

FILED

No. 29906-6-III

JUL 25 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JOHN HYMAS,

Appellant,

v.

UAP DISTRIBUTION, INC., a foreign corporation; CROP PRODUCTION
SERVICES, INC., a foreign corporation; and AGRIMUM U.S., INC., a
foreign corporation,

Respondents.

BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant John Hymas was injured when he fell into an unguarded trench while working on a construction project. A WISHA safety regulation required guardrails around the trench. Respondent UAP Distribution, Inc., currently doing business as Crop Production Services, Inc. (collectively "UAP") was the owner and developer of the site. UAP did not hire a general contractor for the project. UAP performed the tasks of a general contractor itself. Hymas sued UAP alleging it breached duties owed under RCW 49.17.060(2) and general premises liability law.

Under RCW 49.17.060(2) and the cases interpreting that statute, such as *Stute v. P.B.M.C., Inc.* and *Weinert v. Bronco National Company*, a landowner owes a duty to all workers on a construction jobsite to use reasonable care to ensure WISHA safety regulations are complied with when the landowner's conduct is analogous to that of a general contractor. As detailed below, UAP's conduct was analogous to that of a general contractor. An examination of UAP's contract with Hymas' employer coupled with UAP's conduct on the project shows that UAP reserved the right to control the work being performed. UAP also exercised this reserved right of control. As such, UAP owed a duty to ensure compliance with WISHA safety regulations. UAP does not challenge the fact it did nothing to ensure that safety regulations were followed.

Landowners also owe a duty to business invitees to use reasonable care to protect them from dangerous conditions on the land. This is true even when the dangerous condition is open and obvious if the owner should anticipate the harm despite such obviousness. Here, the unguarded trench was open and obvious. Nonetheless, UAP should have anticipated that a worker would fall into it. Hymas and other workers had to work in close proximity to the unguarded trench. These workers were focused on and distracted by their work, making it foreseeable that one of them may misstep and fall in the trench. It is undisputed that UAP did nothing to protect Hymas from the risk of harm that the unguarded trench presented.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred when it granted UAP's Motion for Summary Judgment on the issue of applicability of statutory duties owed under RCW 49.17.060 and denied Hymas' competing Motion for Partial Summary Judgment.

2. The trial court erred when it denied Hymas' Motion for Reconsideration.

3. The trial court erred when it granted UAP's Motion for Summary Judgment on the Issue of Premises Liability.

//

Issues Pertaining to Assignments of Error

1. Whether UAP owed Hymas statutory duties under the specific duty clause of RCW 49.17.060 as interpreted by case law to protect Hymas from violations of WISHA safety regulations.

2. Whether UAP breached its duty to protect Hymas from violations of WISHA safety regulations, particularly WAC 296-155-505(6)(a).

3. Whether WAC 296-155-505(6)(a) was violated.

4. Whether the lack of railings around the unguarded trench was a proximate cause of Hymas' injuries.

5. Whether UAP owed Hymas a common law duty of reasonable care as a business invitee under the *Restatement (Second) of Torts* § 343A.

6. Whether UAP breached its common law duty owed to Hymas as an invitee.

III. STATEMENT OF THE CASE

On February 9, 2007, John Hymas was working for Narum Concrete Construction, Inc. ("Narum") as a concrete pump operator.¹ His job was to operate the pumper truck, which consisted of regulating the

¹ Clerk's Papers ("CP") 14.

pressure and flow of concrete being supplied through a discharge hose.² The pressure and flow was controlled through the use of a wireless remote box that was worn as a backpack with controls that rested on Hymas' chest.³ Mr. Hymas operated the controls as he followed a co-worker who was holding the hose for placement of the concrete at an elevation of 15 feet about Hymas.⁴ As Hymas operated the controls, he had to watch the concrete flow out of the discharge hose.⁵ While operating the concrete pump, Hymas fell into an unguarded trench that was 5 feet deep, 10 feet wide, and 240 feet long.⁶ He sustained serious injuries.⁷

The project on which Hymas was injured involved the construction of a new fertilizer mixing plant in Plymouth, Washington.⁸ UAP was the owner/developer of the site.⁹ UAP is a large commercial enterprise that

² *Id.*

³ *Id.* See also, CP 51-52.

⁴ CP 14 and 955.

⁵ *Id.*

⁶ CP 14-15, 46 and 63.

⁷ CP 3-4 and 15.

⁸ CP 67.

⁹ CP 115 and 130. It should be noted that in UAP's answer, defendants admitted any liability imposed on UAP will be imputed to Crop Production Services. CP 8.

sells fertilizer nationwide.¹⁰ The project consisted of the construction of three buildings – two fertilizer storage buildings and one building used for mixing fertilizer.¹¹ The project also involved the construction of a liquid fertilizer plant.¹² The project was scheduled to occur in two phases, with the dry fertilizer buildings to be erected first, followed by the construction of the liquid fertilizer plant.¹³

The dry fertilizer buildings consisted of a concrete foundation and concrete walls.¹⁴ Steel poles were attached to the top of the concrete walls forming an A-frame roofing structure.¹⁵ A heavy duty tarp material was then secured to the steel poles to form the remaining walls and roof.¹⁶ The largest of the three buildings was the fertilizer mixing building, which had dimensions of 341 feet long, 112 feet wide, and 65 feet high at the center of the A-frame.¹⁷ Inside one of the buildings was a trench that was

¹⁰ CP 20. *See also*, www.cpsagu.com., printouts of which are located at CP 134-135.

¹¹ CP 68, 89 and 123-124.

¹² CP 68 and 150.

¹³ CP 150.

¹⁴ CP 68-69.

¹⁵ *Id.*, CP 126-127.

¹⁶ CP 68-60 and 126-127. *See also*, the photographs of the finished structures at CP 89 and 1035-1036. Color copies of these photographs are included in the Appendix to this brief.

¹⁷ CP 70-71, 90 and 123-125.

designed to house a below grade conveyor belt system for transporting fertilizer.¹⁸ The trench extended the entire length of the building, exited the building, and continued down to a road and railroad tracks.¹⁹ The section of the trench which approached the road and railroad track was referred to as the "leg" in the testimony.²⁰ The section of the trench that Hymas fell into was inside the building in an area near the front of where the pump truck was positioned.²¹ A diagram of the construction site is at CP 1034 and a color copy is attached in the Appendix to this brief.

By the time of Hymas' fall, the trench had been excavated and framed with concrete.²² The trench had been installed somewhere between six weeks to several months prior to Hymas' fall.²³ UAP had been on the site multiple times during that period prior to Hymas' fall.²⁴ UAP's plant supervisor admitted to seeing the unguarded trench prior to Hymas' fall.²⁵ There were no railings around the trench or other protective

¹⁸ CP 84-86.

¹⁹ CP 1032-1034.

²⁰ CP 58-59 and 100.

²¹ CP 955 and 1032-1033.

²² CP 15.

²³ *Id.*, CP 49.

²⁴ CP 49 and 149.

²⁵ CP 149.

measures taken to protect workers from falling into it.²⁶

UAP did not hire a general contractor for the project.²⁷ UAP had substantial prior experience in orchestrating construction projects and directly contracting with specialty contractors. UAP admitted it had entered into contracts with specialty contractors on 24 separate occasions "with respect to fertilizer plants constructed prior to the construction of the fertilizer plant in Plymouth, Washington."²⁸ UAP further admitted that "[t]here are 123 contracts with respect to fertilizer plants constructed after the construction of the fertilizer plant in Plymouth, Washington."²⁹ As it had previously done, in this case UAP contracted directly with the various specialty contractors needed for the fertilizer plant project. At least one of the contractors, Narum, was selected through a bidding process that was organized by UAP.³⁰ UAP contracted with Ranco Fertiliservice, Inc. ("Ranco") to develop plans for the facility and to erect the steel poles and tarp-like cover.³¹ UAP contracted with an engineer, Meier Enterprises,

²⁶ CP 49 and 149.

²⁷ CP 80.

²⁸ CP 672. *See also*, CP 680. The 24 contracts are at CP 686-806.

²⁹ CP 672. *See also*, CP 680.

³⁰ CP 120-121.

³¹ CP 72, 75-77 and 270.

Inc., to fit the Ranco plans with UAP's property in Plymouth, Washington.³² UAP contracted with Narum to perform the concrete and excavation work on the site,³³ with Sierra Electric to perform the electrical work on the site,³⁴ with Culbert Construction to pipe in water to the site,³⁵ with Sure Sheds to erect a control room for the facility,³⁶ and with Material Testing & Inspection to perform site inspections and quality control for the work being performed on the site.³⁷ Multiple specialty contractors worked on the jobsite at the same time.³⁸ UAP coordinated the work of the various specialty contractors.³⁹ UAP failed, however, to coordinate the overall site safety.⁴⁰ UAP paid all of the specialty contractors directly.⁴¹ The total cost of this project was over four million

³² CP 77.

³³CP 120-121.

³⁴ CP 78.

³⁵ CP 122 and 140.

³⁶ CP 154-157.

³⁷ CP 37-38.

³⁸ CP 143, 146 and 159-160.

³⁹ CP 146.

⁴⁰ CP 293.

⁴¹ CP 40, 74, 78-79 and 131-132.

dollars.⁴²

In the contract between UAP and Narum, UAP required Narum to comply with all WISHA safety regulations.⁴³ UAP also required Narum to "cooperate fully" with UAP.⁴⁴ UAP also reserved the right to terminate the contractor for any or no reason,⁴⁵ and to perform the construction work with its own forces.⁴⁶ That included the right to take over the work being performed by a contractor.⁴⁷ UAP in fact did use its own forces to perform work that fell within the scope of work to be performed by Ranco. UAP used its own employees to paint parts of the steel frame, to paint welds on the equipment, and to bolt down the steel frames to the top of the

⁴² CP 20-21, 91-111, and 255.

⁴³ CP 344. The UAP-Narum contract provided in part:

§ 15.1 Safety Precautions and Programs... The Contractor shall give notices and comply with applicable laws, ordinances, rules regulations and lawful orders of public authorities bearing on safety of persons and property and their protection from damage, injury or loss. ...

§ 15.3 The Contractor shall comply with all applicable safety laws and regulations. ...

⁴⁴ CP 336. Section 8.2.1 of the UAP-Narum contract stated "The Contractor *shall* cooperate fully with the Owner..." (emphasis added).

⁴⁵ CP 348. Section 19.2.5 of the UAP-Narum contract provided: "The owner may at any time and for any reason terminate the Contract by written notice to the Contractor. If the Owner does so, the Contract shall terminate on the date set forth in the notice to the Contractor."

⁴⁶ CP 340. *See* section 11.1 of the UAP-Narum contract. *See also*, CP 21.

⁴⁷ CP 151-153 and 160.

concrete walls.⁴⁸ On the second phase of the project involving the wet fertilizer plant, UAP actually terminated a pipefitting contractor without cause and took over the work with their own employees.⁴⁹ UAP had determined that the pipefitting contractor was performing their work tasks too slowly, so took that work over as their contract allowed.⁵⁰

UAP also contractually reserved the right to approve sub-tier contractors,⁵¹ to stop or delay the work,⁵² to order changes to the work,⁵³ to approve any substitution of materials,⁵⁴ and to reject the work.⁵⁵ UAP determined when the construction would commence⁵⁶ and when substantial completion was achieved.⁵⁷ UAP contractually delegated job

⁴⁸ CP 77-78 and 141-143 (UAP supervisor testified that after UAP employees were done doing some of the work that was within the scope of work to be done by Ranco, "we pretty well backed out and let Ranco take over.") *See also*, CP 21-2 and 148.

⁴⁹ CP 22 and 151-153.

⁵⁰ *Id.*

⁵¹ CP 340 (section 10.2 of the UAP-Narum contract). *See also*, CP 21.

⁵² CP 349 (section 20.1 of the UAP-Narum contract). *See also*, CP 21.

⁵³ CP 341 (section 12.1 of the UAP-Narum contract). *See also*, CP 22.

⁵⁴ CP 336 (section 8.3.4 of the UAP-Narum contract). *See also*, CP 21.

⁵⁵ CP 339 and 347 (sections 9.5 and 17.1 of the UAP-Narum contract). *See also*, CP 21 and 22.

⁵⁶ CP 332 (section 2.1 of the UAP-Narum contract). *See also*, CP 21.

⁵⁷ CP 343 (section 14.4.2 of the UAP-Narum contract). *See also*, CP 21 and 145.

site safety to its contractors.⁵⁸ UAP monitored the progress and quality of the work.⁵⁹ UAP inspected Narum's work through its agent, Material Testing & Inspection, after the rebar was placed and after each time concrete was poured.⁶⁰

UAP supervisors were on site virtually every day in the beginning of the project when Narum was performing work.⁶¹ As the work progressed, UAP was still onsite multiple times a week.⁶²

UAP supervisors who worked on the site testified that they raised concerns of unsafe working conditions to their specialty contractors, such as Narum, if and when such conditions were observed.⁶³ Narum testified that it expected UAP to raise any safety concerns.⁶⁴ Moreover, if and when UAP raised safety concerns, UAP expected their contractors to take proper corrective action to eliminate the safety risks.⁶⁵ Narum testified

⁵⁸ CP 336 (section 8.2.1 of the UPA-Narum contract). *See also*, CP 192-193.

⁵⁹ CP 38-39, 41 and 57.

⁶⁰ CP 37-39 and 54-55.

⁶¹ CP 307.

⁶² CP 144

⁶³ CP 87 and 158.

⁶⁴ CP 44-45 ("They [UAP] were onsite while we were doing the work process, so I'm – if something was unsafe I would have thought something would have been said.").

⁶⁵ CP 87-88.

that if UAP raised any safety concerns, it absolutely would have taken prompt corrective action.⁶⁶

In fact, UAP supervisors did raise a safety concern on the jobsite. UAP addressed a safety hazard that was posed by a section of the unguarded conveyor belt trench that was near a road and railroad track, referred to as a "leg."⁶⁷ UAP was concerned about the fall hazard that section of the unguarded trench presented.⁶⁸ In response to UAP's safety concern, Narum promptly erected barricades around that section of the trench:

Q: And so UAP had some discussions with you regarding safety when you were performing work on that leg; is that correct?

A: Yes.

Q: Do you recall exactly what the safety issue was that was being discussed?

[objection omitted]

A: Just a very large, deep hole.

Q: [UAP] wanted to make sure nobody fell into it or –

A: Correct. Or vehicles.

⁶⁶ CP 42.

⁶⁷ CP 58.

⁶⁸ *Id.*

Q: **And what did you do to satisfy UAP's concerns?**

A: **We barricaded it.**^[69]

There is no dispute that UAP did nothing else to ensure compliance with WISHA safety regulations or protect the workers from falling in the trench. They did not designate a safety officer for the project.⁷⁰ They did not know if Narum had a safety officer.⁷¹ They performed no safety inspections.⁷² They performed no safety training on the project.⁷³ They held no safety meetings.⁷⁴ They had no site specific fall protection plan.⁷⁵ They did not request Narum to submit a site specific safety plan.⁷⁶

IV. ARGUMENT

A. **Standard of review and elements of negligence**

An appellate court reviews summary judgments de novo.⁷⁷ Since

⁶⁹ CP 59-62 (emphasis added).

⁷⁰ CP 81.

⁷¹ *Id.*

⁷² CP 82.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ CP 83 and 147.

⁷⁶ CP 83.

⁷⁷ *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 302, 178 P.3d 995 (2008).

Washington law favors resolution of cases on their merits,⁷⁸ summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.⁷⁹ A material fact is one upon which the outcome of the litigation depends.⁸⁰ All facts and reasonable inferences from those facts are to be construed in the light most favorable to the nonmoving party, here Hymas as it pertains to the trial courts granting of UAP's two motions for summary judgment.⁸¹ Summary judgment should be denied unless there is only one conclusion that reasonable minds could reach from the evidence.⁸² The trial court's findings and its reasoning are entitled to no deference on appeal.⁸³ An appellate court reviewing summary dismissal decides whether the plaintiff showed a prima facie case – not whether the plaintiff met the burden of persuasion, which is for a trier of fact to decide.⁸⁴

⁷⁸ *Doty-Fielding v. Town of South Prairie*, 143 Wn. App. 559, 563, 178 P.3d 1054 (2008).

⁷⁹ *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 243, 178 P.3d 981 (2008).

⁸⁰ *Paopao v. Dep't of Soc. & Health Servs.*, 145 Wn. App. 40, 45-46, 185 P.3d 640 (2008).

⁸¹ *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d at 302.

⁸² *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007).

⁸³ *Chelan County Deputy Sheriffs Ass'n v. Chelan County*, 109 Wn.2d 282, 294 n.2, 745 P.2d 1 (1987).

⁸⁴ *Hill v. Sacred Heart Med. Ctr.*, 143 Wn. App. 438, 445, 177 P.3d 1152 (2008).

In an action for negligence a plaintiff must prove four basic elements: (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause.⁸⁵ The only element challenged by UAP was whether it owed Hymas a duty. "A duty can arise either from common law principles or from a statute or regulation. A duty can also arise contractually."⁸⁶ While the existence of a legal duty is generally a question of law,⁸⁷ where the duty depends on proof of certain facts that may be disputed, summary judgment is inappropriate.⁸⁸

B. Under RCW 49.17.060(2) And The Case Law Interpreting The Statute, UAP Owed Hymas A Duty To Provide A Safe Workplace Free Of WISHA Violations

Hymas was injured as a result of UAP's breach of its duty to provide him with a workplace free of hazards resulting from violations of specific regulations promulgated under the Washington Industrial Safety and Health Act of 1973 ("WISHA").

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⁸⁵ *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994).

⁸⁶ *Kennedy v. Sea-Land Service, Inc.*, 62 Wn. App. 839, 855, 816, P.2d 75 (1991).

⁸⁷ *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996).

⁸⁸ *Afoa v. Port of Seattle*, 160 Wn. App. 234, 238, 247 P.3d 482 (2011) (citing *Sjogren v. Props. of Pacific N.W. LLC*, 118 Wn. App. 144, 148, 75 P.3d 592 (2003)), rev. granted, ___ Wn.2d ___ (July 13, 2011).

1. General contractors owe a nondelegable duty to all employees on a jobsite, not just their own, to provide a workplace free of WISHA violations.

The modern law of construction site liability originated in *Kelley v. Howard S. Wright Constr. Co.*⁸⁹ That case established the common law principle that the general contractor had a duty to enforce safe work practices on the job site, including a duty to enforce WISHA requirements to employees of subcontractors. The *Kelley* court ruled:

Placing ultimate responsibility on the general contractor for job safety in common work areas will, from a practical, economic standpoint, render it more likely that the various subcontractors being supervised by the general contractor will implement or that the general contractor himself will implement the necessary precautions and provide the necessary safety equipment in those areas.^[90]

The *Kelley* court based its analysis not only on Howard S. Wright Construction Company's retention of control by contract,⁹¹ but also because the court "recogniz[ed] the authority a general contractor has to influence work conditions on a construction site."⁹²

Subsequent to the *Kelley* decision, our Supreme Court in *Adkins v. Aluminum Company of America* held that RCW 49.17.060(2) imposed a

⁸⁹ 90 Wn.2d 323, 582 P.2d 500 (1978).

⁹⁰ *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 331, 582 P.2d 500 (1978) (citing *Funk v. Gen. Motors Corp.*, 392 Mich. 91, 220 N.W.2d 641 (1974)).

⁹¹ *Id.* at 330.

⁹² *Id.* at 331 (citing *Funk v. Gen. Motors Corp.*, 392 Mich. 91).

statutory duty on an employer that runs to employees of independent contractors.⁹³ RCW 49.17.060 includes two clauses.⁹⁴ The first clause, known as the "general duty clause" applies only to an employer's direct employees.⁹⁵ The second clause, known as the "specific duty clause," "imposes a duty to comply with WISHA regulations" and "extends to employees of independent contractors when a party asserts that the employer did not follow particular WISHA violations."⁹⁶ "Employer" is defined, in part, as any corporation "which engages in any business, industry, profession, or activity in this state and employs one or more employees."⁹⁷

⁹³ *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 152-53, 750 P.2d 1257 (1988).

⁹⁴ RCW 49.17.060 provides in relevant part:

Each employer:

(1) shall furnish to each of his employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his employees ...; and

(2) shall comply with the rules, regulations and orders promulgated under this chapter.

⁹⁵ *Adkins v. Aluminum Co. of America*, 110 Wn.2d at 152-53.

⁹⁶ *Stute v. P.B.N.C., Inc.*, 114 Wn.2d 454, 457, 788 P.2d 545 (1990). *See also, Adkins v. Aluminum Co. of America*, 110 Wn.2d at 152-53.

⁹⁷ RCW 49.17.020(4) provides:

The term "employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees or who contracts with one or more

In ruling that RCW 49.17.060(2) creates a duty owed by employers to employees of independent contractors, the Court in *Adkins* and *Stute* followed its decision in *Goucher v. J.R. Simplot Company*.⁹⁸ In *Goucher*, the court adopted the reasoning of the federal Sixth Circuit Court of Appeals in *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799 (6th Cir. 1984). The *Teal* court examined 29 U.S.C. § 654(a), the federal OSHA counterpart to RCW 49.17.060, and found its specific duty clause established a duty for an employer to protect all employees on its premises, not just its own, from violations of specific safety regulations. The *Goucher* court described the *Teal* court's reasoning:

When a party relies on the general duty clause, only those parties who are employees of the employer are protected. On the other hand, when a party relies on the specific duty clause on the ground that the employer failed to comply with a particular OSHA standard or regulation, then **all** of the employees who work on the premises of another employer are members of the protected class.^[99]

persons, the essence of which is the personal labor of such person or persons and includes the state, counties, political subdivisions of the state, and charitable organizations: PROVIDED, That any person, partnership, or business entity not having employees, and who is covered by the industrial insurance act shall be considered both an employer and an employee.

⁹⁸ *Adkins v. Aluminum Co. of America*, 110 Wn.2d at 153-54; *Stute v. P.B.M.C., Inc.*, 114 Wn.2d at 458.

⁹⁹ *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 672-73, 709 P.2d 774 (1985) (italics in original, bold added).

The *Goucher* court found "this rationale to be sound and [held the plaintiff], in alleging the violation of particular WISHA regulations, [was] a member of the protected class."¹⁰⁰

The current rule in Washington is that "general contractors have a nondelegable duty to ensure compliance with all WISHA regulations for the protection of all employees on the jobsite, whether its own employees or those of the independent contractor."¹⁰¹ Our Supreme Court in *Stute v. P.B.M.C., Inc.* held that a general contractor on a construction site had the "primary responsibility" under RCW 49.17.060(2) for compliance with WISHA regulations.¹⁰² The court explained, "[i]nasmuch as both the general contractor and subcontractor come within the statutory definition of employer, the primary employer, the general contractor, has, as a matter of policy, the duty to comply with or ensure compliance with WISHA and its regulations."¹⁰³ The primary responsibility of WISHA compliance falls on the general contractor because its "*innate* supervisory authority constitutes sufficient control over the workplace",¹⁰⁴ and imposing liability

¹⁰⁰ *Id.*

¹⁰¹ *Kinney v. The Space Needle Corp.*, 121 Wn. App. 242, 248, 85 P.3d 918 (2004).

¹⁰² 114 Wn.2d at 464.

¹⁰³ *Id.* at 463.

¹⁰⁴ *Id.* at 464 (emphasis added).

on the general contractor "further[s] the purposes of WISHA to assure safe and healthful working conditions for every person working in Washington."¹⁰⁵ The word "innate" means "inherent in the essential character of something."¹⁰⁶

2. The nondelegable duty to ensure compliance with WISHA safety regulations applies to owners who are analogous to general contractors.

The nondelegable duty applies not only to general contractors, but also to jobsite owners when they "play a role sufficiently analogous to general contractors to justify imposing upon them the same nondelegable duty to ensure WISHA compliance when there is no general contractor."¹⁰⁷ In determining if the jobsite owner is sufficiently analogous to a general contractor, courts look to see if the jobsite owner "retained control or supervisory authority over the performance of a subcontractor's work."¹⁰⁸ The actual exercise of control is not

¹⁰⁵ *Id.*

¹⁰⁶ Webster's Encyclopedic Unabridged Dictionary of the English Language, 733.

¹⁰⁷ *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 123-24, 52 P.3d 472 (2002). *See also*, *Afoa v. Port of Seattle*, 160 Wn. App. at 245 ("The rule set forth in *Stute* has been extended to other parties who are sufficiently analogous to justify imposing statutory liability."); *Kinney v. Space Needle Corp.*, 121 Wn. App. at 248 ("While jobsite owners are not per se liable under the statutory requirements of RCW 49.17, they may retain a similar degree of authority to control jobsite work conditions and subject themselves to WISHA regulations.").

¹⁰⁸ *Afoa v. Port of Seattle*, 160 Wn. App. at 245.

necessary.¹⁰⁹ The test is whether the jobsite owner has the right to direct the manner in which the work is performed.¹¹⁰ The right to control can exist where the jobsite owner does not actually interfere with the independent contractor's work.¹¹¹ "Whether the right to control has been retained depends on the parties' contract, the parties conduct, and other relevant factors."¹¹² The analysis is very fact specific.¹¹³

For instance, in *Weinert v. Bronco National Company*, an employee of a subcontractor was injured while installing siding on an apartment complex.¹¹⁴ Bronco National was the jobsite owner/developer. Weinert brought suit against Bronco National, alleging Bronco owed him a duty to ensure compliance with WISHA safety regulations under a *Stute* analysis. The trial court granted the Bronco's motion for summary judgment, finding that the jobsite owner did not owe Weinert a duty. The Court of Appeals reversed: "we do not overlook the fact that Bronco is an

¹⁰⁹ *Afoa v. Port of Seattle*, 160 Wn. App. at 239 (citing *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 121, 52 P.3d 472 (2002)).

¹¹⁰ *Id.*

¹¹¹ *Id.* (citing *Phillips v. Kaiser Aluminum & Chem. Corp.*, 74 Wn. App. 741, 750, 875 P.2d 1228 (1994)).

¹¹² *Id.* (citing *Phillips v. Kaiser Aluminum & Chem. Corp.*, 74 Wn. App. 741, 750, 875 P.2d 1228 (1994)).

¹¹³ *Id.* at 247.

¹¹⁴ 58 Wn. App. 692, 693, 795 P.2d 1167 (1990).

owner/developer rather than a general contractor hired by an owner."¹¹⁵

The court went on to explain:

We see no significance to this factor insofar as applying *Stute* to the facts of this case. **The owner/developer's position is so comparable to that of the general contractor in *Stute* that the reasons for the holding in *Stute* apply here.** The purpose of the statutes and regulations relied upon in *Stute* is to protect workers. The basis for imposing the duty to enforce those laws on a general contractor exists with regard to an owner/developer who, like the general contractor, has the same *innate overall supervisory authority* and is in the best position to enforce compliance with safety regulations.^[116]

Another instructive case is *Doss v. ITT Rayonier, Inc.* There, ITT Rayonier was the jobsite owner.¹¹⁷ ITT Rayonier hired an independent contractor, Del-Hur Industries to clean its boiler.¹¹⁸ An employee of Del-Hur was killed when a chunk of slag fell from above. The personal representative of the decedent brought a wrongful death suit against ITT Rayonier, arguing it owed a duty under RCW 49.17.060(2) to ensure WISHA safety regulations were complied with.¹¹⁹ A unanimous Court of Appeals held that the owner owed all employees on the jobsite, including

¹¹⁵ *Id.* at 696.

¹¹⁶ *Id.* (emphasis added).

¹¹⁷ 60 Wn. App. 125, 128 n2, 803 P.2d 4 (1991).

¹¹⁸ *Id.* at 126.

¹¹⁹ *Id.*

employees of independent contractors, a duty to comply with WISHA regulations.¹²⁰ The court reasoned that ITT Rayonier met the statutory definition of "employer" under RCW 49.17.020, and by its position as the jobsite owner, had "innate supervisory authority that gave it control over the workplace."¹²¹

By contrast, the court in *Kamla v. Space Needle Corporation* held that under the facts in that case, the Space Needle's relationship with the independent contractor who installed a fireworks display was not sufficiently analogous to that of a general and subcontractor relationship to justify imposing a nondelegable duty to ensure WISHA compliance.¹²² There, the court recognized that while general contractors have a nondelegable duty to ensure WISHA safety compliance, the same is not necessarily true for all jobsite owners. The Space Needle, who was the jobsite owner, hired independent contractor Pyro to install fireworks. A Pyro employee was injured when an elevator snagged his safety line, and he sued the Space Needle. Our Supreme Court held that the Space Needle did not retain or exercise a sufficient amount of control over the jobsite to justify imposing a duty under RCW 49.17.060(2) to ensure compliance

¹²⁰ *Id.* at 128-29.

¹²¹ *Id.* at 128.

¹²² *Afoa v. Port of Seattle*, 160 Wn. App. at 241 (citing *Kamla v. Space Needle Corp.*, 147 Wn.2d 52 P.3d 472 (2002)).

with WISHA regulations. The case did not involve a construction project with multiple trades. The Space Needle simply hired a single independent contractor to install fireworks. The Space Needle did not retain any rights that would allow it to interfere with the installation of those fireworks.

The recent decision in *Afoa v. Port of Seattle* is more instructive. The plaintiff, Afoa, was injured while working at the Seattle-Tacoma International Airport, owned by the defendant, Port of Seattle ("Port"). At the time of Afoa's injury, he was driving a motorized vehicle owned by his employer that was used to load and unload aircraft.¹²³ He was injured when the brakes and steering failed on the motorized vehicle, causing him to crash.¹²⁴ Afoa brought suit against the jobsite owner alleging, *inter alia*, a breach of a duty to ensure compliance with WISHA regulations and a breach of the common law duty owed him as a business invitee. The Port filed a motion for summary judgment arguing, *inter alia*, that it did not control the method and manner of Afoa's work. The trial court granted the Port's motion for summary judgment and dismissed the entire case.

The Court of Appeals reversed the trial court, holding there were material factual disputes regarding whether the Port retained a right to

¹²³ *Id.* at 237.

¹²⁴ *Id.*

control the work.¹²⁵ The court noted that the existence of a legal duty is generally a question of law, "but where the duty depends on proof of certain facts that may be disputed, summary judgment is inappropriate."¹²⁶ The court went on to say, "an examination of the agreement between EAGLE [Afoa's employer] and the Port, when viewed in a light most favorable to Afoa, reveals questions of material fact on this issue."¹²⁷

The contract between EAGLE and the Port required EAGLE to comply with all Port regulations and to comply with instructions issued by the Port.¹²⁸ The Port, in turn, argued that it merely required EAGLE to comply with all applicable laws, and it did not train any EAGLE workers, did not employ them, did not manage them, and did not supervise them.¹²⁹ The Port heavily relied upon a provision in the contract which stated the Port "accepts no liability for [EAGLE's] equipment."¹³⁰ Based on the contract provisions, the court ruled that the evidence was conflicting at best, "showing that genuine issues of material fact exist regarding whether

¹²⁵ The Court of Appeals also held that the common law premise liability claim was improperly dismissed and remanded for trial.

¹²⁶ *Afoa v. Port of Seattle*, 160 Wn. App. at 238.

¹²⁷ *Id.* at 241.

¹²⁸ *Id.* at 241-42.

¹²⁹ *Id.* at 244.

¹³⁰ *Id.* Afoa was injured when a piece of equipment he was driving, owned by Afoa's employer EAGLE, malfunctioned.

the Port so involved itself in the performance of EAGLE's work as to undertake responsibility for the safety of EAGLE's employees."¹³¹

The court also went on to say that whether the owner, the Port, owed a duty to ensure compliance with WISHA regulations is a "fact-based" determination:

...and turns on factors such as whether the Port retained control over the manner in which EAGLE and its employees did their work, [citation omitted] whether the Port had "the greater practical opportunity and ability to insure compliance with safety standards," [citation omitted] and whether the Port had "innate supervisory authority." [citation omitted].

As described above, the evidence viewed in a light most favorable to Afoa shows that genuine issues of material fact exist regarding whether the Port retained such control or supervisory authority over the performance of EAGLE's work as to be analogous to a general contractor. As such, we hold summary judgment was improperly granted on this issue.¹³²

3. Hymas presented sufficient evidence showing UAP was analogous to a general contractor such that imposing a duty under RCW 49.17.060(2) is justified.

Here, Hymas presented sufficient evidence to establish UAP owed him a duty under RCW 49.17.060(2) and the cases interpreting that statute (or at least sufficient evidence to create a genuine material factual dispute). There is no dispute that UAP is an employer as defined under

¹³¹ *Id.*

¹³² *Id.* 247-48.

RCW 49.17.020(4). UAP is a large nationwide fertilizer company that has employees in Washington. There is also no dispute that Hymas alleged UAP failed to ensure compliance with a specific WISHA regulation, specifically, WAC 296-155-505(6)(a). Indeed, there is no dispute that this WAC section was violated. The only element in dispute is whether UAP was sufficiently analogous to a general contractor to justify imposing a duty under RCW 49.17.060(2).

There are several facts showing, or at least raising a factual dispute, that UAP was analogous to a general contractor and retained the right to control the work being performed on its property.

- a. UAP's contract incorporated WACs that specified the method and manner of how Narum was to perform concrete work.

UAP's contract and conduct show it was analogous to a general contractor and retained a right to control the work of Narum. Similar to the contract in *Afoa*, which incorporated the Port of Seattle's rules and regulations, the UAP-Narum contract incorporated Washington Administrative Codes into the contract. The contract in *Afoa* provided that the contractor "shall comply with all Port regulations and the Port's SCHEDULE OF RULES AND REGULATIONS FOR SEATTLE-

TACOMA INTERNATIONAL AIRPORT."¹³³ In *Afoa*, the court reviewed the Port of Seattle's rules and regulations and found that they provided detailed instructions on how Afoa's employer must perform its work and, therefore, there was at least a material fact regarding whether the Port of Seattle retained the right to control the work. For instance, the Port's rules and regulations only allowed up to six cargo carts to be pulled by a single motorized vehicle.¹³⁴

Likewise, the UAP-Narum contract provided "[t]he Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations, and lawful orders of public authorities..."¹³⁵ The term "regulations" clearly incorporates Washington's Administrative Code. A review of the Washington Administrative Code shows that there are many rules that provide detailed instructions on how concrete work is to be performed. See the entire chapter of WAC 296-155 Part O. There are detailed instructions on how concrete equipment is to be used,¹³⁶ how concrete is to be finished,¹³⁷ how concrete forms are to be used,¹³⁸ how

¹³³ 160 Wn. App. at 241-42.

¹³⁴ *Id.* at 242.

¹³⁵ See footnote 43, above.

¹³⁶ WAC 296-155-682.

¹³⁷ WAC 296-155-683.

concrete is to be shored,¹³⁹ and how forms are to be placed and removed.¹⁴⁰ By incorporating these WACs into the UAP-Narum contract, UAP was exercising control over how Narum was to perform its work.

It is anticipated that UAP may argue that the contract merely required Narum to abide by the relevant laws applicable to its work. The Port of Seattle raised that same argument in *Afoa* and pointed to provisions in its contract that Afoa's employer, EAGLE, was solely responsible for its own equipment, and that the Port "accepts no liability for [EAGLE's] equipment."¹⁴¹ The court rejected that argument:

But at best, this is conflicting evidence, showing that genuine issues of material fact exist regarding whether the Port so involved itself in the performance of EAGLE's work as to undertake responsibility for the safety of EAGLE's employees. As such, we hold summary judgment was improper and reverse.^[142]

As with Washington's Administrative Code, the Port of Seattle's rules and regulations are law. The Port of Seattle is a political subdivision of the state and a municipal corporation.¹⁴³ As such, the Port is statutorily

¹³⁸ WAC 296-155-684.

¹³⁹ WAC 296-155-685, 686, and 687.

¹⁴⁰ WAC 296-155-688 and 689.

¹⁴¹ *Afoa v. Port of Seattle*, 160 Wn. App. 244.

¹⁴² *Id.*

¹⁴³ *Automobile Drivers & Demonstrators Union v. Dep't of Ret. Sys.*, 92 Wn.2d 415, 419,

authorized to "adopt and amend all needed rules, regulations, and ordinances for the management, government, and use of any properties under its control" and "to fix by ordinance or resolution, as may be appropriate, penalties for the violation of the rules, regulations, and ordinances, and enforce those penalties in the same manner in which penalties prescribed by other rules, regulations, and ordinances of the municipality are enforced."¹⁴⁴ Accordingly, there is no difference by the incorporation of the Port's rules and regulations in *Afoa* and the incorporation of the WACs in present case.

b. UAP retained the right to control the work through various provisions in the UAP-Narum contract.

In addition to detailing how Narum was to perform its work by the incorporation of the WACs, UAP specifically reserved the right to control the work through various provisions in its contract with Narum. In *Afoa*, the contract at issue provided that EAGLE employees "shall comply with written or oral instructions issued by the Director or Port employees to enforce these regulations."¹⁴⁵ The court in *Afoa* found that language sufficient to raise a factual dispute regarding whether the Port of Seattle

598 P.2d 379 (1979); *Port of Seattle v. Int'l Longshoremen's & Warehousemen's Union*, 52 Wn.2d 317, 318, 324 P.2d 1099 (1958). *See also*, RCW 14.08.010(2).

¹⁴⁴ RCW 14.08.120(2).

¹⁴⁵ 160 Wn. App. at 243.

retained the right to control the work. Similarly in this case, the UAP-Narum contract stated Narum "shall cooperate fully" with UAP.¹⁴⁶ That provision means that UAP had the right to instruct Narum on how to perform aspects of its work. It matters not whether that right was actually exercised.

UAP also retained the right to perform any work on the project with its own forces. That included the right to exercise full control by taking over work being performed by a contractor. UAP further retained the right to terminate the contract for any or no reason. That is an unusual right to retain, as generally there is only a right to terminate a contract if there is a material breach.¹⁴⁷ Those two rights, in and of themselves, establish that UAP retained the right to control the work and the working environment.¹⁴⁸

Indeed, UAP exercised its control right under the contract. UAP unilaterally assigned its own employees to perform work that was within the scope of the Ranco contract. Specifically, UAP used their own forces to paint the steel support poles, welds, and to bolt down the steel poles. Moreover, on the second phase of the project, UAP terminated the

¹⁴⁶ See footnote 44, above.

¹⁴⁷ See *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 588-89, 167 P.3d 1125 (2007).

¹⁴⁸ CP 21-24.

pipefitters because, after closely watching and monitoring their work, UAP concluded they were working too slowly. After UAP terminated the pipefitters, they used their own employees to complete the work that they had previously contracted out.¹⁴⁹

The right to use their own employees to complete work that fell within their specialty contractors' scope of work coupled with the right to terminate the specialty contractors exhibited a retained right of control over the method and manner of the work being performed.¹⁵⁰ UAP's role in selection of multiple subcontractors, its retained contractual rights, its presence and activities on the jobsite, and its position as the owner/developer show it had "innate supervisory authority that gave it control over the workplace."¹⁵¹

UAP also retained the right to approve all sub-tier contractors that the specialty contractors wanted to hire. UAP reserved the right to delay, interrupt, or stop the work without cause, the right to have their representative inspect the work, the right to approve any substitution of materials, the right to reject work, the right to change the work, and the

¹⁴⁹ CP 151-153.

¹⁵⁰ CP 23.

¹⁵¹ *Doss v. ITT Rayonier, Inc.*, 60 Wn. App. at 128.

right to direct when the work was commenced and when it was substantially completed.

c. UAP had innate authority over safety issues and raised safety concerns with Narum.

UAP had innate authority over safety as the jobsite owner/developer and exercised that authority. Narum testified that it expected UAP to raise safety concerns on the project if UAP observed any. UAP admitted that they would raise safety concerns if and when safety issues were observed, and that they expected Narum to take prompt corrective action in response thereto. Narum also testified that they would have followed any safety instructions from UAP, as the contract required Narum to "cooperate fully" with UAP. In fact, UAP expressed concerns about the safety of a specific section of the conveyor belt trench because it was unguarded. This related to the leg section of the trench near the road and railroad track, several hundred feet from where Hymas fell. Narum responded to UAP's safety concerns by placing barricades around the trench where UAP directed it to do so.

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- d. UAP's conduct was sufficiently analogous to that of a general contractor to justify imposing a duty under RCW 49.17.060(2).

As in the cases of *Weinert* and *Doss*, UAP's conduct was analogous to that of a general contractor.¹⁵² In addition to the aforementioned facts, UAP managers testified that they did not hire a general contractor for the four million dollar project because they believed they could do that work themselves.¹⁵³ Narum testified that it believed UAP was the general contractor.¹⁵⁴ Our legislature has defined "general contractor" as "a contractor whose business operations require the use of more than one building trade or craft upon a single job or project or under a single building permit."¹⁵⁵ Like a general contractor, UAP identified what specialty contractors were needed and directly entered into complicated, legally binding contracts with six specialty contractors (even more were hired to construct the wet fertilizer plant).¹⁵⁶ UAP had

¹⁵² It should be noted that no published opinion has defined the phrase "general contractor" for purposes of liability under RCW 49.17.060(2). Our Legislature has defined the term in RCW 18.27.010(5). The Court of Appeals in *Arnold v. Saberhagen Holdings, Inc.*, used a "general understanding of the phrase" to conclude the owner in that case was also a general contractor. 157 Wn. App. 649, 663, 240 P.3d 162 (2010), rev. denied, 171 Wn.2d 1012 (2011).

¹⁵³ CP 80.

¹⁵⁴ CP 43.

¹⁵⁵ RCW 18.27.010(5).

¹⁵⁶ See CP 22.

extensive prior experience with selecting and contracting with specialty contractors. UAP produced 24 contracts executed before the Plymouth fertilizer plant project at issue wherein it orchestrated specialty contractor jobs at other UAP facilities. Like a general contractor, UAP solicited bids for all subcontract work and then directly paid the specialty contractors.¹⁵⁷ UAP supervisors Brian Jones, Larry Talmage, and Harold Priest were regularly onsite inspecting and monitoring the work.

UAP coordinated the work between the various specialty contractors.¹⁵⁸ Throughout the course of the construction project, multiple specialty trades were working on the site at the same time.¹⁵⁹ While UAP coordinated the work between the specialty contractors, no one coordinated the overall project safety procedures.¹⁶⁰ The policy and purpose behind the *Stute* doctrine is to ensure worker safety on the entire job site. The *Stute* doctrine specifically attempts to prevent the type of situation that arose in this case by imposing liability on the owner/developer for failure to ensure compliance with WISHA safety

¹⁵⁷ *Id.*

¹⁵⁸ CP 146.

¹⁵⁹ CP 143, 146 and 159-160. UAP supervisor Harold Priest testified: "Q: ...at some point Narum, the plumbing people, there were specialty contractors from different organizations working on the site at the same time as the project flowed through; correct? A: Correct." CP 146.

¹⁶⁰ CP 293.

regulations. Here, UAP, like a general contractor, was in the best practical position to ensure compliance with WISHA regulations. UAP had innate supervisory authority. UAP's directives had to be and were followed. UAP's alleged ignorance of the WISHA safety regulations is no excuse. UAP had the financial resources to hire a construction site safety officer to fill that alleged void. The public policy underlying *Stute* and its progeny would be eradicated if sophisticated commercial enterprises could coordinate multi-million dollar construction projects, but ignore overall site safety.

Mark Lawless, construction site safety expert, reviewed the discovery documents in this case. He has particular familiarity with the issues in this case based on his involvement in *Kamla v. Space Needle Corporation* and *Kinney v. Space Needle Corporation*.¹⁶¹ Mr. Lawless concluded, after review of all the pertinent materials:

As a matter of industry practice, it is my professional conclusion that UAP retained the requisite amount of control over the work to be performed on the construction project to classify them as an owner in control.^[162]

Mr. Lawless further testified:

UAP's conduct shows it retained the right to control the method and manner of the work being performed. The fact

¹⁶¹ CP 21.

¹⁶² CP 24.

that UAP retained the right to terminate a contractor for any or no reason coupled with UAP's right to perform the work with its own forces exhibits a very real and very tangible right to control the method and manner of the work being performed. If UAP did not like the manner in which a contractor was performing the work, the contractor could be terminated without advance notice. *There can be no greater control by a jobsite owner than the control retained by a contract allowing them to terminate the contractor for no reason whatsoever and take over the work with their own forces.* UAP had the authority to raise safety issues with the contractors, and if and when they did so, they expected corrective action to be taken. As Narum testified in its deposition, UAP instructions regarding safety concerns would have been followed.^[163]

The circumstances in this case are clearly distinguishable a homeowner who contracts with a specialty contractor to perform work on his or her house. This case involves a sophisticated, large commercial enterprise that was the owner/developer, experienced in construction projects, who orchestrated a four million dollar project. There can be no question that UAP's position as the owner/developer was sufficiently analogous to that of a general contractor to justify imposing a duty under RCW 49.17.060(2).

- e. UAP cannot delegate a nondelegable duty and attempts to do so do not shield it from liability.

UAP's contract, conduct, and other factors show (or raise a factual dispute) that UAP retained the right to control the work on its land.

¹⁶³ CP 23 (emphasis added).

Consequently, a *nondelegable* duty arises under RCW 49.17.060(2) and *Stute*. UAP's attempt to delegate that duty in its contract with Narum is irrelevant.

C. UAP Violated WAC 296-155-505(6)(a) By Failing To Ensure Railings Were Erected Around The Trench In Which Hymas Fell

There is no dispute that WAC 296-155-505(6)(a) was violated. Partial summary judgment should have been granted on the issue of whether there was a WISHA violation. There were no railings or other modality of guarding around the open edges of the trench in which Hymas fell. There was no reason for the lack of railings.¹⁶⁴ The trench was five feet deep.¹⁶⁵ WAC 296-155-505(6)(a) states:

Every open sided floor, platform or surface **four feet** or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in subsection (7)(a) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a standard toe board wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard.

Emphasis added. Subsection (7) of WAC 296-155-505 provides the specifications for the mandated railing. The railing must consist of a properly placed top rail, intermediate rail, toe board, and posts. Further

¹⁶⁴ CP 49.

¹⁶⁵ CP 46.

material related requirements are enumerated in subsection (7).

UAP failed to ensure the trench had the mandated railings. UAP only instructed Narum to erect railings on a portion of the trench located near a road and railroad tracks.¹⁶⁶ UAP failed to have a site specific fall protection plan to address hazards such as the open trench. UAP failed to hold safety meetings in which the fall hazards could have been addressed. UAP failed to conduct safety inspections. UAP did not even ask Narum who their safety officer was, let alone provide a safety officer of its own. Construction site safety expert Mark Lawless testified that WAC 296-155-505(6)(a) is the industry standard and that UAP failed to meet the industry standard.¹⁶⁷ In short, UAP did nothing to ensure WAC 296-155-505(6)(a) was complied with. The court should rule as a matter of law that UAP breached its duty owed to Hymas.

D. The Lack Of Railings Around The Trench Was A Proximate Cause Of Hymas' Fall

The obvious purpose of WAC 296-155-505(6)(a) is to protect workers from falling into open trenches and sustaining injuries. There can be no question that had a railing that conformed with WAC 296-155-505(7) been erected around the trench, Mr. Hymas would not have fallen.

¹⁶⁶ CP 50.

¹⁶⁷ CP 25.

Mr. Lawless testified:

WAC 296-155-505(6)(a) required railings around all the exposed sides of the trench. The railings would have restrained access to the trench and thereby would have made the likelihood of falling into the trench improbable. It is my conclusion that the failure to comply with these industry standards lead to Mr. Hymas' fall and injuries.¹⁶⁸

Narum had an independent consultant investigate the fall.¹⁶⁹ One of the conclusions was that had a railing been in place, Hymas would not have fallen:

Q: After the investigation was completed, was one of the conclusions that the lack of a handrail along the trench was a contributing factor to Mr. Hymas' fall?

A: It would have helped retain him if there would have been a handrail.¹⁷⁰

Accordingly, the court should rule as a matter of law that a proximate cause of Hymas' fall was the lack of the railings mandated by WAC 296-155-505(6)(a).

E. UAP Owed Hymas, As A Business Invitee, A Duty Of Reasonable Care To Protect Him From Dangerous Conditions On The Property

As the property owner, UAP owed invitees a duty to use reasonable care to protect against dangerous conditions on its land. The

¹⁶⁸ *Id.*

¹⁶⁹ CP 52.

¹⁷⁰ CP 320.

legal duty owed by a landowner to a person entering the premises depends on whether the entrant is a trespasser, licensee, or invitee.¹⁷¹ "There is no dispute that 'employees of independent contractors hired by landowners are invitees on the landowners' premises."¹⁷² Our Supreme Court has adopted sections 343 and 343A of the *Restatement (Second) of Torts* to define a landowner's duty to invitees.¹⁷³ As our Supreme Court explicitly stated in *Kamla*, "[w]e have adopted sections 343 and 343A of the Restatement (Second) of Torts to define a landowner's duty to invitees."¹⁷⁴

Section 343 states in pertinent part:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.^[175]

¹⁷¹ *Iwai v. State*, 129 Wn.2d 84, 91, 915 P.2d 1089 (1996).

¹⁷² *Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 249, 85 P.3d 918 (2004) (citing *Kamla v. Space Needle Corp.*, 147 Wn.2d at 125).

¹⁷³ *Id.* (citing *Iwai v. State*, 129 Wn.2d at 93).

¹⁷⁴ *Kamla v. Space Needle Corp.*, 147 Wn.2d at 125.

¹⁷⁵ *Kinney v. Space Needle Corp.*, 121 Wn. App. at 249 (citing *Restatement (Second) of*

Section 343A states in pertinent part:

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.^[176]

Thus, "a landowner is liable for harm caused by an open and obvious danger if the landowner should have anticipated the harm, despite the open and obvious nature of the danger."¹⁷⁷ Comment "f" to the *Restatement (Second) of Torts* § 343A states:

[R]eason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be *distracted*, so that he [or she] will not discover what is obvious, or *will forget* what he [or she] has discovered, or fail to protect ... against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable [person] in [that] position the *advantages* of doing so would *outweigh the apparent risk*.^[178]

Distraction, forgetfulness, or foreseeable, reasonable advantages from

Torts § 343 (1965)).

¹⁷⁶ *Id.* at 250 (citing *Restatement (Second) of Torts* §343A (1965)). See also, *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn. App. 649, 667, 240 P.3d 162 (2010).

¹⁷⁷ *Kinney v. Space Needle Corp.*, 121 Wn. App. at 250 (citing *Kamla v. Space Needle Corp.*, 147 Wn.2d at 126 and *Iwai v. State*, 129 Wn.2d at 94).

¹⁷⁸ *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 139, 875 P.2d 621 (1994) (citing the *Restatement (Second) of Torts* § 343A cmt. F) (emphasis in original).

encountering the danger are factors which can trigger the landowner's responsibility to protect a business invitee from a known or obvious danger.¹⁷⁹

For example, in *Sjogren v. Properties of the Pacific Northwest, L.L.C.*, the plaintiff was injured when she fell down stairs that were improperly lighted.¹⁸⁰ The plaintiff was leaving her daughter's apartment, which was only accessible by a flight of stairs.¹⁸¹ The stairs were usually lit by a light on an automatic timer.¹⁸² When the plaintiff left her daughter's apartment, she did not notice that the light was not working because the light from the daughter's apartment illuminated the area.¹⁸³ When the plaintiff was halfway down the stairs, the daughter shut her door. At that point the plaintiff noticed that the stairs became "pitch black."¹⁸⁴ The landowner moved for dismissal, arguing that the dangerous condition was open and obvious, and thus, it had no duty.¹⁸⁵ The Court of

¹⁷⁹ *Id.* at 140.

¹⁸⁰ 118 Wn. App. 144, 147, 75 P.3d 592 (2003).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

Appeals reversed, citing the *Restatement (Second) of Torts* § 343A.¹⁸⁶

The court reasoned that the landowner should have anticipated that the plaintiff would elect the advantages of continuing down the darkened stairs and encountering the associated risks versus electing to stay at the apartment.¹⁸⁷

Here, there is no dispute that Hymas was a business invitee. There is no dispute that the unguarded trench Hymas fell in was on UAP's property. There is no dispute that the unguarded trench was a dangerous condition. There is no dispute that both Hymas and UAP long had notice of the dangerous condition. The trench existed for a minimum of six weeks prior to Hymas' fall. UAP had been on the site numerous times each week during that period. UAP's plant supervisor admitted seeing the trench, unguarded, prior to Hymas' fall.¹⁸⁸ Hymas contends that UAP should have used reasonable care to protect him from the dangerous condition despite his awareness of it because UAP should have anticipated that the hazard would go uncorrected.

Hymas was working in close proximity to the trench. UAP should have anticipated that workers on the jobsite would reasonably be focused

¹⁸⁶ *Id.* at 149.

¹⁸⁷ *Id.* at 150.

¹⁸⁸ CP 149.

on and distracted by their work. When a person is focused on his or her work, he or she is not always able to watch every step taken. Hymas' job was to operate a concrete pump while following a co-worker who was controlling the discharge hose for concrete placement 15 feet above the ground. Hymas had to keep his eyes up on the discharge hose to ensure the concrete was discharging appropriately. As with the landowner in *Sjogren*, UAP should have anticipated that Hymas would elect to work and keep his job and encounter the risks associated with the unguarded trench versus not working and jeopardizing his job. It was also reasonably foreseeable that a worker would fall into the trench if measures were not taken to guard against the danger. That the danger was foreseeable is demonstrated by our State regulators promulgating a specific WISHA safety regulation mandating railings around an open trench.¹⁸⁹

In response to Hymas' premise liability claim, UAP argued that the *Restatement (Second) of Torts* § 343A does not apply, citing a 39 year old case, *Golding v. United Homes Corporation*.¹⁹⁰ In *Golding*, the Court of Appeals, Division Two, referenced the standards of the *Restatement (Second) of Torts* § 343A,¹⁹¹ but then concluded those standards do not

¹⁸⁹ See WAC 296-155-505(6).

¹⁹⁰ 6 Wn. App. 707, 495 P.2d 1040 (1972).

¹⁹¹ *Id.* at 710.

apply:

The decedent was an employee of an independent contractor and as such enjoyed the status of invitee. Notwithstanding this fact, it has been held that section 343 is intended to impose liability on the possessor of premises **only** where the negligent harm to the employee of an independent contractor involves a hidden or latent defect on the premises (1) which is known to the owner or possessor or is discoverable by the exercise of a reasonable discretion, and (2) is not known or discoverable by an invitee who is using reasonable care for his own protection.^[192]

The *Golding* court cited the following cases as support: *Hartman v. Port of Seattle*,¹⁹³ *Marsland v. Bullitt Company*,¹⁹⁴ *Parsons v. Amerada Hess Corporation*,¹⁹⁵ and *Epperly v. Seattle*.¹⁹⁶ None of the Washington cases cited by the *Golding* court even referenced the *Restatement (Second) of Torts* § 343A, let alone held that § 343A does not apply to employees of independent contractors.

Moreover, subsequent Supreme Court and Court of Appeals decisions have clearly held that the standard set forth in the §§ 343 and 343A creates a duty owed by landowners to employees of independent

¹⁹² *Id.* at 710-11 (emphasis added).

¹⁹³ 63 Wn.2d 879, 882, 389 P.2d 669 (1964).

¹⁹⁴ 3 Wn. App. 286, 474 P.2d 589 (1970).

¹⁹⁵ 422 F.2d 610 (10th Cir. 1970).

¹⁹⁶ 65 Wn.2d 777, 786, 399 P.2d 591 (1965).

contractors.¹⁹⁷ For example, in *Kamla v. Space Needle Corporation*, an employee of an independent contractor was injured installing fireworks on the Space Needle.¹⁹⁸ Our Supreme Court applied §§ 343 and 343A.¹⁹⁹ Similarly, in the recent case of *Arnold v. Saberhagen Holdings, Inc.*, Division Two of the Court of Appeals, the same court that authored *Golding*, applied §§ 343 and 343A to a case where an employee of an independent contractor was injured and sued the property owner.²⁰⁰ The court in *Arnold* reversed the trial court's order granting summary judgment to the landowner on this issue.²⁰¹ Division One came to the same conclusion in *Kinney v. Space Needle Corporation*.²⁰² To the extent *Golding* holds that §§ 343 and 343A do not apply to employees of independent contractor, that holding has been reversed *sub silentio*. Accordingly, UAP's reliance on *Golding* is misplaced.

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¹⁹⁷ See, e.g., *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 125-26, 52 P.3d 472 (2002); *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn. App. 649, 666-67, 240 P.3d 162 (2010); and *Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 249-50, 85 P.3d 918 (2004).

¹⁹⁸ 147 Wn.2d at 117.

¹⁹⁹ *Id.* at 125-26 ("A landowner is liable for harm caused by an open and obvious danger if the landowner should have anticipated the harm, despite the open and obvious nature of the danger.").

²⁰⁰ 157 Wn. App. 649, 666-68, 240 P.3d 162 (2010), rev. denied, 171 Wn.2d 1012 (2011).

²⁰¹ *Id.* at 668.

²⁰² 121 Wn. App. at 249-250.

F. UAP Breached Its Duty Owed Under The *Restatement (Second) Of Torts* §§ 343 and 343A

There is no dispute UAP did nothing to protect Hymas from the known danger of the open trench. UAP did not erect guardrails (or even caution tape) around the trench. UAP did not instruct Narum or anyone else to take protective measures. UAP raised safety concerns about the "leg" section of the trench. Inexplicably, UAP did not even talk to Narum about the danger that the trench posed inside the building that was being constructed, which is the location where Hymas fell. There can be no question that if UAP owed Hymas a duty under the *Restatement (Second) of Torts* §§ 343 and 343A to remediate a known, open hazard when it should have known no one else would do so. UAP breached its duty.

V. CONCLUSION

The evidence offered by Hymas shows UAP's conduct on the construction project at issue was analogous to that of a general contractor. Whether an owner/developer owes a duty under RCW 49.17.060(2) is heavily *fact-based*. The totality of the UAP-Narum contract establishes that UAP has a right to control the work on its property. The contractual provision stating Narum "shall cooperate fully" with UAP gave UAP the right to control the work. It does not matter if UAP exercised its right to interfere with Narum's work, though of course UAP did so when it ordered

action be taken around the "leg" section of the trench. The contractual right to take over the work of a specialty contractor and to terminate a contract without cause also gave UAP substantial authority over the jobsite. UAP further dictated many details of Narum's work by incorporating the WACs into the contract. UAP's conduct mirrored that of a general contractor. UAP took on many of the job duties that a general contractor performs. UAP had innate supervisory authority over safety and exercised that authority. If UAP, a sophisticated nation-wide company, chooses to take on the job duties of a general contractor, and enjoy those benefits, then it must also take on the legal duties owed by a general contractor. At a minimum, Hymas offered sufficient evidence to raise a genuine issue of material fact regarding whether UAP was sufficiently analogous to a general contractor to justify imposing a duty under RCW 49.17.060(2).

There is no real dispute that a specific WISHA regulation, WAC 296-155-505(6)(a), was violated and that UAP failed to take any action to ensure WISHA regulation were complied with. There is also no real dispute that the violation of WAC 296-155-505(6)(a) was a proximate cause of Hymas' injuries.

With regard to premises liability, Washington law is clear. The standard set forth in the *Restatement (Second) of Torts* §§ 343 and 343A

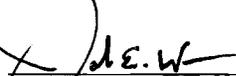
apply to employees of independent contractors. Although the unguarded trench was open and obvious, UAP should have anticipated Hymas' injury since he was required to work in close proximity to the trench, and should have known the hazard would not be remedied by others.

Hymas has offered substantial evidence supporting his claims. It was error for the trial court to dismiss them. This court should reverse and remand for trial.

DATED this 21st of July, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the date entered below, I sent via first class mail, postage prepaid and email pursuant to agreement of counsel, a copy of this brief to:

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DATED this 21st day of July, 2011.



Pamela L. Rainwater
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APPENDIX

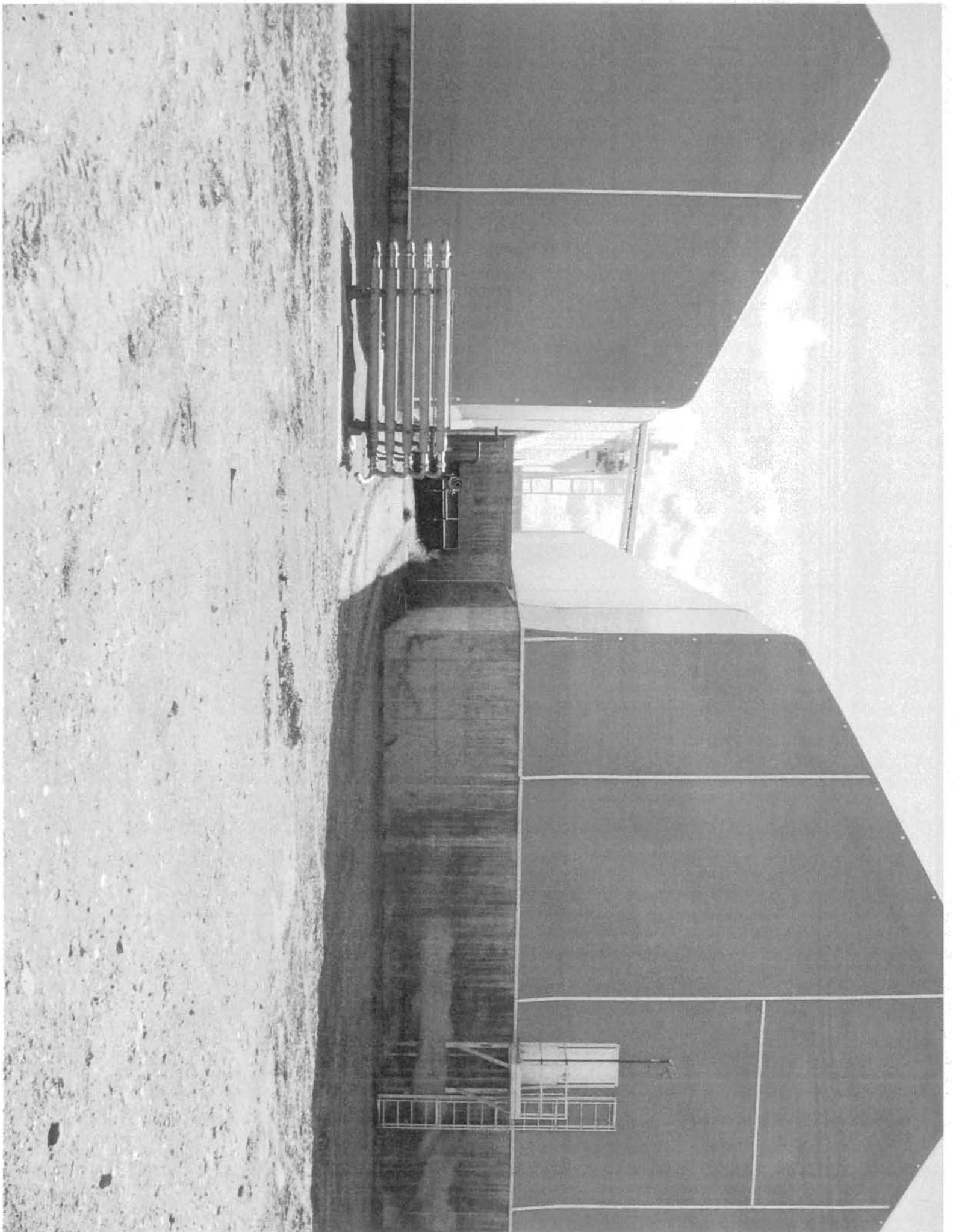
- A. Picture of the completed buildings (CP 89)
- B. Picture of the completed buildings (CP 1035)
- C. Picture of the completed buildings (CP 1036)
- D. Diagram of the jobsite (CP 1034)

APPENDIX A



EXHIBIT 1
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APPENDIX B



APPENDIX C



APPENDIX D

