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 ANSWER TO AMICUS MEMORANDUM OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF REVIEW

CHEN-CHEN JIANG, WSBA #51914
LUCAS W. H. GARRETT, WSBA # 38452
KAITLIN T. WRIGHT, WSBA #45241
COLIN MIELING, WSBA #46328
SCHROETER, GOLDMARK & BENDER
401 Union Street, Suite 3400
Seattle, Washington 98101
(206) 622-8000

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Other Authorities

The amicus curiae brief submitted by the Chamber of Commerce of the United States of America ("the Chamber") in support of the Petition for Review of Defendant-Petitioner ExxonMobil Oil Corporation ("Mobil") fails to justify review by the Washington Supreme Court. The Chamber does not argue that the risks presented by asbestos are obvious. Nor does the Chamber explain how those risks were "known" to decedent Warren Wright, as that term is used in section 343A of the Restatement (Second) of Torts. Instead, the Chamber simply skips to discussing the perils of omitting a section 343A instruction when a danger is known and obvious. But the record here makes clear that the danger was not known or obvious to Mr. Wright. Without that prerequisite, no substantial evidence supported the application of section 343A, and the trial court's refusal to give the corresponding jury instruction was not error.

In addition to that critical omission, the Chamber both misapprehends the record and misconstrues Plaintiff-Respondent Wayne Wright's ("Plaintiff") arguments in his response to

Mobil's petition. Furthermore, even if the Court of Appeals' unpublished decision was erroneous in the way the Chamber suggests—it is not—the Chamber exaggerates the consequences that would follow. The Chamber's amicus brief does not present any reason for review, and the Petition for Review should be denied.

I. THE CHAMBER ASSUMES THAT A SECTION 343A INSTRUCTION WAS NECESSARY WITHOUT ANY ANALYSIS OF WHETHER THE DANGER WAS KNOWN OR OBVIOUS

The Chamber's briefing is replete with contentions that only apply when a hazard is known or obvious. *See, e.g.*, Amicus Br. at 4-5 (describing standard "for duties to invitees for known or obvious dangers"); *id.* at 6 (recounting section 343A's applicability to "a condition 'whose danger is known or obvious'"); *id.* at 12 ("Whenever known or obvious hazards are present . . ."). Indeed, the Chamber concedes that "[i]f there is no basis to claim that a danger is known or obvious, then Section 343A does not come into play." *Id.* at 7. And yet, it conducts no analysis on the "knowledge" necessary to implicate section

343A. *See id.* It simply concludes that "Mr. Wright knew that dangerous asbestos was present" because of precautions that he took. *Id.* at 5.

This misstep—disregarding the sort of "knowledge" relevant to section 343A—undercuts the Chamber's entire argument for review. The "knowledge" implicated by section 343A is not merely some sort of generalized understanding, as the Chamber suggests. 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. The Chamber has no answer to this absence of evidence or the conclusion that follows: an instruction on section 343A was unnecessary because there was no substantial evidence that the dangers at issue were "known."

Because the Chamber glosses over the inapplicability of section 343A, it incorrectly asserts that the Court of Appeals' opinion conflicts with existing precedent. Instead, the Chamber's authorities all require a known or obvious hazard to trigger application of section 343A. *See Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 139, 875 P.2d 621 (1994) (cabining section 343A to "known or obvious dangers");

Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 50, 914 P.2d 728 (1996) (limiting liability under section 343A only "[w]here the danger . . . is known or obvious"); *Suriano v. Sears, Roebuck & Co.*, 117 Wn. App. 819, 826, 72 P.3d 1097 (2003) (recognizing section 343A as appropriate standard "for known or obvious dangers"); *Bozung v. Condominium Builders, Inc.*, 42 Wn. App. 442, 447, 711 P.2d 1090 (1985) (invoking section 343A "[w]ith respect to obvious dangers"). In fact, every one of the Chamber's cases involves precisely what is lacking here: a known or obvious danger. *See Tincani*, 124 Wn.2d at 141 (concerning "obvious dangers" of cliff); *Degel*, 129 Wn.2d at 45 (involving "steep embankment" above "fast-flowing creek"); *Suriano*, 117 Wn. App. at 829 ("Here, the sign was an open and obvious obstruction[.]"); *Bozung*, 42 Wn. App. at 444 (involving slope "bounded on one side by a bluff and on the other side by a ravine"). Accordingly, there can be no conflict between the Court of Appeals' opinion and this authority.

The inapplicability of section 343A also renders the Chamber's prejudice analysis unavailing. Because a section 343A instruction was not necessary here, the trial court's instructions did not clearly misstate the law, and thus, prejudice is not presumed. *See Spencer v. Badgley Mullins Turner, PLLC*, 6 Wn. App. 2d 762, 787-88, 432 P.3d 821 (2018). Moreover, prejudice is not demonstrated by, as the Chamber asserts, the value of the verdict. *See* Amicus Br. at 10. Prejudice is instead measured by whether the purported error affects the results of a case given the record. *Blaney v. Int'l Assoc. of Machinists & Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 211, 87 P.3d 757 (2004). The Chamber makes no attempt to properly demonstrate prejudice, and, on this record, no section 343A instruction was necessary, thus rendering any error harmless.

II. THE CHAMBER MISCONSTRUES THE RECORD REGARDING MOBIL'S CONTROL OVER WARREN WRIGHT'S WORK.

An amicus curiae must be familiar with the record, including all briefs on file. RAP 10.3(e). The Chamber, however,

has seemingly neglected to review the record here, as it maintains incorrectly that "[t]he only evidence of Mobil's control . . . was a contract provision requiring NWIM to follow prevailing safety laws."[1] *See* Amicus Br. at 3. As Plaintiff explained in detail:

> *[N]o contract between Mobil and NIWM was ever located* . . . In addition, abundant evidence of control . . . was either conceded or effectively uncontested. For example, Mobil *conceded* that its control over safety extended beyond contractual provisions requiring compliance with safety laws and included requiring NWIM workers to comply with Mobil's own policies and procedures . . . Mobil would designate a supervisor or representative to be responsible for the project and to "make sure . . . that they had the right amount of manpower, that

[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 Mobil failed to raise the issue in the trial court and 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, the Chamber's suggestion that the *evidence* of Mobil's control was limited in this way has no basis in the record.

> they had the protective gear that they needed," and that "contractors [were] following [Mobil's] asbestos handling procedure" . . . [T]he testimony of persons with actual knowledge of the work—Mr. Wright's co-workers—was in agreement that Mobil supplied tools and even the very dust masks they depended on to protect themselves.

COA Resp. Br. at 31-32 (emphases in original); *see also id.* at 8-9 (reviewing how "Mobil possessed the right to control the work of NWIM in many significant ways, particularly on matters of safety"); Resp. to Pet. at 9-11 (same). The Chamber's mischaracterization of the record undermines both its status as an amicus curiae and its arguments for review.

III. THE CHAMBER MISUNDERSTANDS PLAINTIFF'S DISCUSSION OF CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK

The Chamber takes issue with Plaintiff's discussion of the lack of substantial evidence warranting a contributory-negligence or assumption-of-risk instruction, arguing that "Plaintiff's conflation of these issues is contrary to Washington law." Amicus Br. at 7-8. Plaintiff agrees that those affirmative defenses are not perfectly coextensive with section 343A in all

regards—Plaintiff never suggested otherwise—but the failure of those defenses on factual grounds still unambiguously and necessarily forecloses application of section 343A in this case.

As Plaintiff explained in response to Mobil's petition, the knowledge necessary to trigger those defenses parallels the knowledge necessary to implicate section 343A. That relationship has been recognized by the Restatement and numerous appellate courts. *See, e.g.,* Restatement (Second) of Torts, § 496C, cmt. d (1965); *De Los Santos v. Scindia Steam Nav. Co., Ltd.*, 598 F.2d 480, 487 n.5 (9th Cir. 1979) ("The Comments [to §§ 343(b) and 343A(1)] show that these limitations on liability are based upon the . . . defenses of contributory negligence and assumption of risk."). On this crucial correlation, the Chamber is silent.

Here, the Court of Appeals affirmed the trial court's finding that there was no evidence Warren Wright had the sort of knowledge that would warrant a jury instruction on assumption of risk. *See* CP 2197-98; Op. 12. That evidentiary finding is

unchallenged by Mobil in its petition to this Court, and it necessarily precludes a finding that Warren Wright had the sort of knowledge that might implicate section 343A. Because there was no substantial evidence that the dangers at issue were "known," there was no abuse of discretion in declining to give a section 343A instruction.

On this subject, the Chamber's quotation from *Hvolboll v. Wolff Co.*, 187 Wn. App. 37, 347 P.3d 476 (2015), is misleading. *Hvolboll* distinguished between section 343A and an assumption-of-risk affirmative defense, but *not* because the underlying knowledge needed to trigger their application differs.[2] *See id.* at 48-50. Instead, *Hvolboll* based its analysis on "the exception to section 343A's rule of nonliability," that is, the circumstances where a landowner may be liable *even when its*

[2] To the contrary, *Hvolboll* suggested that, in many cases, application of section 343A *will* "coincide" with an assumption-of-risk defense, just as it does here. *See id*. at 50.

invitee has the requisite knowledge.[3] *Id.* at 48-49. This case, unlike *Hvolboll*, does not involve the "exception to section 343A's rule of nonliability," and, because the requisite knowledge is lacking, section 343A is not implicated in the first place. *See id.* Thus, *Hvolboll* is of no help to the Chamber.

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

Despite the requirement that amicus "avoid repetition of matters in other briefs," RAP 10.3(e), the Chamber predicts the same horribles that will purportedly parade from the Court of Appeals' decision as Mobil does, *compare* Amicus Br. at 10-12, *with* Pet. at 20-22. As Plaintiff articulated in his response, these fears are unfounded. Not only is the decision unpublished and therefore nonbinding, it also specifies that "it is ordinarily the

[3] In this regard, an invitee's knowledge sufficient to implicate assumption of risk is a necessary but not sufficient condition of non-liability under section 343A, as a landowner may be liable despite its invitee's knowledge if the landowner should nevertheless anticipate the harm.

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 the Chamber prophesies, eliminate the protections of section 343A for every business with physical premises, 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.[4]

In contrast to the facts of this case, the scenarios posited by the Chamber to illustrate the purportedly ill consequences of

[4] 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, 429 P.3d 484, 496 (2018) (rejecting arguments about "limitless liability" because such protections exist).

the Court of Appeals' opinion all involve evidence of a known or obvious danger. By its plain terms, section 343A applies only when there is evidence of a known or obvious danger, and 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 in the absence of a known or obvious danger, as here, 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). Furthermore, it would help excuse the sort of condemnable conduct at issue in this case: Mobil invited unsophisticated contract workers onto its premises and then, with Mobil's knowledge, allowed those workers to unknowingly endanger themselves by engaging in unsafe and illegal but presumably cost-saving practices forbidden to Mobil's own employees. The law—including section 343A, with its knowledge requirement—allows for liability in such circumstances, as it should.

V. 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.

DATED this 17th day of June, 2022.

I certify that this document contains 2418 words, in compliance with the RAP 18.17.

Respectfully submitted,

SCHROETER, GOLDMARK & BENDER

s/ Chen-Chen Jiang

CHEN-CHEN JIANG, WSBA #51914
LUCAS W. H. GARRETT, WSBA # 38452
KAITLIN T. WRIGHT, WSBA #45241
COLIN MIELING, WSBA #46328
SCHROETER, GOLDMARK & BENDER
401 Union Street, Suite 3400
Seattle, Washington 98101
(206) 622-8000
Email: SGBasbestos@sgb-law.com

CERTIFICATE OF SERVICE

I certify that I caused to be served in the manner noted below a copy of the foregoing on the following individual(s):

James A. Flynn Emily Villano ORRICK, HERRINGTON & SUTCLIFFE LLP. 1152 15TH Street NW Washington, DC 20005 **Counsel for ExxonMobil Oil Corp.**	☐ ☐ ☐ ☒	Via Facsimile Via First Class Mail Via Email E-Service through the Electronic Portal
Daniel A. Rubens ORRICK, HERRINGTON & SUTCLIFFE LLP. 51 West 52nd Street New York, NY 10019 **Counsel for ExxonMobil Oil Corp.**	☐ ☐ ☐ ☒	Via Facsimile Via First Class Mail Via Email E-Service through the Electronic Portal
Carolyn Frantz Robert McKenna Mark Parris ORRICK, HERRINGTON & SUTCLIFFE LLP. 701 5th Ave., Suite 5600 Seattle, Washington 98104 **Counsel for ExxonMobil Oil Corp.**	☐ ☐ ☐ ☒	Via Facsimile Via First Class Mail Via Email E-Service through the Electronic Portal

Malika Johnson Christopher Marks Alice Serko Tannenbaum Keale One Convention Place 701 Pike Street, Suite 1575 Seattle, WA 98101 **Counsel for ExxonMobil Oil Corp.**	☐ ☐ ☐ ☒	Via Facsimile Via First Class Mail Via Email E-Service through the Electronic Portal
Rory D. Cosgrove Tierney E. Vial Carney Badley Spellman, PS 701 5th Ave, Suite 3600 Seattle, WA 98104 **Counsel for Western States Petroleum Association**	☐ ☐ ☐ ☒	Via Facsimile Via First Class Mail Via Email E-Service through the Electronic Portal
Jackson Wilder Maynard, Jr. Building Industry Association of Washington 300 Deschutes Way, SW, Suite 300 Tumwater, WA 98501 **General Counsel for Building Industry Association of Washington**	☐ ☐ ☐ ☒	Via Facsimile Via First Class Mail Via Email E-Service through the Electronic Portal

D. Michael Reilly Ryan P. McBride Lane Powell PC 1420 Fifth Avenue, Suite 4200 Seattle, WA 98101 **Counsel for Washington Retail Association**	☐ ☐ ☐ ☒	Via Facsimile Via First Class Mail Via Email E-Service through the Electronic Portal
David R. Fine K&L GATES LLP 17 N. Second St., 18th Fl. Harrisburg, PA 17101 (717) 231-4500 **Counsel for the Chamber of Commerce of the United States of America**	☐ ☐ ☐ ☒	Via Facsimile Via First Class Mail Via Email E-Service through the Electronic Portal
Robert B. Mitchell K&L GATES LLP 925 Fourth Ave., Suite 2900 Seattle, WA 98104-1158 (206) 623-7580 **Counsel for the Chamber of Commerce of the United States of America**	☐ ☐ ☐ ☒	Via Facsimile Via First Class Mail Via Email E-Service through the Electronic Portal

Andrew R. Varcoe
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062
(202) 463-5337
Counsel for the Chamber of Commerce of the United States of America

☐ Via Facsimile
☐ Via First Class Mail
☐ Via Email
☒ E-Service through the Electronic Portal

DATED: June 17, 2022, at Bremerton, Washington.

s/ Rhonda de Kelaita
Rhonda de Kelaita, Paralegal
401 Union Street, Suite 3400
Seattle, WA 98101
(206) 622-8000
SGBasbestos@sgb-law.com

SCHROETER GOLDMARK BENDER

June 17, 2022 - 4:01 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_Briefs_20220617160023SC167140_7748.pdf
  This File Contains:
  Briefs - Answer to Amicus Curiae
  The Original File Name was RespChambersAmicusForFiling.pdf

A copy of the uploaded files will be sent to:

- Csims@SGB-Law.Com
- aaron@rockelaw.com
- aserko@tktrial.com
- bobb@awb.org
- breen@sgb-law.com
- cfrantz@orrick.com
- cmarks@tktrial.com
- cosgrove@carneylaw.com
- dawnelle.patterson@klgates.com
- dekelaita@sgb-law.com
- drubens@orrick.com
- evillano@orrick.com
- jacksonm@biaw.com
- jiang@sgb-law.com
- johnl@wahospitality.org
- 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
- vial@carneylaw.com
- whalen@sgb-law.com
- wright@sgb-law.com

Comments:

Sender Name: Rhonda de Kelaita - Email: dekelaita@sgb-law.com
Filing on Behalf of: Lucas William Hannum Garrett - Email: garrett@sgb-law.com (Alternate Email: SGBasbestos@sgb-law.com)

Address:
401 Union Street
Suite 3400
Seattle, WA, 98101
Phone: (206) 622-8000

Note: The Filing Id is 20220617160023SC167140