No. 101864-9

SUPREME COURT
OF THE STATE OF WASHINGTON

JASON BUCKHOLTZ as Personal Representative
for the Estate of DENNIS G. WOODRUFF,

Petitioner,

v.

ZIDELL EXPLORATIONS, INC.,

Respondent,

and

PORT OF TACOMA,

Defendant.

ZIDELL EXPLORATIONS, INC.'S ANSWER TO PETITION FOR REVIEW AND CONDITIONAL CROSS-PETITION

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I. INTRODUCTION

This is a negligence action based on Dennis Woodruff's alleged exposure to asbestos while assisting with dismantling decommissioned Navy ships during his employment at Zidell Dismantling, Inc. in Tacoma in 1970–73. Defendant and Respondent Zidell Explorations, Inc., which operated in Portland, Oregon, was separate and independent from Woodruff's immune former employer, Dismantling. Yet Woodruff was allowed to proceed against Explorations, and he prevailed at trial, aided by an adverse-inference instruction given as a remedy for spoliation that never occurred.[1]

In an unpublished decision, Division Two correctly concluded that the trial court misapplied spoliation law in at least two distinct ways. First, the trial court erroneously concluded

[1] Although the personal representative of Woodruff's estate has since substituted for Woodruff, Explorations will refer to Woodruff for clarity.

that Explorations had a duty to preserve documents in anticipation of unknown future litigation. Second, no evidence supported the finding that Explorations culpably destroyed evidence. Absent the baseless spoliation finding, the adverse-inference instruction was prejudicial error that tainted the entire jury verdict and thus requires a new trial. Nothing in Division Two's spoliation analysis conflicts with precedent or otherwise warrants review.

But if this Court grants Woodruff's petition, this Court should also review Division Two's conclusion that Explorations owed him a duty of care. On that issue, the decision conflicts with this Court's decisions regarding retained control and the independent nature of separate corporations. Review is conditionally warranted under RAP 13.4(b)(1) to resolve these conflicts.

II. COUNTERSTATEMENT OF ISSUES

A. Woodruff's Issues.

1. Division Two correctly stated and applied settled law in determining that Explorations did not commit spoliation because (1) Explorations had no duty to preserve evidence in anticipation of unknown litigation and (2) even if a duty existed, no evidence supported that Explorations consciously disregarded the duty. Is review thus unwarranted?

2. The trial court gave an adverse-inference instruction specifically to remedy spoliation, and Division Two properly disregarded Woodruff's baseless attempt to link the instruction with an unrelated discovery violation that did not involve missing evidence. Is review thus unwarranted?

3. Woodruff premises his notion that Division Two's unpublished decision limits courts' discretion to choose sanctions on the fallacy that the trial court gave the adverse-inference instruction to sanction conduct other than spoliation. Is review thus unwarranted?

B. Explorations' Conditional Issues.

1. In conflict with this Court's decisions holding that an owner assumes a duty of care by retaining control over how work is performed, Division Two held that merely specifying the work to be done is sufficient. If this Court grants Woodruff's petition, should it also review this issue?

2. In conflict with this Court's decisions holding that courts must respect corporations' separate nature absent abuse, Division Two held that having some stockholders, directors, and

officers in common allows one corporation to control another. If this Court grants Woodruff's petition, should it also review this issue?

III. STATEMENT OF MATERIAL FACTS

A. Woodruff worked at Dismantling in 1970–73.

Woodruff worked for Dismantling in Tacoma from 1970 to 1973. After cutting steel in the scrap yard for 14 months, he switched roles to work as a laborer on land and aboard ships. RP 402. Woodruff knew that parts of the ships being dismantled contained asbestos. *See* RP 433–34, 446. And he knew that his co-workers who handled asbestos-containing materials wore masks to protect against exposure. RP 434–35, 446. Yet, while working as a laborer, Woodruff did not wear the mask Dismantling provided. RP 417–18, 436–40.

B. Explorations was separate and independent from Dismantling.

Explorations ran a similar dismantling operation in Portland. Nevertheless, the two companies were separate and

independent, and Woodruff worked only for Dismantling. RP 438, 1123–27.

Although some of the same individuals owned stock in both companies and the companies had some directors and officers in common, the overlap ended there. RP 470–72, 1123–27. The two corporations were incorporated and operated in different states. RP 1115–20. They had separate identities, facilities, operations, employees, and management. RP 1123–27.

Dismantling and Explorations were not parent and subsidiary or otherwise related. RP 460. They had separate books and accounts, financial statements, and tax returns, all handled by different bookkeepers. RP 1125–26. When the companies occasionally exchanged assets or services, they dealt at arm's length to comply with IRS regulations and fiduciary duties to their shareholders. RP 1126–27.

Although Explorations bought ships to be dismantled by Dismantling until 1969, Dismantling's board determined in April 1969—well before Woodruff's tenure—that Dismantling would "thereafter" purchase its own ships. Ex. 304.

C. Woodruff worked on an Explorations-owned vessel for at most a few days.

In 1971, Explorations arranged for Dismantling to partially dismantle the *USS Philippine Sea* to make it short enough to reach Explorations' facility in Portland. During three months in 1971, Dismantling removed the ship's above-deck island and wooden wear deck. *See* RP 529–31, 555–57; Ex. 303 at 3; Ex. 111 at ZMC000078. The record does not reflect who owned the *USS Philippine Sea* while it was in Tacoma.

Despite Woodruff's recollection that he worked aboard the *USS Philippine Sea* for five months, undisputed evidence established that his stint as a laborer overlapped the ship's presence in Tacoma by little more than a week. *See* RP 400–03,

425; Ex. 111 at ZMC000078. Besides, evidence suggested that Dismantling's limited work on the ship would not have disturbed any asbestos-containing materials, which were below deck. *See* RP 555–60, 574–75, 842–43, 894–95.

D. Neither Dismantling nor Explorations received any prior workplace-asbestos-exposure claims.

Dismantling and Explorations ceased dismantling ships by the late 1970s. CP 2081. And in 1997, Explorations ceased separate existence and any remaining Oregon connection by merging with an unrelated and independently owned Delaware corporation. RP 1116–17; Ex. 2059; CP 4652, 4674–75, 4677. The Dismantling entity still exists today as *Zidell Marine Corporation.* *See* CP 788. For clarity, it will be called Dismantling here.

Nothing indicates that Dismantling or Explorations ever received claims based on workplace-asbestos exposure before this lawsuit. Although a former Explorations division had

received "claims involving exposure to asbestos" in the mid-1990s, nothing suggests that those claims involved workplace exposure. *See* CP 2036–37. And any claims against Dismantling or Explorations as employers would have been no-fault worker's compensation claims, so facts ostensibly pertinent to liability, such as who owned the ships, would have been irrelevant.

E. During insurance-coverage litigation in the 1990s, outside counsel created lists that identified when and where particular ships were dismantled—but not who owned them.

Dismantling and Explorations sued their insurance carriers in the 1990s seeking coverage for environmental-cleanup costs, unrelated to any workplace exposure to asbestos. CP 2069–71; *see also ZRZ Realty Co. v. Beneficial Fire & Cas. Co.*, 222 Or. App. 453, 194 P.3d 167 (2008). Relevant to coverage only, their outside counsel created lists of when certain ships were present at Dismantling in Tacoma or Explorations in Portland. *See*

CP 1874–77, 1879–80, 1995. The lists did not indicate who owned each ship. *See* CP 1874–77, 1879–80.

F. In 2017, Dismantling discarded documents from 1970s-era litigation unrelated to asbestos or ship ownership.

In 2017, Dismantling switched document-storage vendors and discarded ancient, obsolete documents to cut costs. CP 2009, 2013. Its legal department discarded documents from two 1970s-era lawsuits—a shareholder dispute and an unfair-competition suit—neither of which remotely related to asbestos or ownership of ships. CP 2020. Its human-resources and accounting departments also discarded some ancient documents. CP 2052. Explorations, having been sold two decades earlier, played no role in Dismantling's handling of documents.

Apart from baseless speculation, nothing suggests that Dismantling discarded the source documents for the ship lists outside counsel created in the 1990s or any documents

addressing who owned each ship dismantled at Dismantling in 1970–73.

G. In 2020, Woodruff sued multiple defendants, including Explorations, for negligence.

Woodruff was diagnosed with mesothelioma and sued Explorations, Dismantling (as Zidell Marine Corporation), and others in 2020. Ex. 2009 at 9; CP 354–57. Soon after, he stipulated to dismiss Dismantling based on immunity under the Industrial Insurance Act. CP 788–89; *see* RCW 51.04.010.

After Explorations could not produce the source documents for the ship lists that were created for the 1990s insurance-coverage litigation, Dismantling's in-house counsel Kathryn Silva testified at deposition that she believed that whatever documents were used no longer existed. This is because she assumed outside counsel would have returned them, but they were not in Dismantling's files. CP 2081–84. She did

not testify that the documents might have been destroyed in 2017.[2]

H. Lacking evidence linking Explorations with his alleged exposure to asbestos, Woodruff persuaded the trial court to conclude that Explorations spoliated ship-ownership records in 2017 and to give an adverse-inference instruction as a remedy.

Woodruff argued that Explorations owned ships dismantled at Dismantling during his time there in 1970–73 and that this created a duty. Because scant, if any, evidence suggested possible asbestos exposure on the *USS Philippine Sea*, Woodruff wished to prove that Explorations owned other ships dismantled at Dismantling in 1970–73.

Lacking direct evidence of such ownership, Woodruff persuaded the trial court to conclude that Explorations had

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[2] Woodruff misreads Silva's testimony in asserting that she testified that the ship lists "could *only* have been made using the destroyed business records." *Petition* at 19. Although Silva testified that she assumed the ship lists were created using company documents, CP 2071–72, she never testified that those documents were destroyed—in 2017 or ever.

destroyed the ship-list source documents in 2017. CP 4627 (FF 18). That those documents were destroyed, that Explorations destroyed them, and that they identified the ship owners were pure speculation. But that did not stop the court from finding as much. *See* CP 4631 (CL 13).

The court found further that Explorations acted with a "culpable state of mind" and destroyed material evidence in a deliberate scheme to avoid future liability for workplace-asbestos exposure. CP 4632 (CL 15–16). The court based this finding on the notion that "Zidell" knew or should have known that the ship-list source documents might be relevant to future litigation but nevertheless destroyed them without scanning them. CP 4632 (CL 16). The court took judicial notice that "most corporations" would "digitize historic business records prior to their destruction." CP 4627 (FF 16); *see also* CP 4632(CL 16).

As a remedy, the court instructed the jury that it could infer that the missing documents would have been unfavorable to Explorations—that is, they would have showed that Explorations owned *all* the ships dismantled at Dismantling in 1970–73. CP 4633 (CL 19(i)); *see also* CP 4592. And Woodruff, in closing argument, urged the jury to so find, emphasizing the adverse-inference instruction. RP 1251–53.

I. A jury found Explorations liable, and the trial court entered a nearly $9.5 million judgment on the verdict.

The jury found Explorations liable and awarded $11 million in noneconomic damages (representing $1 million per year of lost life expectancy from age 75 to 86) plus $216,056 in stipulated economic damages. CP 4598–99; RP 1284. After subtracting Woodruff's settlements with ten other defendants (averaging $176,750), the court entered judgment against Explorations for $9,448,556. CP 4796–97.

J. Division Two reversed and remanded for a new trial because, as a matter of law, Explorations did not commit spoliation.

Division Two held that the trial court erred in concluding that Explorations committed spoliation and in giving the adverse-inference instruction. *Slip Op.* at 20–27. It remanded with directions to vacate the judgment and hold a new trial. *Id.* at 27.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. Division Two correctly applied spoliation law.

If a party intentionally withholds or destroys evidence, the trial court may instruct the jury that it may infer that the missing evidence would have been unfavorable to the at-fault party. *Henderson v. Thompson*, 200 Wn.2d 417, 441, 518 P.3d 1011 (2022). In evaluating a request for an adverse-inference instruction, a court considers (1) the potential importance or relevance of the missing evidence and (2) the adverse party's culpability. *Id.*

Division Two concluded that the trial court erred in finding culpability because (1) Explorations had no duty to preserve documents in anticipation of "vaguely possible future litigation" and (2) even if such a duty existed, no evidence supported that Explorations consciously disregarded the duty. *Slip Op.* at 22–27. Nothing about this analysis warrants review.[3]

1. A duty to preserve evidence is essential to culpability.

No appellate court, including Division Two here, has treated the existence of a duty to preserve evidence as a "third distinct prong" of the spoliation test. *Petition* at 14. Nor is duty a mere nonessential consideration. *See id.* at 15. Indeed, far from a "split in the divisions of the Court of Appeals," *id.* at 17,

[3] Division Two assumed without deciding that substantial evidence supported the finding that the discarded documents included ship-ownership information. *Slip Op.* at 25 n.6. Division Two also did not reach, but expressed skepticism regarding, the trial court's taking of judicial notice that most corporations scan historic business records before discarding them. *Id.* at 26–27. Granting review would bring up these issues.

each division has held that a duty to retain missing evidence is essential to culpability. *Seattle Tunnel Partners v. Great Lakes Reinsurance (UK) PLC*, __ Wn. App. 2d __, 527 P.3d 134, 147–49 (Div. 1, 2023); *Carroll v. Akebono Brake Corp.*, 22 Wn. App. 2d 845, 875, 514 P.3d 720 (Div. 1, 2022); *J.K. by Wolf v. Bellevue Sch. Dist. No. 405*, 20 Wn. App. 2d 291, 308, 500 P.3d 138 (Div. 1, 2021); *Cook v. Tarbert Logging, Inc.*, 190 Wn. App. 448, 470, 360 P.3d 855 (Div. 3, 2015), *review denied*, 185 Wn.2d 1014 (2016); *Homeworks Constr., Inc. v. Wells*, 133 Wn. App. 892, 901, 138 P.3d 654 (Div. 3, 2006).

Division One of the Court of Appeals recently gave two compelling reasons for this rule in *Seattle Tunnel Partners*.

First, "if the existence of a duty to preserve evidence were not a threshold element of the test, and merely a 'factor to consider,' it would undercut the settled rule that there is no general duty to preserve evidence before a lawsuit has been filed." *Seattle Tunnel Partners*, 527 P.3d at 148. As Division

One pointed out, Division Three previously held as much in *Cook*, 190 Wn. App. at 470, and this Court cited *Cook* with approval in *Henderson*. *Seattle Tunnel Partners*, 527 P.3d at 148; *see also Henderson*, 200 Wn.2d at 441–42.

Second, "the existence of a duty inheres in the concept of culpability." *Seattle Tunnel Partners*, 527 P.3d at 148. Division One explained: "Each level of culpability recognized in our spoliation case law—from intentional or willful misconduct, to bad faith, conscious disregard, and negligence—contemplates the violation of some duty to preserve that evidence." *Id.* For instance, a party cannot destroy evidence in bad faith unless it had a duty to act in good faith. *See id.* Conscious disregard likewise presupposes a duty. *See id.* at 149.

Woodruff misreads *Henderson*. He asserts this Court held that spoliation may be found absent a duty to preserve. *See Petition* at 16. But that issue was not before this Court in *Henderson*. Indeed, this Court did not even use the word *duty* in

its spoliation analysis. Woodruff points to this Court's recitation of the two-prong test of importance and culpability. *See Henderson*, 200 Wn.2d at 441. But that recitation does not amount to a rejection—even implicitly—of duty as essential to culpability.

Woodruff observes that this Court "*presumed* that a party has an obligation to provide relevant evidence in discovery and to avoid its destruction." *Petition* at 16. But this made sense in the context of *Henderson* sense because the missing surveillance evidence was developed specifically for the anticipated litigation and some, if not all, still existed during the litigation but was never produced. *See Henderson*, 200 Wn.2d at 442–43.

To support his assertion of a "split in the divisions of the Court of Appeals," *Petition* at 17, Woodruff contends that Division One in *Seattle Tunnel Partners* "disregarded its own opinion" in *J.K.* by holding that a duty is required. *Petition* at 17. But instead of disregarding *J.K.*, Division One cited *J.K.* for that

very proposition. *Seattle Tunnel Partners*, 527 P.3d at 147 (citing *J.K.*, 20 Wn. App. 2d at 308).

And correctly so. Far from holding in *J.K.* that a duty need not be shown, Division One recognized that, even under a bad-faith theory of spoliation, "the party must do more than disregard the importance of the evidence; the party must also have a duty to preserve the evidence." *J.K.*, 20 Wn. App. 2d at 308 (quoting *Homeworks Constr.*, 133 Wn. App. at 900). And the court concluded that a formal records-retention policy adopted under a statute created such a duty. *Id.* at 309.

Woodruff points out that Division Two did not hold that a duty is required in *Washington State Department of Transportation v. Seattle Tunnel Partners*, No. 54425-3-II, 2022 WL 2132780 (unpublished, nonbinding), *review denied*, 200 Wn.2d 1011 (2022). But Division Two did not address duty or otherwise reach the merits of spoliation. It instead held that any error in giving an adverse-inference instruction was harmless

because the instruction there concerned causation—an issue the jury never reached. *Id.* at *14–15.

Because Division Two's decision here on spoliation does not conflict with any appellate decision, review is unwarranted under RAP 13.4(b)(1) or (b)(2).

2. Explorations had no duty to preserve documents in anticipation of "vaguely possible future litigation."

Woodruff does not challenge Division Two's correct observation that no general duty exists to preserve evidence in anticipation of litigation. *See Slip Op.* at 20–24; *see also Carroll*, 22 Wn. App. 2d at 865–72. He challenges only its refusal to hold that Explorations was estopped to deny a supposed admission that it owed a duty. But Ms. Silva's testimony was not a judicial admission that Explorations had a duty to preserve evidence in anticipation of this litigation.

To begin, the judicial-admission doctrine applies to statements of fact—not law. *See Mukilteo Ret. Apartments, LLC*

v. Mukilteo Invs., LP, 176 Wn. App. 244, 257 n.8, 310 P.3d 814 (2013); 29A AM. JUR. 2D EVIDENCE § 767 (updated Feb. 2023). The existence of a duty to preserve evidence is a legal question. *Cook*, 190 Wn. App. at 461. So a statement about that subject is not binding.

No case holds that a party is bound by "recognition" of a duty to preserve where none exists. *Petition* at 21 (citing *J.K.*, 20 Wn. App. at 308, 310; and *Henderson v. Tyrrell*, 80 Wn. App. 592, 609–11, 910 P.2d 522 (1996)). The defendant in *J.K.* "acknowledge[d]" a duty because a document-retention policy adopted under a statute indisputably imposed a duty. *J.K.*, 20 Wn. App. 2d at 310–11. The Court of Appeals in *Tyrrell* did not address any ostensible recognition of a duty but held that no spoliation occurred—even though the plaintiff destroyed the involved vehicle despite being "aware" of the potential for litigation and being requested to retain the car. *Tyrrell*, 80 Wn. App. at 609–11.

Even setting all that aside, Division Two correctly concluded that Silva's testimony was too vague to be deemed binding. She testified only that she understood generally that "retention of documents potentially relevant to litigation is a duty that attaches even…before a particular piece of litigation is commenced." CP 2012. As Division Two reasoned, "Silva did not admit that an entity has a duty to preserve documents simply because they might be relevant to some vaguely possible future litigation." *Slip Op.* at 24. Instead, she acknowledged, at most, "a potential duty to preserve evidence relating to a specific type of anticipated litigation." *Id.* And "Silva testified that there was no litigation or potential litigation at that time," nearly four decades after ship-dismantling ceased. *Id.*

3. Even if a duty to preserve existed, substantial evidence does not support that Explorations consciously disregarded the duty.

Even if Division Two got the duty issue wrong, an independent alternative ground fully sustains its decision: no

evidence supported the finding that Explorations consciously disregarded any duty to preserve the ship-list source documents.

A jury may make an adverse inference because intentionally destroying relevant evidence suggests "consciousness of a weak cause." *Tyrrell*, 80 Wn. App. at 609. "Negligent or even grossly negligent behavior does not logically support that inference" because "[i]nformation lost through negligence may have been favorable to either party, including the party that lost it." *Cook*, 190 Wn. App. at 468. Inferring that evidence was unfavorable to a party that negligently lost or discarded evidence "may tip the balance at trial in ways the lost information never would have." *Id.*

Division Two correctly concluded that, "[a]t worst, the destruction of the documents was negligent." *Slip Op.* at 26. The court reasoned, "There is no indication that Zidell Explorations destroyed the documents in order to avoid future liability or to strengthen its position in future litigation." *Slip Op.* at 25. Given

this, the trial court erred in finding spoliation and giving an adverse-inference instruction. *Id.*

The trial court found that Explorations "should reasonably have known that the evidence might have been relevant to anticipated litigation" because an Explorations division had been "sued for asbestos exposure in the past." CP 4632 (CL 15). But, as Division Two concluded, "Zidell Explorations had never been sued regarding asbestos exposure at Zidell Dismantling's facility (or its own facility), and the only asbestos-related lawsuit involving a Zidell entity had been filed over 20 years earlier." *Slip Op.* at 25. Division Two correctly concluded that substantial evidence did not support culpability.

As for Woodruff's admonishment that courts should be "hesitant to take cases away from juries," *Amended Statement of Add'l Auth.* at 1–2, this ignores that prejudicial error requires reversal, he invited prejudice by urging the jury to reach an

adverse inference, and Division Two remanded for a new jury trial.

B. The trial court expressly gave the adverse-inference instruction as a remedy for spoliation, and Division Two properly regarded Explorations' untimely producing a document as a red herring.

The trial court gave the adverse-inference instruction specifically "to ameliorate the prejudice to Plaintiff resulting from Zidell's authorization of destruction of historic business records regarding ownership of ships scrapped at [the] Zidell Dismantling facility during Mr. Woodruff's employment there." CP 4633 (CL 19(i)).

Unrelated to the spoliation finding, albeit in the same order, the trial court sanctioned Explorations $15,000 for untimely producing the April 1969 board minutes. CP 4633 (CL 19(ii)–(iii)); *see* Ex. 304. After initially concluding that the document was not responsive to Woodruff's discovery requests, Explorations produced it two months before trial, the day before

Dismantling's corporate secretary's deposition, because the witness had reviewed the document. CP 1895–97, 2105–06. Although the document supported Explorations' position that it did not own the ships dismantled at Dismantling in 1970–73, Woodruff inexplicably characterized it as a "smoking gun," and the trial court sanctioned Explorations for producing it untimely. CP 1531, 4633 (CL 19). Although Explorations disputed this sanction, Explorations did not challenge it on appeal.

Despite Woodruff's unsupported assertions, nothing indicates that the trial court, contrary to its order, gave the *adverse-inference instruction* as a sanction for producing the board minutes untimely. Nor would an adverse-inference instruction be an appropriate sanction for producing a document untimely, which does not clearly suggest "consciousness of a weak cause." *Tyrrell*, 80 Wn. App. at 609.

Despite Woodruff's assertion, Division One in *Carroll* did not generally approve adverse-inference instructions to sanction any type of discovery violation. Like here, the trial court found that a party had authorized destroying relevant evidence (autopsy samples that could have been relevant to a defense to asbestos-exposure liability). *Carroll*, 22 Wn. App. 2d at 867–68. As a remedy, the court struck the plaintiff's complaint. *Id.* at 876–78.

On appeal, Division One reversed based on the lack of any general duty to preserve evidence in anticipation of litigation. *Id.* at 868–76. In the alternative, it held that even if the plaintiff breached some duty, the trial court abused its discretion in failing to properly consider the proposed lesser sanction of an adverse-inference instruction. *Id.* at 876–78. Far from approving such instructions to remedy all manner of discovery violations, the court held that it could have been an appropriate remedy for alleged spoliation. *Id.*

Here, too, the adverse-inference instruction could only have been appropriate to remedy the conduct it expressly targeted—spoliation. But because spoliation did not occur, giving the instruction was prejudicial error.

C. Division Two's unpublished decision reversing because a spoliation finding was untenable does not limit courts' discretion in choosing sanctions.

Woodruff wrongly asserts that Division Two's decision "improperly intrudes upon the trial court's expansive authority to impose discovery sanctions." *Petition* at 26 (initial caps omitted). He premises this assertion entirely on the notion that the trial court imposed the adverse-inference instruction as a sanction for conduct other than spoliation. *See id.* at 26–28. Division Two implicitly rejected that fallacy. And despite Woodruff's assertion, Division Two's handling of the point neither conflicts with any appellate decision (RAP 13.4(b)(1), (2)) nor raises any issue of substantial public interest that this Court should decide (RAP 13.1(b)(4)).

V. ARGUMENT FOR CONDITIONAL CROSS-REVIEW ON LACK OF DUTY OF CARE

Division Two's decision that Explorations owed Woodruff a duty of care conflicts with this Court's decisions regarding retained control and the independent nature of corporations. Review is conditionally warranted under RAP 13.4(b)(1) to resolve these conflicts.[4]

A. An owner does not retain control merely by specifying the work it wants done.

An owner generally owes no duty to protect a contractor's employee from his own employer's negligence. *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 119, 52 P.3d 472 (2002). But under an exception to that rule, a duty may exist if the owner retained control over how the contractor performed its work. *Id.*

[4] Woodruff's assertion that "[l]iability for environmental contamination must logically and reasonably lead to liability for the injuries suffered by individuals exposed to that contamination," *Petition* at 18, ignores multiple legal principles, including the separate nature of corporations, employer immunity, and the tort elements of duty, breach, and causation.

at 123–26. In conflict with that binding precedent, Division Two held that a jobsite owner retains sufficient control to create a duty by merely specifying the work it wants done. *Slip Op.* at 18.

Division Two confused the right to specify the result with the right to control *how* the work is done. *See Kamla*, 147 Wn.2d at 118, 121–22 (holding that an owner did not retain control by specifying where to install a fireworks display because the contractor was "free to do the work in its own way"); *see also Morris v. Vaagen Bros. Lumber, Inc.*, 130 Wn. App. 243, 252, 125 P.3d 141 (2005) (holding that an owner that directed a contractor to dismantle equipment did not retain control because

it "did not reserve the right to involve itself in the manner in which [the contractor] completed the disassembly project").[5]

Applying its erroneous rule, Division Two held that Explorations retained control because it had specified the work to be done, so that "Dismantling was not *free to do whatever it wanted* with the ship." *Slip Op.* at 18 (emphasis added). That is not the proper test.

B. Having stockholders, directors, and officers in common does not enable one corporation to control another.

A corporation exists as an entity distinct from its shareholders. *Grayson v. Nordic Constr. Co.*, 92 Wn.2d 548, 552, 599 P.2d 1271 (1979). Its separate identity is not lost even

[5] *See also* 8 CAUSES OF ACTION 2d 859 (1995, updated March 2023) ("It may be possible to establish contractual retention of control where the terms of the contract specify, or give the employer the right to determine, the details of the manner in which the contractor's work would be performed, *and do not merely specify the results the contractor is to produce*." (Emphasis added.)).

if all its stock is held by members of a single family or one person. *Id.* at 553. If the shareholders, officers, and directors keep the corporation's affairs separate from their own and do not commit fraud, the corporation's separate identity must be respected. *Id.*

"Mere common ownership of the capital stock, interlocking directorates, or like evidences of close association will not justify the courts in disregarding corporate identities." *Pittsburgh Reflector Co. v. Dwyer & Rhodes Co.*, 173 Wash. 552, 554, 23 P.2d 1114 (1933).[6] Instead, the dominant corporation "must control and use the other as a mere tool or instrument in carrying out its own plans and purposes so that justice requires that it be held liable for the results," and "there must be such a

[6] *See also* 1 FLETCHER CYC. CORP. § 43 (updated Sept. 2022) ("[O]wnership of all the stock of a corporation coupled with common management and direction does not operate as a merger of the two corporations into a single entity.").

confusion of identities and acts as to work a fraud upon third persons." *Id.* at 555; *see also Morgan v. Burks*, 93 Wn.2d 580, 587–88, 611 P.2d 751 (1980).

In conflict with this binding precedent, Division Two held that having some stockholders, directors, and officers in common allows one corporation to control the other. Citing such commonalities between Explorations and Dismantling, Division Two concluded that Explorations "had the ability to direct the manner in which Zidell Dismantling worked on the ships Zidell Explorations owned if Zidell Explorations had chosen to do so." *Slip Op.* at 17–18. That is not the law.

VI. CONCLUSION

This Court should deny review because Division Two correctly stated and applied spoliation law. But if this Court grants review, it should review the duty issue because Division Two's decision on that issue conflicts with precedent.

This document contains 4,999 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 17th day of May, 2023.

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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:

☒ Via Appellate Portal to the following:

Matt Bergman Erica Bergmann Justin Olson Chandler H. Udo BERGMAN DRAPER OSLUND UDO, PLLC 821 Second Ave, Suite 2100 Seattle, WA 98104 service@bergmanlegal.com	Mark B. Tuvim Kevin J. Craig Trevor J. Mohr GORDON REES SCULLY MANSUKHANI, LLP 701 Fifth Ave, Suite 2100 Seattle, WA 98104 mtuvim@grsm.com kcraig@grsm.com tmohr@grsm.com

DATED this 17th day of May, 2023.

/s/ Patti Saiden
Patti Saiden, Legal Assistant

CARNEY BADLEY SPELLMAN

May 17, 2023 - 11:46 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,864-9
Appellate Court Case Title:	Estate of Dennis G. Woodruff v. American Optical Corporation, et al.
Superior Court Case Number:	20-2-08044-1

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