No. 97683-0

SUPREME COURT OF THE STATE OF WASHINGTON

HEIDI SCHUYLEMAN; ESTATE OF JASON LYLE SCHUYLEMAN; SERENA SCHUYLEMAN; HAILEY WOOLSEY; COLLEEN SCHEWEKING; JULIA SCHEWEKING; SERENA SCHUYLEMAN; RICHARD LOTHROP,

Petitioners,

v.

BP WEST COAST PRODUCTS, LLC,

Respondent,

and

BRIAN JEFFREY SMITH and JANE DOE SMITH,

Defendants.

ANSWER TO PETITION FOR REVIEW

K. Michael Fandel, WSBA No. 16281
Kellen A. Hade, WSBA No. 44535
MILLER NASH GRAHAM & DUNN LLP
Pier 70, 2801 Alaskan Way, Suite 300
Seattle, Washington 98121
Tel: (206) 624-8300 / Fax: (206) 340-9599
Email: michael.fandel@millernash.com
kellen.hade@millernash.com

Attorneys for BP West Coast Products, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

Respondent-defendant BP West Coast Products, LLC ("BP") requests that the Court deny petitioner-plaintiff Heidi Schuyleman's petition for review. Schuyleman asks the Court to review orders granting BP summary judgment and denying reconsideration issued by Whatcom County Superior Court Judge Charles Snyder (the "Orders"). The Orders dismissed claims arising from an alcohol-free children's holiday party. Nearly two hours after the party ended, one of the attendees was involved in a traffic accident that unfortunately killed Jason Schuyleman.

No doubt this case involves tragic facts but also ordinary issues of law on which the two courts below agreed. This Court should deny review because the Orders neither conflict with this Court's precedent nor implicate an issue of substantial public importance—the only bases that Schuyleman argues support review. RAP 13.4(b)(1), (4). The Orders' application is narrow and tailored to these facts, and the Court of Appeals unpublished opinion—though correct—has limited precedential value. There simply is no compelling reason to accept review. The Court should deny the petition.

A. Factual Background

BP owns and operates the Cherry Point Refinery. Each December, an unpaid group of refinery employees called the Cherry Point Rec Club organ-

ize an "Annual Children's Christmas Party" for refinery employees, retirees, and contractors ("Party"). Clerk's Papers ("CP") at 132. The Party is designed for kids up to twelve years old. *Id.* Volunteers serve milk, juice, and snacks, and the Party features kid-friendly activities like craft tables, face painting, a cake walk, and the chance to take pictures with Santa. *Id.*; *see also* CP at 137, 139-148.

The Party is not—and has never been—an adult event. *Id.* The Rec Club does not provide, encourage or condone alcohol there. *Id.* Schuyleman could not find anyone who had seen alcohol at a party before, in some cases extending back decades. CP at 61 (alcohol was "[a]bsolutely not" allowed at the Party); 132 ("no alcohol is provided" at the Party, "and in [the witness's] 39 years attending and participating in the event, [she has] never known of anyone drinking or being intoxicated at the Party"); 223-24 ("Zero tolerance for alcohol" at the event); 243 ("There has never been drinking" at the party"); 264-65 (never observed drinking at the Party).

In 2014, the Party was held at the Lynden Fairgrounds on Friday afternoon, December 5 from 3:00 to 7:00, and billed as "an afternoon of fun and games." CP at 132, 137. Attendance at the event is voluntary: many refinery employees and contractors with young children attend but many others do not. *Id.*; *see also* CP at 223. The Rec Club did not track attendance and there was no consequence, good or bad, to employees who chose to at-

tend or not to attend. CP at 132-33. No alcohol was seen or served at the 2014 party. *Id*.

On the day of the 2014 Party, BP employee Brian Smith worked at the refinery until 5:00 pm. He changed his clothes and then traveled to the Party to meet his family, who had arrived earlier in a separate car. CP at 384-85. Smith arrived at the Party around 5:20 pm and spent less than two hours there. *Id.* Witnesses described watching Smith attend to his children as they participated in activities and ate the snacks. CP at 133. Smith also interacted with many coworkers, all of whom testified that Smith did not appear intoxicated. CP at 44-45, 51-53, 62-63, 69-74 and 93-94. In total, Schuyleman deposed nineteen of Smith's coworkers and Smith himself. CP at 35. None have contradicted or controverted the testimony about Smith's sober appearance at the Party. No witness has testified that Smith drank alcohol or appeared intoxicated there.

The Party ended at 7:00 pm. CP at 391. Smith helped his wife get their children in her car and left the parking lot at around 7:15 pm. CP at 83. From there, Smith drove alone to the Rusty Wagon restaurant in Ferndale, where he had dinner with his and his sister's families. *Id.* During dinner, a server observed that Smith was slow to respond to questions and lacked direct eye contact, although he did not smell of alcohol. CP at 9. Smith paid for his family's dinner at 8:19 pm. CP at 104. Following dinner, at around 8:30

pm and after drinking at least one beer in the parking lot in his wife's car, Smith left the Rusty Wagon and headed home, again driving alone. CP at 84-86.

At about 8:43 pm, Smith was involved in a collision with a motorcycle driven by Jason Schuyleman, who later died. CP at 104-106. Washington State Trooper Bradley Beattie arrived at the accident scene at about 9:07 pm. *Id*. Unlike what coworkers observed at the Party, Trooper Beattie reported that at around 9:30 pm, some two and a half hours after he left the Party, Smith's eyes were bloodshot and watery, his speech was slurred. Also, unlike what the Rusty Wagon server had observed, at the accident scene Mr. Smith smelled strongly of alcohol. *Id*. Smith was arrested and, three and a half hours later, a blood test measured his blood alcohol content at 0.05. *Id.*

B. Schuyleman's claims and the Orders

Schuyleman sued BP based on alternative theories of liability. First, Schuyleman claimed that BP was vicariously liable for Smith allegedly drinking to intoxication at the Children's Christmas Party and later causing Mr. Schuyleman's death. Second, Schuyleman claimed that BP was directly liable for its own negligence in failing to prevent Smith from leaving the party at all. After lengthy discovery—during which Schuyleman deposed almost 20 witnesses, none of whom testified that

Smith drank alcohol or appeared intoxicated at the party—BP moved for summary judgment.

At the hearing, BP argued that Schuyleman could not establish any of the elements of her vicarious liability claim. It contended that the Party was not "hosted" by BP, that there was no evidence to establish that Smith drank to intoxication (or drank at all) at the party, that the accident did not occur on Smith's way home from the party, and that Plaintiffs could not establish proximate cause. BP also argued that it was not directly negligent because the legal basis for that theory did not apply. The trial court granted BP's motion and later denied Schuyleman's motion to reconsider.

C. The Court of Appeals' Opinion.

After this Court denied direct review, a unanimous Court of Appeals panel affirmed the trial court's decisions in an unpublished opinion. As to Schuyleman's vicarious liability claim, the appellate court held that this case did not fit under the rule this Court created for "banquet-hosting" employers, since unlike the employer in every other case applying that rule, BP did not supply alcohol at the event. Opinion at 7-8 ("We decline to apply the banquet-hosting employer analysis for vicarious liability to an employer who did not supply alcohol to employees or explicitly or implicitly condone drinking at an afternoon company Christmas party aimed toward young children.").

As to the direct negligence claim, the appellate court applied settled rules in the Restatement and held that BP had no duty to protect third parties from employees acting outside the scope of employment and away from BP's premises. Opinion at 9 ("[U]nless the employee is using a chattel of the master, an employer has a duty to protect third persons only from acts of an employee that are committed while the employee is on the employer's premises," citing Restatement (Second) of Torts§ 317(a) (emphasis in original)).

The Court of Appeals denied Schuyleman's motions to reconsider and publish the Opinion.

II. ARGUMENT

A. Standard for Review.

This Court accepts discretionary review in few circumstances. RAP 13.4(b). Schuyleman asserts that review is appropriate for two reasons: (i) the Orders somehow conflict with this Court's precedent; and (ii) this case presents an issue of substantial public importance. *Id*. at (b)(1),(4). Neither of those bases warrants review.

B. Vicarious Liability Claim: There is No Conflict with Any Decision of This Court.

Schuyleman first argues that the trial court and the appellate court misconstrued this Court's law in dismissing her vicarious liability claim. The primary authority underlying both decisions is *Dickinson v. Edwards*,

this Court's decades-old, seminal decision on employer-host liability. There, an employer sponsored an event where it served employees wine and hard liquor that the employer bought. 105 Wn.2d 457, 459 (1986). The employer instructed staff to "keep the [employees'] glasses filled." *Id*. at 459-60. A company employee consumed at least 15 drinks bought by the employer, then collided with another motorist on the road as he was leaving the party. The motorist sued the employer, alleging it was vicariously liable for the employee's drunken driving.

In a plurality opinion, this Court acknowledged the common law rule that an employer is generally not liable for acts of employees while they travel to or from work (the "going and coming rule"). It then announced a "new application of the doctrine of *respondeat superior*, which may allow a plaintiff to recover from a banquet hosting employer without damaging the 'going and coming' rule." 105 Wn.2d at 468. Under *Dickinson's* rule, employers can be vicariously liable to third parties if the proximate cause of the injury—the employee's consumption of alcohol to the point of intoxication—occurred while the employee was acting within the scope of his employment. While *Dickinson* is not expressly limited to situations where the "hosting" employer provides alcohol, the Court of Appeals found that limitation implied because "[t]here would be no foreseeable risk of harm to third parties from an employee driving home from a company party at

which the employer did not provide alcohol or encourage drinking." Opinion at 7.

The Court of Appeals' Opinion is consistent with *Dickinson*. In creating its rule, *Dickinson* declined to adopt a "special errand" exception to the going and coming rule. 105 Wn.2d at 468. Instead, the Court focused on whether the employee's drinking was an aspect of work from which his employer benefited, analogizing to a decision a few years earlier in *Flavorland Indus., Inc. v. Schumacker*, 32 Wn. App. 428, 647 P.2d 1062 (1982). Like *Dickinson*, *Flavorland* involved an employer that paid for liquor consumed offsite by an employee who became intoxicated and was later involved in a fatal car accident. Evidence showed that the employer expected the employee to socialize with clients after hours as part of the job, during which time the employer encouraged drinking. *Id*., 32 Wn. App. at 433. The employee used a company charge account to pay these weekly bar tabs. *Id*. at 430. Given those facts, *Flavorland* upheld a jury's finding that the employee's drinking furthered his employer's business and so was within the scope of employment when he became intoxicated and died in a car accident after leaving the bar.

The *Flavorland* court was explicit that the going-and-coming rule did not apply only because the employer benefited from the employee's

drinking, which was part of the job. The court contrasted situations where the employer does not expect its employee to drink:

> The present case must be distinguished from those where the consumption of alcohol is unrelated to the worker's job activities. . . . There was no anticipation by the employer that the worker would be consuming alcohol. Here, [the] job included socializing where alcohol was served.

Id. at 435. *Dickinson* interpreted *Flavorland* as analogous to and consistent with its new vicarious liability rule—not as a departure from the coming-and-going exception—by similarly focusing on the benefit to the employer from the employee's drinking. *Dickinson*, 105 Wn.2d at 467-68. Unless the employer's benefit is tied to the drinking as in *Flavorland*, then *Dickinson* swallows the going-and-coming exception every time an employee gets drunk and leaves the workplace.

Washington cases since *Dickinson* have applied its rule without conflict. For example, this Court had the chance to revisit the case in *Fairbanks v. McLoughlin*, which involved an employee who drank on her employer's tab for three hours and then hit a motorist soon after leaving the party. *Id*., 131 Wn.2d 96, 100 (1997). In *Fairbanks* there was no dispute that the employer required employee attendance at a banquet where it served alcohol; the sole issue there was whether the employee drank to intoxication at the banquet. Rather than deviate or change the rule, the *Fairbanks* court explicitly endorsed *Dickinson*'s analysis. *Fairbanks v. J.B. McLoughlin Co.*, 131

Wn.2d 96, 100–01 (1997) (citing *Dickinson*, 105 Wn.2d at 468). And this Court cited both *Dickinson* and *Fairbanks* favorably relatively recently. *See Faust v. Albertson*, 167 Wn.2d 531, 540 (2009).

Schuyleman argues that the Court of Appeals erred by holding that "the employer is not vicariously liable unless the employer furnished the alcohol or encouraged drinking at the party." Petition for Review at 9. But that holding far from conflicts with *Dickinson* or *Fairbanks*: it is what those courts meant when they made "hosting" by the employer an element of the type of vicarious liability claim Schuyleman is pursuing. Schuyleman argues that "host" broadly means someone who organizes a gathering, ignoring that the term is one of art that means furnishing alcohol.[1] Accepting that *Dickinson* fashioned its test using the colloquial definition of such an important term extends vicarious liability far past the Court's rationales for it. The crux of that case and the authorities it relied on is that the employer creates a foreseeable risk of harm to third parties, not merely by holding an event, but by serving excessive amounts of alcohol there, knowing employees will drive home later. *See Dickinson*, 105

[1] Liquor liability law distinguishes between three types of "hosts": commercial hosts, quasi-commercial hosts and social hosts. *See generally* 16A Wash. Prac., Tort Law and Practice §§ 29:1-6 (4th ed.). All of these hosts serve alcohol to their guests. Thus, in his concurring opinion in *Dickinson*, Justice Utter states that "[t]he dissent first errs in assuming that the world of hosts is neatly divided into those who would serve liquor for social purposes and those who would serve it for commercial purposes." 105 Wn.2d at 472.

Wn.2d at 475 (Utter, J., concurring); *see also* Patrick J. Barry, *Employer Liability for a Drunken Employee's Actions Following an Office Party: A Cause of Action under* Respondeat Superior, 19 CAL. W. L. REV. 107, 120 (1982) (cited by *Dickinson*, 105 Wn.2d at 469-70). It makes sense for those banquet-hosting employers to bear the cost of that risk, especially when an open bar benefits the employer by increasing employee goodwill.

Those same justifications are missing when an employer does not serve alcohol at a company event. Here, for example, there was no reason for BP to foresee that the alcohol-free, kid-focused party created a risk of drunken driving. No alcohol had ever been seen at this party in the years before 2014, and BP employees testified they understood alcohol was not allowed. There were no prior alcohol-related incidents. If employees secretly drank their own alcohol at the party, their consumption did not benefit BP like consuming free drinks did for the employers in *Dickinson* or *Fairbanks*. And Schuyleman's argument swallows the going-and-coming rule that *Dickinson* sought to protect.

The *Dickinson* rationale could arguably be extended to employers who encourage alcohol consumption at a mandatory company event even if they don't serve it, because then the drinking arguably benefits the employer (by increasing employee morale, perhaps). But those are not the facts here, making this case is a poor vehicle to use to consider refining

Dickinson's rule. BP could not have benefitted by employee drinking it knew nothing about. The children's holiday party was not BYOB, either explicitly or implicitly. There were no drink coupons. There is no evidence that BP ever condoned or tolerated alcohol there. Common law rules should not be developed in the abstract; instead, this Court's law-making is best exercised incrementally by applying established law to facts actually before it. *See Adamson v. Port of Bellingham*, 193 Wn.2d 178, 184, 438 P.3d 522 (2019). This record does not give the Court a good opportunity to clarify or reform *Dickinson*.

Simply put, nothing in the appellate court's Opinion disturbs this Court's rule for banquet hosts: employers who serve alcohol to employees may still be vicariously liable for the injuries that employees cause after leaving the event. Those were the facts in *Dickinson* and *Fairbanks*, and they are not the facts here. For that reason, there is no conflict and RAP 13.4(b)(1) is not a basis to accept review.[2]

C. Direct Negligence Claim: There Are No Issues of Substantial Public Importance.

Schuyleman argues that the Court should review the dismissal of her direct negligence claim because it "involves an issue of substantial

[2] The Court of Appeals reached only the threshold question of whether BP was a "banquet hosting employer" under *Dickinson*. It did not address BP's alternative arguments, all of which are independent bases to affirm the trial court. *See* Br. of Resp. at 14-20.

public interest." Petition for Review at 14 (citing RAP 13.4(b)(4)). Review under RAP 13.4(b)(4) is reserved for critical issues that have a statewide impact. For example, this Court noted that the "prime example of an issue of substantial public interest" was an appellate decision that had "the potential to affect every sentencing proceeding in Pierce County." *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (emphasis added). This Court has also reviewed cases involving such substantial public issues as sex offender registration, termination of parental rights and statutory child support obligations. *See Matter of Arnold*, 189 Wn.2d 1023, 408 P.3d 1091 (2017); *In Re Adoption of T.A.W.*, 184 Wn.2d 1040, 387 P.3d 636 (2016); *In re Marriage of Ortiz*, 108 Wn.2d 643, 646, 740 P.2d 843 (1987). This Court's decisions in all of those cases necessarily has wide-reaching effects and is important to more than just the parties involved.

In contrast, Schuyleman suggests that this case involves "the recurring fact pattern of an employee who gets drunk at a holiday party and then causes a fatal accident on the highway." Petition for Review at 14. Setting aside that there's no evidence that Smith drank at the holiday party, important here is the lack of any evidence that alcohol-free company events are creating a recurring risk of harm to the public. Schuyleman offers nothing, either factually or anecdotally, from which the Court can

conclude that its decision will affect anyone other than Shuyleman and BP.

If this case implicates public policy at all, that policy supports *denying* review and permitting the Court of Appeals' decision to stand. The natural consequence of Schuyleman's position—a rule imposing strict liability on employers to prevent clandestine drinking—is that employers will stop having company events at all. This concern was forefront in the minds of the Court of Appeals:

> THE COURT: Did I hear you say that the risk is the same whether alcohol is or isn't served? Essentially an employer would just not have to have any of these events if it wanted to shield itself from liability if we adopt your rule, is that true?
>
> PETITIONER'S COUNSEL: That's correct. That is correct your honor.
>
> THE COURT: ***You're asking us to tell employers that you have holiday celebrations at your risk. Regardless of what your rules are***.[3]
>
> * * *
>
> THE COURT: I want to circle back to something that concerns me, and that is that if we adopt the approach you've taken, then we've essentially told employers: "No holiday celebrations of any kind without liability." ***And that seems***

[3] Oral Argument Hr'g, Division I, Washington Court of Appeals, at 2 min., 22 sec., *audio recording at* https://www.courts.wa.gov/content/OralArgAudio/a01/20190611/.

> ***like, really, an unsatisfactory result from a society perspective***.[4]

Schuyleman cannot show that the public is substantially interested in this Court creating a rule imposing liability that will likely cut (if not eliminate) company events, summer BBQs and holiday parties, even those that are alcohol-free.

D. Case-Specific Evidentiary Issues Do Not Warrant Review.

Finally Schuyleman interlaces certain fact-specific evidentiary issues among her bases for review. Those issues have little importance to anyone but the parties here. This Court's opinion thus would be limited to this record, which would similarly restrict its ability to contribute to the broader common law. This Court's time is reserved for "significant" legal questions and issues of "substantial" interest. *See* RAP 13.4(b). One-off evidentiary rulings are neither.

III. CONCLUSION

This is not a case that warrants discretionary review. For the reasons stated above, Schuyleman has failed her burden to show that RAP 13.4(1) or (4) apply to the issues she raises, and BP asks this Court deny the petition for review.

---

[4] *Id*. at 20 mins, 23 sec. (emphasis added).

DATED this 17th day of October, 2019.

K. Michael Fandel, WSBA No. 16281
Kellen A. Hade, WSBA No. 44535
MILLER NASH GRAHAM & DUNN LLP
2801 Alaskan Way, Suite 300
Seattle, WA 98121-1128
Tel: (206) 624-8300
Fax: (206) 340-9599
Email: michael.fandel@millernash.com
kellen.hade@millernash.com

Attorneys for Respondent BP West Coast Products LLC

DECLARATION OF SERVICE

I, Jennifer Schnarr, hereby declare under penalty of perjury under the laws of the State of Washington, that on this 17th day of October, 2019, a copy of the foregoing document was served on the following via electronic mail, at the address set forth below.

William Johnston
Attorney at Law
401 Central Avenue
Bellingham, WA 98225
wjtj47@gmail.com

Mark Dietzler
Law Offices of Sweeney & Dietzler
1001 Fourth Avenue, Suite 3300
Seattle, WA 98154-1101
Mark.Dietzler@LibertyMutual.com

SIGNED in Seattle, Washington this 17th day of October, 2019.

Jennifer L. Schnarr
Legal Assistant

4817-8045-6614.3

MILLER NASH GRAHAM & DUNN

October 17, 2019 - 1:42 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97683-0
Appellate Court Case Title:	Heidi Schuyleman et al. v. BP West Coast Products, LLC, et al.
Superior Court Case Number:	14-2-02823-3

The following documents have been uploaded:

- 976830_Answer_Reply_20191017133927SC612406_0453.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was BP Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- Mark.Dietzler@LibertyMutual.com
- Michael.Fandel@millernash.com
- gdouglas44@hotmail.com
- jean069s.young@libertymutual.com
- jennifer.schnarr@millernash.com
- wjtj47@gmail.com

Comments:

Sender Name: Emily O'Neill - Email: emily.oneill@millernash.com
Filing on Behalf of: Kellen Andrew Hade - Email: kellen.hade@millernash.com (Alternate Email: SeaLitSupport@millernash.com)

Address:
Pier 70
2801 Alaskan Way, Suite 300
Seattle, WA, 98121
Phone: (206) 777-7542

Note: The Filing Id is 20191017133927SC612406