what began as a narrow exception to that notice requirement, in *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 666 P.2d 888 (1983):

> [T]he unsafe condition must either be caused by the proprietor or his employees, or the proprietor must have actual or constructive notice of the unsafe condition. *Such notice need not be shown,*

> *however, 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*.

Id., at 49 (emphasis added). The *Pimentel* exception has since broadened beyond the self-service context. *Johnson*, 197 Wn.2d at 618.

But, as this Court has recognized, while application of the exception may have broadened, the underlying mechanism for its application has *not* changed. The *Pimentel* exception *only* applies where a plaintiff has otherwise carried its burden to prove a connection linking the nature of the defendant's business or its mode of operation to the unsafe condition, so as to make the risk posed by that condition reasonably foreseeable. *See id*., at 614 (*citing Wiltse v. Albertson's Inc.*, 116 Wn.2d 452, 461, 805 P.2d 793 (1991) ("[T]he rule should be limited to specific unsafe conditions that are continuous or foreseeably inherent in the nature of the business or mode of operation.").

As analyzed by the parties at greater length in the Petition and Answer, *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 869 P.2d 1014 (1994) is also instructive here, particularly for how the summary judgment standard interplays with the

plaintiff's burden of proof when invoking the *Pimentel* exception:

> When [retailer] defendants moved for summary judgment it was their initial burden to show the absence of a genuine issue of material fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989). They met this burden by showing an absence of evidence to support plaintiff's case, specifically a lack of evidence to prove actual or constructive notice. It then became plaintiff's burden to show the existence of a genuine issue of material fact. *Young*, at 225, 770 P.2d 182.
>
> Plaintiff attempts to meet that burden by [invoking the *Pimentel* exception]…[T]he 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."

Id. at 654. This Court affirmed the summary judgment decision dismissing plaintiff's claims in *Ingersoll*, noting "that plaintiff has 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*. The Court further noted that the record there was silent as to five enumerated and "obviously relevant facts relating to

the nature of the [retailer] business and its method of operation." *Id*. at 654–55. Those facts are set forth the Petition, and include things like the historical record of comparable incidents, and how the nature of the business contributed to the specific hazard. Accordingly, even when a premises-liability plaintiff is opposing a motion for summary judgment, in the absence of actual or constructive notice of the hazard, he or she still bears the burden of proof when invoking the *Pimentel* exception.

In this case, the plaintiff *concedes* that Lowe's did not have actual or constructive notice of the dangerous condition at issue. Answer, p. 6. Here, as in *Ingersoll*, the retailer carried its initial burden to show the absence of notice, and it therefore became the *plaintiff's burden* to show that the nature of Lowe's business and its methods of operation made the existence of the unsafe condition reasonably foreseeable. And here, as in *Ingersoll*, the record was extremely sparse with regard to how or whether the specific unsafe condition at issue was shown to be continuous or foreseeably inherent in the nature of Lowe's business or mode of operation. The Court of Appeals

specifically noted only two operative facts it relied on to reverse:

> There are two key pieces of evidence—Galassi's testimony about the askew roll of wire fencing falling on her when she touched it and Jenkins' declaration that associates are trained to immediately correct improperly stocked items on display and do a safety walk at the beginning of the day.
>
> Viewed in the light most favorable to Galassi, a trier of fact could reasonably infer that storage of the wire fencing rolls nearly six feet above ground was an unreasonably dangerous condition. A trier of fact could also reasonably infer that the store's policy of immediately correcting improperly stocked items on display shelves and doing daily safety walks at the beginning of the day reflect Lowe's belief that improperly stocked items may fall from the display shelves and create unsafe situations or cause dangerous outcomes. Further, Lowe's daily practices could show that it implicitly knew that improperly stocked items were unsafe, and it was reasonably foreseeable that such items would fall.

Galassi v. Lowe's Home Centers, LLC., 534 P.3d 354, 358 (2023). As Lowe's Petition notes, this aspect of the decision conflicts with this Court's clear articulation of the law in *Ingersoll*.

First, Division Two's decision does not even consider or acknowledge the factors that this Court set forth in *Ingersoll*. *See* 123 Wn.2d at 654-55. It is true that *Ingersoll* involved a slip and fall, rather than a falling product, but the same general conceptual factors are readily analogized and applicable in either context. In this case, as in *Ingersoll*, the plaintiff did not obtain or present key evidence to carry the applicable burden of proof. As Lowe's summarized:

> There is no evidence of how the roll of wire fencing came to be askew, or how long the roll of wire fencing was so situated on the display shelf. There is no evidence to suggest that any flaw in the Olympia Lowe's business or mode of operation created the likelihood that a roll of wire fencing would be lying askew on a display shelf. There is no evidence that displaying rolls of wire fencing on a display shelf behind a stop bar is unsafe. There is no evidence of how frequently items such as rolls of wire fencing lying askew on a display shelf fell in the garden center at the Olympia Lowe's. And there is no evidence that other similar incidents occurred at the Olympia Lowe's. To the contrary, the only evidence is that that no other similar incidents occurred at the Olympia Lowe's in the three years preceding this incident.

Petition, p. 9. In *Ingersoll*, this Court found the plaintiff's failure to support the five factors to be decisive and to preclude

application of the *Pimentel* exception; but the same failure in this case was discounted or disregarded.

Here, the closest both the plaintiff and the Court of Appeals came to addressing this Court's required analysis in *Ingersoll* was to focus on testimony from Lowe's employee, Ms. Jenkins, that the store had a policy of promptly correcting improperly stocked items and doing daily safety walks at the start of the day. Plaintiff argued that that testimony formed the basis to infer a link between Lowe's method of operation and the hazard at issue here:

> 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.

Answer, p. 9. But plaintiff's argument here is unavailing, and the possible or likely intervening action of a thoughtless customer does not operate as plaintiff suggests. To the contrary, plaintiff's concession that another customer might have recently put the fencing back improperly does not actually amount to

substantial evidence of "specific unsafe conditions that are continuous or foreseeably inherent in the nature of the business or mode of operation." *Johnson*, 197 Wn.2d at 614. In actuality, those facts more closely resemble those contemplated by this Court in *Wiltse*, when this Court stated: "If a customer had knocked over merchandise in the aisle and the next customer had immediately tripped over that merchandise, certainly the store owner should not be responsible without being placed on notice of the hazard." *Wiltse v. Albertson's Inc.*, 116 Wn.2d at 461–62 (1991). In either a slip and fall case or a falling merchandise case, it is clear that if another customer created the hazard shortly before the incident, those facts alone would not be sufficient to impose liability or invoke the *Pimentel* exception—plaintiff must do more to establish a nexus and carry her burden of proof, and plaintiff did not do so here.

Here, as in the *Moore* case now pending review, the Court of Appeals decision erroneously absolves both premises liability plaintiffs of their burden to prove actual or constructive notice, or alternatively, to provide evidence of a link between the nature/method of the business operation and the unsafe

condition as the predicate to a reasonable foreseeability instruction. The Court should grant review to correct this error.

B. Division Two's decision is parallel to the similarly erroneous decision in *Moore v. Fred Meyer*.

As this Court is aware, both the WDTL and the State of Washington argued in the *Johnson* matter that the continued expansion of the *Pimentel* exception raised the specter of vastly increased retailer liability. Wn.2d at 618. The WDTL renewed those concerns in support of the petition for review in *Moore v. Fred Meyer*, which is now set for oral argument. In response to those concerns, this Court reasoned:

> [t]his fear is unwarranted. Removing the self-service requirement does not obviate the need to prove the existence of the unreasonably dangerous condition itself…Proof of a dangerous condition remains an element of a premises liability claim. *See Mucsi*, 144 Wash.2d at 859, 31 P.3d 684 (showing that a *specific* condition must exist even when "*the unsafe condition* was reasonably foreseeable" (emphasis added)) [citation omitted]. No case of ours invoking the reasonable foreseeability exception has suggested otherwise, and we do not do so today.

Id. This Court was satisfied that the expansion of *Pimentel* had not dramatically increased retailer liability, primarily because

Pimentel remained an exception, only absolving plaintiffs of the notice requirement in those cases where plaintiff produced substantial evidence of "specific unsafe conditions that are continuous or foreseeably inherent in the nature of the business or mode of operation." *Id*, 197 Wn.2d at 614.

The concerns WDTL raised in *Johnson* have now resurfaced and been made manifest by Division Two's erroneous decisions in *Moore* and the present case, both of which effectively concluded that a plaintiff is entitled to rely on the *Pimentel* exception, *even* when he or she has not presented substantial evidence of the required nexus. That is out of step with the law as set forth in *Wiltse*, *Ingersoll*, and *Johnson*. The *Pimentel* exception obliges a plaintiff to establish a nexus between the dangerous condition and the nature of the business or its mode of operation. This is a vital plank of business-owners' longstanding reliance on existent premises liability law. Division Two's decision effectively eliminates this requirement, affording a reasonable foreseeability instruction even in cases where no evidence was presented linking the nature of the business or its operations to the unsafe condition

at issue. This Court suggested in *Johnson* that there was no need for the State and WDTL's fears of expanded liability because of the safeguards that remained in place—but the decision below in this case, and in *Moore*, reflect that those safeguards have become inoperable.

III. CONCLUSION

This Court should grant review because the Court of Appeals' decision conflicts with this Court's precedent on the *Pimentel* exception, because the resulting decision significantly impacts the public interest, and because the decision in this case will be directly impacted by this Court's upcoming decision in *Moore v. Fred Meyer*.

This document contains 2,479 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 20th day of November, 2023.

NICOLL BLACK & FEIG

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CERTIFICATE OF SERVICE

I, Ian McDonald, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Nicoll Black & Feig, PLLC, 1325 4th Ave, Suite 1650, Seattle, WA 98101.

2) On November 20, 2023, I caused to be served upon counsel of record at the addresses listed below, via the Appellate Portal the following documents:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20th day of November, 2023 at Seattle, Washington.

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November 20, 2023 - 4:52 PM

Transmittal Information

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