No. 101864-9

SUPREME COURT
OF THE STATE OF WASHINGTON

JASON BUCKHOLTZ, as Personal Representative
of the Estate of DENNIS G. WOODRUFF,
Petitioner,

v.

ZIDELL EXPLORATIONS, INC.,
Respondent,

and

PORT OF TACOMA,
Defendant.

PETITIONER'S RESPONSE TO RESPONDENT'S PETITION FOR CONDITIONAL CROSS-REVIEW

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A. INTRODUCTION

Zidell Explorations ("Zidell") asks this Court to consider its baseless duty argument as a conditional issue when the Court grants review on Division II's erroneous spoliation decision that resulted in the reversal of the judgment in favor of Dennis Woodruff's estate ("Estate"). Zidell's dispersal of toxic asbestos into the environment at the Port of Tacoma ("Port") resulted in Dennis's death due to mesothelioma, a cancer caused invariably by asbestos exposure. Zidell's duty argument seeks to convert a straight-forward negligence case based on the principles of the *Restatement (Second) of Torts* § 281 into a workplace safety duty case, which it is not. But even if analyzed as a workplace duty case as Division II did, no error is present that merits review. RAP 13.4(b).

This Court should grant review on spoliation, but deny Zidell's duty argument.

B. STATEMENT OF THE CASE

Zidell's argument for cross-review on duty begins with an

unsupported factual assumption: that Zidell Dismantling ("ZD") was an independent contractor. Ans. at 29. The actual written instrument setting forth the relationship and obligations between Zidell and ZD has never been found and was never before the jury below. Instead, the jury determined the relationship between these two entities by examining their conduct in relation to each other. What they saw was one man, Emory Zidell, *operating* these two separate companies like divisions under a larger corporate umbrella of "the Zidell companies." Division II did not err in determining upon this record that Zidell retained the right to control the manner in which ZD dismantled the ships Zidell owned.

C. ARGUMENT

A party seeking judgment as a matter of law "admits the truth of the opponent's evidence and all inferences which can be reasonably drawn [from it]." *Faust v. Albertson*, 167 Wn.2d 531, 536, 222 P.3d 1208 (2009). This process requires a court to disregard contrary evidence or inferences, "presume[ing] that the

jury resolved every conflict and drew every reasonable inference in favor of the prevailing party." *Coogan v. Borg-Warner Morse Tec Inc.*, 197 Wn.2d 790, 812-13, 814, 490 P.3d 200 (2021) (citing CR 50). And of course, the Court may affirm on any ground for which the record is "sufficiently developed to fairly consider." RAP 2.5(a).

(1) Zidell Seeks to Avoid the Duty it Owed to Dennis Woodruff for the Asbestos it Knew Was Being Disseminated at the Port of Tacoma Facility

This case has always sounded in ordinary negligence: the general duty to exercise ordinary care set forth under the *Restatement (Second) of Torts* § 281. "At common law, every individual owes a duty of reasonable care to refrain from causing foreseeable harm in interactions with others." *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 550, 442 P.3d 608 (2019). Zidell did not own a "worksite;" it caused the instrumentality of Dennis's harm, a dangerous chattel, to be publicly disseminated at the Port facility where persons like Dennis would foreseeably encounter it. Zidell failed to exercise ordinary care when it sent

ships laden with asbestos, including the *Philippine Sea*, to be dismantled without taking any steps to remove the hazard first or warn or protect Dennis and others who foreseeably encountered the asbestos thereby disseminated into the environment from exposure.[1]

The hazards of asbestos were well-known in the medical and scientific community during that time period at issue. In 1958, the Department of Labor and Industries Safety Standards for Protection Against Occupationally Acquired Diseases listed asbestos as a harmful mineral dust capable of causing disease and disability. Ex. 122 at 37; RP 677–78. The jury also heard that the federal government passed an emergency temporary standard concerning exposure to asbestos fibers in 1971, which later

[1] The Estate disagrees with Division II that the "retained control" doctrine applies; rather, the only question is whether Zidell failed to act as a reasonably careful corporation would have done under the same or similar circumstances. WPI 10.01, 10.02 (7th Ed.). The evidence before the jury demonstrated that asbestos from Zidell's ships contaminated the Port Industrial Yard *for decades*. *See, e.g.*, RP 645, 649, 657–58; Exs. 126a, 127a, 128a.

became permanent through the Occupational Safety and Health Act of 1972. Ex. 121; RP 672–73. This law referenced the "undisputed grave consequences from exposure to asbestos fibers." RP 673. And the jury heard that, in 1973, the federal government under NESHAP identified asbestos as a "hazardous air pollutant which … may cause or contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness." Ex. 120; RP 669–70. Zidell *conceded* that it knew, as of the early 1970s, that asbestos was hazardous to human health. RP 526–27.

Environmental studies performed decades later depicted the ubiquity of asbestos at ZD's Port site. A 1982 Historic Land Use Survey prepared by the Washington Department of Ecology described debris unburied through excavation that included car bodies, tanks, bunker fuel oil, and asbestos. Ex. 128a; RP 645. In 1998, a Pre-Remedial Design Study prepared for the Port noted that "[w]aste petroleum, PCBs, and asbestos were generated" from ZD's activities between 1960 through 1984. Ex.

127a; RP 649. And in 2000, an Engineering Evaluation / Cost Analysis Report found ten soil samples that all came back positive for asbestos, with concentrations ranging from .38 to 2.3 percent by weight. Ex. 126a; RP 657–58. Samples taken in the embankment boreholes contained asbestos concentrations as high as 80 percent by volume. Ex. 126(a); RP 658.

Here, an analogy may sharpen the point. If the owner of an automobile carrying open containers of an invisible, deadly toxic substance in the trunk were to bring that vehicle to a scrap yard, both the common law and common sense would dictate that a reasonably careful vehicle owner would either (1) first remove the hazard or (2) warn or protect the scrapyard workers from the danger. After all, it would be reasonably foreseeable that the scrapyard workers would encounter these toxic substances while performing their work. *See, e.g., Restatement (Second) of Torts* § 388, cmt. c (1965) (requiring exercise of reasonable care by "any person who ... gives possession of a chattel for another's use ... without disclosing his knowledge that the chattel is

dangerous for the use for which it is supplied."); *Schuck v. Beck*, 19 Wn. App. 2d 465, 497 P.3d 395 (2021). A Navy vessel is no more a "premises" than any other chattel, such as an automobile or an airplane.

A defendant like Zidell owed a duty to those persons, like Dennis, foreseeably exposed to toxic materials it *knew* it was dispersing into the public.

Even applying a "retained control" workplace safety analysis, Zidell still owed Dennis a duty of care not to disseminate toxic asbestos where Dennis would foreseeably encounter it. Worksite owners that retain control over the work being performed have a common law duty to keep common work areas safe for all workers. *Afoa v. Port of Seattle*, 176 Wn.2d 460, 466, 296 P.3d 800 (2013). The seminal case on this point is *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978), an opinion that this Court later described as one that "elevates concern for worker safety over rigid adherence to formalistic labels and emphasizes the court's central role in

ensuring the safety of our state's workers." *Afoa*, 176 Wn.2d at 475–76. In *Kelley*, the Court explained that where a principal retains control over "some part of the work," common law duties require the principal to maintain safe common workplaces for all workers on the site. *Kelley*, 90 Wn.2d at 330; *Afoa*, 176 Wn.2d at 477. "The test of control is not the actual interference with the work … but the *right to exercise* such control." *Vargas v. Inland Washington, LLC*, 194 Wn.2d 720, 731, 452 P.3d 1205 (2019) (emphasis added).

There are two ways by which a jobsite owner may retain control such that the duty of providing a safe workplace attaches. The first is when the jobsite owner retains the right to control the manner with which work is performed such that the contractor "is not entirely free to do the work in his own way." *Afoa v. Port of Seattle*, 160 Wn. App. 234, 240, 247 P.3d 482 (2011) (citing *Restatement (Second) of Torts* § 414 (1965) cmt. c). The second is when the owner affirmatively assumes responsibility for all

workers' safety. *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 121–22, 52 P.3d 472 (2002).

As Division II pointed out, op. at 18, Zidell directed that only certain portions of the ship should be dismantled by ZD, leaving the rest for Zidell to complete in Portland. Although the parties disagreed as to precisely what work occurred on the *Philippine Sea*, there is no dispute that Zidell dictated the scope of work to be performed. While merely dictating the scope of work, without more, is not the same as retaining control over the means and manner of performing work, Division II correctly observed that "the nature of the relationship between the two companies" demonstrated that Zidell retained the right to control the means and manner with which ZD performed its work. Op. at 17-18. Consequently, it was the collaboration and coordination between these two separate—but inextricably intertwined—companies that demonstrated the right of Zidell to exercise control over the means and manner of work performed by ZD on its ships. Zidell did not merely retain the right to "inspect and

supervise to insure the proper completion of the contract." *Hennig v. Crosby Group, Inc.*, 116 Wn.2d 131, 134, 802 P.2d 790 (1991). Rather, the evidence demonstrated that Zidell involved itself in ZD's operations to such a high degree that ZD could not even purchase its own ships to dismantle for the first decade of its existence. Ex. 304 (1969 board meeting memorandum determining that ZD would finally begin purchasing its own ships for dismantling).

Citing *Morris v. Vaagen Bros. Lumber, Inc.*, 130 Wn. App. 243, 125 P.3d 141 (2005), Zidell claims that ZD was merely an independent contractor hired by an arms-length separate corporation to perform dismantling work. However, as this Court explained, an independent contractor is one whom "contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." *Kamla*, 147 Wn.2d at 119. Zidell was unable to produce the actual written instruments setting forth the

contractual rights and obligations between these two sister corporations. Consequently, the jury could look only to the overlapping operations and interactions to determine whether and to what extent Zidell had any right to control whether ZD performed its work safely.

Zidell was founded in 1912 by Sam Zidell, Emery Zidell's father. Emery took over the company. RP 462-63. Zidell performed ship dismantling operations in Portland, Oregon beginning in the 1950s. RP 457. In January 1960, the Zidell family created ZD[2] to perform similar ship dismantling operations at the Port Industrial Yard, a location owned and leased by the Port. RP 486-87. Although Zidell and ZD were separate corporate entities on paper, the evidence in this case demonstrated significant overlap in their business operations.

[2] ZD was originally named Zidell-Michaels Dismantling, Inc., and today is called Zidell Marine Corporation.

Zidell's corporate representative[3] explained that the ship dismantling operations were "very similar" with the same business purpose to salvage and sell ship materials. RP 487. Both Zidell and ZD were part of the "Zidell organization." RP 465-66. In written discovery responses, Zidell referred to ZD as its as "sister corporation." CP 1346, 1371.

Stock transfer records demonstrate that both companies were owned in substantial part in common by Emery Zidell, Arnold Zidell, Jay Zidell, and Jack Rosenfield during the time at issue. Ex. 103; RP 471, 513. Annual reports for ZD throughout the early 1970s list these same individuals as officers with addresses in Portland, Oregon. Exs. 105-108; RP 472.

Emery served as president for both Zidell and ZD. Exs. 105-108; RP 513. Zidell's CR 30(b)(6) representative testified that the two companies would communicate and coordinate with

[3] As further evidence of the overlapping business operations, Gobel served as the CR 30(b)(6) representative for *both* ZD and Zidell in this case. CP 1609.

one another for purposes of ship dismantling operations, and both Emery and Arnold Zidell visited the Tacoma job site while working for Zidell. RP 488-89, 514-16. On at least one occasion, a Zidell employee was loaned out to ZD. RP 517.

Richard Monroe worked with Dennis at ZD beginning in 1970 and stayed with the company for approximately ten years. RP 876, 888. Although a ZD employee, Monroe understood that the Zidell headquarters was in Portland. RP 877. Monroe testified to seeing Emery touring the Port job site as a representative of Zidell's leadership. RP 898-99. Monroe confirmed that, when Emery came up from Portland to tour the Tacoma job site on behalf of Zidell, he never conveyed any warnings regarding asbestos hazards. RP 899; *see also*, RP 527.

Lists of the Navy ships dismantled at the Portland and Tacoma facilities demonstrate Zidell's high level of integration with ZD. For instance, the *USS Philippine Sea*—which Dennis worked aboard—was initially taken to ZD before being sent to Portland where the dismantling was completed by Zidell. Ex.

111; RP 490. Monroe testified that "there was insulation [on] pretty much every part of the ship, so anything [they] took off had insulation," including the *Philippine Sea* specifically. RP 894–95.

Zidell took the lead with regard to marketing and sales of salvaged ship equipment for both Zidell entities. Throughout numerous issues of the *Maritime Reporter and Engineering News* magazine, advertisements prominently feature the Zidell logo alongside contact information for its own sales agent, followed by the sales agent for ZD. Exs. 112, 143; RP 520-23. In a May 1971 edition of the *Maritime Reporter*, Zidell placed a large advertisement for equipment salvaged from the *Philippine Sea*—all while that ship was still being dismantled at the Port by ZD. Ex. 112, at WOODRUFF_0033-34. The advertisement prominently featured the Zidell logo and contact information while declaring that all machinery and equipment was available for "IMMEDIATE SALE." *Id.*

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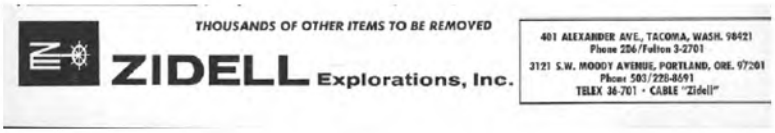

Zidell was advertising the "immediate sale" of equipment from the *USS Philippine Sea* during time the vessel was being dismantled at ZD in Tacoma. All this evidence demonstrates that Zidell retained the right to control how ZD performed its work, even though it never exercised its right. *Vargas*, 194 Wn.2d at 731.

Moreover, this right of control is reinforced by the guaranty clause Zidell signed. That guaranty clause was relevant evidence of retained control. *See Robey v. Walton Lumber Co.*, 17 Wn.2d 242, 255, 135 P.2d 95 (1943) ("An absolute guaranty is an unconditional undertaking on the part of the guarantor that

the debtor will pay the debt or perform the obligation."); *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 707, 952 P.2d 590 (1998) ("[T]he very nature of a guaranty is such that [the guarantor] created personal liability by his signature."). Zidell agreed to "jointly and severally guarantee *compliance* with all of the provisions" of the ZD lease, including the provisions requiring that the job site be kept in a *clean and safe condition*. Ex. 123 at 4; RP 610, 612. Like the guaranty language at issue in *Robey* and *Wilson*, this represented Zidell's absolute guaranty that ZD would perform its workplace safety obligations. *Robey*, 17 Wn.2d at 255. Put differently, Zidell *could not* have fulfilled its guaranty obligation if it did not retain some right to control how ZD performed its work such that it kept the job site in a clean and safe condition.

Division II did not conclude that Zidell retained control over ZD simply by virtue of specifying the work to be done. Ans. at 31. Nowhere did the court hold that simply "having some stockholders, directors, and officers in common allows one

corporation to control the other." Ans. at 33. Rather, the court cited in large part the evidence of *conduct, behavior, and interactions* set forth above demonstrating the overlapping and interconnected business operations between these two sister companies. Op. at 10-11, 17-18 ("[T]he nature of the relationship between the two companies shows that Zidell Explorations had the right to control Zidell Dismantling's work on the ships that Zidell Explorations owned.").

Similarly, there is no suggestion or argument here that either the jury or Division II at any time "disregarded" the separate corporate identities of ZD and Zidell or otherwise failed to "respect" the corporate form. Ans. at 31-33. In *Grayson v. Nordic Construction Company, Inc.*, 92 Wn.2d 548, 549-50, 551, 599 P.2d 1271 (1979), the trial court held the president, director, and majority stockholder of a company personally liable for breach of a contract entered into by the company. This Court reversed, holding that the evidence did not support an "alter ego" theory of liability required to pierce the corporate veil and

impose personal liability. *Id.* at 553. Unlike in *Grayson*, there was no finding of personal liability entered here against any officers, directors, or shareholders of Zidell. Neither Dennis nor the trial court applied an "alter ego" theory of personal liability or otherwise pierced the corporate veil. *See also*, *Morgan v. Burks*, 93 Wn.2d 580, 585, 611 P.2d 751 (1980) (disregarding corporate form to assess liability against shareholders). Rather, Zidell was found to be negligent for its own acts or omissions, not the acts or omissions of its shareholders. CP 4598-99.

"Respect for the jury's role in our civil justice system is rooted in Washington's constitution, which grants juries the ultimate power to weigh the evidence and determine the facts … ." *Coogan*, 197 Wn.2d at 811 (internal quotation omitted). Zidell does not challenge the jury's finding in this case that it was negligent and that such negligence was a proximate cause of Dennis's mesothelioma. Respect for the corporate form does not entitle a corporate defendant to unfettered immunity from civil

liability arising from its own negligent acts or omissions when it was under a duty to exercise ordinary care.

(2) Zidell Ignores the Jury's Determination of Conflicting Evidence and Disputed Facts

"If verdict is based on conflicting evidence, that of the prevailing party must be taken as true as well as all reasonable inferences deducible from such evidence." *Wylie v. Stewart*, 197 Wash. 215, 219, 84 P.2d 1004 (1938). In seeking review on duty, Zidell distorts the evidentiary record and flagrantly ignores the jury's interpretation of disputed facts, notwithstanding a finding by that same jury that Zidell was negligent and that such negligence was a proximate cause of Dennis's death. Because the factual misrepresentations are so numerous, they must necessarily be addressed and corrected in summary fashion.

(a) Dennis Worked on the *USS Philippine Sea* for Far More than "a Few Days"

Regarding work on the *USS Philippine Sea*, Zidell greatly stretches the definition of "undisputed" by claiming that Dennis's "stint as a laborer overlapped the ship's presence in

Tacoma by little more than a week." Ans. at 6. On this point, Division II inappropriately credited the "personal recollection" of Zidell's corporate representative, William Gobel, over the personal recollection of Dennis himself. Op. at 10. On the contrary, Dennis testified that he spent "maybe five months" on the *Philippine Sea*, but regardless of the exact amount, it "felt like a long time." RP 425. The reasonable inference to be drawn here is that Dennis spent weeks or even months working aboard that ship. The jury was free to accept Dennis's testimony over that of Gobel and Zidell, and this Court must defer to that determination. *Wylie*, 197 Wash. at 219.

(b) Woodruff's Work on the *USS Philippine Sea* Included the Disturbance and Removal of Asbestos Insulation

Zidell argues that "[ZD]'s limited work on the ship would not have disturbed any asbestos-containing materials, which were below deck." Ans. at 7. However, Monroe confirmed that "insulation from steam piping [was] removed from the *Philippine Sea* in Tacoma." RP 894. This could not have

occurred if, as Zidell claims, the only work performed on the ship was removal of the ship's above-deck island and wooden wear deck. Ans. at 6. The jury was free to accept Monroe's testimony over that of Gobel and Zidell, and this Court must again defer to that determination. *Wylie*, 197 Wash. at 219.

(c) Zidell Owned the *USS Philippine Sea* While it Was Dismantled in Tacoma by ZD

Zidell suggests that the "record does not reflect who owned the *USS Philippine Sea* while it was in Tacoma." Ans. at 6. Certainly, Zidell's corporate representative confirmed that neither Zidell nor ZD had any records regarding the purchase and sale of the *Philippine Sea*, or title documents for any ship whatsoever during that time period (due in no small part to Zidell's spoilation). RP 528, 532. However, the cruise book for the *Philippine Sea* demonstrated that Zidell continued purchasing vessels for ZD even after 1969, stating that the ship was "sold for scrap 23 March 1971 to Zidell Explorations, Inc., of Portland, Oregon." Ex. 303; RP 531. The jury was free to

draw a reasonable inference from this cruise book that Zidell, not ZD, owned the *Philippine Sea* while Woodruff worked on it in Tacoma, and this Court must defer to that determination. *Wylie*, 197 Wash. at 219.

(d) Dennis Was Not Contributorily Negligent for His Asbestos Exposures in Any Way

Zidell argues that Dennis "knew that parts of the ships being dismantled contained asbestos … knew that his co-workers who handled asbestos-containing materials wore masks to protect against exposures, [and] did not wear the mask [ZD] provided" while working as a laborer himself. Ans. at 4. However, Zidell's ham-handed implication here that Dennis was contributorily negligent is misleading. Dennis was given a respirator to protect him from metal fumes while working as a burner cutting pieces of metal apart—not for protection from asbestos. RP 445-46.

Dennis unambiguously testified that he never saw any other laborer wearing a respirator at any time, and he was never

told that asbestos was hazardous. RP 417-18, 424-25, 445. In fact, Dennis did not learn that asbestos could be hazardous until later in his career, during a union meeting sometime in the late 1970s. RP 425-26. Dennis testified that had he been warned of asbestos hazards while working at Zidell he would have "got ahold of the right authorities and turned them in, you know, brought it to their attention, 'Hey, this is not good.'" RP 426.

Even Gobel, Zidell's corporate representative who himself worked for a time at ZD, never wore a respirator while working as a laborer. RP 455-56. Even though Zidell understood that asbestos was used on the Navy ships it owned and was hazardous to human health, Gobel confirmed that Zidell never warned Dennis about the hazards of asbestos at any time. RP 454, 524-27. Not surprisingly, the jury found that Dennis was not contributorily negligent to any degree, CP 4599, and Zidell has never challenged that determination on appeal. This Court should treat with great skepticism the revisionist history advanced by Zidell for no purpose other than to disparage a man

whose death it caused, according to the jury.

(e) Dealings Between Zidell and ZD Were Hardly "Arms-Length" Transactions

Zidell suggests that while Zidell and ZD "occasionally exchanged assets or services, they dealt at arm's length to comply with IRS regulations and fiduciary duties to their shareholders." Ans. at 5. In support of this claim, Zidell cites the testimony of ZD's corporate secretary, Larry Richards. RP 1111, 1126-27. But Richards first started working for ZD in 1982 and could not have any personal knowledge regarding the business practices of the two companies in the early 1970s. RP 1131-33. Indeed, ZD was not even conducting any ship dismantling business by 1982, having transitioned into barge-building. RP 1133-34. Consequently, the jury was free to reject Richards's testimony in favor of the evidence depicting how Zidell and ZD interacted in the 1970s discussed *supra*, and this Court must defer to that decision. *Wylie*, 197 Wash. at 219.

D. CONCLUSION

This case has always sounded in ordinary negligence: the general duty to exercise ordinary care. A company cannot disseminate toxic materials into the public without addressing or warning the public about the hazards it creates. Moreover, to the extent Division II applied worksite owner principles to Zidell under the "retained control" doctrine, it did not err in applying the law to the facts of this case. Zidell retained the right to control the means and manner of the work being performed on its ships by ZD yet declined to exercise such control. Zidell owed Dennis a duty of care accordingly.

This document contains 4,122 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 1st day of June, 2023.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Petitioner's Response to Respondent's Petition for Conditional Cross-Review*** in Supreme Court Cause No. 101864-9:

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Original E-filed with:
Washington Supreme Court
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: June 1, 2023 at Seattle, Washington.

/s/ Matt J. Albers
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TALMADGE/FITZPATRICK

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Petitioner Response to Respondent's Petition for Conditional Cross-Review

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