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.

AMICUS MEMORANDUM OF WASHINGTON RETAIL ASSOCIATION, WASHINGTON FOOD INDUSTRY ASSOCIATION, ASSOCIATION OF WASHINGTON BUSINESS, AND WASHINGTON HOSPITALITY ASSOCIATION IN SUPPORT OF DEFENDANT/PETITIONER

Aaron V. Rocke, WSBA No. 31525
Rocke Law Group, PLLC
500 Union St., Ste 909
Seattle, WA 98101
(206)652-8670

Counsel for Amicus Washington Food Industry Association.

D. Michael Reilly, WSBA No. 14674
Ryan McBride, WSBA No. 33280
Lane Powell PC
1420 Fifth Avenue, Suite 4200
Seattle, WA 98101
(206) 223-7000

Counsel for Amicus Washington Retail Association.

Robert A. Battles, WSBA No. 22163
General Counsel
Association of Washington Business
1414 Cherry St. SE
Olympia, WA 98501
(360) 943-1600

Counsel for Amicus Association of Washington Business.

John Lane, WSBA No. 31541
Washington Hospitality Association
510 Plum St. SE
Olympia, WA 98501
(360) 956-7279

Counsel for Amicus Washington Hospitality Association.

TABLE OF CONTENTS

Page

I. INTRODUCTION 1
II. INTEREST OF THE AMICI CURIAE 3
III. ARGUMENT 3
A. The "known or obvious" danger doctrine reaches a broad spectrum of circumstances and may be determinative in a premises liability case 3
B. Dispensing with the "known or obvious" danger exception will impose unjustified costs on premises owners and negatively impact the state 6
C. The Court of Appeals' decision undermines the continued vitality of the "known or obvious" danger exception to premises liability 11
IV. CONCLUSION 15
CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

Page(s)

Cases

Baber v. Dill,
531 N.W.2d 493 (Minn. 1995) 9

Bd. of Regents of Univ. of Wash. v. Frederick & Nelson,
90 Wn.2d 82, 579 P.2d 346 (1978) 12

Caron v. Grays Harbor Cnty.,
18 Wn.2d 397, 139 P.2d 626 (1943) 7, 8

Dombrowski v. Corp. of the Catholic Archbishop of Seattle,
No. 80283-6-I, 15 Wn. App. 2d 1037, 2020 WL 7027543 (Nov. 30, 2020) 4

Hymas v. UAP Distribution, Inc.,
167 Wn. App. 136, 272 P.3d 889 (2012) 1

McDonald v. Cove to Clover,
180 Wn. App. 1, 321 P.3d 259 (2014) 5

Roumillat v. Simplistic Enters., Inc.,
414 S.E.2d 339 (N.C. 1992) 8

Stuart v. Coldwell Banker Comm. Grp., Inc.,
109 Wn.2d 406, 745 P.2d 1284 (1987) 7

Swank v. Valley Christian Sch.,
188 Wn.2d 663, 398 P.3d 1108 (2017) 7

Warner v. Simmons,
849 N.W.2d 475 (Neb. 2014) 8

Webert v. Seattle Univ.,
No. 64851-9-I, 161 Wn. App. 1018, 2011 WL
1533506 (2011) 5

Restatement

Restatement (Second) of Torts § 343 ..... 1, 3, 6, 7, 13

Restatement (Second) of Torts § 343A ..... *passim*

Other Authorities

C. Peter Goplerud III & Nicolas P. Terry,
*Allocation of Risk Between Hockey Fans &
Facilities: Tort Liability After The Puck Drops*,
38 Tulsa L. Rev. 445, 449-50 (2003) 8

J.P. Morgan Chase & Co., *Cash is King: Flows,
Balances, and Buffer Days* 22 (2016),
https://tinyurl.com/23tfhcn3 10

McKinsey & Co., *COVID-19's effect on jobs at
small businesses in the United States* 4 (May
2020), https://tinyurl.com/2p85znh2 10

Paul Roberts, *The deepening economic divide:
How the pandemic has hurt small businesses*,
Seattle Times (Mar. 28, 2021) 10

Small Bus. Assoc. Off. of Advoc., *Impact of
Litigation on Small Business* 12 (October
2005), https://tinyurl.com/4wjpsyaa; 10

U.S. Chamber Inst. for Legal Reform, *Tort
Liability Costs for Small Businesses* 3 (October
2020), https://tinyurl.com/2w4xd4pf 9

I. INTRODUCTION

The Court of Appeals' erroneous decision could affect every single potential premises liability defendant in Washington. Until this decision, the Court of Appeals had recognized that "[t]he scope of sections 343 and 343A of the *Restatement* … encompasses the liability of every class of land possessor to every conceivable person invited onto property—and for that matter, property as varied as a business establishment, a home, or raw land." *Hymas v. UAP Distribution, Inc.*, 167 Wn. App. 136, 162, 272 P.3d 889 (2012). By depriving premises owners and occupiers (including the diverse *amici* here) of recourse to the "known or obvious" danger exception to premises liability established by § 343A, the decision below marks an extraordinarily consequential expansion of the scope of premises liability.

Amici write to illustrate the stakes of the Court of Appeals' decision and to urge this Court to intercede. The "known or obvious" danger limitation frequently arises to shield premises

owners from unwarranted liability. And a jury is unable to apply this limitation without an instruction that tracks the Restatement (Second) of Torts § 343A, and makes legally relevant an invitee's independent knowledge of a condition. Moreover, no policy justifies imposing liability on premises owners where "known or obvious" dangers are concerned. To the contrary, doing so would inflict substantial, unjustified costs on premises owners and commercial tenants—and the economy at large.

Plaintiff has offered no meritorious defense of the Court of Appeals' departure from the "known or obvious" danger doctrine. Instead, Plaintiff erroneously contends that its continued vitality is not implicated by this case. This Court should reject that suggestion. The Court of Appeals' decision teaches that liability may be imposed on premises owners and occupiers, even where substantial evidence supports a finding that a dangerous condition was "known or obvious" to the harmed invitee. Because the Court of Appeals' decision undermines the "known or obvious" danger doctrine and thus

materially affects the interests of all those who own or occupy premises in Washington, this Court should grant review.

II. INTEREST OF THE *AMICI CURIAE*

The identity and interests of the undersigned *amici*, are set out in the Motion to File an Amicus Curiae Memorandum, filed alongside this Memorandum.

III. ARGUMENT

A. The "known or obvious" danger doctrine reaches a broad spectrum of circumstances and may be determinative in a premises liability case.

Section 343A's "known or obvious danger" doctrine offers an important protection from liability in negligence actions for premises owners of all stripes—including churches, restauranteurs, farmers, and everyday homeowners. And § 343A is not mere window dressing to § 343; it introduces the concept of the invitee's independent knowledge of a dangerous condition, and thus may be determinative of whether a premises owner has violated its duty of care. The importance of a separate § 343A instruction thus cannot be understated.

A sample of just a subset of premises liability cases ("slip-and-fall"-style actions) in which § 343A's "known or obvious" danger exception has come into play demonstrates how the doctrine cabins premises liability to assure it applies fairly and in a socially optimal manner.

For example, § 343A protected a church from liability after a plaintiff walked through the church's courtyard in the middle of a children's recess, a stray basketball hit the back of her ankles, and she fell—injuring her knee. *See Dombrowski v. Corp. of the Catholic Archbishop of Seattle*, No. 80283-6-I, 15 Wn. App. 2d 1037, 2020 WL 7027543, at *1 (Nov. 30, 2020). The court determined that the "known and obvious nature of recess" prevented the plaintiff from recovery in that case, since the plaintiff plainly "saw children at play in the courtyard playground including a boy with a ball." *Id.* at *5.

Similarly, the exception ensured that the organizer of an outdoor festival could not be held to blame where a festival-participant slipped and fell on a wet patch of grass. *See*

McDonald v. Cove to Clover, 180 Wn. App. 1, 1-5, 321 P.3d 259 (2014). The plaintiff was "well aware of the risk posed by the wet grass where he fell"—"having traversed the same grass going the opposite direction"—and as such, the festival organizer "had no duty to warn of or remedy … the wet grass." *Id.* at 6, 1.

Take a final example: a student sued a university after she tripped and fell over cracked pavement, walking on campus. *See Webert v. Seattle Univ.*, No. 64851-9-I, 161 Wn. App. 1018, 2011 WL 1533506, at *1 (2011). The court found it "[s]ignificant[]" that the student "admitted in her deposition that although the area was dark and shady, she could see the patched area in spite of the shade." *Id.* at *3. Because the student knew in advance of the dangerous condition, the court determined that the university could not be held liable for her fall. The university was not required to prove that the student knew the ways that falling on the sidewalk could be harmful to invoke the "known or obvious danger" doctrine.

The outcome of each of these cases would have been altered in the absence of the "known or obvious" danger doctrine. In each, the court looked to § 343A's limitation of a premises owner's duty-of-care, as articulated by § 343, as the legal basis for its decision. And as a result, it was the invitee's knowledge of the dangerous condition on the premises that proved decisive.

Simply put, there are significant stakes to the Court of Appeals' decision. The "known or obvious" danger doctrine is a critical, and frequently recurring, component of Washington tort law that impacts a diverse array of potential defendants.

B. Dispensing with the "known or obvious" danger exception will impose unjustified costs on premises owners and negatively impact the state.

Premises owners in Washington should continue to be able to depend on the "known or obvious" danger exception to premises liability. It ensures that such liability is not so expansive as to lead to unfair results and impose undue social costs on Washingtonians.

Tort law acts as a "safety-insurance" policy, *Stuart v. Coldwell Banker Comm. Grp., Inc.*, 109 Wn.2d 406, 421, 745 P.2d 1284 (1987), "encourag[ing] people to act with reasonable care for the welfare of themselves and others," *Swank v. Valley Christian Sch.*, 188 Wn.2d 663, 680, 398 P.3d 1108 (2017). The duty of care a landowner owes to an invitee stems from the presumption that the premises owner has "superior knowledge" of dangerous conditions on the premises. *See, e.g.*, *Caron v. Grays Harbor Cnty.*, 18 Wn.2d 397, 411, 139 P.2d 626 (1943). Reasonable care, in such circumstances, requires the premises owner to either make the condition safe or warn the invitee of the danger. § 343, cmt. d. That is, the premises owner must make it possible for the invitee to act with reasonable care for their own welfare.

But where a dangerous condition is known or obvious to an invitee, the "superior knowledge" justification for premises liability disappears. A reasonable invitee is "assumed … to be vigilant in the avoidance of injury in the face of a known and

obvious danger." *Roumillat v. Simplistic Enters., Inc.*, 414 S.E.2d 339, 344 (N.C. 1992). This is the basis for the "known or obvious" danger doctrine: "There is no liability for injuries from dangers that are obvious, reasonably apparent, or *as well known* to the person injured as they are to the owner or occupant." *Caron*, 18 Wn.2d at 411 (emphasis added); *see also Warner v. Simmons*, 849 N.W.2d 475, 480 (Neb. 2014) ("[A] land possessor is not liable to [an invitee] unless the possessor had or should have had superior knowledge of the dangerous condition.").

Imposing liability on premises owners in circumstances involving "known or obvious" dangers would be tremendously inefficient and costly. Where a danger is known, there is something scholars call "[i]nformation cost parity," meaning that "the plaintiff is *as able* as the defendant to avoid the risk (either by avoiding the activity altogether or by taking suitable precautions)." C. Peter Goplerud III & Nicolas P. Terry, *Allocation of Risk Between Hockey Fans & Facilities: Tort*

Liability After The Puck Drops, 38 Tulsa L. Rev. 445, 449-50 (2003). As a general rule, in those circumstances, it is more cost-efficient for the invitee to exercise reasonable care than to burden the premises owner with responsibility for the invitee's well-being. Consider the wasteful, duplicative cost of imposing a duty-to-warn on premises owners in these circumstances: After all, "no one needs notice of what he knows." *Baber v. Dill*, 531 N.W.2d 493, 496 (Minn. 1995). Or the deadweight—and substantial—cost of requiring premises owners to *remove* dangerous conditions that an invitee exercising reasonable care may easily avoid.

Inefficiently burdening premises owners with those responsibilities will negatively impact Washington's economy and cause harm to ordinary Washingtonians. For example, small businesses—a brick-and-mortar retail establishment, say, such as the neighborhood grocer—are frequent targets of tort litigation and disproportionately shoulder its costs. *See, e.g.*, U.S. Chamber Inst. for Legal Reform, *Tort Liability Costs for Small Businesses*

3 (October 2020), https://tinyurl.com/2w4xd4pf. Moreover, they are least capable of absorbing those costs; the median small business holds no more than a 27-day cash buffer in reserve. McKinsey & Co., *COVID-19's effect on jobs at small businesses in the United States* 4 (May 2020), https://tinyurl.com/2p85znh2. With such small margins, there is a real risk that a tort claim could bring these establishments to the brink of closure. *See* Small Bus. Assoc. Off. of Advoc., *Impact of Litigation on Small Business* 12 (October 2005), https://tinyurl.com/4wjpsyaa; J.P. Morgan Chase & Co., *Cash is King: Flows, Balances, and Buffer Days* 22 (2016), https://tinyurl.com/23tfhcn3 (noting small businesses' vulnerability to "idiosyncratic shocks"). The decision here magnifies these risks for the more than 600,000 small businesses in Washington, responsible for employing 1.4 million workers in the state and just now emerging from the pandemic. Paul Roberts, *The deepening economic divide: How the pandemic has hurt small businesses*, Seattle Times (Mar. 28, 2021), https://tinyurl.com/fm8k9jtm.

Eliminating the "known or obvious" danger exception to premises liability has no upside in terms of preventing harms, but would impose substantial costs on premises owners in Washington. This Court should grant review to ensure the continuing vitality of the doctrine.

C. The Court of Appeals' decision undermines the continued vitality of the "known or obvious" danger exception to premises liability.

In his Answer to the Petition, Plaintiff makes no attempt to challenge the status of the "known or obvious" danger limitation as a sound, bedrock principle limiting the scope of premises liability in Washington. Nor does Plaintiff dispute the substantial public importance of maintaining § 343A. Plaintiff instead suggests that the "known or obvious" danger doctrine is not implicated by this case. Resp. 2-3. That is mistaken.

Plaintiff contends that there was insufficient evidence before the trial court to justify a § 343A instruction. Resp. 20 ("[A] section 343A instruction was inapplicable because there was not substantial evidence that the dangers at issue were

'known.'"). But Petitioner pointed to ample evidence of Mr. Wright's knowledge of the danger of asbestos exposure on the premises. As outlined in Petitioner's motion for reconsideration before the Court of Appeals (at 6-7): "Mr. Wright was told that his work involved asbestos, 1 RP 449; he knew that the work was dangerous and required safety precautions, 1 RP 506-09, 514-15; he wore a respirator every time he worked with asbestos, 1 RP 452-53, 519; and he was the foreman responsible for training his crew to fit and wear them, too, 1 RP 453, 500-01, 504-07." Facts supporting the theory that Mr. Wright was aware of the danger of asbestos go well beyond "speculation and conjecture." *Bd. of Regents of Univ. of Wash. v. Frederick & Nelson*, 90 Wn.2d 82, 86, 579 P.2d 346 (1978).

Unsurprisingly, neither the Court of Appeals nor the trial court below justified the refusal to provide a § 343A instruction on the grounds that there was insufficient evidence of Mr. Wright's "knowledge" of asbestos. *See* Op. 7-10; 1 RP 1760-61. Indeed, there would have been no reason for the Court of

Appeals to extend itself and make a novel legal ruling if the proposed jury instruction could have been denied on this factual ground.

Instead, the Court of Appeals determined that the component of an invitee's "knowledge" was perfectly well encompassed by § 343, and Petitioner "had the opportunity to argue that Wright knew of the danger"[1]—thereby acknowledging that the record contained sufficient evidence of Mr. Wright's knowledge to warrant *some* instruction on the matter. Op. 9. But even if counsel was able to argue knowledge, without a § 343A instruction, a jury has no way to incorporate that fact into its consideration of liability under § 343.

In questioning the substantiality of this evidence, Plaintiff relies on the Court of Appeals' separate and distinct analysis of

[1] Indeed, the Court of Appeals adopted the same theory that Plaintiff had presented to the trial court in urging rejection of Petitioner's § 343A instruction. 1 RP 1760 (Plaintiff's counsel citing § 343 language and arguing that it "encompass[es] dangers that are known or obvious").

Petitioner's assumption-of-risk defense (Op. 11-12), but that in no way forms part of the Court of Appeals' discussion of proper instructions on the scope of premises liability. Plaintiff's argument, in other words, is aimed at defending an opinion the Court of Appeals did not actually write. Plaintiff's attempt to conflate assumption-of-risk with the § 343A instructional error should not distract from the urgent need for this Court to review the issue presented.

The Court of Appeals' decision undoubtedly places the interests of *amici*—and all premises owners in Washington—under threat. The Court of Appeals affirmed the refusal to provide a § 343A instruction limiting liability in a premises action involving substantial evidence that the danger was "obvious or known" to the invitee. If allowed to stand, premises owners in Washington will be sure to see the negative consequences—whether in the form of erroneous jury verdicts, or the unnecessary and inefficient costs they will be required to

incur to avoid suit. This Court should reject Plaintiff's attempt to diminish the import of this case.

IV. CONCLUSION

Amici urge the Supreme Court of Washington to grant the petition for review.

This document contains 2,373 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 6th day of June 2022.

/s/ *Aaron V. Rocke*
Aaron V. Rocke, WSBA No. 31525
Rocke Law Group, PLLC
500 Union St., Ste 909
Seattle, WA 98101
(206) 652-8670

/s/ *D. Michael Reilly*
D. Michael Reilly, WSBA No. 14674
Ryan McBride, WSBA No. 33280
Lane Powell PC
1420 Fifth Avenue, Suite 4200
Seattle, WA 98101
(206) 223-7000

/s/ *John Lane*
John Lane, WSBA No. 31541
Washington Hospitality Association
510 Plum St. SE
Olympia, WA 98501
(360) 956-7279

/s/ *Robert A. Battles*
Robert A. Battles, WSBA No. 22163
General Counsel
Association of Washington Business
1414 Cherry St. SE
Olympia, WA 98501
(360) 943-1600

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

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

Dated June 6th, 2022.

/s/ *Aaron V. Rocke*
Aaron V. Rocke, WSBA No. 31525
Attorney for *Amicus Curiae* Washington Food Industry Association

ROCKE LAW GROUP, PLLC

June 06, 2022 - 4:29 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,768-0
Appellate Court Case Title:	Wayne Wright v. ExxonMobil Oil Corp.

The following documents have been uploaded:

- 1007680_Other_20220606162827SC044851_5525.pdf
  This File Contains:
  Other - Amicus Memorandum
  The Original File Name was 220606 Wright Amicus Memo.pdf

A copy of the uploaded files will be sent to:

- Csims@SGB-Law.Com
- SGBasbestos@sgb-law.com
- aaron@rockelaw.com
- aserko@tktrial.com
- breen@sgb-law.com
- cfrantz@orrick.com
- cmarks@tktrial.com
- cosgrove@carneylaw.com
- dawnelle.patterson@klgates.com
- drubens@orrick.com
- evillano@orrick.com
- garrett@sgb-law.com
- jacksonm@biaw.com
- jwmaynard2003@yahoo.com
- mcbrider@lanepowell.com
- mclafferty@sgb-law.com
- mieling@sgb-law.com
- mjohnson@tktrial.com
- mparris@orrick.com
- mtiegen@tktrial.com
- reillym@lanepowell.com
- rmckenna@orrick.com
- rob.mitchell@klgates.com
- rutzick@sgb-law.com
- sea_wa_appellatefilings@orrick.com
- seattle.service@tktrial.com
- service@rockelaw.com
- vial@carneylaw.com
- whalen@sgb-law.com
- wright@sgb-law.com

Comments:

Sender Name: Aaron Rocke - Email: aaron@rockelaw.com
Address:
500 UNION ST STE 909
SEATTLE, WA, 98101-4052
Phone: 206-652-8670

Note: The Filing Id is 20220606162827SC044851