

No. 43044-4-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON, DIVISION II

WENDY LOUISE TINSLEY and KENNETH TINSLEY,  
Husband and wife and their marital community,

Appellants,

v.

TACOMA GOODWILL INDUSTRIES,  
a Washington Corporation,

Respondent.

Appeal from the Superior Court of Washington  
for Pierce County  
No. 10-2-12457-3

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DIVISION II  
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**RESPONDENT'S BRIEF**

1001 Fourth Avenue, Suite 3900  
Seattle, Washington 98154-1051  
Tel (206) 625-8600  
Fax (206) 625-0900

CORR CRONIN MICHELSON  
BAUMGARDNER & PREECE LLP  
Seann C. Colgan, WSBA 38769

Attorneys for Tacoma Goodwill Industries

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**Table of Contents**

I. INTRODUCTION ..... 1

II. RESPONSE TO APPELLANTS’ STATEMENT OF ISSUES ..... 3

III. STATEMENT OF THE CASE..... 4

IV. ARGUMENT..... 5

    A. Legal Standard. .... 5

    B. Law Governing Appellants’ Negligence Claim..... 6

    C. Appellants’ First Assignment of Error: There Is No  
    Genuine Issue of Material Fact Regarding Application of  
    the Reasonably Foreseeable Danger Exception..... 8

    D. Appellants’ Second Assignment of Error: There Is No  
    Genuine Issue of Material Fact Regarding Actual or  
    Constructive Knowledge. .... 13

V. CONCLUSION ..... 17

**Table of Authorities**

**Cases**

*Coleman v. Ernst Home Center, Inc.*, 70 Wash. App. 213, 853 P.2d 473  
(1993) ..... 7

*Iwai v. State*, 129 Wn.2d 84, 915 P.2d 1089 (1996) ..... 7

*Las v. Yellow Front Stores, Inc.*, 66 Wash. App. 196,  
831 P.2d 744 (1992).....14, 15

*Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 719 P.2d 98 (1986)..... 6, 10

*O'Donnell v. Zupan Enterprises, Inc.*, 107 Wash. App. 854,  
28 P.3d 799 (2001).....15, 16, 17

*Pimentel v. Roundup Co.*, 100 Wn.2d 39,  
666 P.2d 888 (1983).....8, 9, 13, 16

*Reynolds v. Hicks*, 134 Wn.2d 491, 951 P.2d 761 (1988) ..... 7

*Shoulberg v. Public Util. Dist. No. 1 of Jefferson Co.*, \_\_ Wash. App. \_\_,  
280 P.3d 491 ..... 6, 10

*Wiltse v. Albertsons, Inc.*, 116 Wn.2d 452,  
805 P.2d 793 (1991).....8, 9, 10, 13, 15, 16, 17

**Treatises**

Restatement (Second) of Torts § 343..... 7, 17

## I. INTRODUCTION

The Superior Court entered summary judgment in favor of Respondent Tacoma Goodwill Industries on the grounds that Appellants Wendy and Kenneth Tinsley failed to come forth with evidence to create a disputed issue of material fact on an essential element of their negligence claim. Appellants' factual allegations, in a nutshell, are that Ms. Tinsley was injured when a picture frame fell on her neck from atop a mattress that was leaning against the wall in Respondent's Goodwill store. Under Washington law, a business invitee plaintiff making a negligence claim against a property owner must prove, among other elements, that she was injured as a result of an unsafe condition that the defendant caused or about which the defendant had actual or constructive notice. Here, the alleged unsafe condition is the presence of the picture frame on top of the mattress. The Superior Court below dismissed Appellants' claim on summary judgment finding there was no evidence, other than speculation, that store employees placed the picture on top of the mattress, nor any evidence of actual or constructive notice to the store.

Appellants argue that they did not need to show actual or constructive notice to prove their negligence claim, relying upon an exception that applies only if the nature of the defendant's business and its methods of operation are such that the existence of unsafe conditions on

the premises are reasonably foreseeable. Appellants claim that they were entitled to the benefit of this exception because Respondent's Goodwill store was a self-service operation. The exception does not automatically apply whenever the defendant store is self-service, however. To the contrary, a plaintiff claiming the benefit of the exception must come forth with specific facts demonstrating that it applies, i.e., facts showing that the operating methods of the defendant created continuous and reasonably foreseeable dangerous conditions. Because Appellants failed to do so, the Superior Court properly held that they had failed to create a disputed issue of material fact on that issue.

Appellants also argue, in the alternative, that Respondent was put on constructive notice of the allegedly unsafe condition. Constructive knowledge of a temporary unsafe condition may be imputed, however, only if the unsafe condition has been present long enough that a person exercising ordinary care would have discovered it. Again, Appellants failed to come forward with specific facts below that would support such a finding. Accordingly, the Superior Court properly granted summary judgment dismissing Appellants' negligence claim, and Respondent respectfully requests that this Court affirm that ruling.

## II. RESPONSE TO APPELLANTS' STATEMENT OF ISSUES

Appellants contend that the Superior Court's order dismissing their claims on summary judgment was erroneous in two respects. Brief of Appellants (hereinafter "Brf. App."), p. 2.

First, Appellants contend that the Superior Court erred because "there is a material question of fact whether Defendant's operating methods at the time of injury created a foreseeable dangerous condition." *Id.* (emphasis supplied by Appellants). Appellants' emphasis on the phrase "at the time" of injury is not clear to Respondent. The Superior Court ruled that Appellant had failed to come forth with any evidence to show that the operating methods of the Goodwill store created a continuous and reasonably foreseeable dangerous condition. Verbatim Report of Proceedings (hereinafter "Ver. Rep."), p. 10. The court did not rule that there was such evidence with respect to some time period, but not with respect to some other time period, as Appellants' argument suggests.

In any event, Respondent understands Appellants' first assignment of error as arguing that the Superior Court erred by finding Appellants failed to come forth with evidence sufficient to create a genuine issue of material fact concerning whether the exception to the notice requirement for reasonably foreseeable dangers applied. For all the reasons discussed

in section IV.C, *infra*, the Superior Court properly found that Appellants failed to come forth with any such evidence.

Second, Appellants contend that the Superior Court erred because “there is a material fact whether Defendant knew or should have known of the potentially dangerous condition.” Brf. App., p. 2. Thus, Appellants argue that, even if the exception does not apply, there was evidence to support a finding that store employees had actual or constructive notice of the alleged dangerous condition. For all the reasons discussed in section IV.D, *infra*, the Superior Court properly found that Appellants had failed to come forth with any such evidence.

### **III. STATEMENT OF THE CASE**

Appellants claim that Ms. Tinsley was injured when a picture fell on her neck while she was shopping at Respondent’s Tacoma Goodwill store. They alleged two causes of action: (1) premises liability/negligence; and (2) loss of consortium. CP 2-4 (Complaint). After close of discovery, Respondent moved for summary judgment on the grounds that Appellants lacked evidence sufficient to show that Respondent created an unsafe condition or had actual or constructive notice of such a condition. CP 9-19. Appellants’ opposition rested upon speculative testimony and conclusory statements, including:

- Ms. Tinsley’s declaration testimony regarding the placement of

the frame and the events surrounding her injury. CP 67 (“I don’t actually recall what the picture was on or how it was positioned . . . I do believe it was not appropriately secured otherwise it would not have fallen and struck me.”).

- The declaration of Ms. Tinsley’s cousin, Carlena De La Grange, that Respondent had placed the subject picture frame for sale in an unsafe manner. CP 70 (“It is unlikely that that these items would have been stacked there by a customer”); and
- Unsourced speculation that “[m]ost likely it was an employee of Goodwill that had placed the pictures on top of the mattress to get them out of the way and keep them from being damaged.” CP 87-88.

Appellants thus failed to come forward with any specific facts to prove that Respondent created an unsafe condition or had actual or constructive notice of an unsafe condition. Nor did Appellants come forward with any evidence to show that Respondent’s operating methods created a continuous and reasonably foreseeable dangerous condition. Accordingly, the Superior Court correctly concluded that Appellants could not meet their burden of proof, and granted summary judgment. Verbatim Report of Proceedings, pp. 9-10; CP 112-13. Appellants moved for reconsideration offering the same evidence and case law, which motion was denied. CP 154-155.

#### **IV. ARGUMENT**

##### **A. Legal Standard.**

This Court reviews a trial court’s summary judgment decision de

novo. *Shoulberg v. Public Util. Dist. No. 1 of Jefferson Co.*, \_\_\_ Wash. App. \_\_\_, 280 P.3d 491, 494 (2012). Summary judgment is proper if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c); *id.* All facts are viewed in the light most favorable to the nonmoving party, and summary judgment is proper if reasonable persons could reach but one conclusion from the evidence presented. *Id.*

The moving party bears the initial burden to show the absence of a material factual issue. The nonmoving party may not merely claim contrary facts and may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on affidavits considered at face value. *Id.* Rather, the nonmoving party must set forth “specific facts” that sufficiently rebut the moving party’s contentions and disclose the existence of a material fact. *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986).

**B. Law Governing Appellants’ Negligence Claim.**

To prove a claim of negligence under Washington law, a plaintiff must show “(1) the existence of a duty to the complaining party, (2) breach of that duty, (3) a resulting injury, and (4) that the breach was the

proximate cause of the injury.” *Reynolds v. Hicks*, 134 Wn.2d 491, 495, 951 P.2d 761 (1988). The legal duty owed by a property owner to a person entering the premises depends upon whether the entrant falls under the common law category of a trespasser, licensee, or invitee. *Iwai v. State*, 129 Wn.2d 84, 90-91, 915 P.2d 1089 (1996). For business invitees, Washington adopts the test articulated in the Restatement (Second) of Torts § 343 (1965), which provides as follows:

A possessor of land is subject to liability for physical harm caused to his [or her] invitees by a condition on the land if, but only if, he [or she]

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves from it, and

(c) fails to exercise reasonable care to protect them against the danger.

*Id.* at 93-94.

As to the first of these elements – knowledge – the rule in Washington is that a business invitee plaintiff must show:

(1) [T]hat an unsafe condition was caused by the proprietor or its employees or (2) the proprietor had actual or constructive notice of the dangerous condition.

*Coleman v. Ernst Home Center, Inc.*, 70 Wash. App. 213, 217, 853 P.2d 473 (1993). Constructive notice of a temporary unsafe condition exists “if

the unsafe condition has been present long enough that a person exercising ordinary care would have discovered it.” *Wiltse v. Albertson’s Inc.*, 116 Wn.2d 452, 459, 805 P.2d 793 (1991).

Finally, there is an exception to the knowledge requirement for “reasonably foreseeable dangers.” *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 666 P.2d 888 (1983). This exception provides that notice “need not be shown ... 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.

**C. Appellants’ First Assignment of Error: There Is No Genuine Issue of Material Fact Regarding Application of the Reasonably Foreseeable Danger Exception.**

Appellants’ first assignment of error is addressed to the exception for reasonably foreseeable dangers. Brf. App., pp. 5-7. Appellants assert that the exception applies whenever the defendant is a self-service store. App. Brf., p. 5 (“The Defendant Goodwill is a self-service store. In a self-service situation an exception applies to general [*sic*] rule that Plaintiff must show the specific unsafe condition existed for sufficient time to afford the Defendant an opportunity to discover it and remove the danger.”). That is an incorrect statement of the law.

In *Pimentel*, the Supreme Court made clear that “the requirement of showing notice will be eliminated *only if the particular self-service*

*operation of the defendant is shown to be such that the existence of unsafe conditions is reasonably foreseeable.” Id. at 50 (emphasis).*

Thus, it must be “shown” that the “particular self-service operation of the defendant” is such that the existence of unsafe conditions is reasonably foreseeable. Since the *Pimentel* decision, the Supreme Court has reaffirmed that “*Pimentel* is a limited rule for self-service operations, *not a per se rule.*” *Wiltse*, 116 Wn.2d at 461 (emphasis added). Merely pointing out, as Appellants have done, that the defendant is a self-service operation is therefore insufficient to show that the exception applies.

Rather, as set forth in *Pimentel* and *Wiltse*, a plaintiff seeking to avail herself of the exception must show that “the operation of a business is such that unreasonably dangerous conditions are continuous or reasonably foreseeable.” Appellants argue as follows:

Goodwill is a self-service store. It is extremely unlikely that a random customer placed or stacked multiple pictures on top of the mattress. What is more probable is that an employee of Goodwill put the pictures on top of the mattress until the shelving and racks for display of merchandise were in place.

Brf. App., p. 7.

As an initial point, the fact that “Goodwill is a self-service store” does not support Appellants’ contention that it is “extremely unlikely that a random customer” placed a picture on top of a mattress. To the contrary,

the fact that Respondent's store is a self-service operation means that customers may pick up and move items without the immediate knowledge of store employees. As the Supreme Court noted in *Wiltse*, "[i]f 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." 116 Wn.2d at 461-62. In other words, it is precisely because a "random customer" may create temporary unsafe conditions that Washington law requires business invitee plaintiffs to make a showing of notice and opportunity to the store owner to remedy an unsafe condition before imposing liability.

More fundamentally, however, Appellants' contentions concerning what is "extremely unlikely" and what is "more probable" are, in any event, pure speculation. The nonmoving party may not rely upon speculation, conclusory statements, or argumentative assertions to defeat summary judgment. *Shoulberg*, 280 P.3d at 494. Rather, she must come forward with "specific facts" that disclose the existence of a material fact. *Meyer*, 105 Wn.2d at 852. Appellants' speculation is insufficient to meet that burden.

Appellants also argue that "the operating methods of the Defendant at the time of the injury did not meet their own standard of care regarding

the placement of pictures,” and, “[t]hus, the mode of operation ... was such that the existence of unsafe conditions was reasonably foreseeable.” Brf. App., p. 7. Appellants’ use of the phrase “standard of care” is apparently intended as a reference to store manager Pam Yanez’s declaration testimony that large pictures were placed in vertical racks. Brf. App., p. 6 (citing to CP 64-65). According to Appellants, “shelves were not up” in the store at the time Ms. Tinsley was allegedly injured. *Id.* Appellants’ argument, therefore, appears to be that the mode of operation of the store created reasonably foreseeable unsafe conditions because shelving was not up in the store, and, therefore, pictures were not placed in racks.

As an initial point, Appellants are conflating “shelving” with vertical racks. There is no testimony that vertical racks were absent at the time of the alleged accident. On the contrary, the only testimony on this point, provided by Ms. Yanez, is that such racks were present. Moreover, Ms. Yanez’s testimony makes it clear that the alleged absence of shelving is completely immaterial because large pictures were not kept on shelves in any event:

The area where Ms. Tinsley claimed the picture fell was where, at that time, we kept furniture items such as chairs. They were arranged near the wall and there were not shelves in that immediate area upon which pictures or any other items could be displayed.

Large pictures, such as the one Ms. Tinsley pointed out to

Deanna Bixby, were never displayed on shelves or hung from a wall. They were placed in a vertical rack, on the floor, between other items. The photograph attached as Exhibit 1, taken on February 14, 2011, is representative of how large pictures were placed.

CP 64 (emphasis added).<sup>1</sup>

The photograph attached to Ms. Yanez's declaration as Exhibit 1 is the same one inserted on page 1 of Appellants' brief. Appellants claim that "these racks were not in place when Wendy Tinsley was injured." App. Br., p. 1. They offer no record evidence to support that assertion, however. Ms. Tinsley's cousin, Carlena De La Grange, stated only that shelving was not up and that she saw at least two pictures on top of a mattress. CP 70. She said nothing about the presence or absence of vertical racks.<sup>2</sup>

Moreover, Appellants' shelving argument is fundamentally flawed regardless of the presence or absence of vertical racks. Appellants' argument, in essence, is that the absence of racks in the store at the time of

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<sup>1</sup> Appellants' assertion that Ms. Yanez's testimony was contradicted by that of store supervisor Deanna Bixby is incorrect. App. Br., p. 6. Ms. Bixby's declaration testimony that "[i]t was our practice to place large pictures on the floor, sandwiched between other items," CP 62, is not different from Ms. Yanez' testimony that large pictures "were placed in a vertical rack, on the floor, between other items."

<sup>2</sup> Nor did Ms. Tinsley, who admitted she was not even aware of the location of the picture that allegedly fell on her. CP 67 ("I don't actually recall what the picture was on or how it was positioned. Carlena and I were not looking at the pictures.").

the alleged injury (an assertion for which there is no evidence) was an operating condition that resulted in continuous and reasonably foreseeable dangers. The mere absence of vertical racks does not create a dangerous condition, however. For instance, if the picture that allegedly fell on Ms. Tinsley had been leaning against the wall or lying flat on the ground, there would have been no alleged dangerous condition, and no injury. Appellants' argument, therefore, depends on their further assertion that, because no racks were present (and, again, there is no evidence to support that assertion), Goodwill employees placed the picture on top of the mattress. The only support for that further assertion, however, is Appellants' speculative comments concerning what is "extremely unlikely" and what is "more probable." Brf. App., p. 7. As discussed above, such speculation is insufficient to defeat summary judgment.

**D. Appellants' Second Assignment of Error: There Is No Genuine Issue of Material Fact Regarding Actual or Constructive Knowledge.**

Appellants argue, in the alternative, that a "material question of fact whether Defendant knew or should have known of the potentially dangerous condition" prevents summary judgment. Brf. App., pp. 8-11. Appellants thus appear to argue that, even if the *Pimentel/Wiltse* exception does not apply, there is sufficient evidence to show that Respondent had actual or constructive knowledge of the alleged unsafe condition.

Appellants offer no argument, however, that Respondent had actual knowledge. Nor is there any shred of evidence to support the conclusion that store employees knew of the alleged presence of the picture on top of the mattress prior to the accident. The phrasing of Appellants' assignment of error notwithstanding, therefore, their argument appears to be addressed only to the issue of constructive notice.

In support of their constructive notice argument, Appellants point to the fact that Ms. Tinsley was allegedly injured in proximity to the production area of the store, which was a "high traffic area" for store employees. Brf. App., p. 8. Constructive notice arises, however, only if the alleged unsafe condition "*existed for a sufficient length of time* and under such circumstances that [a] defendant or defendant's employees should have discovered it in the exercise of ordinary care." *Wiltse*, 116 Wn.2d at 798 (emphasis added). Appellants have set forth no such evidence.

*Las v. Yellow Front Stores, Inc.*, 66 Wash. App. 196, 831 P.2d 744 (1992), is on point. In *Las*, the plaintiff was injured in a store when she removed a skillet from a stack, resulting in five or six skillets falling to the floor, at least one of which struck her in the leg. 66 Wash. App. at 197. The plaintiff, like Appellants here, claimed that the store must have been negligent, but failed to come forth with any evidence that store employees,

rather than another customer, had placed the pans in that condition. As the Court of Appeals noted, “the pans were not in the *exclusive* control of [the store],” and “[o]ther customers could take out a pan and then replace it.” *Id.* at 202 (emphasis in original). Just as in *Las*, the pictures in Respondent’s store were not in the store’s “exclusive control,” and a customer could have placed the picture that allegedly fell on Ms. Tinsley on top of the mattress. *See also Wiltse*, 116 Wn.2d at 461-62 (noting that “[i]f 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”).

The point is simply that store owners are not charged with constructive notice of temporary unsafe conditions unless the condition has existed long enough for store employees to discover it, and remedy the condition, in the exercise of ordinary care. Appellants’ argument that the picture was in an area frequented by store employees does not make this showing.

Appellants also argue that “[n]either Goodwill employee Pam Yanez or Deanna Bixby stated that a regular inspection schedule existed,” analogizing to the facts in *O’Donnell v. Zupan Enterprises, Inc.*, 107 Wash. App. 854, 28 P.3d 799 (2001). Brf. App., pp. 8-9. *O’Donnell* held,

however, that the *Pimentel/Wiltse* exception applied under the facts of that case. *Id.* at 858-60. It is not clear, therefore, why Appellants cite to it in support of their argument, under the second assignment of error, that Respondent had constructive notice of the alleged unsafe condition.

In any event, *O'Donnell* is distinguishable concerning application of the *Pimentel/Wiltse* exception, and, in fact, illustrates the type of evidence Appellants needed to set forth to defeat summary judgment. *O'Donnell* involved an injury alleged to have taken place when the plaintiff slipped and fell on a piece of lettuce in the check-out area of a grocery store (which was considered a self-service area because customers unloaded their carts onto the conveyor belt). The plaintiff “presented evidence of [the store owner]’s knowledge that grocery items occasionally fell from carts during the check-out process,” and the existence of “maintenance policies designed in part to protect against this hazard.” *Id.* at 860. Thus, there was evidence that the check-out operations of the store “inherently created a reasonably foreseeable hazardous condition.” *Id.* at 859.

There is no such evidence here. In fact, Appellant’s argument concerning the “inspection schedule” concerns a different part of the *O'Donnell* decision that is not relevant to the issues on appeal. As the court noted in *O'Donnell*, even if the *Pimentel/Wiltse* exception applies, a

plaintiff must still show that the property owner failed to exercise reasonable care to prevent the alleged injury. 107 Wash. App. at 860. That is so because the exception only relieves the plaintiff of the knowledge requirement under the Restatement § 343. See section IV.B, *supra*. In *O'Donnell*, the court held that evidence which showed that “despite a policy requiring hourly checks, the [store] employees followed no set cleaning or inspection schedule,” raised a material fact concerning whether the store “exercised reasonable care to prevent injuries caused by items dropped by customers in the check-out area.” *Id.* at 860-61.

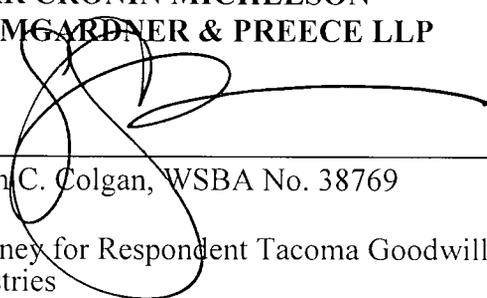
The issue of whether Respondent’s employees exercised reasonable care, however, is not relevant to either of Appellant’s assignments of error – both of which concern the knowledge requirement for business invitee liability. Knowledge and reasonable care are *separate elements* under the Restatement test. The Superior Court correctly entered summary judgment because Appellants failed to set forth specific facts disclosing a material issue as to the knowledge element of their negligence claim. Respondent respectfully requests that this Court affirm the Superior Court’s ruling.

## V. CONCLUSION

For all the foregoing reasons, Respondent requests that this Court affirm the Superior Court’s grant of summary judgment to Respondent.

DATED this 19th day of September, 2012.

**CORR CRONIN MICHELSON  
BAUMGARDNER & PREECE LLP**



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Seann C. Colgan, WSBA No. 38769

Attorney for Respondent Tacoma Goodwill  
Industries

