NO. 100768-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Plaintiff/Respondent,

v.

EXXONMOBIL OIL CORPORATION,

Defendant/Petitioner.

RESPONDENT'S OPPOSITION TO BUILDING INDUSTRY ASSOCIATION OF WASHINGTON'S AMICUS MEMORANDUM BRIEFING

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I. INTRODUCTION

The amicus curiae brief submitted by the Building Industry Association of Washington ("BIAW") in support of the Petition for Review of Defendant-Petitioner ExxonMobil Oil Corporation ("Mobil") fails to justify review by the Washington Supreme Court. BIAW lectures on the importance of protecting premises owners, like Mobil, who engage independent contractors, like Northwestern Industrial Maintenance ("NWIM"), because BIAW claims the contractor typically has more control over and specialized knowledge about the hazard.

But that is not this case. Instead, the record evidence establishes that Mobil invited unsophisticated contract workers onto its premises and then, subject to Mobil's control and with Mobil's knowledge, allowed those workers to unknowingly endanger themselves by engaging in unsafe but presumably cost-saving practices forbidden to Mobil's own employees. The law allows—and should allow—for liability in such circumstances.

BIAW neglects this evidence of Mobil's control and expertise, thus rendering the majority of its arguments—predicated on a premises owner's lack of control and expertise—irrelevant. Moreover, BIAW omits any analysis of whether the danger here was known or obvious, so as to warrant a section 343A instruction. These misapprehensions of the record and the law mean BIAW's claims about the consequences of the Court of Appeals' decision are not just overwrought but unfounded. BIAW's amicus brief does not present any reason for review, and the Petition for Review should be denied.

II. BIAW MISREPRESENTS THE RECORD REGARDING MOBIL'S CONTROL OVER NWIM EMPLOYEES' WORK

An amicus curiae must be familiar with the record, including all briefs on file. RAP 10.3(e). BIAW, however, has seemingly neglected to review the factual record here, as it maintains incorrectly that Mobil lacked control over whether NWIM workers "perform[ed] their work with appropriate

precaution."[1] *See* Amicus. Br. at 1. To the contrary, as Plaintiff-Respondent Wayne Wright ("Plaintiff") explained in the Court of Appeals, Mobil "possessed the right to control the work of NWIM in many significant ways, particularly on matters of safety":

> Mobil required NWIM to comply not merely with state and federal regulations, but also additional policies and procedures applicable to Mobil's own employees. These policies required contract workers to, among other things, secure work permits from Mobil personnel before commencing certain work . . . Mobil provided training and safety

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[1] In the Court of Appeals, Mobil argued that the jury instructions *permitted* the jury to find for Plaintiff on his retained-control claim solely on the basis of a contractual provision requiring Warren Wright's employer to comply with prevailing safety laws. The Court of Appeals agreed, Op. 6-7, though Plaintiff argued, among other things, that no contract was ever located and that Mobil failed to raise the issue in the trial court, where Mobil had in fact argued essentially the opposite, COA Resp. Br. at 24-25. *Accord* 1 RP 1777 ("That was a contractual agreement in that case. We have no contract in this case, your Honor, that's why we don't believe it's applicable."); CP 1850 (arguing there is no contract for the jury to consider and "the only evidence in this case came from the co-workers"). As explained herein, BIAW's suggestion that there was insufficient *evidence* of Mobil's control over the precautions NWIM workers employed is contrary to the record.

> information to contractors to inform them of Mobil's rules and potential hazards at the refinery.
>
> NWIM supervisors regularly reported to and received assignments from Mobil personnel. A NWIM supervisor testified that he met with Mobil personnel more than his own boss and that he expected Mobil personnel rather than his boss would correct NWIM's work if it had been inadequate. Indeed, Mobil asserted the right to correct a contractor if its workers, for example, mishandled asbestos-containing materials.

COA Resp. Br. at 8 (internal citations and footnote omitted). In his response to Mobil's Petition, Plaintiff again emphasized the extent of Mobil's control over NWIM's safety measures:

> Mobil supplied NWIM workers with gloves, tools, and the very 3M 8710 dust masks they used to protect against dust inhalation. Mobil controlled access to the water NWIM workers used for wetting down insulation. Mobil tested the air in vessels to ensure it was safe for NWIM personnel to enter. When contract workers like NWIM would handle asbestos, Mobil designated a supervisor or representative to have responsibility for "mak[ing] sure . . . that they had the right amount of manpower, that they had the protective gear that they needed," and that "contractors [were] following [Mobil's] asbestos handling procedure."

Resp. to Pet. at 9 (internal citations omitted).

BIAW does not even mention this record evidence, let alone respond meaningfully. Instead, it falls back on a conclusory statement, unsupported by any citation, that NIWM and not Mobil controlled whether employees like Mr. Wright took appropriate safety precautions. *See* Amicus Br. at 1. BIAW's apparent unfamiliarity with the record undermines both its status as amicus curiae and its arguments for review.

III. BIAW MISREPRESENTS THE RECORD ON MOBIL'S KNOWLEDGE OF ASBESTOS AND PROPER SAFETY PRECAUTIONS

BIAW similarly ignores the record in asserting that NWIM and Mr. Wright had "greater expertise" than Mobil regarding asbestos and the appropriate safety measures. *See* Amicus Br. at 9-10. Again, Plaintiff laid out Mobil's "significant knowledge of the hazards of asbestos" in its briefing below:

> [Mobil] had a large, nation-wide industrial hygiene department dedicated to protected workers in the workplace, as well as a medical department and a safety department, which aimed to stay abreast of developments regarding potential workplace hazards. It had long belonged to trade organizations that circulated health and safety information, including information related to asbestos . . .

> [B]y 1979[when Warren Wright began working on the premises], "Mobil was acutely aware of the hazards . . . of asbestos to the human body," "knew what the medical and scientific information was," and "followed all the state of the art."

COA Resp. Br. at 3 (internal citations omitted); *see also* Resp. to Pet. at 4-5. In comparison, NWIM was far less sophisticated:

> [NWIM] had been operating in Washington for only about a year when hired by Mobil. At that time, NWIM was run by three men working out of an "old house" . . . seemingly without even a place to store tools. It had no doctor or industrial hygienist. While NWIM employees may have had some general understanding that they should avoid breathing asbestos dust, they did not understand asbestos had been linked to cancer. They had no formal training or education about asbestos until . . . roughly 1984 . . . [NWIM] did not hold itself out as having expertise in asbestos abatement.

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

As with Mobil's control, BIAW does not address this uncontroverted evidence of Mobil's superior knowledge of the

dangers of asbestos. Thus, this case is fundamentally different from those cited by BIAW, where the contractor had more control over and knowledge of the hazard. *See Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 126-27, 52 P.3d 472 (2002); *Golding v. United Homes Corp.*, 6 Wn. App. 707, 711-12, 495 P.2d 1040 (1972).

Nor does this case involve a contractor and workers who "knew of the dangerous conditions and the relevant safety precautions, but nevertheless performed their labor in a manner that did not appropriately account for the danger," as in *Kessler v. Swedish Hosp. Med. Ctr.*, 58 Wn. App. 674, 794 P.2d 871 (1990), and *Bozung v. Condo. Builders, Inc.*, 42 Wn. App. 442, 711 P.2d 1090 (1985). *See* Amicus Br. at 10. Quite the opposite: as the Court of Appeals concluded, Mr. Wright took every precaution to account for all the danger known to him. Op. 12. But his and NWIM's knowledge paled in comparison to that of Mobil, and in these circumstances, section 343A's protections do not extend to the premises owner. Again, BIAW's apparent

unfamiliarity with the record undermines both its status as amicus curiae and its arguments for review.

IV. BIAW CONFLATES THE PREMISES CLAIM AT ISSUE IN MOBIL'S PETITION WITH OTHER CLAIMS NOT AT ISSUE

BIAW's statements—citing *Kamla* and *Kelly v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978), *see* Amicus Br. at 3-4—regarding the general rule of non-liability for those who employ independent contractors relate not to premises claims but to retained-control claims, which are not at issue in Mobil's petition. These claims have different elements and are supported by different rationales, and BIAW repeatedly conflates the two. *See* Amicus Br. at 3-4.

Similarly, BIAW quotes from the Iowa case *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689 (Iowa 2009). *See* Amicus Br. at 4. However, that case did not involve a premises claim under section 343. *Van Fossen*, 777 N.W.2d at 693 ("Van Fossen's claim on appeal . . . is not based on the well-established special duty of possessors of real estate to protect non-trespassers

against dangerous conditions on real estate. *See* Restatement (Second) of Torts § 343, at 215–16 (1965).”). Instead, the passages cited arise from a discussion that is both factually and legally distinct from the circumstances of this case. It is factually distinct because it relates to whether one who hires an independent contractor owes duties to the *spouse* of the contractor’s employee. *See id.* at 696-98. And it is legally distinct because it relates to an expansive theory—a general duty to exercise reasonable care—that is seemingly unavailable against premises owners in Washington,[2] and because it relates to application of an exception to any such duty based on a section of the Restatement (Third) of Torts has never been cited by a Washington court. *See id*.

[2] The Washington Supreme Court has declined to abandon traditional premises liability standards of care owed by owners or occupiers of land in favor of a “standard of reasonable care under all the circumstances.” *Younce v. Ferguson,* 106 Wn.2d 658, 662, 724 P.2d 991 (1986).

V. BIAW ASSUMES THAT A SECTION 343A INSTRUCTION WAS NECESSARY WITHOUT ANY ANALYSIS ON WHETHER THE DANGER WAS KNOWN OR OBVIOUS

BIAW's briefing makes clear that section 343A only applies when a hazard is known or obvious. *See, e.g.*, Amicus Br. at 9-11. And yet, BIAW conducts no analysis on the "knowledge" necessary to implicate section 343A. *See generally id.* They simply point to the same evidence that Mobil identified of Mr. Wright's general knowledge of asbestos. *Id.* at 9.

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

there must be substantial evidence that Warren Wright knew not only of the asbestos at his workplace but also the probability and gravity of the risk presented by that asbestos.

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

VI. BIAW'S FEARS REGARDING THE PURPORTED CONSEQUENCES OF THE COURT OF APPEALS' UNPUBLISHED AND NONBINDING OPINION ARE UNFOUNDED

BIAW predicates its long list of horribles that will purportedly parade from the Court of Appeals' decision on its

belief that the decision was "[e]liminating the 'known or obvious' exception." Amicus Br. at 11. The Court of Appeals did no such thing. Not only is the decision unpublished and therefore nonbinding, it also specifically reiterates that "it is ordinarily the better practice to give both Section 343 and Section 343A(1) instructions." Op. 8. Moreover, because this case does not implicate section 343A in the first place, it does not, as BIAW prophesies, reallocate responsibility for the safety of workers to premises owners, and as explained, further review by this Court would necessarily result in ratification of the decision to omit a section 343A instruction in this case.[3]

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[3] In addition, premises liability claims are limited no matter the effect of this case. Premises liability necessarily depends on a plaintiff's status, for example, as an invitee or licensee. Liability to invitees lies only where a premises owner knew or should have known both of the danger at issue and that an invitee will not realize or protect against it, and only where the premises owner fails to take reasonable precautions. Reasonable care, in turn, depends on the circumstances confronting the premises owner and is limited by what is foreseeable. And premises claims are subject to the full panoply of affirmative defenses that may apply in any case. *Accord H.B.H. v. State*, 192 Wn.2d 154, 177,

Put simply, this case, which did not involve a known or obvious danger, does not eliminate application of section 343A in cases where the risk is truly known or obvious. Instead, application of section 343A here where there is no known or obvious danger, as BIAW proposes, would disregard the Restatement's admonition that "[t]he word 'known' denotes... appreciation of the danger [an activity] involves." Restatement (Second) of Torts § 343A, cmt. b (1965).

VII. CONCLUSION

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

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429 P.3d 484, 496 (2018) (rejecting arguments about "limitless liability" because such protections exist).

DATED this 21st day of June, 2022.

I certify that this document contains 2381 words, in compliance with the RAP 18.17.

Respectfully submitted,

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