
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 STORES, INC.,

Respondents.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

RESPONDENT'S BRIEF

Keith A. Bolton, WSBA 12588
BOLTON & CAREY
Attorneys for Respondent
Safeway, Inc.
7016 – 35th Avenue N.E.
Seattle, Washington 98115-5917
(206) 522-7633

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IV. STATEMENT OF THE CASE

This was a personal injury action arising out of Plaintiff Viki White's accident at the Belfair Safeway store on September 9, 2003. At Safeway's summary judgment motion, the evidence showed Plaintiff slipped and fell near a hot chicken display at the front of the store. After the accident, some drops of chicken juice were found in the area where Plaintiff fell, heading towards the check stands, which were about 30-40 feet away. Clerk's papers 92-93. There was no evidence that Safeway caused the chicken juice to be on the floor. Clerk's papers 86, 94. Plaintiff had no idea how long the chicken juice had been on the floor. Clerk's papers 86, 94. Plaintiff further testified she had no evidence that anyone at Safeway knew the liquid was on the floor before she fell. Clerk's papers 86-87, 94. Plaintiff's accident was the first notice Safeway had of any problem with the floor. Clerk's papers 97.

The evidence at summary judgment was also undisputed that the area where Plaintiff's accident occurred was a very safe place in the store. Clerk's papers 97. Charles Patnode, the store manager, testified he had worked at the Belfair Safeway store since it opened in 1999. Clerk's papers 97. Plaintiff White's accident was the only instance he was aware of where chicken juice had

spilled on the floor, or where anyone had slipped or fallen on chicken juice. Clerk's papers 97-98.

It was also undisputed that Safeway inspected the area where Plaintiff's accident occurred much more frequently than required by the foreseeability of risk. Clerk's papers 97. An employee at the store was assigned the task of inspecting the entire store on an hourly basis, to look for any potential hazards and to clean them if necessary. Clerk's papers 97. The last such hourly inspection occurred 30 minutes before Plaintiff's accident, and had revealed no problems whatsoever with the floor. Clerk's papers 97. Mr. Patnode inspected the area where Plaintiff's accident occurred approximately 4-5 times per hour during his shift. Clerk's papers 97. Courtesy clerks also inspected the area several times per hour. There were no spills or other foreign objects on the floor during any of the inspections that occurred before Plaintiff's accident. Clerk's papers 97.

The trial court granted Safeway's summary judgment motion. Clerk's papers 24-25. The court then denied Plaintiffs Motion for Reconsideration, Clerk's papers 5-6. Plaintiffs brought this appeal. Clerk's papers 3-4.

V. ARGUMENT

A. Standard of Review

Summary judgment should be granted when, after viewing the pleadings, depositions, admissions and affidavits and all reasonable inferences that may be drawn therefrom in the light most favorable to the non-moving party, it can be stated as a matter of law that (1) there is no genuine issue as to any material fact, (2) all reasonable persons could reach only one conclusion, and (3) the moving party is entitled to judgment. *Olympic Fish Products v. Lloyd*, 93 Wn.2d 596, 611 P.2d 737 (1980). When a motion for summary judgment is supported by evidentiary matter, the adverse party may not rest on mere allegations in the pleadings but must set forth specific facts showing there is a genuine issue for trial. *LePlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975).

It is well settled in Washington that a defendant in a civil action is entitled to summary judgment when the defendant shows there is an absence of evidence supporting an element essential to plaintiff's claim. See, e.g., *Carlyle v. Safeway Stores, Inc.*, 78 Wn.App. 272 (1995); *Las v. Yellow Front Stores*, 66 Wn.App. 196, 831 P.2d 744 (1992). The defendant may support a motion for summary judgment by merely challenging the sufficiency of plaintiff's evidence as to any

material issue. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 770 P.2d 182 (1989); *Las v. Yellow Front Stores*, *supra* at 198.

B. The trial court properly granted summary judgment because Plaintiffs failed to prove that Safeway either caused an unreasonable risk at the store or had actual or constructive notice of an unreasonable risk.

In order to recover against Safeway, Plaintiffs had the burden of proving, among other things, that Safeway either caused an unreasonable risk at the store or had actual or constructive notice of the unreasonable risk or unsafe condition. *Ingersoll v. Debartolo, Inc.*, 123 Wn.2d 649, 869 P.2d 1014 (1994). *Carlyle v. Safeway Stores, Inc.*, 78 Wn.App. 272, 896 P.2d 750 (1995), review denied, 128 Wn.2d 1004 (1995). In *Carlyle v. Safeway Stores, Inc.*, the Court held:

To impose liability for failure to maintain business premises in a reasonably safe condition generally requires the plaintiff to prove (1) the unsafe condition was caused by the proprietor or its employees, or (2) the proprietor had actual or constructive notice of the dangerous condition. *Pimentel v. Roundup Co.*, 100 Wash.2d 39, 49, 666 P.2d 888 (1983).

Carlyle v. Safeway Stores, Inc., 78 Wn. App. at 275. In the *Ingersoll* case, the Supreme Court reiterated this well-established principle as follows:

As to the law, we start with the basic and well-established principle that for a possessor of land to be liable to a business invitee for an unsafe condition of the land, the possessor must have actual or constructive notice of the unsafe condition. *Smith v. Manning's, Inc.*, 13 Wn.2d 573, 126 P.2d 44 (1942). 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." *Smith*, at 580. The plaintiff must establish that the defendant had, or should have had, knowledge of the dangerous condition in time to remedy the situation before the injury or to warn the plaintiff of the danger. *Brant v. Market Basket Stores, Inc.*, 72 Wn.2d 446, 451-52, 433 P.2d 863 (1967).

Ingersoll v. Debartolo, Inc., 123 Wn.2d at 652. In *Wiltse v. Albertson's, Inc.*, 116 Wn.2d 452, 805 P.2d 793 (1991), the Supreme Court held with respect to notice:

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.

Applying this law to the facts in the case at bar, Plaintiffs did not meet their burden of setting forth admissible evidence to prove that Safeway either caused an unsafe condition on the floor, or had actual or constructive knowledge of an unsafe condition on the floor. First, Plaintiffs admitted they had no evidence that anyone from Safeway caused the liquid to be on the floor. Viki White testified:

- Q. And you don't have any evidence that anybody from Safeway caused the chicken juice to be on the floor, do you?
- A. I don't have any knowledge of that.

Dep. Viki White, 36:22-24. Clerk's papers 86. Similarly, Ed White testified:

- Q. The – with respect to the chicken juice, you don't know how the chicken juice got on the floor, do you?
- A. No, I don't.

Dep. Edward L. White, 30:6-8. Clerk's papers 94.

In addition, Plaintiffs admitted they had no evidence that anyone from Safeway knew the liquid was on the floor before Plaintiff's accident occurred. Viki White testified:

- Q. Do you know – and you don't have any evidence that anybody from Safeway knew the chicken juice was on the floor before your accident, do you?
- A. No.

Dep. Viki White, 36:25-37:3. Clerk's papers 86-87. Ed White also testified:

- Q. You don't have any evidence that anybody from Safeway knew the chicken juice was on the floor before your wife's accident, do you?
- A. No.

Dep. Edward L. White, 30:16-19. Clerk's papers 94.

Finally, Plaintiffs also acknowledged they had no idea how long the liquid had been on the floor before Plaintiff stepped in it.

Viki White testified:

- Q. And you don't know how long the chicken juice had actually been on the floor before your accident?
- A. I don't know. I didn't see it.
- Q. So for all you know, it could have just gotten onto the floor before you came into the area?

A. I don't have any knowledge of that.

Dep. Viki White, 36:16-21. Clerk's papers 86. Similarly, Ed White testified:

Q. And you don't know how long the chicken juice had been on the floor before your wife's accident, do you?

A. No, I don't.

Q. For all you know, a customer could have just dripped the juice on the floor right before the accident, correct?

A. That could happen.

Dep. Edward L. White, 30:9-15. Clerk's papers 94. Obviously, without any evidence as to how long the liquid was on the floor, Plaintiffs did not prove the liquid was on the floor long enough for Safeway to have had an opportunity to notice and remedy the problem. The trial court properly applied the general rule in granting Safeway's summary judgment motion.

C. The limited *Pimentel* exception does not apply where Plaintiffs produced no evidence that problems of chicken juice spilling on the floor where Plaintiff's accident occurred were continuous or foreseeably inherent in Safeway's business.

Plaintiffs contend that if an accident happens in a self-service area from a self-service product then the accident is

automatically foreseeable and the *Pimentel* exception applies. The Court should reject Plaintiffs' contention. The cases do not say that. On the contrary, Washington cases since *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 666 P.2d 888 (1983) have consistently held that *Pimentel* is a very limited exception to the general rule that Plaintiffs must prove notice. The cases have uniformly held that if an accident happens in the self-service area from a self-service product, plaintiff must still produce evidence showing that the hazard was continuous or foreseeably inherent in the nature of the business in order for *Pimentel* to apply.

For example, in *Arment v. Kmart Corp*, 79 Wn.App. 694, 902 P.2d 1254 (1995), the court rejected the very argument Plaintiffs White are making in the case at bar, and held:

The fact that a business is a self-service operation is insufficient, standing alone, to bring a claim for negligence within the *Pimentel* exception. *Wiltse v. Albertson's, Inc.*, 116 Wn.2d 452, 805 P.2d 793 (1991). The *Pimentel* exception is a narrow one, limited to specific unsafe conditions in specific areas that are inherent in the nature of self-service operations. *Wiltse*, 116 Wn.2d at 461. In order to fall within the *Pimentel* exception, therefore, a plaintiff must show that the nature of the particular self-service operation is such that it creates reasonably foreseeable

unsafe conditions in the self-service area of the business. *Wiltse*, 116 Wn.2d at 456. While certain departments of a store, such as a produce department, are “areas where hazards were apparent and therefore the owner [is] placed on notice by the activity,” *Wiltse*, 116 Wn.2d at 461, it does not follow that specific unsafe conditions associated with a self-service business are reasonably foreseeable in all areas of the business. On the contrary, to invoke the *Pimentel* exception, a plaintiff must present some evidence that the unsafe condition in the particular location of the accident was reasonably foreseeable. *Carlyle v. Safeway Stores, Inc.*, 78 Wn.App. 272, 896 P.2d 750 (1995).

Arment v. Kmart Corp., *supra* at 698. (Emphasis added). In the case at bar, Plaintiffs White presented no evidence whatsoever that chicken juice on the floor in the area of Plaintiff’s accident was reasonably foreseeable.

Similarly, in *Ingersoll v. Debartolo, Inc.*, 123 Wn.2d 649, 869 P.2d 1014 (1994), the court held:

We note that even if the injury does occur in the self-service department of a store, this alone does not compel application of the *Pimentel* rule. Self-service has become the norm throughout many stores. However, the *Pimentel* rule does not apply to the entire area of the store in which customers serve themselves. Rather, it applies if the unsafe condition causing

the injury is "continuous or foreseeably inherent in the nature of the business or mode of operation." *Wiltse v. Albertson's, Inc., supra* at 461. There must be a relation between the hazardous condition and the self-service mode of operation of the business. See *Wiltse*. . . .

As stated above, "self-service" is not the key to the exception. Rather, the 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." *Pimentel*, at 49.

The record shows 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. . . .

In short, Plaintiff failed to present evidence that the nature of the Mall's business and its methods of operation are such that the existence of unsafe conditions is reasonably foreseeable. Without any evidence on which to make a determination that the *Pimentel* exception applies, Plaintiff had to show actual or constructive notice, a showing she did not even attempt to make.

Ingersoll v. Debartolo, Inc., supra at 653-55. (Emphasis added).

Similarly, in *Carlyle v. Safeway Stores, Inc.*, 78 Wn.App. 272, 896 P.2d 750 (1995), the court also rejected the argument Plaintiffs White are now making. The court held:

Mrs. Carlyle interprets the *Pimentel* rule too broadly. The *Pimentel* exception is a limited rule for self-service operations which applies only to specific unsafe conditions that are continuous or foreseeably inherent in the nature of the business or mode of operation. *Ingersoll*, at 653; *Wiltse*, at 461. 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. *Wiltse*, at 461. The plaintiff can then establish liability by showing the operator of the premises had failed to conduct periodic inspections with the frequency required by the foreseeability of the risk. *Wiltse*, at 461; *Pimentel*, at 49. The *Pimentel* rule does not apply to the entire area of a store in which customers serve themselves, however; there must be a relation between the hazardous condition and the self-service mode of operation of the business. *Ingersoll*, at 653-54.

Under Ms. Carlyle's interpretation, all complaints arising out of slip and fall accidents in self-service establishments would be immune from summary judgment. That is clearly contrary to the narrow interpretation adopted by the Supreme Court in *Pimentel*, *Wiltse* and *Ingersoll*. *Ingersoll*, at 653-54, notes that even if the injury occurs in the self-

service department of a store, this alone does not compel application of the *Pimentel* rule. The rule applies only "if the unsafe condition causing the injury is 'continuous or foreseeably inherent in the nature of the business or mode of operation' ". *Ingersoll*, at 653-54 (quoting *Wiltse*, at 461). . . .

Ms. Carlyle, too, has failed to produce any evidence from which it could reasonably be inferred that the nature of Safeway's business and its methods of operation are such that unsafe conditions are reasonably foreseeable in the area in which she fell. The mere presence of a slick or slippery substance on a floor is a condition that may arise temporarily in any public place of business. Under *Pimentel*, *Wiltse*, and *Ingersoll*, something more is needed. Because there was insufficient evidence to apply the *Pimentel* exception, she needed to produce evidence of actual or constructive notice. *Ingersoll*, at 655; *Pimentel*, at 49. This, too, she failed to do.

Carlyle v. Safeway Stores, Inc., *supra* at 276-77. (Emphasis added).

If the Court adopted Plaintiffs White's argument, *Pimentel* would become the general rule, rather than the very limited exception that the courts have stated it is. If the Court adopted Plaintiffs' position, then *Pimentel* would apply anytime a customer dropped something in the store and another customer came right along behind and slipped on it. However, the *Wiltse* court clearly rejected that position, holding:

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., supra at 461-62.

Applying this law to the case at bar, it is clear the Court properly granted Safeway's summary judgment motion. Plaintiffs White failed to demonstrate the chicken juice on the floor where Plaintiff's accident occurred was continuous or foreseeably inherent in the nature of Safeway's business. Plaintiffs submitted no evidence whatsoever of the frequency of spills of chicken juice in the area where Plaintiff fell. In fact, Plaintiffs submitted no evidence as to any other spill in the area where she fell, much less that spills in that area were continuous or foreseeably inherent in Safeway's business. On the contrary, the undisputed evidence at summary judgment showed the area where Plaintiff's accident occurred was an extremely safe part of the store. See Declaration of Charles Patnode at page 2. Clerk's papers 97. Mr. Patnode further testified he worked at the Belfair store since it opened in 1999, and he is not aware of any other instance where chicken juice spilled on the floor. See Declaration of Charles Patnode at 2-3. Clerk's papers 97-98.

Given that evidence, the Court properly held that *Pimentel* does not apply.¹

Not only is Plaintiffs White's position directly contrary to the courts' express statements and application of *Pimentel*, it is contrary to the rationale behind the limited *Pimentel* exception. Under the general rule in Washington, Plaintiffs are required to prove that Safeway either caused the problem, or had actual or constructive notice of the problem. See, e.g., *Carlyle v. Safeway Stores, Inc.*, *supra*. The rationale for the limited *Pimentel* exception is that it is fair to deem a self-service store on notice where foreign objects get onto the floor so frequently that it can be said the problems are continuous or inherently foreseeable in the nature of the business. Without evidence that a particular area of the self-service store is problematic to that extent, it is not fair to impose liability on the store owner without the store owner being placed on notice of the hazard.

¹ *O'Donnell v. Zupan Enterprises, Inc.*, 107 Wn.App. 854, 28 P.3d 799 (2001), relied upon by Plaintiffs, is clearly distinguishable. In contrast to the case at bar, in *Zupan* the evidence showed it was not unusual for produce items to fall on the floor in the check stand area because of customers unloading their carts at the check stand. Unlike *Zupan*, the evidence in the case at bar showed no other instance where chicken juice had spilled on the floor. *Zupan* is also clearly distinguishable from the case at bar in that the store employees in *Zupan* did not conduct periodic inspections with the frequency required by the foreseeability of risk. The evidence in *Zupan* showed that the cashiers could not see the checkout area from where they worked, and did not comply with store policy regarding hourly checks. The evidence showed the checkout aisles were not inspected on a consistent basis. *Zupan, supra* at 857. In contrast, Safeway's inspections in the case at bar were much more frequent than required by the foreseeability of risk. See Declaration of Charles Patnode. CP 96-98.

Plaintiffs' view of *Pimentel* would be directly contrary to the rationale behind *Pimentel*, and would deem store owners to be on notice of hazards where hazards were in fact extremely rare, or, as in the case at bar, non-existent. Plaintiffs' rewriting of *Pimentel* would make premises owners strictly liable, and insurers of their patrons' safety, all of which is contrary to Washington law.

D. The Court properly granted Safeway's summary judgment motion because Plaintiffs did not meet their burden of proof under *Pimentel* in any event.

Even if the *Pimentel* case did apply to the case at bar, which Safeway disputes, Plaintiffs did not set forth the evidence required by *Pimentel* in order to demonstrate liability against Safeway. In *Wiltse v. Albertson's, Inc.*, *supra*, the Supreme Court held:

We emphasize that this exception [*Pimentel*] did not impose strict liability or even shift the burden to the defendant to disprove negligence. Rather, where the operation of a business is such that unreasonably dangerous conditions are continuous or reasonably foreseeable, it is unnecessary to prove the length of time that the dangerous condition had existed. The plaintiff can establish liability by showing that the operator of the premises had failed to conduct periodic inspections with the frequency

required by the foreseeability of risk.
Pimentel, 100 Wn.2d at 49.

Wiltse v. Albertson's, Inc., *supra* at 461. (Emphasis added).

Plaintiffs did not set forth any evidence that Safeway failed to conduct periodic inspections with the frequency required by the foreseeability of risk. On the contrary, the evidence is undisputed that Safeway conducted periodic inspections much more frequently than required by the foreseeability of risk. The risk of chicken juice getting onto the floor where Plaintiff's accident occurred was extremely low, *i.e.*, one time in the last seven years. See Declaration of Charles Patnode at pages 2-3. Clerk's papers 97-98. The evidence showed Mr. Patnode, the person in charge of the store, inspected the area where Mrs. White's accident occurred approximately 4-5 times per hour during his shift. See Declaration of Charles Patnode at page 2. Clerk's papers 97. Courtesy clerks were through the area several times per hour. See Declaration of Charles Patnode at page 2. Clerk's papers 97. Consequently, Plaintiffs did not demonstrate the requirement of *Pimentel* that Safeway failed to conduct periodic inspections with the frequency required by the foreseeability of risk. The Court properly granted

Safeway's summary judgment motion. *Wiltse, supra; Arment, supra; Carlyle, supra.*

E. Plaintiffs are not entitled to fees or costs.

Plaintiffs have requested attorney's fees, citing RAP 18.1. The Court should deny Plaintiffs' request for fees. RAP 18.1(a) requires Plaintiffs to demonstrate that applicable law grants them the right to recover reasonable attorney's fees. Plaintiffs have cited no authority for the proposition that any applicable law grants them the right to recover reasonable attorney's fees in this case.

With respect to Plaintiffs' request for costs, that request is, at best, premature. Only the prevailing party is entitled to costs pursuant to RAP 14.2. RAP 14.3-14.6 outlines the procedure for requesting costs once the Court determines the prevailing party.

VI. CONCLUSION

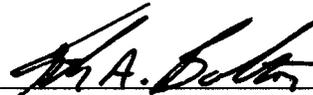
Plaintiffs did not demonstrate that Safeway caused an unreasonably dangerous condition on the floor, or had actual or constructive notice of such a condition before Plaintiff's accident. Consequently, the trial court properly applied the general rule in granting Safeway's summary judgment motion.

Neither did Plaintiffs demonstrate that the *Pimentel* exception applies. Plaintiffs arguments misstate and misapply the *Pimentel*

exception. Plaintiffs' view of *Pimentel* is also contrary to the rationale for *Pimentel*'s limited exception. Plaintiffs presented no evidence at summary judgment that would justify imposing liability against Safeway based upon the *Pimentel* exception, even under Plaintiffs' incorrect reading of *Pimentel*. Safeway respectfully requests the Court affirm the Superior Court's summary judgment decision.

RESPECTFULLY SUBMITTED this 29TH day of June, 2007.

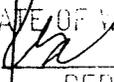
BOLTON & CAREY



Keith A. Bolton, WSBA # 12588
Attorneys for Respondent Safeway, Inc.

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NO. 35960-0-II

STATE OF WASHINGTON
BY  DEPUTY

**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 STORES, INC.,

Respondents.

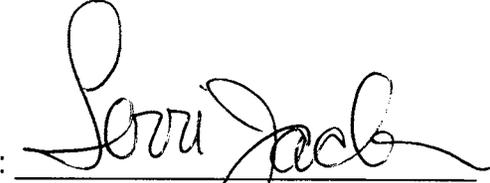
DECLARATION OF SERVICE

The undersigned, Terri Jackson, hereby declares under penalty of perjury of the laws of the State of Washington, that on June 29, 2007, she served by depositing in the United States Mail, First Class postage prepaid, a copy of *Respondent's Brief*, together with a copy of this *Declaration of Service*, addressed to the following:

J. Michael Koch, Esq.
E. L. McCurdy, Esq.
Law Offices of J. Michael Koch
& Associates, P.S., Inc.
10049 Kitsap Mall Boulevard, Suite 201
P.O. Box 368
Silverdale, WA 98383

DATED this 29th day of June, 2007, at Seattle, Washington.

By: _____

A handwritten signature in black ink, appearing to read "Terri Jackson", written over a horizontal line.

Terri Jackson, Assistant to
Keith A. Bolton, WSBA 12588
BOLTON & CAREY
Attorneys for Respondent Safeway, Inc.
7016 – 35th Avenue N.E.
Seattle, Washington 98115-5917
(206) 522-7633