

NO. 35960-0-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

Viki White and Edward White, wife and husband and the marital
community thereof, Appellants,

v.

Safeway, Inc., a Delaware corporation doing business in the State of
Washington, Respondents.

BRIEF OF APPELLANT

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Appellants

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COURT OF APPEALS
DIVISION II
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DEPUTY
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Regulations and Rules

CR 56 6

I. Introduction

Viki White slipped and fell in greasy chicken drippings next to a self-serve hot roasted chicken cart in the Belfair, Washington Safeway Store. The drippings on the floor were directly next to the self-serve chicken cart, trailed to the check stands, and were obviously a result of someone spilling the drippings while handling one of the chickens.

Under *Pimentel v. Roundup Co.* and subsequent decisions, such a spill is inherently foreseeable in self-service operations if it occurs within a self-service area where customers handle and transfer goods from one place to another, and if it is related to that self-service operation. In such circumstances the store is considered to be on constant notice that spills will occur. Safeway did not need to have actual notice of the hazard in order to be liable for the damages that resulted. Nor did Plaintiff need to present additional proof of notice or foreseeability of the hazard, such as evidence of other similar spills. Issues of material fact remain, and summary judgment for the Defendant was inappropriate.

II. Assignments of Error

A. Assignments of Error

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

2. The trial court erred by denying Plaintiffs' Motion for Reconsideration heard telephonically in open court on January 23, 2007.

B. Issue Pertaining to Assignments of Error

1. Whether a hazard in a self-service store, which is within a self-service area where customers handle goods and is clearly related to that self-service operation, is reasonably foreseeable under *Pimentel v. Roundup Co.* and subsequent decisions, or whether additional evidence of the foreseeability of the hazard is required. (Assignments of Error 1 and 2.)

III. Statement of the Case

A. Procedural History

Appellants Viki and Edward White filed a complaint against Respondent Safeway in the Superior Court of Washington in Mason County on May 10, 2006. CP 108-110.

Respondent Safeway brought a Motion for Summary Judgment that was heard on December 11, 2006. CP 99-105; RP 1-7. The trial judge granted Respondent's Motion. CP 24-25; RP 5-6. The judge found that the *Pimentel* exception to the notice requirement for premises liability did not apply to the facts, because Plaintiff did not show that the hazard was foreseeable. *Id.* Appellants filed a Motion for Reconsideration, which

was heard on January 23, 2007. CP 17-23. The trial judge denied Appellants' Motion. CP 5-6. This appeal followed. CP 3-4.

B. Factual History

The following facts were undisputed for the purpose of the Defendant's Motion for Summary Judgment and the Plaintiffs' Motion for Reconsideration. On September 9, 2003, Appellants Viki and Edward White were shopping at the Safeway Store in Belfair, Washington. CP 109. On display near the front of the store was a heated cart with a number of hot roasted chickens for sale. *Id.* The chickens were packaged in plastic containers with snap-on tops. CP 54. On the floor approximately six to eight feet from the chicken cart were several large puddles of clear chicken drippings, each about ten inches in diameter. CP 56-58. There was a trail of smaller grease drips leading from the large puddles towards the check stands. *Id.*

Mr. and Mrs. White had completed their shopping and were ready to check out. As Mrs. White made her way to the check stand she walked past the roasted chicken cart, slipped in the chicken drippings on the floor next to the cart and fell on her back and left shoulder, breaking her clavicle and sustaining other injuries. CP 37-49.

Neither Mr. nor Mrs. White noticed the clear chicken drippings on the floor prior to Mrs. White's fall. CP 51; CP 55. After falling on the

floor, Mrs. White had chicken drippings on her shoes, pants, sweater, and in her hair. CP 50. The store manager cleaned Mrs. White's shoes and offered to have her clothes dry-cleaned. CP 46, 48. Mrs. White knew the liquid she had slipped in was from the chicken display, because the smell of the chicken drippings in her hair made her nauseated. CP 50. Mr. White testified that it was obvious the chicken drippings were from a chicken taken from the chicken display cart, and that the store manager acknowledged such. CP 56.

On December 11, 2006, at the hearing on Defendant's Motion for Summary Judgment, the trial judge found that the *Pimentel* exception does not apply to the facts of this case. RP 5-6. A subsequent Motion for Reconsideration was denied. CP 5-6.

IV. Summary of Argument

A. The *Pimentel* Exception Applies

Safeway is considered to be a constant notice of a hazard on its premises if the hazard was reasonably foreseeable based on the store's self-service mode of operation. This *Pimentel* exception to the notice requirement for premises liability has been limited by subsequent cases requiring that in order for a hazard to be reasonably foreseeable a plaintiff must show that the hazard was within a self-service area of the store

where customers handle/transfer goods themselves, and related to that same self-service operation.

The Plaintiffs demonstrated that the chicken grease in which Mrs. White fell was a reasonably foreseeable hazard because it was related to Safeway's self-service mode of operation and it was within the self-service area to which it was related, where customers handled the hot chickens. Contrary to the trial court's holding, no additional evidence such as prior spills or falls is needed to prove the foreseeability of the hazard. Summary judgment for Safeway 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.”¹ 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

¹ *Brown v. Stevens Pass, Inc.*, 97 Wn. App. 519, 522, 984 P.2d 448 (1999) quoting *Reynolds v. Hicks*, 134 Wn.2d 491, 495, 951 P.2d 761 (1998).

of law.² Here, the trial judge incorrectly found that the Defendant was entitled to judgment as a matter of law, and issues of material fact remain. Therefore, 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 should have known of the unsafe condition.³ 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.⁴ This “*Pimentel*” exception to the notice requirement applies where a proprietor’s business incorporates a self-service mode of operation, and this mode of operation inherently creates an unsafe condition that is continuous or reasonably foreseeable.⁵

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

³ *Ingersol v. DeBartolo, Inc.*, 123 Wn.2d 649, 654, 869 P.2d 1014 (1994).

⁴ *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 666 P.2d 888 (1983).

⁵ *Pimentel*, 100 Wn.2d at 40; *Ingersoll*, 123 Wn.2d at 653.

In such cases, the store is considered to be on **constant notice** that spills and hazards will occur in the normal course of business.⁶

A self-service area has been defined as any location where customers serve themselves, goods are stocked, and customers handle the grocery items.⁷ Examples of areas that courts have found to be self-serve areas include the check-out aisle, a magazine display, and the produce department.⁸

In *Pimentel*, the Supreme Court examined three different approaches used in other jurisdictions for determining storekeeper liability for injuries occurring on the premises. The Court adopted the second approach of those examined, and concluded that a plaintiff's burden "may be established by the operating methods of the proprietor and the nature of his business."⁹ 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 self-service operation of the defendant is shown to be such that the

⁶ *Wiltse v. Albertson's Inc.*, 116 Wn.2d 452, 461, 805 P.2d 793 (1991) (emphasis added).

⁷ *O'Donnell v. Zupan*, 107 Wn.App. 854, 860, 28 P.3d 799 (2001).

⁸ See, e.g., *O'Donnell*, 107 Wn.App. 854, *Pimentel*, 100 Wn.2d 39, *Wiltse v. Albertson's, Inc.*, 116 Wn.2d 452, 461, 805 P.2d 793 (1991).

⁹ *Pimentel*, 100 Wn.2d at 48-49.

existence of unsafe conditions is reasonably foreseeable. And, once this is established, the plaintiff must still prove that defendant failed to take reasonable care to prevent injuries to customers.¹⁰

B. The Policy Behind the *Pimentel* Exception Applies Here: By Choosing a Self-Service Method of Business With Lower Overhead and Greater Profits the Owner Is Charged With the Knowledge of the Foreseeable Risks Inherent in Such a Mode of Operation, and Is in a Better Position to Accept the Risks Involved.

The Supreme Court in *Pimentel* cited and adapted in part this Court's reasoning and holding in *Ciminski v. Finn Corp.*, which found a similar exception to the notice requirement for self-service operation owners based in part on the fact that the owner has for his own monetary benefit required customers to perform the tasks previously carried out by employees.¹¹ "Thus, the risk of items being dangerously located on the floor, which previously was created by the employees, is now created by other customers. But it is the very same risk and the risk has been created by the owner by his choice of mode of operation."¹²

¹⁰*Pimentel*, 100 Wn.2d at 49.

¹¹*See, Pimentel*, 100 Wn.2d 39; and *Ciminski v. Finn Corp.*, 13 Wn.App. 815, 819, 537 P.2d 850 (1975), which held that the requirement of notice of a hazard for premises liability was satisfied as a matter of law because of the nature of the defendant's business. The issue in both *Pimentel* and *Ciminski* was whether the defendant's method of doing business establishes notice of a risk of harm to the defendant's customers.

¹²*Ciminski*, 13 Wn.App. at 819.

In *Ciminski v. Finn Corp.*, this Court explained in detail the rationale for finding an exception to the notice requirement in self-service operations:

It is common knowledge that the modern merchandising method of self-service poses a considerably different situation than the older method of individual clerk assistance. It is much more likely that items for sale and other foreign substances will fall to the floor. Clerks replenish supplies by carrying them through the area the customer is required to traverse when selecting items. Customers are naturally not as careful in handling the merchandise as clerks would be. They may pick up and put back several items before ultimately selecting one. Not unreasonably they are concentrating on the items displayed, which are usually arranged specifically to attract their attention. Such conditions are equally typical of self-service restaurants and the most common self-service operation, the modern supermarket.

In choosing a self-service method of providing items, the owner is charged with the knowledge of the foreseeable risks inherent in such a mode of operation. The logic of this rule is obvious if it is remembered that if a clerk or other employee has been negligent, the employer is charged with the responsibility of creating a dangerous condition. In a self-service operation, an owner has for his pecuniary benefit required customers to perform the tasks previously carried out by employees. Thus, the risk of items being dangerously located on the floor, which previously was created by the employees, is now created by other customers. But it is the very same risk and the risk has been created by the owner by his choice of mode of operation. He is charged with the creation of this condition just as he would be charged with the responsibility for negligent acts of his employees. A pattern of conduct, such as self-service, is as permanent and the risks

from such pattern as foreseeable, as a deceptive condition.¹³

In creating the exception to the notice requirement, the Supreme Court in *Pimentel* upheld the lower court's decision in the case, and cited the Court of Appeal's justification that, "a business that chooses to adopt the self-service merchandising technique which allows for lower overhead and greater profits, is in a better position to accept the risks involved."¹⁴

C. 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.¹⁵ 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.¹⁶

¹³ *Ciminski v. Finn Corp.*, 13 Wn.App. at 819 (1975) (emphasis added)

¹⁴ *Pimentel*, 100 Wn.2d at 46, citing *Pimentel v. Roundup Co.*, 32 Wn.App. 647, 651-52, 649 P.2d 135 (1982).

¹⁵ *Coleman v. Ernst*, 70 Wn.App 213, 853 P.2d 473 (1993); *Ingersoll*, 123 Wn.2d at 653.

¹⁶ *Coleman v. Ernst*, 70 Wn.App 213

Courts have also limited *Pimentel* in holding that there must be a relation between the hazardous condition and the self-service mode of operation of the business.¹⁷ 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.¹⁸

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.¹⁹

Examining the facts of the case, the Court held that "the check-out aisle of a grocery store where customers are responsible for unloading their own groceries is a self-service area, and, thus, the proprietor is

¹⁷*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).

¹⁸*Wiltse*, 116 Wn.2d at 461.

¹⁹*O'Donnell v. Zupan*, 107 Wn.App. 854 at 856, 28 P.3d 799 (2001)

charged with knowledge of the reasonably foreseeable risks inherent in the self-service mode of operation.”²⁰ The Court went on to state that customers “**handle and transfer grocery items from one place to another, presenting an inherent risk of items dropping on the floor and creating a hazard.**”²¹

The term “inherent” is defined as: “involved in the constitution or essential character of something.”²² Therefore, if there is an “inherent” risk of items dropping to the floor where customers handle and transfer goods from one place to another, such drops (and the hazards caused by such drops) are reasonably foreseeable.

Although the *Zupan* court noted that the defendant store had knowledge that grocery items occasionally fell from carts during the check-out process, this evidence was not necessary to the Court’s holding. Rather, as noted above, the Court found that there is an inherent risk of items dropping to the floor wherever customers handle and transfer goods from one place to another. Because of this inherent risk, the Court

²⁰ *O’Donnell*, 107 Wn.App. at 858-59. Despite the fact that in dicta the Court noted there was evidence the Defendant knew that grocery items occasionally fell from carts during check-out, this did not change its conclusion that where customers handle grocery items there is an inherent risk of items dropping on the floor.

²¹ *O’Donnell*, 107 Wn.App. at 859(emphasis added)

²² Merriam-Webster’s Collegiate Dictionary, Tenth Edition (1998).

concluded that spills in the check-out aisle are reasonably foreseeable, and summary judgment was reversed.

Plaintiff met the requirements of all of the cases limiting the *Pimentel* exception. Mrs. White was within a self-service area where customers handle goods - she was directly next to the self-service hot roasted chicken kiosk where customers choose from a selection of hot roasted chickens and either place them in a shopping cart or carry them away by hand. Furthermore, the hazard causing her injuries, that is the greasy chicken drippings in which she slipped, are obviously related to that particular self-service operation.

D. 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 not related to that self-service operation.²³

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

²³ 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).

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.²⁴

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.

In *Carlyle v. Safeway*, the plaintiff slipped in spilled shampoo in the coffee aisle.²⁵ 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.”²⁶ 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

²⁴ *Arment v. K-Mart Corp.*, 79 Wn.App. 694, at 698, 902 P.2d 1254 (1995)

²⁵ *Carlyle v. Safeway*, 78 Wn.App. 272, 896 P.2d 750 (1995)

²⁶ *Id.* at 277 (citing *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652, 869 P.2d 1014 (1994))

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.”²⁷ In the case at hand, spilled chicken drippings next to a chicken cart 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.

In *Fredrickson v. Bertolino*’s, decided in December, 2005, the plaintiff was injured when a chair collapsed in the Defendant’s coffee shop.²⁸ The Court noted that Washington courts have so far applied the *Pimentel* exception only to self-service establishments, and only to self-service areas within those establishments. And, “further, the hazardous condition must be related to the self-service mode of operating.”²⁹ The Court then ruled in favor of the defendant, finding that the plaintiff,

²⁷ *Id.* at 276-277 (citing *Wiltse v. Albertson’s Inc.*, 116 Wn.2d 452)

²⁸ *Fredrickson v. Bertolino*’s, 131 Wn.App 183, 127 P.3d 5 (2005)

²⁹ *Fredrickson*, 127 P.3d at 11

has not shown that the seating area at Bertolino's is a self-service area. Specifically, he has not shown that customers 'serve themselves' in the Bertolino's seating area; and he has presented no evidence that customers in the seating area perform duties that a proprietor's employees would customarily perform. Further, he has not shown how any hazardous condition posed by the chairs relates to any self-service aspect of Bertolino's.³⁰

Since the plaintiff did not demonstrate that he was within a self-service area, or that the hazard was related to the self-service operation, the Court then looked to whether there were any other indicia of foreseeability and states, "[n]or has Fredrickson established that the danger of breaking chairs was continuous or foreseeably inherent in the nature of Bertolino's business."³¹

While it is true that *Pimentel* is a narrow exception to the notice requirement, there is no case that requires evidence of foreseeability such as prior spills when the hazard is within a self-service area and directly related to that self-service operation. Rather, the cases reiterate that in self-service areas such as the produce aisle, the check-out aisle, and wherever customers are handling goods themselves the owner is considered to be on constant notice that spills and hazards will occur in the normal course of business.³²

³⁰ *Fredrickson*, 127 P.3d at 13-14

³¹ *Fredrickson*, 127 P.3d at 14

³² 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).

E. Fees and Costs

Pursuant to RAP 18.1, Appellant requests fees and costs for copies of the clerk's papers; preparation of this brief and any reply brief if filed (pursuant to RAP 14.3(b)); transmittal of the record on review; the filing fee; such other sums as provided by statute.

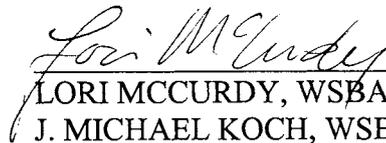
VI. CONCLUSION

Owners are charged with knowledge of reasonably foreseeable risks that are inherent to a self-service 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. Mrs. White demonstrated that the chicken drippings in which she fell were within a self-service area where customers handled and transferred hot chickens themselves, and were directly related to that specific self-serve operation. No additional proof of foreseeability was required. Additional issues of material fact remain including whether Respondent Safeway took adequate precautions to prevent injuries to customers in light of the foreseeable hazard. 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, as should the trial court's decision denying the Plaintiff's Motion for Reconsideration.

Dated this 12th day of June, 2007.

Respectfully submitted,



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**COURT OF APPEALS, DIVISION II,
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The undersigned, being first duly sworn on oath, deposes
and says:

On June 12, 2007, I mailed a copy of the attached **BRIEF
OF APPELLANT** with proper postage prepaid to Defendants'
attorney, Keith A. Bolton, whose name and address is as follows:

/

ORIGINAL

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Patti Aycock
Patti Aycock

SUBSCRIBED AND SWORN to before me this ____ day of
June, 2007.

Steve C. Franklin
NOTARY PUBLIC in and for the
State of Washington
Residing at: Poulsbo, WA
Commission Expires: 10/09/09
Printed Name: Steve C. Franklin