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C.O.A. No. 81289-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

v.

EXXONMOBIL OIL CORPORATION,
Petitioner.

PETITION FOR REVIEW

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I. INTRODUCTION

In *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 50, 914 P.2d 728 (1996), this Court reaffirmed a key limitation on premises liability: "[w]here [a] danger to an invitee is known or obvious, the landowner's liability is limited by the Restatement (Second) of Torts § 343A[]." This petition seeks to preserve the vitality of that principle. Landowners should not be held liable for injuries to an invitee where the invitee was aware of the dangerous condition.

A jury found Mobil liable for $4 million on the theory that Mobil caused the wrongful death of William Wright, who worked at a Mobil refinery site for three months as the foreman for an independent contractor hired to remove insulation, and decades later passed away from mesothelioma. Trial evidence showed that Mr. Wright was aware of the dangers of asbestos exposure. But the trial court refused to instruct the jury on the liability exception outlined in § 343A. And the Court of Appeals affirmed, reasoning that because the jury had been properly

instructed on a landowner's general duty of care under the Restatement's § 343, the law required nothing more.

That holding cannot be squared with precedent or logic, and it is irreconcilable with the Washington Pattern Jury Instructions and the Restatement itself. Those sources make clear that § 343A operates as a limit on the § 343 liability rule, such that a jury should be instructed on § 343A when the defendant owner claims that the danger was known or obvious to the plaintiff invitee. The Court of Appeals has accordingly recognized that "'it is ordinarily the better practice to give both Section 343 and Section 343A(1) instructions.'" Op. 8. Yet here, the Court of Appeals concluded that the § 343 instruction was sufficient, because "no [Washington] case has *explicitly required* a court to issue both instructions." Op. 9 (emphasis added).

At best, there is now confusion as to whether and when a § 343A instruction is required. That confusion goes to a matter of public importance, threatening to expand liability for all

business owners that invite customers onto their premises, and all landowners that depend on the work of independent contractors—not to mention its implications for the significant docket of asbestos litigation against premises owners. This Court should grant review to reinforce the fundamental tort law principles underlying the "known or obvious" liability limitation and restore the proper allocation of responsibility between owners and invitees.

II. IDENTITY OF PETITIONER

Petitioner is ExxonMobil Oil Corporation ("Mobil"), Appellant in the Court of Appeals and Defendant in the Superior Court.

III. COURT OF APPEALS DECISIONS

The December 13, 2021 opinion of the Court of Appeals is unreported. App. 1; *Wright v. 3M Co.*, No. 81289-1-I, 2021 WL 5879009 (Wn. Ct. App. Dec. 13, 2021). On February 23, 2022, the Court of Appeals issued orders denying Plaintiff's

motion for reconsideration and denying Exxon's motion for reconsideration and publication. App. 25-26.

IV. ISSUE PRESENTED FOR REVIEW

Where there is evidence that a business invitee on land knows of a dangerous condition, and the jury is instructed on the duty landowners owe to invitees under Restatement (Second) of Torts § 343, should the jury also be instructed on the exception to liability for known or obvious dangers set out in § 343A(1)?

V. STATEMENT OF THE CASE

The claims against Mobil in this case arise from three months that Warren Wright spent working at a refinery in Ferndale that Mobil owned and operated. In 1979, Mobil hired an independent contractor, Northwestern Industrial Maintenance (NWIM), to remove insulation from various pipes at the refinery, some of which contained asbestos. Mr. Wright worked as a foreman for NWIM and was assigned to the Ferndale abatement job. *See* 1 RP 469-70, 508, 734.

Mr. Wright's job responsibilities involved ensuring the safety of his crew and training them on safety precautions, including precautions relating to asbestos exposure risks. *See, e.g.*, 1 RP 453, 470-71, 502-03. Mr. Wright and his crew were told that some of the insulation at Ferndale contained asbestos. 1 RP 449. And as a foreman, Mr. Wright's duties included mitigating his crew's exposure. He led a daily safety meeting at the start of each shift, during which he instructed his crew to wear masks when working with insulation. 1 RP 453, 502-03. Mr. Wright always wore a mask when doing such work, 1 RP 452-53, 519, and he was a "stickler" for ensuring that his crew did, too, 1 RP 505-07. Mr. Wright enforced NWIM's safety policies, like its ban on facial hair that could interfere with a mask's efficacy, and he taught his crew how to test their masks for proper fit and seal. 1 RP 500-01. While they worked, Mr. Wright and his crew took additional precautions like wetting down the insulation to prevent dust and placing discarded

insulation in plastic bags and plastic-lined dumpsters. 1 RP 506-09, 513-16.

In 2015, after developing what was later identified as mesothelioma, Mr. Wright passed away. 1 RP 656. Mr. Wright's son ("Plaintiff") filed this action in 2018 against Mobil and other defendants, including U.S. Oil, Shell, Texaco, and 3M. *See* CP 1. The other defendants settled, and in November 2019, after an 11-day trial, a jury rendered a $4 million verdict against Mobil. CP 2295-96. The jury found Mobil liable under two theories, both based on instructions that Mobil had disputed as incomplete or inaccurate statements of the law: first, that Mobil owed Mr. Wright a duty of care as a business invitee on Mobil's premises, and second, that Mobil retained control over Mr. Wright's work. *Id.* After determining (over Mobil's objection) that Plaintiff's settlements with the other defendants were reasonable, the trial court applied an offset and entered judgment against Mobil in the amount of $2.27 million. CP 3313-15.

Mobil appealed, assigning error to, among other things, the trial court's business-invitee and retained-control liability instructions, as well as its refusal to compel production of the settlement agreements with other defendants. On its liability to business invitees, Mobil argued that the trial court erred when it instructed the jury on the duty that premises owners owe to their invitees under the Restatement (Second) of Torts § 343 but then refused to instruct on the exception to liability for known or obvious dangers in § 343A(1). Opening Br. 20-23. On retained control, Mobil argued that the trial court erred by instructing the jury that it could hold Mobil liable merely because Mobil required its contractors to follow applicable workplace safety laws, as more is required to hold a company liable for an injury to an employee of an independent contractor. *Id.* at 14-19.

The Court of Appeals affirmed in part and reversed in part. It agreed with Mobil that the trial court's instruction on retained control was "a clear misstatement of the law." Op. 7. It nevertheless affirmed the verdict, finding no error as to premises

liability. Op. 10. In particular, although the Court of Appeals acknowledged that "'it is ordinarily the better practice to give both Section 343 and Section 343A(1) instructions,'" Op. 8 (quoting *Suriano v. Sears, Roebuck & Co.*, 117 Wn. App. 819, 831, 72 P.3d 1097 (2003)), it concluded that the refusal of a § 343A(1) instruction was not error because "no case has explicitly required a court to issue both instructions," Op. 9.

Although it affirmed the verdict, the Court of Appeals vacated the judgment and remanded for a new hearing on the reasonableness of Plaintiff's settlements, agreeing with Mobil that the trial court erred under RCW 4.22.060(1) by making a reasonableness determination without ensuring that the actual settlement agreements were provided to Mobil and the court. Op. 22-24.

VI. ARGUMENT

A. Review is warranted because the failure to instruct the jury on the § 343A limitation contravenes decisions of this Court and published decisions of the Court of Appeals (RAP 13.4(b)(1)-(2)).

The Court of Appeals departed from precedent defining an owner's premises liability where an invitee (including a contractor's employee) had independent knowledge of the dangerous condition that caused injury, as Mr. Wright did. The trial court here instructed the jury that Mobil could be held liable for Mr. Wright's injury if Mobil violated the reasonable-care standard owed by a landowner to an invitee outlined in the Restatement (Second) of Torts § 343. CP 2280. But the court rejected another jury instruction, repeatedly proposed by Mobil, CP 577, 1489, 1787; *see also* 1 RP 1756-61, that would have alerted the jury to Restatement § 343A, which "limits" the § 343 standard when a dangerous condition is "known or obvious" to the invitee. *See* § 343 cmt. a.

The Court of Appeals acknowledged that the § 343 instruction, alone, did not represent a "complete statement of the law." Op. 9. It noted that when charging a jury on these issues, '"it is ordinarily the better practice to give both Section 343 and Section 343A(1) instructions."' Op. 8 (quoting *Suriano*, 117

Wn. App. at 831). And it recognized that evidence of Mr. Wright's knowledge of the risk of asbestos exposure had been presented to the jury and was critical to Mobil's defense. Op. 9. Despite all this, the court determined that a trial court's failure to instruct the jury about Mobil's liability for injuries where the danger was "known or obvious" did not constitute legal error. Op. 8. That holding directly contravenes the decisions of this Court, as well as prior published decisions of the Court of Appeals.

1. This Court has made clear that in cases involving evidence of "known or obvious dangers," § 343, standing alone, does not accurately describe a landowner's liability. In *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 139, 875 P.2d 621 (1994), this Court first established that "[§ 343A] is the appropriate standard for duties to invitees for known or obvious dangers." There, because the trial court "did not instruct the jury correctly … on the [landowner's] duty regarding known or obvious dangers" in accordance with § 343A, this Court ordered

a new trial. *Id.* And it did so even though the trial had "correctly instructed the jury" on the appropriate reasonable-care standard for landowners by using the language in § 343. *Id.*

Later cases confirm that conclusion. "Where the danger to an invitee is known or obvious, the landowner's liability is limited by the Restatement (Second) of Torts § 343A(1)." *Degel*, 129 Wn.2d at 50; *Iwai v. State, Emp. Sec'y Dep't*, 129 Wn.2d 84, 95, 915 P.2d 1089 (1996) ("[This Court] … impose[s] Restatement (Second) of Torts §§ 343 and 343A as the appropriate standards for determining landowner liability to invitees."). While none of these cases explicitly requires both instructions to be given, their logic confirms the inappropriateness of instructing a jury solely on § 343 when there is evidence that the danger is known or obvious to the invitee.

2. Here, the Court of Appeals appeared to understand that §§ 343 and 343A, together, constitute the "'appropriate standard for duties to invitees for known or obvious dangers.'" Op. 8 (quoting *Tincani*, 124 Wn.2d at 139). Nevertheless, it

determined that the trial court properly refused to provide Mobil's proposed § 343A instruction because "no case has *explicitly* required a court to issue both instructions." Op. 9 (emphasis added). But no explicit statement should have been necessary. Jury instructions are erroneous if they do not "inform the trier of fact of the applicable law." *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). And the Court of Appeals needed to look no further than this Court's cases—including *Tincani*, *Degel*, and *Iwai*—to know that § 343A is the "applicable law" where known or obvious dangers are concerned. Indeed, given this decisional law, the Washington Pattern Jury Instructions explain that "[i]n cases involving invitees and known or obvious dangers, the jury *should be* instructed in accordance with both sections 343 and 343A of the Restatement." 6 WPI 120.07 cmt. at 797 (emphasis added). A § 343A instruction was plainly required on the facts of this case, even if this Court has yet to say so in so many words.

The Court of Appeals cited *Suriano* for the proposition that "no case has explicitly required a court to issue both instructions." Op. 9. But *Suriano* dealt with the converse of the situation here, holding that a trial court did not err by "giv[ing] a Section 343A(1) instruction alone without the more general Section 343 instruction." 117 Wn. App. at 831. In that situation, the *Suriano* court held, instructing on the 343(A) exception may provide the jury all it needs to know about 343's general rule. That statement does not excuse the error in this case, where the trial court gave the general § 343 instruction but did not instruct the jury on the § 343A exception at all, leaving the jury entirely unaware of it. To our knowledge, the Court of Appeals' decision is the first in Washington to approve the withholding of a § 343A instruction where the facts at trial would support a finding that a danger was known to an invitee. At a minimum, this Court should grant review to clarify whether or when the dual instruction is in fact required.

Even more troubling is the Court of Appeals' suggestion that by instructing the jury on the § 343 standard alone, the trial court provided a correct statement of the law. *See* Op. 9. That would read § 343A's "limit[ation]" on landowner liability, *Degel*, 129 Wn.2d at 50, out of the premises liability tort altogether, regardless of the strength of trial evidence showing that the danger was known and obvious. There is a reason this Court has held that "*both* sections of the Restatement … embody[] this state's common law." *Iwai*, 129 Wn.2d at 95 (emphasis added); *see also* § 343 cmt. a. (noting that the two sections "should be read together"); 6 WPI 120.07 cmt. at 797. Whereas § 343 articulates the general reasonable-care duty of a premises owner, § 343A "limits the liability stated [in § 343]" in circumstances where "the [dangerous] condition is known to the invitee." § 343 cmt. a. Critically, it is only § 343A that declares legally relevant the invitee's own knowledge of a danger—and modifies the scope of an owner's liability as a result. In this case,

where the evidence showed Mr. Wright had such knowledge, such an error likely dictated the outcome.

The Court of Appeals further reasoned that the § 343 instruction already "included the element of the invitee's knowledge," rendering superfluous any instruction on § 343A superfluous. Op. 9. But that misunderstands the Restatement's plain text. Section 343 imposes liability where a premises owner fails to exercise reasonable care to protect an invitee against harm (1) where a danger is known to or reasonably discoverable by the owner; and (2) the owner "should expect that [invitees] will not discover or realize the danger, or will fail to protect themselves against it." § 343. The subject of the relevant knowledge, there, is the owner. And what an *owner* may reasonably expect an invitee to discover or realize is entirely different from what an *invitee* herself actually knows. Only § 343A establishes that even if an owner violated its duty of care under the § 343 standard, the owner may not be held liable where a dangerous condition is independently "known" to the invitee. That is why

the Restatement's drafters describe § 343A as a "limit[]" on the liability rule set forth in § 343. § 343 cmt. a.

B. This case presents an ideal vehicle for this Court to clarify the proper jury instruction in cases presenting "known or obvious" dangers.

The Court of Appeals, and Plaintiff below, variously suggested that any instructional error was harmless in this case. Although Plaintiff may advance similar points to resist this Court's review, those arguments should be rejected.

First, the trial court's instructional error plainly prejudiced Mobil. The crux of Mobil's defense was that the risk of asbestos exposure was "known" to Mr. Wright. *E.g.*, 1 RP 380 (opening) ("Our evidence will be that Mr. Wright and his employer knew about the risks of asbestos and knew that asbestos was there."). Even the Court of Appeals acknowledged that Mr. Wright was "clearly aware" of the danger of asbestos. Op. 12. But without Mobil's proposed instruction—which exactly mirrored § 343A—the jury could not factor evidence of Mr. Wright's actual knowledge into its liability determination. Instead, the

jury could only assess evidence related to what Mobil "*should* [have] expect[ed]" Mr. Wright to know. § 343 (emphasis added). Because the trial court rejected Mobil's proposed instruction, therefore, the jury could not possibly have based its verdict on either Mobil's "theory of the case" or the "applicable law." *Anfinson*, 174 Wn.2d at 860.

The Court of Appeals nonetheless suggested that any error from the failure to instruct would be "harmless," because Mobil "touched on Wright's knowledge of the danger during closing arguments" and was thus able to "argue its theory of the case to the jury." Op. 9. Yet jury instructions amounting to a "clear misstatement of the law"—like those here—are "*presumed* to be prejudicial." *Keller v. City of Spokane*, 146 Wn.2d 237, 250, 44 P.3d 845 (2002) (emphasis added). The Court of Appeals did not even mention this presumption, or give any indication that it considered it.

The fact that Mobil chose to mention Mr. Wright's knowledge to the jury does not defeat the presumption. It matters

little whether Mobil presented *factual* evidence of Mr. Wright's knowledge of the danger of asbestos exposure to the jury if the jury was not, as a *legal* matter, instructed to take that evidence into account. Thus, even if the jury believed Mobil that Mr. Wright knew about the danger, it had no legal ability to take that into consideration in reaching its verdict. *See State v. Alexander*, 7 Wn. App. 329, 335, 499 P.2d 263 (1972) (requiring instructions "enunciating basic and essential elements of the legal rules necessary to enable the parties to each present their theories of the case"). In this context, the presumption of prejudice cannot be overcome. *Keller*, 146 Wn.2d at 250.[1]

Plaintiff has also suggested that the instructional error was harmless because even if the dangers of asbestos were known to Mr. Wright, Mobil could still owe him a duty if Mobil should

[1] Because §§ 343A and 343 articulate different rules, this case bears no resemblance to those in which a jury instruction is properly rejected because it merely elaborates on or adds specificity to another one. *See, e.g.*, *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 166-67, 876 P.2d 435 (1994).

have "anticipate[d] that the dangerous condition will cause physical harm …. notwithstanding its known or obvious danger" under the final clause in § 343A(1). *See* Answering Brief 20. But the jury was not given the § 343A instruction at all, so there is no way of knowing what a properly instructed jury would have made of this carveout. And neither the trial court nor the Court of Appeals rested their views on the existence of the carveout. Whether it applies to the facts of this case, therefore, cannot impact on the outcome here.

The unpublished nature of the Court of Appeals' decision should not foreclose review. Publication is not a prerequisite for review under RAP 13.4(b). As the Court of Appeals' decision reveals, the lack of an "explicit[]" requirement in this Court's cases that a § 343A instruction be given in these circumstances, Op. 9, can lead lower courts to treat the instruction as optional even when a § 343 instruction is given. That is an important and potentially recurring error that this Court should correct.

C. Review is warranted because the duty of a premises owner to protect invitees against known dangers is a matter of substantial public importance (RAP 13.4(b)(4)).

The Court of Appeals' errors in this case go to issues of public importance. Determining responsibility for harms incurred by invitees on an owner's premises is a key—and contested—area of tort law in many contexts, not just cases involving asbestos. Reaffirming the § 343A limitation for dangers that are "known or obvious"—the standard adopted by the "majority" of state courts, *Coln v. City of Savannah*, 966 S.W.2d 34, 41 (Tenn. 1998)—is critical to ensuring that this theory of liability does not expand so far that landowners become guarantors of responsibilities that contractors are better—and more fairly—positioned to exercise.

Eliminating the exception to a premises owner's liability in the context of a known danger, as the Court of Appeals has done, would mark a fundamental shift in Washington's tort law, with reverberations that go well beyond asbestos litigation. Without § 343A, a retailer may be exposed to liability where a

customer falls over an advertising sign located in an aisle, *see Suriano*, 117 Wn. App. at 821-22, 826-27, or a landowner where a hired and expert excavator injures himself operating on a slope of ground, *see Bozung v. Condo. Builders, Inc.*, 42 Wn. App. 442, 444, 449-50, 711 P.2d 1090 (1985)—even as the dangers involved were "known or obvious" to the invitee. Consider, for example, whether the duty of care a restaurant owner owes to a patron should extend to the widely known risk of contracting COVID-19 when cases are widespread.

Even focusing on the asbestos context alone, the Court of Appeals' decision has significant policy consequences that themselves warrant review. This case is far from alone in involving a premises liability theory against a landowner based on an employee's asbestos exposure while working for an independent contractor. *See* Daniel L. Martens, *The Expanded Liability Analysis in Premises Asbestos Cases*, L.A. Law 20 (July-August 2006). Premises actions have led to "huge verdicts," and represent a "major battleground" in asbestos

litigation. Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 601 (2007). The question presented in this case thus implicates a broader category of litigation that has imposed massive liabilities on premises owners for asbestos exposures at their sites decades ago, even though the contractors who hired such plaintiffs may have been in the best position to protect them from such exposures.

Review is further warranted because the Court of Appeals' approach threatens to make Washington an outlier in this area. Because of the basic unfairness of holding a landowner liable for dangers known or obvious to invitees, "[n]early every jurisdiction," including Washington, follows the Restatement's § 343A. *Coln*, 966 S.W.2d at 41. And they have reaffirmed that the invitee's knowledge of a dangerous condition is a key component in defining the scope of a landowner's duty of care, even as a handful of other courts have subsumed it under assumption of risk or comparative negligence principles. *See id.* at 41 (adopting § 343A while recognizing that "a few courts have

held that comparative fault principles abrogate the open and obvious rule entirely"); *Groleau v. Bjornson Oil Co.*, 676 N.W.2d 763, 769 (N.D. 2004) (applying § 343A). As these courts have understood, the Restatement approach best "balanc[es] foreseeability and gravity of harm with feasibility and availability of alternatives that would have avoided the harm." *Coln*, 966 S.W.2d at 42.

Other jurisdictions also recognize that §§ 343 and 343A must be "read together." *Bertrand v. Alan Ford, Inc.*, 537 N.W.2d 185, 187 (Mich. 1995). If juries were instructed on § 343 alone, landowners' duty of care would not be "limited" by an invitee's knowledge of a dangerous condition. *Degel*, 129 Wn.2d at 50; *Hale v. Beckstead*, 116 P.3d 263, 268 (Utah 2005) ("[T]he Restatement sections 343 and 343A … define[] the duty of care a [landowner] owes to invitees."). Instead, that knowledge could be relevant only to whether an invitee was independently at fault. *See, e.g.*, *Get-N-Go, Inc. v. Markins*, 550 N.E.2d 748, 750-51 (Ind. 1990) (lack of § 343A instruction

confines relevance of an "invitee's knowledge" to "determining his own fault"). And that would impose a "cumbersome burden" on landowners, requiring them to "ensure that their [properties] are perfectly clear from all obvious and potentially injury-producing circumstances" in order to fulfill their duty of reasonable care. *Hale*, 116 P.3d at 269.

Washington has, and should, continue to follow the Restatement approach. *See Degel*, 129 Wn.2d at 50. To the extent that the lower courts are now departing from this approach because no Washington case has "explicitly required" a § 343A instruction, that is further reason for this Court to grant review. As the above citations indicate, the highest courts of many States have grappled with these issues, and not all of them have struck the balance in the same way. That reinforces the significance of the question presented, and the need for this Court to resolve it definitively.

VII. CONCLUSION

Mobil respectfully requests that the Supreme Court of Washington grant the petition for review and reverse the judgment of the Court of Appeals to the extent that it upheld the jury verdict in favor of Plaintiff.

This document contains 4,196 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED THIS 25th day of March 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Petition for Review to be served on counsel for all other parties in this matter via this Court's e-filing platform.

Dated March 25, 2022.

/s/ Robert M. McKenna
Robert M. McKenna

APPENDIX

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12/13/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WAYNE WRIGHT, individually and as personal representative for the estate of WARREN WRIGHT, deceased, Respondent, v. 3M COMPANY, f/k/a MINNESOTA MINING & MANUFACTURING COMPANY; E.J. BARTELLS SETTLEMENT TRUST; SHELL OIL COMPANY; TEXACO, INC.; U.S. OIL & REFINING COMPANY, Defendants, EXXONMOBIL OIL COMPANY, Appellant.	No. 81289-1-I DIVISION ONE UNPUBLISHED OPINION

APPELWICK, J. — Wright sued ExxonMobil and others for his father's wrongful death from mesothelioma as a result of asbestos exposure in oil refineries while working for an independent contractor, Northwestern Industrial Maintenance. The other companies settled, but Mobil proceeded to trial. Mobil raises several issues on appeal pertaining to jury instructions, evidentiary issues, jury selection, and the reasonableness of settlement agreements. We affirm the jury verdict, but vacate the judgment and remand for a new reasonableness hearing.

FACTS

From the mid 1950's until 1988, Mobil[1] operated a refinery in Ferndale, Washington. In 1979, Northwestern Industrial Maintenance (NWIM) was contracting with Mobil, to perform maintenance jobs at the Mobil refinery in Ferndale. NWIM employed Warren Wright as a working foreman on a crew at the Ferndale facility. Wright was involved in a NWIM job that entailed demolition of insulation from the pipes, pumps, and other equipment in an out of service unit of the refinery. The NWIM workers were informed that the old insulation contained asbestos. During the demolition, the employees took precautions including the use of respirators and wet methods to minimize airborne particles. That job lasted three months.

Wright continued working for NWIM at various refineries until 1988. Wright died in September 2015. An autopsy performed on his lungs revealed that Wright had suffered from mesothelioma.

In January 2018, Wright's son, Wayne Wright, filed a wrongful death suit individually and on behalf of Wright's estate.[2] The lawsuit named defendants Mobil, Shell Oil Company, Texaco Inc., and U.S. Oil and Refining Company who owned the refineries where Wright had worked while employed by NWIM. Wright also included 3M Company, the manufacturer of the face mask worn by Wright and his coworkers, as a defendant.

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[1] ExxonMobil Oil Company is the successor-in-interest to Mobil Oil Corporation. Mobil was the name when Warren Wright worked at the refinery.

[2] For the purposes of this opinion, we use "Wright" for both Warren Wright individually as the employee and plaintiff/appellants Wayne Wright and the Estate of Warren Wright collectively.

Shell, Texaco, U.S. Oil, and 3M all entered settlement agreements with Wright. Mobil proceeded to trial. The jury returned a $4 million verdict for Wright. The trial court held a reasonableness hearing and determined the settlement agreements with Shell, Texaco, U.S. Oil, and 3M were reasonable. The court then calculated the set-off for the amounts of the settlement and entered a judgment of $2,270,000.00 plus attorney fees and costs and postjudgment interest. The court denied Mobil's posttrial motions for a judgment as a matter of law and for a new trial. Mobil appeals.

DISCUSSION

I. Jury Instructions

Mobil argues the trial court erred by omitting several jury instructions. Generally, the decision to give a particular jury instruction is within the trial court's discretion. Taylor v. Intuitive Surgical, Inc., 187 Wn.2d 743, 767, 389 P.3d 517 (2017). "Where substantial evidence supports a party's theory of the case, the trial courts are required to instruct the jury on the theory." Id. An appellate court reviews a trial court's decision to give a jury instruction de novo if based on a matter of law or for abuse of discretion if based on an issue of fact. Id.

"Jury instructions (1) cannot be misleading, (2) must allow counsel to argue their theory of the case, and (3) must properly inform the jury of the applicable law, when read as a whole." Spencer v. Badgley Mullins Turner, PLLC, 6 Wn. App. 2d 762, 787, 432 P.3d 821 (2018). An instruction is erroneous if it fails to satisfy these criteria. Id. An erroneous instruction is not reversible unless it is prejudicial. Id.

Prejudice is assumed if the instruction is a clear misstatement of the law, but must be demonstrated if the instruction is merely misleading. Id. at 787-88.

A. Liability Instructions

Wright based his negligence claim for asbestos exposure on two discrete theories: (1) Mobil retained control over NWIM and failed to exercise ordinary care in overseeing its work; and (2) Mobil failed to use ordinary care for Wright's safety as an invitee onto its property. The jury returned a verdict for Wright on both theories. As a result, reversal is necessary only if the court's actions rose to the level of prejudicial error for instructions related to both theories.

1. Retained Control

The parties do not dispute that Wright was an employee of independent contractor NWIM, rather than an employee of Mobil. Instead, Wright argues that Mobil had liability for his asbestos exposure because it retained control of the workplace. The trial court instructed the jury on Wright's proposed instruction for the theory of retained control:

> An owner and/or operator of a refinery "retains control" over the work of a contractor when it either (1) retains the right to direct the means and manner in which a contractor works or (2) retains the right to require use of safety precautions or otherwise assumes responsibility for worker safety.

Mobil argues this instruction was erroneous because it permitted the jury to find for Wright "based solely on Mobil's contractual requirement that NWIM follow prevailing safety laws."

"The scope of an employer's liability depends on whether the worker is an independent contractor or an employee." Kamla v. Space Needle Corp., 147

Wn.2d 114, 119, 52 P.3d 472 (2002). Employers are not liable for injuries incurred by independent contractors because the employers cannot control the manner in which independent contractors work. Id.

As an exception to this rule, an employer may be liable to an independent contractor where it has retained the right to direct the manner in which work is performed. Id. "'Whether a right to control has been retained depends on the parties' contract, the parties' conduct, and other relevant factors.' The proper inquiry is whether the jobsite owner retains the right to direct the manner in which work is performed, not whether it actually exercises that right." Hymas v. UAP Distrib., Inc., 167 Wn. App. 136, 154, 272 P.3d 889 (2012) (citation omitted) (quoting Phillips v. Kaiser Aluminum & Chem. Corp., 74 Wn. App. 741, 750, 875 P.2d 1228 (1994)).

The case law establishes the proper inquiry for whether the employer retains control as "whether there is a retention of the right to direct the manner in which work is performed." Kamla, 147 Wn.2d at 121. The first part of the jury instruction properly reflects the Kamla test. However, the second part of the instruction that allows for a finding of retained control if Mobil "retains the right to require use of safety precautions or otherwise assumes responsibility for worker safety," stems from Kelley v. Howard S. Wright Constr. Co., 90 Wn.2d 323, 330-31, 582 P.2d 500 (1978).

Kelley involved a lawsuit against a general contractor by an injured employee of a subcontractor. Id. at 326. In its contract with the owner of the project, the general contractor "assumed sole responsibility for supervising and

coordinating all aspects of the work." Id. at 327. The general contractor agreed to be responsible for "initiating, maintaining and supervising all safety precautions and programs in connection with the work." Id. It "had general supervisory and coordinating authority under its contract with the owner, not only for the work itself, but also for compliance with safety standards." Id. at 331.

The court's determination of retained control in Kelley arose because of the general contractor's contractual responsibility for establishing and maintaining safety precautions for the project. See also Straw v. Esteem Constr. Co., 45 Wn. App. 869, 875, 728 P.2d 1052 (1986) ("In Kelley the court found the contractor had assumed contractual responsibility for initiating and maintaining a safety program, and thus responsibility for supervising the subcontractor's work to insure it complied with safety standards."). The significance of actual involvement in a safety measure is confirmed by subsequent cases: "It is one thing to retain a right to oversee compliance with contract provisions and a different matter to so involve oneself in the performance of the work as to undertake responsibility for the safety of the independent contractor's employees." Hennig v. Crosby Grp., Inc., 116 Wn.2d 131, 134, 802 P.2d 790 (1991) (emphasis omitted). The employer must actively involve itself with the operation of safety measures to retain control. Id. Contract language that provides for inspections to ensure compliance with relevant laws and regulations is not enough to constitute retained control. Cano-Garcia v. King County, 168 Wn. App. 223, 237, 277 P.3d 34 (2012).

In this case, the jury instruction allowed the jury to conclude that Mobil retained control because it required NWIM employees to comply with its general

safety rules and Occupational Safety and Health Administration (OSHA) regulations. This is far below the contractual obligation for undertaking safety procedures that Kelley identified as the reason for retained control. Moreover, it is directly contrary to the case law establishing that the right to ensure compliance with relevant laws and regulations does not constitute retained control. See Cano-Garcia, 168 Wn. App. at 237. As a result, the retained control jury instruction is a clear misstatement of the law. Such an error is presumed prejudicial and requires reversal. See Hendrickson v. Moses Lake Sch. Dist., 192 Wn.2d 269, 281, 428 P.3d 1197 (2018).

2. Premises Liability

Mobil argues the trial court also provided an incorrect jury instruction on its duty of care to Wright as a business invitee.

The legal duty owed by a landowner to a person entering the premises depends on whether the entrant was a trespasser, licensee, or invitee. Kamla, 147 Wn.2d at 125. Employees of independent contractors are business invitees on the landowner's premises. Id. The parties do not dispute Wright's status as an invitee. A landowner owes an invitee the duty of care set forth in the Restatement (Second) of Torts § 343 (Am Law Inst. 1965):

> "[a] possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, [the possessor]
>
> "(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 against it, and
>
> "(c) fails to exercise reasonable care to protect them against the danger."

Tincani v. Inland Empire Zoological Soc., 124 Wn.2d 121, 138, 875 P.2d 621 (1994) (alterations in original) (quoting RESTATEMENT § 343). Restatement § 343A further explains the duty owed to an invitee for known or obvious dangers on the premises: "'(1) A possessor of land is not liable to . . . invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." Id. at 139 (alteration in original) (quoting RESTATEMENT § 343A). The Washington Supreme Court established that section 343A "is the appropriate standard for duties to invitees for known or obvious dangers." Id.

When instructing a jury on the duty owed to an invitee for known or obvious dangers, "it is ordinarily the better practice to give both Section 343 and Section 343A(1) instructions." Suriano v. Sears, Roebuck & Co., 117 Wn. App. 819, 831, 72 P.3d 1097 (2003). The Washington Pattern Jury Instructions reiterates this, "[i]n cases involving invitees and known or obvious dangers, the jury should be instructed in accordance with both sections 343 and 343A of the Restatement." 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 120.07 cmt. at 797 (7th ed. 2019).

In this case, Mobil proposed a jury instruction that included the language of section 343A: "A possessor of land is not liable to his business invitee for physical harm caused to him by an activity or condition on the land whose danger is known or obvious to him, unless the possessor should anticipate the harm despite such knowledge or obviousness." The court declined to give this instruction, choosing

to provide a jury instruction on only section 343. This was not legal error. While the two instructions together provide a more complete statement of the law, no case has explicitly required a court to issue both instructions. See Suriano, 117 Wn. App. at 831. The court's single instruction was not an incorrect or misleading statement of the law.

As part of its statement of the law, the given instruction included the element of the invitee's knowledge, allowing for liability only if Mobil "should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it." Even without the section 343A instruction, Mobil had the opportunity to argue that Wright knew of the danger and knew to protect himself against it. Mobil touched on Wright's knowledge of the danger during closing arguments:

> Mr. Wright was not some invitee who came onto our facility and wandered into some dangerous condition that he wasn't prepared for or aware of. His company was hired to do this work.
>
> Based on all the precautions that were taken, they were prepared to do this work. The employer had that nondelegable duty and satisfied that duty in this case. Yet with all of that, Mobil is the one standing here having to defend itself against a claim that we failed to exercise ordinary care for this three-month job, 40 years ago.

Mobil was able to argue its theory of the case to the jury.

The business invitee instruction allowed Mobil to argue Wright's knowledge to the jury and was not incorrect or misleading. Therefore, the trial court's instruction was not erroneous. Additionally, because Mobil was able to argue its theory of the case, any error in the trial court's failure to provide the section 343A instruction was harmless. See Blaney v. Int'l Assoc. of Machinists & Aerospace Workers, Dist. No. 160, 151 Wn.2d 203, 211, 87 P.3d 757 (2005) ("An erroneous

jury instruction is harmless if it is 'not prejudicial to the substantial rights of the part[ies] . . ., and in no way affected the final outcome of the case.'") (alteration in original) (quoting State v. Britton, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)). The jury verdict stands based on premises liability.

B. Contributory Negligence

Mobil claims the trial court erred by refusing to instruct the jury on the affirmative defense of contributory negligence. Wright counters that Mobil failed to produce evidence in support of the instruction.

In order to prove contributory negligence, the defendant must show the plaintiff had a duty to exercise reasonable care for his own safety, failed to exercise such care, and the failure was a cause of the injuries. Gorman v. Pierce County, 176 Wn. App. 63, 87, 307 P.3d 795 (2013). The inquiry is whether or not the plaintiff exercised the care for his own safety that a reasonable person would have used under the existing facts and circumstances. Dunnington v. Virginia Mason Med. Ctr, 187 Wn.2d 629, 637, 389 P.3d 498 (2017).

The evidence presented showed that Wright took all precautions known at the time to limit his exposure to asbestos. As the corporate representative for Mobil noted, "Mr. Wright was the champion of wearing respirators," and he "not only wore one religiously himself" but also told other workers that they needed to wear one. Wright also directed the employees to use water to wet down the insulation, which was a precaution to minimize asbestos dust. However, the workers could not always use the wet method. Brian Daley testified, "you couldn't do it all the times, you couldn't get the hose, you couldn't get the water to the areas

at all the times because there wasn't water in that unit." As Daley said, "the procedure we followed was to spray water to the best of everybody's ability and as much water as they had that was provided that we could get it on there."

Based on the testimony, Wright personally took the known precautions necessary to keep himself and his fellow workers safe. He wore the OSHA approved respirator and knew how to properly fit it. He and his coworkers used the wet method when possible. And, they bagged the insulation in plastic and deposited in a plastic lined dumpster for safe disposal of the asbestos containing material. Wright complied with the safety measures of the time period as a reasonable person would. Therefore, the trial court did not err in denying Mobil's request for a jury instruction on contributory negligence.

C. Assumption of Risk

Mobil argues it was entitled to a jury instruction on its affirmative defense of assumption of risk. Wright contends that Mobil did not provide evidence that Wright had more than generalized awareness of the risks of asbestos as required for an assumption of risk instruction.

To invoke assumption of risk, Mobil must show that Wright knowingly and voluntarily chose to encounter the risk. Egan v. Cauble, 92 Wn. App. 372, 377, 966 P.2d 362 (1998). This means that Wright, "(1) had full subjective understanding, (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter that risk." Wagenblast v. Odessa Sch. Dist. No. 105-157-166J, 110 Wn.2d 845, 858, 758 P.2d 968 (1988). "A plaintiff has knowledge if, 'at the time of decision, [he or she] actually and subjectively knew all

facts that a reasonable person . . . in the plaintiff's shoes would want to know and consider.'" Reed-Jennings v. Baseball Club of Seattle, LP, 188 Wn. App. 320, 333, 351 P.3d 887 (2015) (alterations in original) (quoting Home v. N. Kitsap Sch. Dist., 92 Wn. App. 709, 720, 965 P.2d 1112 (1998)). Knowledge requires more than mere awareness of the generalized risk of the activities. Reed-Jennings, 188 Wn. App. at 333. There must be proof the plaintiff knew of and appreciated the specific hazard that caused the injury. Id.

Mobil failed to meet this burden. No testimony from Wright was available to show the extent of his knowledge of the risks inherent in removing asbestos-containing insulation. Daley testified that he and the other workers had been told that the material they were removing was asbestos. Wright knew to wear a respirator and advised the other workers to wear one when working with the insulation. He, and others, took precautions when removing the insulation to avoid breathing the asbestos dust. This is the extent of the information provided as to Wright's level of knowledge of the risks of removing the asbestos insulation. While Wright was clearly aware of the "generalized risk" of asbestos exposure, Mobil did not produce evidence that Wright knew the risk of exposure even with precautions or evidence that he knew the risk of developing mesothelioma. Given the minimal evidence on the extent of Wright's knowledge of the risks of performing his job, the trial court's decision against instructing the jury on assumption of risk was not an abuse of discretion.

II. Hearsay Evidence

Mobil contends the trial court erred by admitting hearsay embedded within an ancient document. We review admission of evidence for abuse of discretion. Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 668, 230 P.3d 583 (2010). Even if a trial court abuses its discretion in admitting evidence, the error is harmless where it is cumulative or of only minor significance in reference to the evidence as a whole. Hoskins v. Reich, 142 Wn. App. 557, 570-71, 174 P.3d 1250 (2008).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Statements in ancient documents, older than 20 years with established authenticity, are not excluded by the hearsay rule even if the declarant is available as a witness. ER 803(a)(16). After proper authentication as an ancient document, Washington courts have not examined the contents for hearsay.[3] See Allen v. Asbestos Corp., 138 Wn. App. 564, 576-77, 157 P.3d 406 (2007) (finding collection of documents from Puget Sound Naval Shipyard admissible as an authenticated ancient document); Bowers v. Fibreboard Corp., 66 Wn. App. 454, 563-65, 832 P.2d 523 (1992) (finding dictionary of naval fighting ships was a compilation of data and admissible as an ancient document).

[3] But, federal courts interpreting the identical language of the Federal Rule of Evidence 803(16) have required examination of hearsay embedded within those documents. See Langbord v. United States Dept. of Treasury, 832 F.3d 170, 190 (3rd Cir. 2016); United States. v. Hajda, 135 F.3d 439, 444 (7th Cir. 1998).

Here, the trial court allowed Wright to introduce a photocopy of a newspaper article entitled "Lung Cases Show Up at Mobil." The article was included in "OSHA Oversight Hearings on Proposed Rules on Hazards Identification" Hearings before the subcommittee on health and safety of the committee on education and labor for the House of Representatives in 1981. The article contains references to information about lung disease in confidential medical reports compiled by Mobil and statements by an unnamed medical expert. The court admitted the article, stating it qualified under ER 901(b)(8) as authentic for the purposes of the ancient document exception to hearsay.[4] The court did not undertake an examination of the contents for embedded hearsay. Nor did it need to since under ER 803(a)(16), any hearsay within the ancient document was admissible. Any arguments about the content would merely go to the weight to be given to the evidence by the jury.

Regardless of whether admission of the article was an abuse of discretion, any error was harmless. Wright introduced the article to contradict Mobil's claim that its refineries did not have excess cases of respiratory disease, lung cancer or mesothelioma. The article noted that a confidential Mobil study revealed 380 employees from the company's Paulsboro[5] refinery had lung damage associated with asbestos exposure, and 42 of those cases were serious. The article went on to say that an unnamed medical expert said that people with similar conditions have a 1-in-10 or 1-in-15 chance of contracting mesothelioma. In response to

[4] Mobil objected to authentication of the newspaper article through the Oversight Hearings record, stating "the mere fact that it's attached to this document does not authenticate it."

[5] Paulsboro is not the refinery at issue in this case.

questions about a passage in the article, the Mobil representative highlighted the unreliability of the article:

> [W]e don't know that medical expert, we don't know the dose that the person received, we don't know the time frame, we don't know that these people at Paulsboro, how long they worked there. They could have worked in a shipyard for 20 years before they got to Paulsboro. All of that is salient information on how to assess information like this."

Put in context of the trial, Wright used this ancient document to question Mobil's corporate representative and to briefly raise the issue of asbestos exposure at other Mobil locations during closing argument. This evidence was minimal and shown as unreliable by the Mobil representative. Moreover, the existence of asbestos at the Ferndale refinery was not a disputed issue. The main issue was the duty of care that Mobil owed Wright. Admission of the document was harmless.

III. Expert Testimony

The trial court denied Mobil's motion to exclude the testimony of expert Industrial Hygienist Susan Raterman. Mobil contends the court erred because the testimony was speculative as to Wrights's potential range of exposure to asbestos. Wright argues the testimony was based on generally accepted principles in the field of industrial hygiene.

ER 702 governs the admission of expert testimony: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The expert's testimony must be based on fact rather than assumption. Coogan v. Borg-Warner Morse Tec Inc., 197 Wn.2d 790, 801,

490 P.3d 200 (2021). When courts have refused to admit expert testimony as speculative, the decision "hinge[d] on the expert's basis for forming the opinion, not on the expert's conclusions. When an expert fails to ground his or her opinions on facts in the record, courts have consistently found that the testimony is overly speculative and inadmissible." Volk v. DeMeerleer, 187 Wn.2d 241, 277, 386 P.3d 254 (2016). We review a decision on admission of expert testimony for abuse of discretion. Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 683, 15 P.3d 115 (2000).

According to Mobil, Raterman "ignored the undetectable amounts of asbestos measured at Ferndale during the time Mr. Wright worked there" and did not account for Wright's use of a mask for work with insulation. This mischaracterizes Raterman's testimony.

Raterman opined that Wright "was exposed to significant concentrations of asbestos . . . . They contributed to his cumulative asbestos exposure dose and increased his risk of developing mesothelioma." Raterman provided a range of exposure for Wright at the Mobil refinery. She determined an exposure range, rather than a specific amount, because "conditions change from day to day and work activities change from day to day." Raterman considered Wright's various work activities after reviewing the deposition testimony of Wright's coworkers at the refinery as to the tasks, protective equipment, and exposure controls they used. She reviewed documents from the refineries themselves, detailing the type of insulation, air samples, and exposure controls of the facilities. Raterman looked at asbestos specific literature published in the industrial hygiene field. And, she

considered the weather conditions of Wright's outdoor work at the refinery. She believed her opinions were based on a reasonable degree of scientific certainty.

During questioning by Mobil, Raterman stated that she did not use any of the air measurements taken at the Mobil Ferndale plant where Wright worked when she determined the exposure range. When asked whether using the data from Mobil Ferndale would be "more reliable and scientific," Raterman responded, "The most reliable and scientific method is to compare work activities. So the data from Mobil Ferndale was not presented in a way that differentiated what activities the individuals were actually performing when the data was collected." She explained that she used data from a different company and refinery because

> it provides the jury an example of dry removal exposure levels both in the breathing zone and at areas a distance from the actual breathing zone, for a bystander exposure. So it was important because it differentiated the work activities and the locations, whereas the Mobil Ferndale data, as a complete set, does not make a distinction between wet methods, dry methods, it doesn't make a distinction between the various different activities.

Additionally, the Ferndale air sample readings were taken around the perimeter of the refinery unit.[6] It was unclear how close the Ferndale measurements were to where the asbestos related work was being done. Based on these reasons, Raterman did not rely on the Ferndale data but compared the numbers to her exposure range and determined the Ferndale data "fell within the range" that she calculated from the literature and data about other sites.

[6] The Mobil corporate representative testified that Mobil could not perform personalized breathing zone samples for contractors because it was considered a medical procedure. Mobil could only perform area sampling.

Raterman also testified that she did not consider the use of masks or respirators in calculating Wright's exposure range. Raterman explained that "[t]he effectiveness of the respirators when worn by Mr. Wright was not tested and made available." She also noted that literature showed that masks or respirators would "likely hav[e] only been partially effective at completely preventing the inhalation of airborne asbestos during the 1940s to the 1980s due to improper seal or fit." And, she did not include the possible reduction of exposure due to masks, because OSHA directs "sampling in the breathing zone of employees or area samples without respect to the use of respirators to determine the amount of asbestos present" in order to facilitate the use of exposure controls. Raterman said that Wright's asbestos exposure could have been reduced by respiratory protection if his equipment was effective, but the commonly used masks had flaws that often allowed entry of contaminated air.

Raterman clearly explained the factual basis for her opinion, which was grounded in accepted research in the field of industrial hygiene. As to Mobil's claims that Raterman's testimony was speculative because she did not use the Ferndale sample data or consider a reduction in the range due to mask use, Raterman clearly explained her scientific reasons for her decision to exclude this information. Her expert testimony was not overly speculative. Mobil may disagree with Raterman's method of reaching her opinion. But, that goes to the weight of the evidence rather than its admissibility. See Lewis River Golf, Inc. v. O.M. Scott & Sons, 120 Wn.2d 712, 723, 845 P.2d 987 (1993) ("difference of opinion is the essence of conflicting opinions from experts," and where the expert explained the

opinion and method of calculation, defendant's disagreement with the opinion is with its weight rather than its admissibility). Therefore, the trial court did not abuse its discretion in admitting Raterman's expert testimony.

IV. GR 37

During jury selection, Mobil attempted to exercise a peremptory challenge of juror 7. Wright objected to Mobil's use of the peremptory under GR 37. The court considered Wright's objection and then denied Mobil's peremptory challenge of juror 7. We review de novo a trial court's application of GR 37. State v. Omar, 12 Wn. App. 2d 747, 750-51, 460 P.3d 225, review denied, 196 Wn.2d 1016, 475 P.3d 164 (2020).

The purpose of GR 37 "is to eliminate the unfair exclusion of potential jurors based on race or ethnicity." GR 37(a). A party may object to the use of a peremptory challenge on GR 37 grounds. GR 37(c). The trial court must then "evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances." GR 37(e). The court will consider factors such as the number and type of questions posed to the prospective juror as compared to others, use of peremptory challenges for similar answers to jurors not challenged, reasons disproportionately associated with race or ethnicity, and history of discriminatory peremptory challenges. GR 37(g). The court uses these factors to determine whether "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge." GR 37(e). The applicable objective observer "is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors

in Washington." GR 37(f). If the court concludes that an objective observer could view race or ethnicity as a factor, the peremptory challenge is denied. GR 37(e). In its evaluation, "[t]he court need not find purposeful discrimination to deny the peremptory challenge." GR 37(e).

Juror 7 stated that her aunt had died of cancer and her uncle "just died from cancer." According to her, "one of them was dealing with lungs and one of them was my uncle, it was his throat." Juror 7 told the court she was "in the process of going to [sic] going through a civil case with someone, similar to this one." She clarified that her uncle was the plaintiff and she was "doing paperwork for him." When Mobil pressed for more details later, juror 7 said "I don't want to discuss it because the case is still going on. It's confidential. I would rather not speak about it, if you don't mind, Judge." The court responded, "That's fine." Mobil did not object or make a record of what it might have wanted to explore further about the lawsuit. Instead, it ceased questioning juror 7 about the lawsuit and moved on to other issues.

Mobil turned to the issue of juror 7's experience with cancer in the family: "We had talked a little bit about a number of people in your family who had had experience with cancer, as well. Do you believe that perhaps your sympathies with those individuals would affect how you viewed the issues in this case?" Juror 7 responded, "Ma'am, it's an emotional process that I'm still dealing with, because it just happened last year and this year. But, no, ma'am, it won't hinder or affect me from doing the case."

Mobil raised four issues to defend its use of a peremptory challenge on juror 7, who the court identified as one of four members of the venire who were likely African American. Mobil stated that juror 7 had "indicated that she is currently helping her uncle with an active lawsuit, he is the plaintiff" and declined to discuss the case further. When discussing cancer, juror 7 "was visibly upset. She was crying and she spoke about the effect of having lost family members to cancer." Juror 7 had a history of working as a caregiver. And, Mobil concluded by saying that juror 7 "appeared hostile" when answering questions.

In its analysis, the trial court expressed concern about the number of questions asked of juror 7 and that Mobil used "animus toward the defense" as a reason for its peremptory challenge. GR 37 identifies several reasons that "have historically been associated with improper discrimination in jury selection in Washington State," including that the prospective juror "exhibited a problematic attitude, body language, or demeanor." GR 37(i). A trial court should not accept these reasons "unless opposing counsel or the court itself can corroborate the allegations." Omar, 12 Wn. App. 2d at 752. Here, the trial court disagreed with Mobil that juror 7 was hostile, stating, "[N]othing that I observed or I heard gave me that particular concern." Mobil used a reason akin to a "problematic attitude," which "raise[d] a red flag" for the trial court.

Ultimately the trial court concluded that an objective observer aware of implicit bias could find race to be a factor in Mobil's use of the peremptory challenge to juror 7. Of key importance is the low threshold established by GR 37 that an objective observer could view race or ethnicity as a factor. GR 37(e). An

objective observer, aware of historical "implicit, institutional, and unconscious biases," would recognize Mobil's objection based on "hostility" as historically "associated with improper discrimination in jury selection" and could conclude that race was one factor in Mobil's exercise of its peremptory challenge. GR 37(f), (i).

"Even if the [defense]'s race-neutral justification was persuasive, under GR 37, a court's task is to determine whether an objective observer aware of implicit bias could view race or ethnicity as a factor." State v. Listoe, 15 Wn. App. 2d 308, 324, 475 P.3d 534 (2020). Mobil's inclusion of "problematic attitude," as a justification for the peremptory challenge would allow an objective observer to view race or ethnicity as a factor in asking to strike juror 7. Despite Mobil's other concerns, the trial court's denial of the peremptory challenge on GR 37 grounds was not an abuse of discretion.

V. Settlement Agreements

Mobil argues that Wright and the parties he settled with violated the plain language of RCW 4.22.060 by refusing to provide their settlement agreements. Wright contends that Mobil received the settlement agreement of each defendant and all material terms of the settlement agreements.

RCW 4.22.060(1) requires settling parties to give all other parties five days' notice and a copy of the proposed agreement. The court then holds a hearing "on the issue of the reasonableness of the amount to be paid with all parties afforded an opportunity to present evidence." Id. The court determines whether the settlement is reasonable and reduces the amount of the claims against the remaining parties. RCW 4.22.060(2). The settling parties bear the burden of

establishing reasonableness. Sykes v. Singh, 5 Wn. App.2d 721, 727, 428 P.3d 1228 (2018). A determination of reasonableness is reviewed for abuse of discretion. Id.

Statutory interpretation is a question of law reviewed de novo. HomeStreet, Inc. v. Dept. of Revenue, 166 Wn.2d 444, 451, 210 P.3d 297 (2009). The primary objective of statutory construction is to ascertain and carry out the intent of the legislature. Id. When interpreting a statute, we look first to the plain language and end the inquiry if the plain language is subject to only one interpretation. Id.

By its plain terms, RCW 4.22.060(1) requires a settling party to provide the other parties and the court with a notice of settlement which "shall contain a copy of the proposed agreement." Here, the settling parties did not provide Mobil with the actual settlement agreements. Wright "verbally advised" Mobil of the amounts of the settlements with 3M, Texaco, Shell, and U.S. Oil. The settling parties provided declarations as to the amounts of the settlements. However, the parties did not provide "a copy of the proposed agreement" and therefore did not comport with the plain language of RCW 4.22.060.

Due to issues of confidentiality,[7] the court believed that it could assess the reasonableness of the settlements without introduction of the actual documents, "unless there's just something kind of wonky and unusual in the settlement

[7] RCW 4.22.060 does not contain an exception to full disclosure based on the parties' wish to keep any part of the agreement confidential. Wright has not cited any cases that have interpreted the statute to allow the parties to provide anything other than a copy of the settlement agreement. Wright also has not provided any case law holding that production to the trial court for in-camera review is authorized under RCW 4.22.060(1).

agreements." The court ordered the parties to "meet and confer regarding the production of the settlement agreements to ExxonMobil under an agreed protective order." The court subsequently signed and entered a stipulated protective order for the settlement agreements and accompanying documents. Despite the protective order, the settling parties did not provide the full settlement agreements to either Mobil or the court. Neither the trial court nor Mobil had the opportunity to examine the agreements for evidence of any "wonkiness."

The trial court failed to review and consider the entirety of the settlement agreements, focusing on only the bottom line numbers provided by the settling corporations. Because the trial court did not review the full terms of the settlement agreement, the determination of reasonableness and the calculation of the set-off amount was an abuse of discretion. A new reasonableness hearing is required.

We affirm the jury verdict, but vacate the judgment and remand for a new reasonableness hearing after full access to the settlement agreements.

Appelwick, J.

WE CONCUR:

Chun, J.

Verellen, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

WAYNE WRIGHT, individually and as personal representative for the estate of WARREN WRIGHT, deceased,

Respondent,

v.

3M COMPANY, f/k/a MINNESOTA MINING & MANUFACTURING COMPANY; E.J. BARTELLS SETTLEMENT TRUST; SHELL OIL COMPANY; TEXACO, INC.; U.S. OIL & REFINING COMPANY,

Defendants,

EXXONMOBIL OIL COMPANY,

Appellant.

No. 81289-1-I

ORDER DENYING MOTION FOR RECONSIDERATION AND TO PUBLISH DECISION

ExxonMobil Oil Corporation, filed a motion for reconsideration and to publish decision. The court has considered the motion pursuant to RAP 12.4 and a majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Appelwick, J.
Judge

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

WAYNE WRIGHT, individually and as personal representative for the estate of WARREN WRIGHT, deceased, Respondent, v. 3M COMPANY, f/k/a MINNESOTA MINING & MANUFACTURING COMPANY; E.J. BARTELLS SETTLEMENT TRUST; SHELL OIL COMPANY; TEXACO, INC.; U.S. OIL & REFINING COMPANY, Defendants, EXXONMOBIL OIL COMPANY, Appellant.	No. 81289-1-I ORDER DENYING MOTION FOR RECONSIDERATION

Respondent, Wayne Wright, filed a motion for reconsideration. Appellant, ExxonMobil Oil Corporation, has filed an answer. The court has considered the motion pursuant to RAP 12.4 and a majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Appelwick, J.
Judge

k. Where warning inadequate. There will, however, be special situations in which the possessor has knowledge of facts from which he should realize that an ordinary warning will not be sufficient to notify the licensee of the danger, or to enable him to protect himself against it. Thus where the possessor knows that the licensee is blind, illiterate, or a foreigner, or a child too young to be able to read, it is not enough to rely upon a posted notice to give warning of the danger, and the possessor may still be required to exercise reasonable care to give adequate warning in some other way. In extreme cases, as in the case of the blind man, he may even be required to give physical assistance to enable the licensee to avoid the danger.

l. Dangers known to licensee. The licensee, who enters land with no more than bare permission, is entitled to nothing more than knowledge of the conditions and dangers which he will encounter if he comes. If he is warned of the actual conditions, and the dangers involved, or if he discovers them for himself without such warning, and fully understands and appreciates the risk, he is in a position to make an intelligent choice as to whether the advantage to be gained is sufficient to justify him in incurring the risk by entering or remaining. Therefore, even though a dangerous condition is concealed and not obvious, and the possessor has given the licensee no warning, if the licensee is in fact fully aware of the condition and the risk, there is no liability to him.

TITLE E. SPECIAL LIABILITY OF POSSESSORS OF LAND TO INVITEES

§ 343. Dangerous Conditions Known to or Discoverable by Possessor

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

(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 against it, and

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

See Reporter's Notes.

Comment:

a. This Section should be read together with § 343 A, which deals with the effect of the fact that the condition is known to the invitee, or is obvious to him, as well as the fact that the invitee is a patron of a public utility. That Section limits the liability here stated. In the interest of brevity, the limitation is not repeated in this Section.

b. Distinction between duties to licensee and invitee. One who holds his land open for the reception of invitees is under a greater duty in respect to its physical condition than one who permits the visit of a mere licensee. The licensee enters with the understanding that he will take the land as the possessor himself uses it. Therefore such a licensee is entitled to expect only that he will be placed upon an equal footing with the possessor himself by an adequate disclosure of any dangerous conditions that are known to the possessor. On the other hand an invitee enters upon an implied representation or assurance that the land has been prepared and made ready and safe for his reception. He is therefore entitled to expect that the possessor will exercise reasonable care to make the land safe for his entry, or for his use for the purposes of the invitation. He is entitled to expect such care not only in the original construction of the premises, and any activities of the possessor or his employees which may affect their condition, but also in inspection to discover their actual condition and any latent defects, followed by such repair, safeguards, or warning as may be reasonably necessary for his protection under the circumstances.

As stated in § 342, the possessor owes to a licensee only the duty to exercise reasonable care to disclose to him dangerous conditions which are known to the possessor, and are likely not to be discovered by the licensee. To the invitee the possessor owes not only this duty, but also the additional duty to exercise reasonable affirmative care to see that the premises are safe for the reception of the visitor, or at least to ascertain the condition of the land, and to give such warning that the visitor may decide intelligently whether or not to accept the invitation, or may protect himself against the danger if he does accept it.

As stated in § 342, the possessor is under no duty to protect the licensee against dangers of which the licensee knows or has reason to know. On the other hand, as stated in § 343 A, there are some situations in which there is a duty to protect an invitee against even known dangers, where the possessor should anticipate harm to the invitee notwithstanding such knowledge.

c. As to invitees who go beyond the scope of the invitation, as to either time or place, see § 332, Comment *l.*

d. What invitee entitled to expect. An invitee is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein. Therefore an invitee is not required to be on the alert to discover defects which, if he were a mere licensee, entitled to expect nothing but notice of known defects, he might be negligent in not discovering. This is of importance in determining whether the visitor is or is not guilty of contributory negligence in failing to discover a defect, as well as in determining whether the defect is one which the possessor should believe that his visitor would not discover, and as to which, therefore, he must use reasonable care to warn the visitor.

e. Preparation required for invitee. In determining the extent of preparation which an invitee is entitled to expect to be made for his protection, the nature of the land and the purposes for which it is used are of great importance. One who enters a private residence even for purposes connected with the owner's business, is entitled to expect only such preparation as a reasonably prudent householder makes for the reception of such visitors. On the other hand, one entering a store, theatre, office building, or hotel, is entitled to expect that his host will make far greater preparations to secure the safety of his patrons than a householder will make for his social or even his business visitors. So too, one who goes on business to the executive offices in a factory, is entitled to expect that the possessor will exercise reasonable care to secure his visitor's safety. If, however, on some particular occasion, he is invited to go on business into the factory itself, he is not entitled to expect that special preparation will be made for his safety, but is entitled to expect only such safety as he would find in a properly conducted factory.

f. Appliances used on land. A possessor who holds his land open to others must possess and exercise a knowledge of the

dangerous qualities of the place itself and the appliances provided therein, which is not required of his patrons. Thus, the keeper of a boardinghouse is negligent in providing a gas stove to be used in an unventilated bathroom, although the boarder who is made ill by the fumes uses the bathroom with knowledge of all the circumstances, except the risk of so doing. This is true because the boardinghouse keeper, even though a man of the same class as his boarders, is required to have a superior knowledge of the dangers incident to the facilities which he furnishes to them.

g. As to the duty of a possessor of business premises to protect his invitees from harm threatened thereon by third persons, see § 344.

§ 343 A. Known or Obvious Dangers

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

See Reporter's Notes.

Comment on Subsection (1):

a. The rule stated in this Subsection applies to all persons who enter or remain on land in the capacity of invitees, as defined in § 332. It includes in particular the patrons of a public utility who enter land in its possession seeking its services, to which as members of the public they are entitled; and it includes members of the public making use of the land of the government or a government agency which is held open for the use of the public. As is stated in Subsection (2), such a public utility, government, or government agency may have special reason to anticipate that one who so enters will proceed to encounter known or obvious dangers; and such a defendant may therefore be subject to liability in some cases where the ordinary possessor of land would not.

b. The word "known" denotes not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves. Thus the condition or activity must not only be known to exist, but it must also be recognized that it is dangerous, and the probability and gravity of the threatened harm must be appreciated. "Obvious" means that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment.

c. The possessor's activities may involve a risk which is known or obvious to those who enter his land, either because the risk is inherent in the nature of the activity itself, or because they are aware that it is carried on in a manner which involves risks that are not necessarily inherent in such activities.

d. A statute may require the possessor of land to keep it, or anything upon it, in a condition safe for invitees, or even for licensees, or to take particular precautions for the safety of such visitors. If so, the fact that the visitor knows that the possessor has not complied with the requirements of the statute does not prevent the possessor from being subject to liability for his breach of his statutory duty. Such knowledge of the violation is material only in determining whether the visitor is to be charged with contributory negligence, or assumption of risk, in coming in contact with the dangerous condition. As to this, see § 288 B and Comment *b* to that Section; also §§ 496 A–496 G.

e. In the ordinary case, an invitee who enters land is entitled to nothing more than knowledge of the conditions and dangers he will encounter if he comes. If he knows the actual conditions, and the activities carried on, and the dangers involved in either, he is free to make an intelligent choice as to whether the advantage to be gained is sufficient to justify him in incurring the risk by entering or remaining on the land. The possessor of the land may reasonably assume that he will protect himself by the exercise of ordinary care, or that he will voluntarily assume the risk of harm if he does not succeed in doing so. Reasonable care on the part of the possessor therefore does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them.

Illustration:

1. The A Company has in its store a large front door, made of heavy plate glass. The door is well lighted and plainly visible, and its existence is obvious to any person exercising ordinary attention and perception. B, a customer in the store, while preoccupied with his own thoughts, mistakes the glass for an open doorway, and runs his head against it and is injured. A Company is not liable to B.

f. There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.

Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. (See §§ 466 and 496 D.) It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances.

Illustrations:

2. The A Department Store has a weighing scale protruding into one of its aisles, which is visible and quite obvious to anyone who looks. Behind and about the scale it displays goods to attract customers. B, a customer, passing through the aisle, is intent on looking at the displayed goods. B does not discover the scale, stumbles over it, and is injured. A is subject to liability to B.

3. The A Drug Store has a soda fountain on a platform raised six inches above the floor. The condition is visible and quite obvious. B, a customer, discovers the condition when she ascends the platform and sits down on a stool to buy some ice cream. When she has finished, she forgets the condition, misses her step, falls, and is injured. If it is found that this could reasonably be anticipated by A, A is subject to liability to B.

4. Through the negligence of A Grocery Store a fallen rainspout is permitted to lie across a footpath alongside the store, which is used by customers as an exit. B, a customer, leaves the store with her arms full of bundles which obstruct her vision, and does not see the spout. She trips over it, and is injured. If it is found that A should reasonably have anticipated this, A is subject to liability to B.

5. A owns an office building, in which he rents an office for business purposes to B. The only approach to the office is over a slippery waxed stairway, whose condition is visible and quite obvious. C, employed by B in the office, uses the stairway on her way to work, slips on it, and is injured. Her only alternative to taking the risk was to forgo her employment. A is subject to liability to C.

Comment on Subsection (2):

g. In determining whether the possessor of land should expect harm to invitees notwithstanding the known or obvious character of the danger, the fact that premises have been held open to the visitor, and that he has been invited to use them, is always a factor to be considered, as offering some assurance to the invitee that the place has been prepared for his reception, and that reasonable care has been used to make it safe. There is, however, a special reason for the possessor to anticipate harm where the possessor is a public utility, which has undertaken to render services to members of the public, so that they are entitled to demand the use of its facilities, and to expect reasonable safety while using them. The same is true of the government, or a government agency, which maintains land upon which the public are invited and entitled to enter as a matter of public right. Such defendants may reasonably expect the public, in the course of the entry and use to which they are entitled, to proceed to encounter some known or obvious dangers which are not unduly extreme, rather than to forego the right.

Even such defendants, however, may reasonably assume that members of the public will not be harmed by known or obvious dangers which are not extreme, and which any reasonable person exercising ordinary attention, perception, and intelligence could be expected to avoid. This is true particularly where a reasonable alternative way is open to the visitor, known or obvious to him, and safe.

Illustrations:

6. An incoming train of the A Railroad deposits B, a passenger, upon a platform from which the only exit is over a footbridge crossing the tracks. Employees of the Railroad have encumbered the bridge with baggage from the train. B, crossing the bridge, attempts to climb over the pile of baggage, falls, and is injured. A Railroad is subject to liability to B.

7. The same facts as in Illustration 6, except that B is told by the train conductor that he may safely walk across the tracks. A Railroad is not liable to B.

8. The only convenient approach from the east to the station of A Railroad is over a footbridge which, through the negligence of the Railroad, is covered with snow and ice. The condition of the bridge is obviously dangerous, but not extremely so. The only other approach to the station, from the west, would require a detour of six blocks. B, a prospective passenger coming from the west, attempts to use the bridge rather than detour, and slips and is injured. A Railroad is subject to liability to B.

9. The A Steamship Company is engaged in unloading a passenger ship. Its pier is encumbered with trunks, baggage trucks, and many other large visible objects, but there is ample room for passage between them. B, a passenger leaving the ship, is preoccupied with her own thoughts, and stumbles over a trunk and is injured. The A Company is not liable to B.

§ 343 B. Child Licensees and Invitees

In any case where a possessor of land would be subject to liability to a child for physical harm caused by a condition on the land if the child were a trespasser, the

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