

I. Argument

A. Both Parties Agree that for the *Pimentel* Exception to Apply, a Hazard in a Self-Service Area Must Be “Foreseeably Inherent” In the Nature of the Business¹ Mrs. White Met Her Burden of Demonstrating That the Chicken Drippings Hazard Was Foreseeably Inherent in Safeway’s Mode of Operation

Owners are charged with knowledge of reasonably foreseeable risks that are inherent in a self-service mode of operation.² The issue on appeal is what is the plaintiff’s burden for demonstrating that a particular risk is “inherent” in a business’ mode of operation, and whether Ms. White met that burden.³ Safeway insists that Ms. White was required to show evidence of prior spills in Safeway’s self-service area. However, there is no case or authority for such a requirement, and Safeway’s position is contrary to the facts, the language, and the policy of *Pimentel* and subsequent cases.

¹ Respondent’s Brief at 9; *Wiltse v. Albertson’s Inc.*, 116 Wn.2d 452, 461, 805 P.2d 793 (1991)

² See, i.e., *Wiltse v. Albertson’s Inc.*, 116 Wn.2d at 461 (“the rule should be limited to specific unsafe conditions that are continuous or foreseeably inherent in the nature of the business or mode of operation”); *O’Donnell v. Zupan*, 107 Wn.App. 854 at 856, 28 P.3d 799 (2001) (This narrow ‘self-service’ or *Pimentel* exception to the notice requirement applies where a [] business incorporates a self-service mode of operation and this mode of operation inherently creates an unsafe condition that is continuous or reasonably foreseeable in the area where the injury occurred.”)

³ *Pimentel v. Roundup Co.*, 100 Wn.2d 39 at 40, 666 P.2d 888 (1983); *Ingersol v. DeBartolo, Inc.*, 123 Wn.2d 649, 653, 869 P.2d 1014 (1994); *O’Donnell v. Zupan*, 107 Wn.App. 854 at 856, 28 P.3d 799 (2001)

What the cases reiterate is that “certain departments of a store, such as the produce department, [are] areas where hazards [are] apparent and therefore the owner [is] placed on notice by the activity.”⁴ No case implies that a customer injured in a produce department would have to present evidence of prior spills or hazards in that area. Rather, simply the nature of the self-service produce operation alone makes such hazards “continuous or foreseeably inherent.”⁵

This Court’s analysis in *O’Donnell v. Zupan* is applicable to the facts at hand.

A location where customers serve themselves, goods are stocked, and customers handle the grocery items, or where customers otherwise perform duties that the proprietor’s employees customarily performed, is a self-service area. ...[I]n the check-out area, **[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.** By requiring customers to unload their grocery items at the check-out area, a task once performed by the checkers, Zupan’s has created a self-service area. And the hazard, debris in the check-out aisle, is related to the mode of operation in the area where O’Donnell fell.⁶

Safeway incorrectly states Ms. White’s position, and incorrectly asserts that Ms. White’s position would make *Pimentel* the rule, rather

⁴*Wiltse v. Albertson’s*, 116 Wn.2d at 461;

⁵*Wiltse v. Albertson’s*, 116 Wn.2d at 461

⁶*O’Donnell v. Zupan*, 107 Wn.App. 854, 859, 28 P.3d 799 (2001).

than the exception.⁷ On the contrary, Ms. White met the requirements for the *Pimentel* exception to apply, even as limited by subsequent case law including this Court's three-part test laid out in *O'Donnell v. Zupan*.⁸ This Court held that the *Pimentel* exception applies if the plaintiff shows that (1) the mode of operation 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.⁹

There is no question that Safeway is a self-service operation and that the chicken drippings that caused Mrs. White's injuries were within the self-service area. Furthermore, like the check-out aisle in *O'Donnell*, the self-service chicken cart was an area where 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."¹⁰ The self-serve chicken cart is also analogous to the produce aisle, which the Supreme Court has said is an area where hazards are apparent and therefore the owner is placed on notice by the activity.¹¹ The nature of the

⁷Respondent's Brief at 8-9, 13

⁸*O'Donnell v. Zupan*, 107 Wn.App. 854, 859

⁹*Id.* at 859 (citations omitted)

¹⁰*O'Donnell v. Zupan*, 107 Wn.App. at 859

¹¹*Wiltse v. Albertson's*, 116 Wn.2d at 461

operation, where customers handled and transferred hot greasy chickens in plastic containers with snap-on lids, inherently created a foreseeable risk and no proof of prior spills was necessary for the *Pimentel* exception to apply.

The facts at hand are easily distinguishable from the cases in which the *Pimentel* exception was found to not apply. Those hazards either didn't occur in a self-service area or the hazard was not related to that particular self-service operation. In *Wiltse v. Albertson's Inc.*, the hazard was water that had leaked from the roof.¹² In *Arment v. Kmart*, the hazard was a spilled soft drink in the menswear department.¹³ In *Carlyle v. Safeway Stores*, the hazard was spilled shampoo in the coffee aisle.¹⁴ In *Ingersoll v. DeBartolo*, the hazard was an unknown spill in the common area of the Tacoma Mall.¹⁵ The bare facts of these cases alone show that they do not meet the most basic requirements for the self-service

¹²*Wiltse v. Albertson's, Inc.*, 116 Wn.2d 452

¹³*Arment v. K-Mart Corp.*, 79 Wn.App. 694, 902 P.2d 1254 (1995)

¹⁴*Carlyle v. Safeway*, 78 Wn.App 272, 896 P.2d 750 (1995)

¹⁵*Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 654, 869 P.2d 1014 (1994). See also, *Coleman v. Ernst*, 70 Wn.App 213, 853 P.2d 473 (1993) (carpeting in entryway was not in a self-service area); *Fredrickson v. Bertolino's*, 131 Wn.App 183, 127 P.3d 5 (2005)(broken chair in a coffee shop was not in a self-service area nor related to any self-service operation)

exception to apply - that the hazard be within a self-service area and directly related to that particular self-service operation.¹⁶ Common sense dictates that such hazards are not inherently foreseeable as a result of customers transferring goods from one place to another.

Finally, the policy behind the *Pimentel* exception supports Mrs. White's position. Safeway argues that it is not fair to impose liability on the store owner without the store owner being placed on notice of the hazard. However, what the *Pimentel* Court held is that "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."¹⁷ And the Court explicitly stated that "**these elements may be established by the operating methods of the proprietor and the nature of his business.**"¹⁸

The justification for the exception, as explained by the Court of Appeals and adapted by the Supreme Court is that:

[A]n owner of a self-service establishment has actual notice that his mode of operation creates certain risks of harm to his customers. Since a self-service operation involves the reasonable probability that these risks will

¹⁶See, *Coleman v. Ernst*, 70 Wn.App 213, 853 P.2d 473 (1993); *Wiltse v. Albertson's, Inc.*, 116 Wn.2d 452

¹⁷*Pimentel v. Roundup Co.*, 100 Wn.2d at 49

¹⁸*Pimentel v. Roundup Co.*, 100 Wn.2d at 48-49

occur, these risks are foreseeable. Thus, it is not necessary to show actual or constructive notice of the specific hazard causing injury, and **it becomes the task of the jury to determine whether the proprietor has taken all reasonable precautions necessary** to protect his invitees from these foreseeable risks.¹⁹

The *Ingersoll* Court went on to state that the notice requirement is not eliminated as a matter of law for all self-service establishments, but is a limited exception.²⁰ The injury must occur in a self-service area of the store, and there must be a relation between the hazardous condition and the self-service mode of operation of the business.²¹ Mrs. White clearly met these requirements, and the trial court erred in holding that the *Pimentel* exception does not apply in her case.²²

B. Summary Judgment Was Inappropriate Because Issues of Material Fact Remain Regarding Whether Safeway Took Adequate Precautions In Light of the Risks

In a self-service area where hazards are inherently foreseeable, a plaintiff can establish liability by showing that the owner failed to exercise

¹⁹*Pimentel v. Roundup Co.*, 100 Wn.2d at 45, and *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d at 652, quoting *Ciminski v. Finn Corp.*, 13 Wn.App. 815, 537 P.2d 850, review denied 86 Wn.2d 1002 (1975) (emphasis added)

²⁰*Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d at 653 (citing *Pimentel*, at 49-50)

²¹*Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d at 653-654 (citing *Coleman v. Ernst Home Ctr., Inc.*, 70 Wn.App. 213, 853 P.2d 473 (1993) and *Wiltse v. Albertsons, Inc.*, 116 Wn.2d at 461)

²²RP 5-6; CP 24-25, 5-6

reasonable care in light of the foreseeable risks. "In the exercise of reasonable care, a store proprietor must inspect for dangerous conditions and provide such repair, safeguards, or warning as may be reasonably necessary to protect its customers under the circumstances."²³ The reasonableness of a proprietor's methods of protection is a question of fact.²⁴ Reasonable minds could differ on whether Safeway's periodic inspections and sweeping were reasonable precautions; therefore, summary judgment was inappropriate.

VI. CONCLUSION

Owners are charged with knowledge of reasonably foreseeable risks that are inherent in a self-service mode of operation. Mrs. White demonstrated that the chicken drippings upon which she slipped 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 foresee ability was required. Additional issues of material fact remain including whether Respondent Safeway

²³*O'Donnell v. Zupan*, 107 Wn.App. at 860

²⁴*O'Donnell v. Zupan*, 107 Wn.App. at 860, citing *Ciminski v. Finn Corp.*, 13 Wn.App. 815, 819, 537 P.2d 850 (1975)

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 2nd day of August, 2007.

Respectfully submitted,



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DIVISION II

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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,

Respondent.

AFFIDAVIT OF MAILING

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

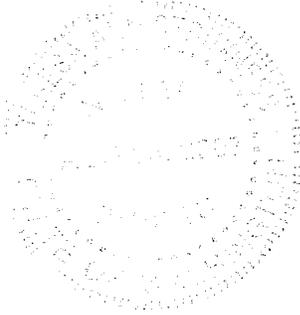
On July 27, 2007, I mailed a copy of the attached **REPLY
BRIEF OF APPELLANT** with proper postage prepaid to
Defendants' attorney, Keith A. Bolton, whose name and address
is as follows:

Keith A. Bolton, WSBA #12588
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Janet Allen

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SUBSCRIBED AND SWORN to before me this 27th day of
July, 2007.



Teresa Ann Struxness

NOTARY PUBLIC in and for the
State of Washington

Residing at: Poulsbo

Commission Expires: 8/18/2007

Printed Name: Teresa Ann Struxness