NO. 100768-0

SUPREME COURT
OF THE STATE OF WASHINGTON

WAYNE WRIGHT, individually and as personal representative for the ESTATE OF WARREN WRIGHT,

Respondent,

v.

EXXONMOBIL OIL CORPORATION,

Petitioner.

MEMORANDUM OF AMICUS CURIAE WESTERN STATES PETROLEUM ASSOCIATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Western States Petroleum Association (WSPA) is a nonprofit trade association representing companies that explore, produce, refine, transport, and market petroleum in Arizona, California, Nevada, Oregon, and Washington. Founded over a century ago, WSPA is dedicated to ensuring that Americans have safe and reliable access to petroleum products.

WSPA and its members have an interest in predictable and fair liability standards for premises owners and occupiers in Washington, where some of its members own and occupy refineries. WSPA represents its members' interests in matters pending before the courts. WSPA regularly participates as an amicus curiae in courts across the country, including in this Court as recently as late last year in *Department of Labor & Industries v. Phillips 66 Company*, No. 100309-9, in cases that raise important issues of concern to its member companies.

II. STATEMENT OF THE CASE

WSPA relies on the facts presented in ExxonMobil Oil Corporation's petition for review.

III. INTRODUCTION

The jury-trial system relies on lay members of the community to apply the law to the facts of each case. To achieve this end, courts instruct juries on the applicable law. So important are instructions to the jury-trial system that a court's duty to inform jurors of the law is enshrined in the Washington Constitution: "Judges . . . shall declare the law [to the jury]." CONST. art. IV, § 16. These instructions must inform jurors of the applicable law and allow each party to argue its theory of the case based on the evidence admitted at trial. Each party has a right to have its case theory specifically presented to the jury by proper and complete instructions, which in turn permits the jury to find in favor of that party's case theory.

Instructions that fail to inform the jury of the applicable law are erroneous. An erroneous instruction that is a clear

misstatement, or incomplete statement, of the law is presumed prejudicial because it strips a party of its fundamental right to have its specific case theory presented to the jury. Absent a specific instruction permitting the jury to find for a party on its case theory, the jury is denied "an opportunity to reach exact justice." *Allison v. Dep't of Labor & Indus.*, 66 Wn.2d 263, 267, 401 P.2d 982 (1965).

This Court recognized nearly three decades ago that the *Restatement (Second) of Torts* § 343A(1) (1965) is "the appropriate standard for duties to invitees for known or obvious dangers." *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 139, 875 P.2d 621 (1994). When instructing the jury on a landowner's 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.2d 1097 (2003); *see also* 6 WASH. PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 120.07 (7th ed. 2019) (explaining that the

"jury should be instructed in accordance with both sections 343 and 343A of the Restatement" in "cases involving invitees and known or obvious dangers"). Both instructions accurately and completely articulate a landowner's duty to invitees.

The Court of Appeals' decision here threatens precedent in ways that go well beyond the facts of this case. Its decision would permit Washington trial courts to abdicate their constitutional duty to declare the law completely in jury instructions in any premises-liability case involving a "known or obvious danger." That decision affects every business that has a physical premises. The Court of Appeals' upholding the trial court's refusal to instruct the jury on the universally recognized liability limitation for "known and obvious dangers" under the *Restatement (Second) of Torts* § 343A contravenes explicit warnings in the *Restatement* itself, the Washington Pattern Jury Instructions, and decisions of this Court and published decisions the Court of Appeals, effectively nullifying the liability limitation for all premises owners or occupiers in Washington.

RAP 13.4(b)(1)–(2). The consequences of the decision are far-reaching and a matter of substantial public interest, also warranting this Court's review under RAP 13.4(b)(4).

IV. ARGUMENT

A. Specific instructions on a party's case theory are essential to a jury's ability to properly apply the applicable law to the facts as found by the jury.

Jury instructions are proper if they permit each party to argue its theory of the case, are not misleading, and inform the jury of the applicable law. *Fergen v. Sestero*, 182 Wn.2d 794, 803, 346 P.3d 708 (2015). Although trial courts generally have discretion to discern how best to instruct the jury on the law, that discretion is not limitless.

This Court has long "recognize[d] that a party is entitled to have the trial court instruct [the jury] on its theory of the case if there is substantial evidence to support it." *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 135, 606 P.2d 1214 (1980). The "jury should be instructed in accordance with the facts." *Allison*, 66 Wn.2d at 267. That rule applies irrespective

of the inconsistency of the parties' theories presented to the jury. *Id.* When parties present different case theories, this Court has admonished trial courts that they "should, if requested, give instructions applicable to both theories[.]" *Allen v. Hart*, 32 Wn.2d 173, 176, 201 P.2d 145 (1948).

This Court has also "held in a long line of cases" that a trial court's general instruction on the applicable law may be insufficient to permit a party to have its case theory presented to the jury. *Heinz v. Blagen Timber Co.*, 71 Wn.2d 728, 732, 431 P.2d 173 (1967) (citing cases from this Court, including *DeKoning v. Williams*, 47 Wn.2d 139, 286 P.2d 694 (1955)). A party's right to have its specific theory presented to the jury "is not affected by the fact that . . . the law is, in a general way, covered by the instructions given." *Allen*, 32 Wn.2d at 176 (remanding for a new trial because the trial court refused to instruct the jury on the defendant's case theory). And when a trial court has failed to instruct the jury on a party's specific case theory, this Court has time and again reversed for instructional

error and remanded for a new trial.[1] *E.g.*, *Allison*, 66 Wn.2d at 266–67 (concluding that a trial court's refusal to instruct the jury completely deprives the defendant of an established case theory and the jury of the ability to "reach exact justice").

This Court's decision in *DeKoning v. Williams*, 47 Wn.2d 139, 286 P.2d 694 (1955), illustrates this Court's longstanding approach to a trial court's refusal to instruct on a party's specific case theory. *DeKoning* arose from a car accident where the plaintiff alleged that he drove his vehicle into another lane of travel because of the defendant's alleged negligent driving. *Id.* at 140. The central issue on appeal was the trial court's refusal to give the plaintiff's proposed instructions on the emergency doctrine. *Id.* at 141. Holding that the trial court committed

[1] *See, e.g.*, *Heinz*, 71 Wn.2d at 731–32; *Izett v. Walker*, 67 Wn.2d 903, 906–08, 410 P.2d 802 (1966); *Middleton v. Kelton*, 66 Wn.2d 309, 311–313, 402 P.2d 493 (1965); *Dabroe v. Rhodes Co.*, 64 Wn.2d 431, 435, 392 P.2d 317 (1964); *DeKoning*, 47 Wn.2d at 141–43; *Woods v. Goodson*, 55 Wn.2d 687, 689–90, 349 P.2d 731 (1960); *Allen*, 32 Wn.2d at 175–76; *Lubiner v. Ruge*, 21 Wn.2d 881, 889–92, 153 P.2d 694 (1944).

reversible instructional error, this Court reasoned that the trial court denied the plaintiff an adequate opportunity to argue its case theory to the jury. *Id.* This Court made clear that general instructions are not always sufficient to allow a party to argue its case theory:

> In instructing the jury, the court covered [plaintiff's] theory by only a single general instruction. Each party is entitled to have his theory of a case presented to the jury by proper instructions, . . . and this right is not affected by the fact that the law is covered in a general way by the instructions given.

Id.[2] This Court concluded that the plaintiff was "entitled to have his theory of the case specifically presented to the jury" and that "the giving of a single general instruction on the emergency doctrine did not adequately present to the jury the [plaintiff's] sole theory of the case." *Id.* at 142.

[2] Of course, in some cases, general instructions may be sufficient to allow a party to argue its case theory—but not when, as explained below, the general instruction completely omits a party's case theory.

Applying that same approach in the premises-liability context, a specific instruction on the limitation of a landowner's liability reflected in the *Restatement (Second) of Torts* § 343A is necessary in any case involving "known or obvious dangers." *See Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 50, 914 P.2d 728 (1996) (re-affirming that where "the danger to an invitee is known or obvious, the landowner's liability is limited by the *Restatement (Second) of Torts* § 343A(1)" (citing *Tincani*, 124 Wn.2d at 139, and *Jarr v. Seeco Constr. Co.*, 35 Wn. App. 324, 326, 666 P.2d 392 (1983)).

Whereas a trial court's general instruction in premises-liability cases on § 343 focuses the jury on the landowner's knowledge, a specific instruction on § 343A—as proposed by Mobil here—focuses the jury on the invitee's knowledge. CP 1787. Absent a specific instruction on § 343A in any case where the evidence warrants it, a jury would be left without the applicable law to find that an invitee's knowledge of the danger relieved the landowner's liability. A general instruction on

§ 343—without a corresponding specific instruction on § 343A—leaves the jury without the law it needs to understand or apply the premises owner's case theory on "known or obvious dangers." A defendant is thus effectively denied its right to argue its case theory to the jury.

Where the evidence is more than "sufficient to encompass" the known or obvious danger exception in § 343A, applying the Court of Appeals' decision, which upheld the trial court's refusal to "declare the law" to the jury on the "known or obvious danger" exception to premises liability, effectively deprives a landowner of a recognized defense to a negligence claim. *Allison*, 66 Wn.2d at 267.

For instance, akin to *DeKoning*, Mobil's only argument against Wright's premises-liability claim is predicated solely on application of the liability limitation in § 343A to the evidence admitted at trial. Mobil's case theory was that Wright and his employer knew about the danger of asbestos in pipe insulation. *Slip op.* at 2, 10–12. Mobil indeed warned Wright's employer

that there was asbestos present in old insulation at Mobil's refinery. Wright "took all precautions known at the time to limit his exposure to asbestos," "religiously" wore his OSHA-approved respirator, and followed protocol to wet down the insulation material to minimize airborne particles.

Because the Court of Appeals' decision conflicts with *DeKoning*, *Tincani*, *Degel*, and *Jarr*, review is warranted under RAP 13.4(b)(1)–(2).

B. In premises-liability cases involving "known or obvious dangers," a specific instruction under *Restatement (Second) of Torts* § 343A should be given when supported by the evidence and timely requested by a party.

Division One's refusal to require an instruction on *Restatement (Second) of Torts* § 343A unwisely disregards warnings from the *Restatement* itself, the pattern instructions, and Washington case law. The ensuing threat to jurors' ability to apply the applicable law is a matter of substantial public interest warranting review under RAP 13.4(b)(4).

The drafters of the *Restatement* warn that § 343A's limitation on a landowner's premises liability should be considered alongside the general standard of reasonable care under § 343:

> This Section ***should be read together with § 343A***, which deals with the effect of the fact that the condition is known to the invitee, or is obvious to him . . . . ***That Section limits the [landowner's] liability here stated***.

RESTATEMENT (SECOND) OF TORTS § 343 cmt. a (1965) (emphasis added).

Washington's pattern instructions likewise warn that jurors should be equipped with an instruction on the liability limitation in § 343A: In "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 WASH. PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: Civil 120.07. Although pattern instructions are not binding on Washington courts, they provide a trusted authority on the state

of the law. And the Civil Rules encourage practitioners to use pattern instructions. *See* CR 51(d).

Washington case law confirms that § 343A is an essential part of the applicable law on premises liability. This Court has held that that "[§ 343A] is the appropriate standard for duties to invitees for known or obvious dangers." *Tincani*, 124 Wn.2d at 139 (ordering a new trial because the trial court "did not instruct the jury correctly . . . on the [landowner's] duty regarding known or obvious dangers" under § 343A); *see also Degel*, 129 Wn.2d at 50. More recently, the Court of Appeals advised that "it is ordinarily the better practice to give both Section 343 and Section 343A(1) instructions." *Suriano*, 117 Wn. App. at 831.

This case presents this Court with the ideal vehicle to address whether Washington trial courts must instruct on § 343A in any case where there is substantial evidence to support that the invitee knew about a dangerous activity or condition on the land. The Court of Appeals' decision, if left to stand, elevates a trial court's discretion to give general instructions over its duty to

fully inform juries on the applicable law specific to a party's case theory.

Mobil's proposed instruction on § 343A was its only argument against Wright's premises-liability claim. Depriving the jury of the complete, applicable law on the limits to premises liability leaves it with "no instruction given which cover[ed] that part of [Mobil's] theory of the case." *Izett*, 67 Wn.2d at 908. Only through an instruction on § 343A can a jury properly evaluate a landowner's potential liability to an invitee. When a danger is known or obvious, the jury must be instructed on known or obvious dangers to adequately allow a party to argue its specific theory of the case.

The decision's clear conflict with Washington precedent, as well as the guidance from the pattern instructions and the *Restatement*—all of which warn that § 343A is a vital part of the applicable law on premises liability—should warrant this Court's review under RAP 13.4(b)(1)–(2). Review is also warranted because Mobil's petition raises an issue of substantial public

interest that should be determined by this Court. RAP 13.4(b)(4).

V. CONCLUSION

This Court should grant review and decide whether a jury must be instructed on the universally recognized exception to premises liability for "known or obvious dangers" under the *Restatement (Second) of Torts* § 343A(1) when substantial evidence supports—and the premises owner requests—the instruction.

This document contains 2,495 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted: June 6, 2022.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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June 06, 2022 - 3:28 PM

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