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NO. 100768-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WAYNE WRIGHT, INDIVIDUALLY AND
AS PERSONAL REPRESENTATIVE FOR THE
ESTATE OF WARREN WRIGHT,

Plaintiff/Respondent,

v.

EXXONMOBIL OIL CORPORATION,

Defendant/Petitioner.

RESPONDENT'S OPPOSITION TO THE AMICUS MEMORANDUM BRIEFING OF WASHINGTON RETAIL ASSOCIATION, ET AL.

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The amicus curiae brief submitted by the Washington Retail Association, Washington Food Industry Association, Association of Washington Business, and Washington Hospitality Association (collectively, "Amici")[1] in support of the Petition for Review of Defendant-Petitioner ExxonMobil Oil Corporation ("Mobil") fails to justify review by the Washington Supreme Court. Amici do not argue that the risks presented by asbestos are obvious. Nor do Amici explain how those risks were "known" decedent Warren Wright, as that term is used in section 343A of the Restatement (Second) of Torts. Instead, Amici simply skip to discussing the perils of omitting a section 343A instruction when a danger is known and obvious. But the record here makes clear that the danger was not known or obvious to

[1] While the Washington Retail Association sought and received an extension of time to file an amicus brief, the Washington Food Industry Association, Association of Washington Business, and Washington Hospitality Association did not. Accordingly, Amici's brief is untimely as to the latter three entities, a circumstance Amici fail to address or even acknowledge.

Mr. Wright. Without that prerequisite, no substantial evidence supported the application of section 343A, and the trial court's refusal to give the corresponding jury instruction was not error.

In addition to that critical omission, Amici ignore record evidence of Mobil's superior knowledge of the dangers of asbestos. Due to the legal and factual misapprehensions, among other things, Amici's account of how the opinion will inflict substantial costs on premises owners and the Washington economy at large is unfounded. Amici's brief presents no reason for review, and the Petition for Review should be denied.

I. AMICI ASSUME THAT A SECTION 343A INSTRUCTION WAS NECESSARY WITHOUT ANY ANALYSIS OF WHETHER THE DANGER WAS KNOWN OR OBVIOUS

Amici's briefing makes clear that section 343A only applies when a hazard is known or obvious. *See, e.g.*, Amicus Br. at 2, 14 (assuming that "substantial evidence supports a finding that a dangerous condition was 'known or obvious'"); *id.* at 6 (conceding that "invitee's knowledge of the dangerous condition" is decisive); *id.* at 7 ("[W]here a dangerous condition

is known or obvious. . ."); *id.* at 8 ("Where a danger is known . . ."). And yet, Amici conduct no analysis on the "knowledge" necessary to implicate section 343A. *See generally id.* They simply point to the same evidence that Mobil identified of Mr. Wright's general knowledge of asbestos. *Id.* at 12.

This omission—disregarding the sort of "knowledge" relevant to section 343A—undercuts Amici's entire argument for review. The "knowledge" implicated by section 343A is not merely some sort of generalized understanding, as Amici suggest. To the contrary, for a hazard to be known, section 343A requires that the invitee not only recognize the existence of the condition or activity itself, but also that the condition or activity is dangerous as well as the probability and gravity of that danger. Restatement (Second) of Torts § 343A, cmt. b (1965). In other words, for section 343A to be implicated and a corresponding instruction to be warranted, there must be substantial evidence that Mr. Wright knew not only of the asbestos at his workplace

but also the probability and gravity of the risk presented by that asbestos.

The jury heard no such evidence. More specifically, there was no evidence that Warren Wright, given the safety precautions that he took, appreciated any remaining asbestos-related danger. As the Court of Appeals correctly concluded, "[w]hile [Mr.] Wright was clearly aware of the 'generalized risk' of asbestos exposure, Mobil did not produce evidence that [he] knew the risk of exposure even with precautions." Op. 12. Amici do not challenge this absence of evidence or the conclusion that necessarily follows: an instruction on section 343A was unnecessary because there was no substantial evidence that the dangers at issue were "known." *See* Amicus Br. at 13-14.

Because Amici gloss over the inapplicability of section 343A, their cited authority only supports the Court of Appeals' opinion.[2] Their cases all require a known or obvious hazard to

[2] Amici cite two unpublished cases that have no precedential value and are not binding. *See* GR 14.1;

trigger application of section 343A. *See Dombrowski v. Corp. of the Catholic Archbishop of Seattle*, No. 80283-6-I, 15 Wn. App. 2d 1037, 2020 WL 7027643, at *4 (Nov. 30, 2020) (unpublished) (cabining section 343A to "condition on the land whose danger is known or obvious"); *McDonald v. Cove to Clover*, 180 Wn. App. 1, 321 P.3d 259 (2014) (same); *Webert v. Seattle Univ.*, No. 64851-9-I, 161 Wn. App. 1018, 2011 WL 1533506, at *2 (Apr. 25, 2011) (unpublished) (same). In fact, these cases involve precisely what is lacking here: a known or obvious danger. *See Dombrowski*, 2020 WL 7027543, at *5 (concerning "known and obvious nature of recess" after invitee saw children playing with

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Dombrowski v. Corp. of the Catholic Archbishop of Seattle, No. 80283-6-I, 15 Wn. App. 2d 1037, 2020 WL 7027643 (Nov. 30, 2020) (unpublished); *Webert v. Seattle Univ.*, No. 64851-9-I, 161 Wn. App. 1018, 2011 WL 1533506 (Apr. 25, 2011) (unpublished). One was issued before March 1, 2013, and therefore should not be cited at all. *See* GR 14.1; *Webert*, 2011 WL 1533506. Moreover, in neither instance did Amici identify the opinions as unpublished. This conduct is both improper and sanctionable. *Accord Crosswhite v. Washington State Dep't of Soc. & Health Servs.*, 197 Wn. App. 539, 544, 389 P.3d 731, 733 (2017); *Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wn. App. 542, 548, 13 P.3d 240, 244 (2000).

ball that caused injury); *McDonald*, 180 Wn. App. at 6 (finding that invitee was "well aware of the risk posed by the wet grass"); *Webert*, 2011 WL 1533506, at *3 (involving cracked pavement that invitee had seen beforehand). Accordingly, Amici's authorities support omitting a section 343A instruction when, as here, there is no known or obvious danger.

In sum, because the knowledge required to implicate section 343A is not present, this case cannot be a vehicle, as Amici desire, to reiterate the importance of a section 343A instruction. As it stands, the Court of Appeals' unpublished opinion already reiterates how both section 343 and 343A instructions should generally be given and does not threaten the known or obvious danger exception or expand liability as Amici fear.[3] *See* Op. 8. Here, Mobil invited unsophisticated contract

[3] In addition, premises liability claims are limited no matter the effect of this case. Premises liability necessarily depends on a plaintiff's status, for example, as an invitee or licensee. Liability to invitees lies only where a premises owner knew or should have known both of the danger at issue and that an invitee will not realize or protect against it, and only where the premises

workers onto its premises and then, with Mobil's knowledge, allowed those workers to unknowingly endanger themselves by engaging in unsafe and illegal but presumably cost-saving practices forbidden to Mobil's own employees. The law—including section 343A, with its requirement of more than just generalized knowledge—allows for liability in such circumstances, as it should.

II. THE INAPPLICABILITY OF SECTION 343A IS FURTHER SUPPORTED BY MOBIL'S "SUPERIOR KNOWLEDGE" OF THE HAZARD

Amici make much of how premises owners' purported lack of "superior knowledge" justifies section 343A's exemption from liability for known and obvious dangers. Amicus Br. at 7-9. But Amici conveniently ignore the fact that the record *in this case* demonstrates Mobil was the one with superior knowledge.

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owner fails to take reasonable precautions. Reasonable care, in turn, depends on the circumstances confronting the premises owner and is limited by what is foreseeable. And premises claims are subject to the full panoply of affirmative defenses that may apply in any case. *Accord H.B.H. v. State*, 192 Wn.2d 154, 177, 429 P.3d 484, 496 (2018) (rejecting arguments about "limitless liability" because such protections exist).

Accordingly, under Amici's own "superior knowledge" rationale, Mobil should not be shielded from liability.

Plaintiff previously laid out Mobil's "significant knowledge of the hazards of asbestos":

> [Mobil] had a large, nation-wide industrial hygiene department dedicated to protected workers in the workplace, as well as a medical department and a safety department, which aimed to stay abreast of developments regarding potential workplace hazards. It had long belonged to trade organizations that circulated health and safety information, including information related to asbestos . . . [B]y 1979[when Warren Wright worked on Mobil's premises], "Mobil was acutely aware of the hazards . . . of asbestos to the human body," "knew what the medical and scientific information was," and "followed all the state of the art."

COA Resp. Br. at 3 (internal citations omitted); *see also* Resp. to Pet. at 4-5. In comparison, Mobil's contractor Northwestern Industrial Maintenance ("NWIM") was much less sophisticated:

> [NWIM] had been operating in Washington for only about a year when hired by Mobil. At that time, NWIM was run by three men working out of an "old house" . . . seemingly without even a place to store tools. It had no doctor or industrial hygienist. While NWIM employees may have had some general understanding that they should avoid breathing asbestos dust, they did not understand asbestos had

> been linked to cancer. They had no formal training or education about asbestos until . . . roughly 1984 . . . [NWIM] did not hold itself out as having expertise in asbestos abatement.

COA Resp. Br. at 4-5 (internal citations omitted); *see also* Resp. to Pet. at 5-7. Despite this vast disparity in knowledge, Mobil never "sought to ascertain NWIM's knowledge or training regarding asbestos hazards." COA Resp. Br. at 5.

Amici do not address this evidence of Mobil's "superior knowledge" of the hazard. It follows that Amici's concerns regarding the "information cost parity" and other inefficiencies are misplaced, as those costs purportedly result from imposing liability on those without "superior knowledge." *See* Amicus Br. at 8-9. Amici's downstream fears of how these inefficiencies would burden Washington's economy are likewise overblown. *See id.* at 9-10. Indeed, this case demonstrates how it is appropriate to instruct on section 343A only when, unlike here, the hazard at issue is actually obvious or known to the invitee, and Amici's apparent unfamiliarity with the record undermines both their status as amici curiae and its arguments for review.

III. CONCLUSION

For the foregoing reasons and for the reasons stated in Plaintiff's Response to Petition for Review, the opinion of the Court of Appeals is neither erroneous nor does it meet the criteria for review by the Supreme Court. While Plaintiff is confident he will prevail should review be accepted, he asks that review be denied.

DATED this 21st day of June, 2022.

I certify that this document contains 1755 words, in compliance with the RAP 18.17.

Respectfully submitted,

SCHROETER, GOLDMARK & BENDER

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