

**FILED**

**AUG 22 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 299066

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

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JOHN HYMAS,

Appellant,

v.

UAP DISTRIBUTION, INC., a foreign corporation; CROP  
PRODUCT SERVICES, INC., a foreign corporation; and  
AGRIUM U.S., INC., a foreign corporation,

Respondents.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR BENTON COUNTY

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**BRIEF OF RESPONDENTS UAP DISTRIBUTION, INC., CROP  
PRODUCT SERVICES, INC., and AGRIUM U.S., INC.**

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## **I. ISSUES PRESENTED FOR REVIEW**

Appellant has identified 3 assignments of error and 6 issues for review in his brief (the “Brief”). Brief, pp. 2-3. Respondents do not identify any additional issues in this brief.

## **II. IDENTIFICATION OF PARTIES**

Appellant is John Hymas (“Hymas”). Respondents are UAP Distribution, Inc., Crop Production Services, Inc., and Agrium U.S., Inc. They will collectively be referred to herein as “UAP.”

## **III. SUMMARY**

In order for Hymas to convince this court to reverse the trial court and find that UAP assumed a legal obligation for WISHA compliance, he must show that UAP had right to control the means and methods of the work of Hymas’s employer, Narum Concrete (“Narum”). The evidence, however, is indisputably clear that no such control existed. In particular, Narum and UAP executed a contract which unambiguously provided sole control over the means and methods of Narum’s work to Narum itself. Moreover, both Narum and UAP then testified that they acted in conformance with that contract. These uncontested facts are dispositive.

Against this outwardly-insuperable backdrop, Hymas nonetheless maintains that “control” somehow still existed. His argument in this regard, however, is plainly unsupportable. In essence, Hymas urges this

Court to believe: (1) that the contract between UAP and Narum does not actually mean what it plainly says; and (2) that Hymas and his expert know better than the parties themselves what they really meant when they contracted. Obviously, such a position is faulty on its face.

Hymas makes similar missteps as it relates to his premises-liability claim. He ignores the fact that the trial court found that there are several Washington cases that prohibit his claim, and instead focuses his efforts solely on trying to discredit just one of them: *Golding v. United Homes*. But even then, in order to prevail, he is forced to misconstrue both the holding of *Golding* and the facts surrounding this case.

In sum, Hymas has not presented this Court with any reason to disturb the rulings below. The trial court's well-reasoned decisions should accordingly be upheld.

#### **IV. STATEMENT OF THE CASE**

##### ***A. Factual Background***

##### **1. The relationship between Hymas's employer, Narum, and UAP**

In 2006, UAP desired to have a fertilizer mixing plant constructed on "bare land" it owned in Plymouth, Washington. Clerk's Papers ("CP") 171-72, 252 (19:13-21). UAP is not in the construction industry; it is a seller of fertilizer. CP 173. It therefore contracted with Ranco Fertiservice, Inc. ("Ranco"), one of a limited number of manufacturers of

fertilizer-handling equipment, and asked it to develop a plan for erecting this facility. CP 175, 270 (14:14-15:2). Ranco did just that, creating a design which required the construction of three buildings. CP 173, 175.

Under Ranco's plans, the first stage of the project was the excavation of the site and the pouring of concrete foundations and walls. CP 173-75. In that regard, Ranco's design called for a large conveyor belt to run down the middle of one of the buildings, which meant that a large trench had to be dug and then the area around it be poured with concrete. *Id.* UAP hired Hymas's employer, Narum, to perform this work. CP 175. To that end, Narum and UAP negotiated and signed a detailed written contract (the "Contract"). CP 91-111, 176.

The Contract provided Narum with several unambiguous rights related to control over the work it was to perform. In particular, the Contract expressly stated that Narum was to be "solely responsible" for, and "have control over," the means and methods of its work. CP 96. Moreover, it was specifically to be "responsible" for the acts and safety of its own employees. *Id.* To wit:

**§ 8.2.1** The Contractor shall cooperate fully with the Owner and Architect and supervise and direct the Work, using the Contractor's best skill and attention. *The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work under the Contract, unless the Contract*

*Documents give other specific instructions concerning these matters. ...*

**§ 8.2.2** The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for or on behalf of the Contractor or any of its Subcontractors.

*Id.* (some emphasis added).<sup>1</sup>

The Contract conversely did not give to UAP any control over the means or methods of Narum's work. CP 91-111. UAP merely retained a very limited and general-level authority to demand contractual compliance. It could, for example: determine the start date (CP 92); ask an architect to inspect the work (CP 98); terminate the contract as a whole (CP 108); or stop the work of Narum (CP 109). Yet, crucially, none of these provisions gave UAP the right or authority to control the means, methods, techniques, or procedures Narum would use in its work, since, again, those were rights expressly reserved for Narum. CP 96.

Representatives for both UAP and Narum explicitly testified that they understood the Contract to give Narum the right of control of the means and methods of its work. In fact, the three UAP employees who periodically visited the site during construction each testified that they

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<sup>1</sup> The "Contractor" referred to here is Narum, and the Owner is UAP. CP 91.

never told Narum how to do its job, but were instead there simply to ensure that the project was proceeding as promised.

For example, one UAP representative who visited the site was Brian Jones, the UAP Area Manager at the time. CP 191. Mr. Jones testified that he visited the site “every couple weeks.” CP 251 (15:8-9). He further stated that his visits to the site were only for the purpose of “meet[ing] with Wayne Narum [of Narum Concrete] just to find out where we’re at on our status and on our process just to see how work was going.” *Id.* (16:4-9). He never spoke with other Narum employees, nor offered them instruction of any sort. CP 259 (48:14-19). Instead, he limited his conversations to “how [Narum was] coming along with the project, and then I’d make sure [its] payments were on time.” CP 252 (17:14-22). Moreover, he did not walk around the site. CP 260 (49:2-7).

Another UAP representative who visited the site was the plant manager, Harold Priest. CP 191. Mr. Priest was on the job site perhaps two times a week while Narum was working, during which time he simply observed the progress of the contractors to ensure that the work was progressing on schedule. CP 291 (24:9-21). Notably, he testified that if he had observed a safety concern about Narum’s work, he would not even have known the protocol for addressing it. CP 295 (39:12-23).

Similarly, Larry Talmage, a UAP Fertilizer Manager who also visited the site on a few occasions, stated that he never had substantive conversations with Narum about any aspect of its work. CP 273 (27:21-28:11), 276 (39:15-23). In fact, he testified that his understanding was that the Contract specifically divested UAP of any authority or control over Narum's work and safety procedures. CP 275 (35:21-25, 36:7-10), 278 (46:25-27:3).

Narum, for its part, testified to having the same experience with UAP. Wayne Narum, in particular, stated that Narum's conversations with UAP concerned nothing more than "how the project was progressing, when we thought we'd have this completed or that." CP 307 (19:19-23).

There is absolutely *no* evidence that UAP somehow tried to circumvent these clear terms of the Contract and exercise control over the methods by which Narum did its work. For example, it is undisputed that UAP never conducted meetings or directed any of Narum's employees. CP 178-79; 307(18:17-25). Likewise, UAP never asked Narum to perform its work differently. CP 308 (21:21-23). As Mr. Priest testified:

Q Was it your understanding at all times throughout the project that Narum was solely responsible for, and had sole control over, the methods it chose to employ to do the work that it was contracted for?

A Yeah, I agree with that.

CP 299 (53:12-24).

Wayne Narum testified identically to Mr. Priest. He stated that Narum did not discuss with UAP, or ask its advice about, any building or safety issues that arose on the job. CP 307 (20:10-13). Moreover, in one very telling exchange, Wayne Narum also stated that after giving Narum a general task to complete, UAP had no involvement in how Narum subsequently went about doing its job:

Q Let me ask you: What is your general layman's understanding ... of what that provision [§ 8.2.1 of the Contract] states?

...

A It states that we are responsible for our actions in our construction sequence.

...

Q In other words, . . . it states, does it not, that Narum is solely responsible and has control over the means, the methods, the techniques, the sequences and the procedures for the work that it's performing on the project; correct?

A Yes.

Q And it does not give any of that responsibility to UAP; correct?

A That's correct.

Q Was that your understanding of how this project would, in fact, be completed, independent of the contract is what I'm asking?

A The responsibility that we assumed for building the building, yes.

Q In other words, when you began the project, you broke ground and began the work, it was your understanding, wasn't it, that Narum was responsible for and had control over the way the work was to be performed?

...

A Yes.

Q And it was similarly your understanding that UAP didn't have the right or the obligation to come and tell you what sequence the order – or the work was to be performed in; correct?

...

WITNESS: Well, we were given directions in which process, what they wanted first, and how they wanted it intermittent, yes.

BY MR. SCRIBNER: What processes are you referring to in that instance?

A As far as what building first, second, and third, and the process in which they wanted them to be completed.

Q So in other words, amongst the three buildings that were being constructed, you got instructions from UAP as to which one was to be constructed first?

A Correct.

Q *But with respect to the specific techniques and all of the various mechanics of the building, each building, they left that to you; did they not?*

A *The process in which we constructed it, yes.*

CP 321-22 (72:10-74:16) (emphasis added).

So as to make himself absolutely clear on this point, Wayne Narum then reiterated this testimony by stating that: “UAP had no control over the manner or methods used by Narum Concrete when it performed its work. UAP did generally ask us to build the structures, but left all the specifics and decisions of how to accomplish that task to us, given our expertise in the area.” CP 1079.

In addition to Narum’s contractual autonomy over its operations, the Contract also made Narum solely responsible for knowing and implementing all applicable safety regulations and laws:

#### **§ 15.1 SAFETY PRECAUTIONS AND PROGRAMS**

The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract. The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

- 1 employees on the Work and other persons who may be affected thereby;
- 2 the Work and materials and equipment to be incorporated therein; and;
- 3 other property at the site or adjacent thereto.

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. ...

CP 104 (emphasis in original).

Just as with its operational control, both parties testified that in conformance with this contractual provision, they also believed and expected Narum to be in charge of any safety issues related to its work. Indeed, UAP testified that it wholly relied on Narum to identify and remediate any potentially dangerous conditions. As Mr. Priest stated:

Q ... Was it your understanding that UAP was relying upon Narum, in Narum's case, to know what an unsafe condition was and to make sure they either didn't exist or correct them?

A Absolutely.

Q And did you, in fact, rely on them to do that?

A Absolutely.

CP 301 (61:15-20).

Similarly, Narum testified that it took its contractual responsibility for safety very seriously. For example, Wayne Narum, who was also Narum's safety officer, stated that, "safety was every day" for Narum, and that it conducted weekly safety meetings with its employees. CP 308-11 (24:21, 25:2-14, 32:23-33:8). Moreover, Wayne Narum testified that

Narum made all of the safety decisions involving its work unilaterally and never expected any UAP involvement in those decisions. CP 307-08, 310-11, 323-24, 326 (20:18-21, 22:9-10, 32:23-33:8, 79:13-80:16, 84:1-7, 89:11-13). For example, with respect to the fact that Narum put up a handrail around the trench, Wayne Narum testified that that he did not ask UAP before doing so, since it “was our responsibility.” CP 327 (94:4-10).

Critically, Hymas has never challenged the validity of the Contract. CP 647. Thus, the undisputed evidence before the trial court concerning the relationship between Narum and UAP was that: (1) Narum and UAP had an enforceable contract which specifically provided that Narum was to remain in full control of the means, methods, and safety of the work it agreed to perform; and (2) both Narum and UAP thereafter acted in conformance with that contract.

## **2. Hymas’s injury while working for Narum**

While Narum performed a handful of concrete-related tasks under the Contract, the most important task for the purposes of this appeal was the excavation and maintenance of the aforementioned trench, since it is this trench into which Hymas allegedly fell and was hurt in February of 2007. CP 172. As noted above, the Contract specifically made Narum responsible for digging and maintaining the trench, which was to be approximately 5-feet deep, 240-feet long, and 10-feet wide. CP 110, 172-

73, 175, 306-07 (16:17-17:22). Narum excavated the trench—or had its own sub-contractor do so—at least six weeks prior to Plaintiff’s fall. CP 174, 306-07, 946 (64:13-21). Again, prior to Narum’s involvement, the subject property was unimproved “bare dirt.” P. 252 (19:13-21).

There is no evidence—or even allegation—that UAP participated in the digging or the maintenance of the trench. Instead, as noted, the Contract made the excavation and safety of the trench Narum’s exclusive responsibility. CP 96, 104, 110. And again, Wayne Narum testified that he considered the safety of the trench to be Narum’s responsibility. CP 327 (94:4-10).

Moreover, there is no dispute that Hymas was intimately familiar with the dangers of the trench. His testimony was that he at the site as many as 30 different times, with at least 10-12 of those times within a month of his accident, and that much of his work was right up against the trench itself. CP 945-46 (61:10-62:18), 958 (110:15-113:5). Moreover, he stated that he recognized the trench as a dangerous condition right away, and that he even had an exchange with his supervisors at Narum about just how perilous it was. CP 943-44 (53:18-54:11), 946 (63:14-65:18), 952 (86:8-24). Obviously, given the recognized reality that Narum had sole responsibility for the safety of the site, there is no evidence that

Hymas ever communicated his concerns about the trench to UAP. *Id.*; CP 952 (86:25-14); *see also* CP 949 (77:19-78:11).

***B. Procedural History***

Hymas filed his lawsuit against UAP in February of 2010. CP 1067-72. Hymas amended his complaint thereafter, alleging that UAP failed to maintain the trench within certain WISHA guidelines. CP 1-6.

Both Hymas and UAP moved for summary judgment on Hymas's WISHA claim in November of 2010. CP 171-235. The trial court ruled on these cross-motions by letter on January 27, 2011. CP 647-49. It granted UAP's motion, finding that UAP did not assume a duty under Washington law for WISHA compliance. *Id.* However, it allowed the suit to continue by "conforming the pleadings" to provide Hymas a premises-liability claim against UAP. *Id.* UAP then moved for summary judgment on that claim in March of 2011. CP 837-56. The Court granted UAP's motion on April 15, 2011, finding that UAP had no duty to protect Hymas from Narum's putative negligence. Verbatim Report, 4/15/11, pp. 19-22; CP 1058-59. Hymas thereafter appealed.

**V. ARGUMENT**

***A. Standard of Review.***

"When reviewing an order for summary judgment, [the appellate court] engage[s] in the same inquiry as the trial court, and will affirm

summary judgment if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law.” *Wilson Court Ltd. Partnership v. Tony Maroni’s, Inc.*, 134 Wash. 2d 692, 698, 952 P.2d 590 (1998). That said, the appellate court may “sustain the trial court’s judgment on any theory established in the pleadings and supported by proof.” *Washington State Bank v. Medalia Healthcare*, 96 Wash. App. 547, 553, 984 P.2d 1041 (1999).

In order to defeat UAP’s meritorious motions for summary judgment in this action, Hymas, as the responding party, was required to come forward with specific evidence showing that there is a genuine issue of material fact. CR 56(e); *Charbonneau v. Wilbur Ellis*, 9 Wash. App. 474, 477, 512 P.2d 1126 (1973). “Mere allegations, argumentative assertions, conclusory statements, and speculation [were insufficient to] raise issues of material fact that preclude a grant of summary judgment.” *Greenhalgh v. Department of Corrections*, 160 Wash. App. 706, 714, 248 P.3d 150, 154 (Div. 2, 2011). Instead, Hymas was obligated to “set forth specific facts rebutting the moving party’s contentions and disclosing that a genuine issue as to a material fact exists.” *Id.*

***B. The majority of Hymas's "Issues Pertaining to Assignments of Error" are not appealable.***

As noted, Hymas asserted two claims against UAP: one based on failure to comply with WISHA and the other for premises liability.

Though its decisions were rendered a few months apart, the trial court basically made the same finding in both: that UAP never assumed any duty under either cause of action. *See* Brief, pp. 2-3 (Issues 1 and 5); CP 647-48; Verbatim Report, 4/15/11, pp. 19-23. And obviously, because the trial court did not find a duty under either of these causes of action, there was no reason for it to progress to other questions, such as whether those duties had been breached, or whether damages occurred as a result. CP 647-48; Verbatim Report, 4/15/11, pp. 19-23; *see also, e.g., Honcoop v. State*, 111 Wash. 2d 182, 191, 759 P.2d 1188, 1194 (1988) (since "there is no duty that the State owes the operators, [there can] consequently [be] no breach of duty to trigger the proximate cause of the operators' damages.").

Hymas, however, argues at length in his Brief concerning breach and damages, ignoring the fact that the trial court did not reach these issues at summary judgment. Indeed, he makes these breach and damages questions four of his six appellate "issues" (Issues 2, 3, 4, and 6) and then discusses them in some detail in his Brief. Brief, pp. 3, 38-40, 48.

Clearly, however, since the trial court did not address the issues of breach

or damages, they are not now ripe on appeal. *See, e.g., Kitsap County v. Smith*, 143 Wash. App. 893, 909, n.18, 180 P.3d 834, 843 (Wash. App. 2008) (“Although the County invites us to reach [certain] issue[s]...we decline to do so because the trial court did not reach these issues and the record related to these issues is not adequately developed.”). The majority of Hymas’s “issues” must accordingly be disregarded by this Court. *Id.*

***C. The trial court correctly concluded that UAP owed no duty to comply with WISHA***

**1. Hymas invited the error he complains of**

Hymas argues throughout his Brief that there is “at least” a fact issue as to whether UAP “controlled” Narum such that UAP could owe a duty to comply with WISHA, and that this fact issue makes the trial court’s grant of summary judgment improper. Brief at, *e.g.*, pp. 15, 26-30, 49. This is false, but it is worth noting initially that it was Hymas—not UAP—that invited this alleged error. In specific, Hymas expressly informed the trial court at the summary judgment hearing that all of the “material” facts surrounding this cause of action were undisputed, and that as a result, the *only* question left for the court was the “legal effect” of the terms of the Narum Contract. Verbatim Report, 12/17/10, p. 19. As Hymas himself stated, this meant that summary judgment concerned solely “legal questions,” which Hymas informed the trial court it could and should rule on by itself and without delay:

[UAP is] responsible to Mr. Hymas for the consequences of this failure as a matter of law. *The interpretation of contract terms is a legal question and because these facts aren't in material dispute, it's only the legal effect of the facts.* Mr. Hymas is entitled to summary judgment that UAP had control over the work site *based on the contract* that they had with Narum and the control that they reserved contractually...

*Id.* (emphasis added).

Put another way, Hymas told the trial court that no further facts needed to be developed, and no jury needed to hear this matter, because the facts were not “in material dispute” and therefore this case came down to a “legal question” of contract interpretation. This, of course, is the exact opposite position from what he argues now, which is that the trial court allegedly erred by ignoring fact issues. Unfortunately for Hymas, however, Washington law does not allow such contradiction. In particular, a well-developed appellate principle called the “invited error doctrine” “prohibits a party from setting up an error in the trial court then complaining of it on appeal.” *Humbert/Birch Creek Const. v. Walla Walla County*, 145 Wash. App. 185, 185 P.3d 660, 663 (Wash. App., Div. 3, 2008). As a result, if it is true, as Hymas now argues, that the trial court took his advice and made a summary judgment determination in spite of disputed facts, then Hymas has no one to blame but himself for the error.<sup>2</sup>

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<sup>2</sup> UAP reiterates that no such error did, in fact, occur.

**2. Once accurately articulated, the standard and the undisputed facts in this matter unquestionably require dismissal**

Hymas's approach to the cases defining when a jobsite owner will owe a duty to comply with WISHA regulations is perplexing. He spends about eight pages of his Brief discussing several largely secondary cases before he finally gets around to mentioning *Kamla v. Space Needle Co.*, 147 Wash. 2d 114, 52 P.3d 472 (Wash. 2002) a Washington Supreme Court decision which is undoubtedly the most important case on this issue. Brief, pp. 15-24. He then treats *Kamla* as an afterthought, ineffectively trying to limit it to its facts. *Id.*, pp. 23-24. This approach is confusing, since it gives the appearance that a jobsite owner will generally be liable for WISHA compliance unless there are special circumstances suggesting otherwise. As *Kamla* makes clear, however, the opposite is true.

In *Kamla*, as in the present action, an employee of a contractor who was injured on a jobsite brought a personal injury suit against the owner of the property. 147 Wash. 2d 114, 52 P.3d at 473-74. Like Hymas, the injured worker in *Kamla* argued that the property owner owed him a duty to comply with WISHA. *Id.* As such, the Court began its analysis in this regard with the threshold question of “whether jobsite owners are per se liable under the statutory requirements of” WISHA and

then immediately found that “they are not.” *Id.* at 477. The Court

explained its rationale:

Although jobsite owners may have a similar degree of authority to control jobsite work conditions, they do not necessarily have a similar degree of knowledge or expertise about WISHA compliant work conditions. Jobsite owners can run the gamut from an owner/developer with the same degree of knowledge about WISHA compliant work conditions as that of a general contractor to a public corporation without any knowledge about WISHA regulations governing a specific trade. Because jobsite owners may not have knowledge about the manner in which a job should be performed or about WISHA compliant work conditions, it is unrealistic to conclude all jobsite owners necessarily control work conditions. Instead, some *jobsite owners may reasonably rely on the contractors they hire to ensure WISHA compliance* because those jobsite owners cannot practically instruct contractors on how to complete the work safely and properly.

*Id.* (emphasis added).

The *Kamla* Court then articulated a test for when a jobsite owner might assume a responsibility for WISHA compliance. *Id.* That test essentially boiled down to the right of control:

If a jobsite owner does not retain control over the manner in which an independent contractor completes its work, the jobsite owner does not have a duty under WISHA to “comply with the rules, regulations, and orders promulgated [thereunder].”

*Id.* Critically, this “control,” according to the Court, must be something well beyond the right to simply monitor the work, suggest alterations, or even the unilateral ability to start or stop the work at any time, since those are the types of rights *any* jobsite owner would have. *Id.* at 475. Instead,

there must “be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.” *Id.*

Given this legal framework, the question of whether UAP “controlled” Narum (and therefore assumed a duty to comply with WISHA) was fairly easy for the trial court. First and foremost, the trial court had before it the Contract between UAP and Narum which repeatedly and specifically addressed this pivotal issue of control described in *Kamla*. Again, § 8.2.1 of the Contract explicitly provides that Narum “shall be *solely responsible for and have control over* construction means, methods, techniques, sequences, and procedures, and for coordinating all portions of the Work under Contract.” CP 96 (emphasis added). Moreover, the Contract explicitly put Narum in charge of its own safety: Narum was “responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract,” and was to “take reasonable precautions for the safety of, and shall provide reasonable protection to prevent damage, injury or loss to . . . employees on the Work.” CP 104.

These contractual provisions are enough on their own to warrant summary judgment. As Hymas admits, “[t]he test is whether the jobsite owner has *the right to direct the manner in which the work is performed.*” Brief, p. 21 (emphasis added). Obviously, the entire purpose of the Narum

Contract was to delineate and fix what legal *rights* existed between the parties, as it would be in any contract. *See, e.g., Mauk v. Lee*, 66 Wash. 184, 190, 119 P. 185, 188 (Wash. 1911) (“The object of entering into the contract was to definitely determine and fix the rights of the parties to it.”). As such, the fact that this Contract expressly provided to Narum “the *right* to direct the manner in which the work is performed” is dispositive. CP 96 (emphasis added). It was presumably for this reason that the trial court found it important that Hymas has never disputed the validity of this Contract. CP 647.

Moreover—and again—there is also no dispute that both Narum and UAP acted at all times with the understanding that Narum had this control over the means and methods of its work. Among several other similar statements described above, Wayne Narum testified that “*UAP had no control over the manner or methods used by Narum Concrete when it performed its work. UAP did generally ask us to build the structures, but left all the specifics and decisions of how to accomplish that task to us.*” CP 1079 (emphasis added). *See also, e.g.,* CP 307 (19:19-20:13) (Narum never asked for help with any issues that arose on the job; and UAP’s oversight was largely limited to questions about “how the project was progressing, when we thought we’d have this completed or that.”); CP 321-22 (72:10-74:16) (UAP left the “specific techniques and all of the

various mechanics of the building” to Narum); CP 327 (94:4-10) (Narum did not see any need to ask for advice on safety issues given that jobsite safety was Narum’s responsibility).

UAP also testified that it gave Narum a job and then let Narum perform that job in its way. As one UAP representative Larry Talmage stated, “[w]e had other jobs to do. There contractors were hired to do the work and do it right.” CP 280 (53:18-19). This is consistent with his stated understanding that the Contract specifically divested UAP of any authority or control over Narum’s work or safety procedures. CP 275 (35:21-25, 36:7-10), 278 (46:25-27:3). *See also, e.g.*, CP 299 (53:12-24) (“[A]t all times throughout the project [] Narum was solely responsible for, and had sole control over, the methods it chose to employ to do the work that it was contracted for.”); CP 301 (61:15-20) (“UAP was relying upon Narum . . . to know what an unsafe condition was and to make sure they either didn’t exist or correct them.”); CP 251-52 (16:4-17:22) (main purpose of UAP visits to site was to “just to see how work was going”—not to tell Narum how to do its job); CP 295 (39:12-23) (UAP’s personnel did not even know the protocols for addressing safety concerns to Narum).

It is finally worth noting in this regard that the test in *Kamla* concerns itself with who is in the “best position” to “ensure WISHA compliance or provide safety equipment to workers.” In this case, there is

no doubt that this party was Narum. As Hymas himself was forced to admit, the “record shows that UAP may not have had expertise in safety or WISHA compliance.” CP 371. For Narum, conversely, “safety was every day,” meaning that it held regular safety meetings and took unilateral steps to ensure its employees’ safety. CP 307-11 (20:18-21, 22:9-10, 24:21, 25:2-14, 32:23-33:8); CP 323-24, 326 (79:13-15, 80:7-16, 84:1-7, 89:11-13); *see also* CP 647-48. Given this disparity in safety expertise, there is simply no question that Narum was in the “best position” to ensure safety over its employees.

Indeed, these undisputed facts seem to depict the exact situation the *Kamla* Court was describing when it ruled that “jobsite owners [who] may not have knowledge about the manner in which a job should be performed or about WISHA compliant work conditions...*may reasonably rely on the contractors they hire to ensure WISHA compliance.*” *Kamla*, 52 P.3d at 477 (emphasis added). This is precisely what UAP did: given its undisputed lack of knowledge about WISHA, it “reasonably relied” on Narum to “ensure WISHA compliance” by way of the Contract. *Kamla* makes clear that UAP had an absolute legal right to do so, and the trial court’s grant of summary judgment was accordingly appropriate.

### **3. Hymas presents no competent evidence of control.**

The foregoing makes clear that: (1) UAP and Narum specifically agreed that Narum would have control of the means and methods of Narum's work; and then (2) both parties to that Contract specifically testified that Narum thereafter exercised sole control over the means and methods of that work. These facts should end the inquiry. Nonetheless, Hymas argues that there exists some nebulous evidence of control. In order to come to that conclusion, however, Hymas has been forced to misstate the facts and rely on incompetent evidence.

*a. Most of the circumstances of control cited by Hymas are actually legally incapable of constituting control*

Hymas argues throughout his Brief that the following alleged facts and contractual rights are evidence of UAP's "control" over Narum: the contractual right to start and stop the work; the fact that UAP visited the job site; the contractual right to delay the work; the contractual right to inspect the work; the contractual right to approve certain materials; the contractual right to reject the work; the contractual right to ask that the work be modified; the contractual right for UAP to state when it felt the work was completed; and the allegation that UAP once "expressed concern" about a conveyor belt. Brief at, e.g., pp. 9-11, 31-33, 36-37.

Yet none of these items have the legal capability to create the "control" Hymas needs to reverse summary judgment. As noted above,

several Washington Courts—even those which Hymas sites at length in his Brief, such as *Afoa v. Port of Seattle*, 160 Wash. App. 234, 247 P.3d 482 (Div. 1, 2011)—have made clear that these are precisely the types of rights reserved to *any* jobsite owner, and therefore do not factor into the analysis as a matter of law:

[For the purposes of control,] It is not enough that [the jobsite owner] has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. *Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail.* There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

*E.g., Afoa v. Port of Seattle*, 247 P.3d at 485 (emphasis added); *Kamla*, 52 P.3d at 475. Obviously, this clear law eliminates most of Hymas’s arguments concerning control.

It is also worth noting that, consistent with this law, Wayne Narum testified that he did not see any of the above-listed contractual provisions or actions by UAP as “control” over his work. In fact, he pointedly stated that Narum was always free to do its work in its way, and that the fact that work might be stopped, started, or terminated would not change the way in which Narum performed its job. CP 1078-79.

*b. There is no evidence that UAP acted like a general contractor*

Hymas also argues that the fact that UAP may have hired other contractors to perform discrete tasks on the jobsite somehow makes UAP a *de facto* general contractor. Brief, pp. 7-9, 33-37. There are several problems with this argument. First, Hymas cites no case for the proposition that hiring multiple contractors equates to *de facto* general contractor status or control. And, to the contrary, in *Rogers v. Irving*, 85 Wash. App. 455, 933 P.2d 1060, 1061 and 1064 (Wash. App. 1997), the Court noted that a jobsite owner had hired several contractors to work on his property, yet did not find those facts to have any effect on whether an individual contractor had assumed responsibility for his own safety.

Secondly, UAP's relationship with other contractors is of no use to the inquiry at hand. Again, accordingly to *Kamla*, the relevant question for this Court is who, as between Narum and UAP, was in the better position to enforce compliance with safety regulations on the property where Narum Concrete was working. 52 P.3d at 477. Here, as discussed in detail above, both Narum and UAP agree that party was unquestionably Narum. As such, UAP's relationship with other contractors is of no import here. Moreover, none of these *other* contracts with *other* contractors were submitted to the trial court at summary judgment, so

there is no way to tell what rights may have been retained in those instances. *See, e.g.*, CP 32-170.

Given these other contractors' irrelevance to the question posed in *Kamla*, it bears mentioning that *almost all* of the instances of supposed interference cited by Hymas involved these other contractors instead of Narum. *See, e.g.*, the Brief, pp. 9-10, 31-32. Hymas is regrettably less than clear on this point, often switching between UAP's relationship with Narum and its relationship with other contractors as if they were one and the same. *Id.* They obviously are not, and Hymas's unwillingness to focus on UAP's relationship with Narum is tacit proof that he simply cannot find evidence from that relationship to support his claim.

Next, Hymas misstates the record when he suggests that Narum was forced to work right on top of other contractors on the site. To the contrary, Wayne Narum testified that Narum was done with its work on the buildings before any other contractor arrived: "There was no coordination necessary because we already completed the buildings [when the other contractors arrived]." CP 310 (pp. 31-32). Tellingly, he stated that he did not even know the identity of any other contractors who may have worked on the site, since he never interacted with them. *Id.* Moreover, Hymas has never disputed that the jobs performed by all of the

contractors on the site were so discrete from one another that they were not the sort where a general contractor would be necessary. CP 298-99.

Hymas also points out in this regard that Wayne Narum testified that he believed that UAP was the “general contractor.” Yet this is misleading since Wayne Narum clarified in that same deposition that in his mind, the terms “owner” and “general contractor” are synonymous, regardless of function, meaning that he refers to *any* owner as a “general contractor.” CP 326 (90:24-92:4). Obviously, such a view would make anyone who hired a contractor on their property a “general contractor,” and, as noted in detail above, that simply is not the state of the law. *See, e.g., Rogers*, 933 P.2d at 1061, 1064; *Kamla*, 52 P.3d at 477. Nor is it unusual for there to be no general contractor. Wayne Narum, in fact, testified that only 25% of the work Narum does has a general contractor, and the other 75% simply involves the owner of the building or land. CP 304 (7:11-20). This includes even large “multi-trade projects.” CP 312 (37:6-11).

*c. UAP’s contracts with unrelated contractors on wholly disparate and independent projects outside of Washington are obviously irrelevant*

Hymas also alleges that prior to the Contract with Narum, UAP had engaged 24 other contractors in sundry work projects around the

nation. Brief, pp. 7, 35. Hymas then contends that this fact somehow makes UAP “like a general contractor.” *Id.*, p. 35. Hymas is in error.

These other contracts are irrelevant to the analysis for several reasons. First and foremost, simply showing some theoretical general contractor experience would not be enough under *Kamla* in any event. Instead, the key under *Kamla* is to show a right to control as between UAP and Narum. 52 P.3d at 477. And clearly, there is nothing to be learned about UAP’s possible control of Narum from the relationships UAP may have had with a random assortment of contractors entirely unrelated to this suit.<sup>3</sup>

Moreover, *Kamla* is also clear that the only issue of knowledge it is concerned with, if at all, is what a jobsite owner may know about WISHA, not what it generally might know about general contracting. *Id.* As such, these other contracts are per se irrelevant, since all but one of them were for work to be performed *in a state other than Washington*. CP 687, 692, 701, 711, 716, 725, 730, 736, 756, 781, 789, 801. That is, there is no way for construction projects performed in these *other* states to even hypothetically give UAP a working knowledge of *Washington* regulations.

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<sup>3</sup> It is worth noting that many of the companies who hired these contractors were not UAP, but other affiliates, and all involved different personnel than those that supervised the work in Plymouth. CP 687, 692, 701, 711, 716, 725, 730, 736, 756, 781, 789, 801.

Finally—and perhaps most importantly—there is simply no evidence from any of these contracts that UAP acted as (or like) a general contractor. Just as in the contract between UAP and Narum, each contract cited by Hymas specifically states that the independent contractor will control the means and methods of its work. CP 687 (§ 1), 689-90 (§ 11), 692 (§ 2), 701-02 (§ 1), 707 (§ 11), 711 (§ 6), 712 (§§ 9(a) and 13(c)), 716 (§ 2), 725 (§ 1), 730 (§ 1), 741 (§ 8.2.1), 749 (§§ 15.1, 15.3), 756 (§ 1), 789 (§ 1), 795 (§ 1), 801 (§ 1). Put another way, as in the Narum Contract, each of the contracts which Hymas argues to indicate that UAP was “like a general contractor” ironically shows the opposite: that UAP lacked the ability to control the means and methods of these contractors’ work. 52 P.3d at 477.

*d. Hymas’s contention that UAP believed it was in charge of safety is based on obvious mischaracterizations of the record*

On pp. 11-13 and 33 of his Brief, Hymas presents a slew of misleading “facts” designed to convince the Court that UAP believed it was in charge of safety on the site. In truth, however, each one of the “facts” presented by Hymas on these pages is wholly unsupported by the record. Indeed, most of the testimony cited actually indicates the exact opposite of what Hymas represents it to be saying.

For example, Hymas argues that UAP personnel testified that they “raised concerns of unsafe working conditions to [the] contractors,” and that they “expected their contractors to take proper corrective action” as a result. Brief, pp. 11, 33. Hymas cites CP 87-88 as support for these statements, which is the testimony of Brian Jones. *Id.* Yet when the entire exchange on those pages is examined, it is clear that Mr. Jones said nothing like what Hymas is representing:

Q [I]f you observed an unsafe condition on the construction project, would you have brought it to Narum Concrete Construction’s attention?

A I probably would, but unless it’s something really obvious, I mean, I can’t -- but, yeah, I mean, obviously if I was to see somebody going to hurt themselves, yeah, I would definitely say something.

Q And if you told someone at Narum to correct an unsafe condition that you saw, do you believe that they would have followed your instruction?

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A I don’t know. I really don’t know if they would or wouldn’t. You know, I don’t know.

Q No, I understand you don’t know if, in fact, they would. Would you expect them to?

\*\*\*\*\*

A Okay. I -- I guess if I was to see if somebody was going to get hurt, I would hope that they would do that. Yeah, I’d hope that they would correct their -- their -- their issue of if somebody was going to get hurt, yeah. I mean, I think that’s, you know, the right thing to do, but -- ... Well, let me back up. If I saw somebody that was going to be hurt or like get run over by a truck, yeah, I would tell them that, yeah, move the hell out of the way. ... But as far as if they’re going to take my advice or not, I mean, it’s not my responsibility, so they -- you know -- you know, I don’t know what their practices are or aren’t, so

whatever they do, they do. I mean, if it's an employee working for me, it's a totally different situation.

At the risk of stating the obvious, then, Mr. Jones did not testify that UAP routinely “raise[d] safety concerns if and when safety issues were observed,” and he certainly did *not* state that he “expected Narum to take prompt corrective action.” Brief, p. 33. Indeed, his testimony is the polar opposite. He attests to nothing more than his own internal, moral belief that preventing unnecessary harm to others is “the right thing to do,” but that he had no expectation that Narum would do anything about any particular suggestion he made, since he did not consider safety to be UAP’s responsibility.

Nor did Wayne Narum ever testify that Narum “expected UAP to raise safety concerns,” as Hymas alleges. Brief, pp. 11-12, 33. Indeed, footnote 64 of Hymas’s own brief tellingly reveals all Wayne Narum actually stated was the innocuous observation that because UAP was periodically onsite, he would have “thought something would have been said” if UAP’s employees noticed anything. *Id.*, p. 11. Again, nothing in that comment suggests that Narum believed there was any sort of “expectation” that UAP would bring up safety issues (or possessed the *right* to correct them).

Finally, Hymas’s statement that UAP approached Narum about a conveyor belt “leg” and “ordered” Narum to fix it is highly misleading. Brief, pp. 12-13, 49. Hymas leaves out the fact that when asked for specifics, Wayne Narum stated that he did not know whether he initiated this conversation with UAP or the other way around, and could not even remember what in particular was said about the leg by UAP, let alone that UAP “ordered” Narum to fix it. CP 325 (pp. 87-88). At best, according to Wayne Narum, UAP and Narum “talked it over.” *Id.* And, notably, that was the *only* time Wayne Narum could remember that they had ever even *discussed* any sort of safety issue. *Id.*

In sum, despite his best efforts, Hymas simply cannot create a fact issue out of the unchallenged facts of this case. Indeed, his unfortunate attempt to torture and misconstrue these facts into something that they are clearly not strongly indicates the complete dearth of legitimate evidence to support his claim.

*e. Hymas’s misguided reliance on Afoa v. Port of Seattle further illustrates the deficiencies of his position*

Hymas spends a surprising amount of his Brief—roughly eight pages—discussing the opinion from *Afoa v. Port of Seattle*. Brief, pp. 24-31. His arguments in this regard, stated succinctly, are that *Afoa* is similar to this case because: (1) the Port of Seattle in *Afoa* required the contractor

it hired to follow its rules and regulations; and (2) the Port's contract with the contractor stated that the contractor was to "comply with written or oral instructions issues by the...Port...to enforce these regulations." *Id.* Hymas then argues that these are facts extant in this case as well. Yet, for patent reasons, Hymas is once again mistaken.

Accurate analysis reveals that *Afoa* is nothing like this case. Most telling in this regard are the glaring differences between the contract in *Afoa* and the Contract governing Narum and UAP. In particular, the *Afoa* contract contained none of the clauses which the trial court in this case found so important in its January 27, 2011 decision. For example, the trial court specifically stated that §§ 8.2.1, 15.1, and 15.3 of the Narum Contract were crucial to its analysis. CP 647-48. Among other things, these provisions stated explicitly that: (1) Narum was solely responsible for determining and implementing the means, methods, and processes of the work it was asked to perform (§ 8.2.1); (2) Narum was solely responsible for telling its employees how to do their job (§§ 8.2.1 and 8.2.2); (3) Narum was solely responsible for keeping its employees safe (§§ 8.2.1, 15.1); (4) Narum was to identify—and determine how best to comply with—applicable safety regulations, and then was to be responsible for adhering to those regulations (§ 15.3); and (5) UAP would conversely *not* be responsible for complying with those regulations

(§ 15.3). CP 96, 104. Significantly, there is nothing in the contract in *Afoa* even remotely similar to these dispositive provisions. *See* 247 P.3d at 486-88.

Moreover, not only did the contract in *Afoa* fail to contain these critical conditions, it actually contained provisions that established just the opposite. For example, as Hymas himself points out, rather than allow the contractor and its employees to determine the means and methods of their work, as in § 8.2.1 of the Narum Contract, the agreement in *Afoa* required both the contractor and its employees to “comply with written or oral instructions issued by the Director or Port employees....” *Afoa*, 247 P.3d at 487. Moreover, the jobsite owner in *Afoa* exercised that right by specifically telling the contractor and its employees the exact manner in which they should do their job, issuing dozens of detailed mandates delineating the minute processes that the employees were obligated to follow in performing their tasks. *Id.* at 486-88. Plainly, this is wholly contrary to the independence and self-determination provided to Narum in § 8.2.1 of the Contract. CP 96.

In addition, the contract between the jobsite owner and the contractor in *Afoa* specifically stated that the employees of the contractor were to obey the jobsite owner rather than their own employer if there was ever a conflict between the two. 247 P.3d at 487. Again, §§ 8.2.1 and

8.2.2 of the Narum Contract provide the exact opposite. CP 96. Likewise, the employees of the contractor in *Afoa* were even supposed to take a safety test from the jobsite owner itself. 247 P.3d at 487. Conversely, § 15.1 of the Narum Contract makes Narum responsible for such training and safety. CP 104.

Hymas has entirely ignored all these critical differences in his Brief. His blindness seems intentional, because it is only through his studious avoidance of *Afoa*'s facts that he can attempt to contortedly equate the *Afoa* jobsite owner's plenary right to draft and enforce its own specific safety regulations with Narum's general contractual obligation to comply with statewide and universally applicable Washington state regulatory requirements. Brief, pp. 27-30. But in so arguing, Hymas ignores *the* key and massive factual difference between these two situations. In the case of *Afoa*, the detailed safety and work regulations were actually created, drafted, and implemented *by the jobsite owner itself*: the Port of Seattle. 247 P.3d at 486-88. That is, the relevant regulatory agency in *Afoa* was *also the jobsite owner*. *Id.* Thus, the jobsite owner was both: (1) the party responsible for creating the detailed safety regulations which allegedly controlled the contractor's work; and (2) the party which required the contractor to comport with those

regulations by painstakingly incorporating each of them into the contract.

*Id.*

The case at bar could hardly be more different. In its contract with Narum, UAP does not even demonstrate that it knows what the possible applicable regulations might be, let alone take responsibility for individually drafting them into the contract. CP 104. Indeed, WISHA is not even mentioned by name. *Id.* Instead, § 15.3 of the contract with Narum Concrete simply states that *if* there happen to be regulations that intersect with Narum Concrete's work, it is Narum Concrete who is responsible for figuring out what they are and then complying with them. *Id.* Put another way, for this case to be analogous to *Afoa*, UAP would have to be the Department of Labor and Industries. The two situations are accordingly wholly dissimilar.

Finally, it is worth exploring the end result of Hymas's argument in this regard. Taken to its logical conclusion, Hymas's position is that a contractor and jobsite owner can *never* agree that the contractor will be in charge of figuring out and following relevant safety requirements, because once they agree on that issue, the jobsite owner will have exercised "control" over the contractor by telling it how to do its job. This would mean, paradoxically, that in every scenario the jobsite owner would thereby be responsible for safety. That is, according to Hymas, by doing

nothing more than agreeing to let a contractor be responsible for safety, the jobsite owner will ironically always keep it. Obviously, this is an absurd result—and one that has been specifically rejected by cases like *Kamla*: “jobsite owners may reasonably rely on the contractors they hire to ensure WISHA compliance.” *Kamla*, 52 P.3d at 477.

*f. Mark Lawless’s “expert” analysis was obviously not proper summary judgment evidence*

Finally, Hymas cites testimony from the report of his expert, Mark Lawless, in which Mr. Lawless opined that: (1) UAP “retained the requisite amount of control...to classify them [*sic*] as an owner in control”; and (2) that UAP “retained the right to control the means and methods of the work.” Brief, pp. 36-37. Lawless’s testimony, however, is not admissible summary judgment evidence since both of these statements are legal conclusions which Lawless is not qualified to render. In particular, though Lawless asserts that he is only opining on what the “industry practice” is, in essence, all he really does in the quotes in Hymas’s Brief is summarize the terms of the Narum Contract—an exercise for which an expert is clearly not needed or helpful to the court—and then announce that those terms automatically gave UAP a legal “right to control” Narum’s work and thus a duty for WISHA compliance. *Id.*

Lawless's statements are impermissible legal conclusions for at least two reasons. First, by analyzing the contractual terms and then stating that, taken together, these terms create a legal "right of control," Lawless is obviously stating the *legal* effect of terms in a *legal* document. Such conclusions are not allowed from experts and do not create a fact issue at summary judgment. *See, e.g., Brown v. Crescent Stores, Inc.*, 54 Wash. App. 861, 776 P.2d 705, 708 (Wash. App. 1989) ("Mrs. Brown's expert's affidavit, which interprets the *legal effect* of the regulations and manuals, does not raise a genuine factual issue that would preclude summary judgment.") (emphasis added).

Secondly, as Hymas himself admits, control and duty are the ultimate legal issues in this matter (Brief, p. 15), and, as an expert, Lawless is prohibited from testifying as to these "ultimate issues." *Charlton v. Day Island Marina, Inc.*, 46 Wash. App. 784, 732 P.2d 1008, 1010-11 (Wash. App. 1987). This is true even if the "ultimate issue's" resolution also embraces some factual questions:

[w]hile expert testimony is admissible even if it embraces an ultimate issue to be decided by the trier of fact if it will assist the trier of fact to understand the evidence or determine a fact in issue..., experts are not to state opinions of law or mixed fact and law.... An affidavit is to be disregarded to the extent that it contains [these types of] legal conclusions.

*Charlton*, 732 P.2d at 1010-11.

*Charlton* is directly on point. In that case, as here, a plaintiff's experts tried to create a fact issue by doing nothing more than taking the undisputed facts of a case and announcing that they all added up to negligence. 732 P.2d at 1010-11. The Court, however, "disregarded" this "evidence," holding that these experts were "stat[ing] opinions of law or mixed fact and law." *Id.* This type of opinion, said the Court, could not create an issue of fact on summary judgment. *Id.*

Such is precisely the case here as well. Lawless has done nothing more than look at the same contractual terms that were before the trial court and then "conclude" that those terms add up to a *legal* "right to control" sufficient to create a *legal* duty. Brief, pp. 36-37. Obviously, this is inadmissible expert testimony.

This determination of inadmissibility is further supported by the fact that Lawless candidly admitted at deposition that way he created his so-called "industry" standard employed on pp. 36-37 of the Brief was to simply take the *legal* standards articulated in governing precedents such as *Kamla* and other cases and then apply them to the undisputed contractual provisions and facts of this case. CP 1195-99.<sup>4</sup> Obviously, simply

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<sup>4</sup> Q So is it fair to say that in the remainder of your declaration which follows this paragraph we just read, you are presenting the evidence which you believe fulfills the requirements to show owner control as developed in *Kamla*, *Kinney*, and other case law?

renaming a legal test as an “industry test” does not change its admissibility. *Washington State Physicians Ins. v. Fisons Corp.*, 122 Wash.2d 299, 858 P.2d 1054, 1078 (Wash. 1993) (“legal opinions on the ultimate *legal* issue before the court are not properly considered under the *guise of expert testimony.*”) (emphasis added).

In this regard, it should also be noted that after summary judgment was argued, but before it was granted, UAP moved to exclude Lawless from testifying on this exact issue, and to prohibit Hymas from introducing his expert report. CP 1085-1211. Hymas had a chance to respond (CP 1212-1226), and, after oral argument, the trial court excluded Lawless’s testimony on control. CP 1227. All of this was completed before the Court rendered its decision on summary judgment. *Compare* CP 647 *with* CP 1227. As such, it was evidence “called to the attention of the trial court,” as per RAP 9.12, yet Hymas has not designated the striking of Lawless’s testimony as an assignment of error before this

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- A Yes.
- Q And you’re taking the facts that you know in this case and applying them to that list of requirements in Kinney and Kamla, correct?
- A In part, yeah. ...
- Q Okay. Well, and I misspoke and probably unfairly limited you. The remainder of your declaration then is your process of taking the facts as you know them in this case and applying them to the list of requirements necessary to show owner control that’s developed in all of the body of Washington case law?
- A That’s correct.

Court. Brief, p. 3. Resultantly, Hymas is now precluded from arguing that Lawless's statements on pp. 36-37 were admissible.

***D. The trial court correctly concluded that UAP did not owe a duty to protect Hymas from Narum's negligence***

Hymas ends his Brief by asserting that the trial court erred when it found that UAP could not be liable under Hymas's premises-liability claim. Brief, pp. 40-47. Hymas is once again incorrect.

According to the Washington Supreme Court, in the context of premises liability, "[t]he general rule is that the owner of premises owes to the servant of the independent contractor employed to perform work on his premises the duty to avoid endangering him by his own negligence or affirmative act, *but owes no duty to protect him from the negligence of his own master.*" *Epperly v. City of Seattle*, 65 Wash.2d 777, 785, 399 P.2d 591, 597 (Wash. 1965) (emphasis added). "[I]n other words, [the premises-liability duty] does not make the landowner liable where the work of an independent contractor is of an unsafe nature or the defects are due to the imperfect and negligent work of the contractor himself." *Phillips v. Kaiser Aluminum & Chemical Corp.*, 74 Wash. App. 741, 748, 875 P.2d 1228, 1234 (Div. 2, 1994).

This law is critical, because there is no dispute in this case that Narum—not UAP—was the entity responsible for excavating the trench

and pouring concrete into it. CP 110, 172-73, 175, 306-07 (16:17-17:22). Nor is there any dispute that Narum did, in fact, have the trench excavated and then poured concrete into it. CP 110, 174, 306-07.<sup>5</sup> Importantly, Hymas has made no allegation, let alone pointed to evidence, that UAP interfered in the excavation or maintenance of that trench. As a result, if it is true, as Hymas alleges, that the trench represented a “dangerous condition” (Brief, p. 44), then that dangerous condition was exclusively created and maintained by Narum. And again, UAP has no duty under Washington law to protect Hymas from whatever negligence Narum may have committed concerning that trench. *See Phillips*, 875 P.2d at 1234.

Hymas has said surprisingly little in response to this well-settled law. Instead, he spends most of his time attacking just one of the cases cited by UAP at summary judgment: *Golding v. United Homes*, 6 Wash. App. 707, 495 P.2d 1040 (Wash. App. 1972). Brief, pp. 45-47. While misguided, Hymas’s singular focus on *Golding* is understandable, since it is factually identical to this case and completely undermines his arguments.

In *Golding*, as here, an employee of an independent contractor sued a landowner for premises liability. 6 Wash. App. 707, 495 P.2d at

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<sup>5</sup> Again, it appears that Narum hired to subcontractor to do its work on its behalf.

1043-44. Just as in this case, the employee in *Golding* was injured in a trench that his employer had been responsible for excavating. *Id.* Similarly, as in the case at hand, the estate of the injured worker in *Golding* sued the jobsite owner, arguing that it had a duty to the worker because the worker was a “business invitee.” *Id.* at 1042-43. And just as in this case, the estate of the employee in *Golding* argued that the jobsite owner should have done more to protect the employee from the dangers of the trench *that his own employer had been responsible for excavating and maintaining.* *Id.* at 1042.

The *Golding* Court, however, found that the jobsite owner could not be liable under these facts. Stated succinctly, the Court held that if the premises were safe when they were turned over to the contractor, the fact that the contractor thereafter made them unsafe for its workers would not render the landowner liable. *Id.* at 1043-44.

Such is the exact case here as well. Because there is no allegation that the premises were unsafe when UAP turned them over to Narum, and because there is no dispute that Narum was the party responsible for the creation and maintenance of the allegedly dangerous condition, then, as with *Golding*, there can be no liability for UAP here.

In response, Hymas argues that *Golding* applied the wrong law and has been impliedly overruled. Brief, pp. 45-47. Neither of these

contentions is true; but even if Hymas were correct, it would make little difference to the analysis. This is because *Golding* is hardly alone in its holding; there are, in fact, a bevy of Washington cases which, just like *Golding*, have held that a jobsite owner owes no duty to protect a servant from the negligence of his or her own master. See, e.g., *Epperly*, 399 P.2d at 597; *Lamborn v. Phillips Pac. Chem.*, 89 Wash.2d 701, 707-08, 575 P.2d 215, 220 (Wash. 1978); *Phillips*, 875 P.2d at 1234; *Winfrey v. Rocket Res.*, 58 Wash. App. 722, 725, 794 P.2d 1300, 1302 (Wash. App. 1990).

Indeed, it is significant that when the trial court ruled from the bench in this matter, it noted that while *Golding* was indeed instructive to its analysis, the case it found “particularly helpful” was *Phillips v. Kaiser Aluminum*. Verbatim Report, 4/15/11, p. 20. In fact, the trial court stated that it was *Phillips*—not *Golding*—that focused it on the correct question, which the court stated was “whether the premises presented a dangerous condition or [whether] the work that was being performed on the premises [was] being performed in a negligent or dangerous way.” *Id.*, pp. 20-21. Then, in reliance on this law from *Phillips* and based on the undisputed facts, the Court found that UAP could not be held liable. *Id.*, pp. 21-22. Put another way, simply discrediting *Golding* alone—which is what Hymas has solely focused on doing in his Brief—does not fix Hymas’s fatal deficiencies, since there are many cases, like *Phillips*, which have

held just as *Golding* has and which compel the same result as the trial court reached here.

Nor has Hymas done much to discredit *Golding*. Hymas argues principally in this regard that the *Golding* Court entirely ignored Restatement §§ 343 and 343A and instead applied some other standard. This is untrue. To the contrary, *Golding* specifically applies these sections in its analysis:

Accepting sections 343 and 343A as the law of Washington and their applicability to decedent as a business invitee, we then inquire as to the nature of the duty owing under sections 343 and 343A by a possessor of land, or one in charge of premises, to an invitee engaged in the performance of inherently dangerous work on the premises when the possessor exercises no control or direction over the performance of the contracted work.

495 P.2d at 1043.

Thus, despite Hymas's arguments, the Court in *Golding* pointedly did not hold that §§ 343 and 343A "do not apply" to this case. Brief, pp. 45-46. It instead found that the application of these sections to a situation such as this—where the property is safe but for the acts of the contractor—compels the result that a jobsite owner does not have a duty to protect employees from the negligence of their own employers. *Id.* And again, *Golding* is hardly alone in so holding.

It is for this reason that Hymas's assertion that cases like *Kamla* and *Kinney v. Space Needle Co.*, 147 Wash. App. 242, 85 P.3d 918 (Div.

1, 2004) have somehow overruled *Golding sub silentio* is so untenable. As Hymas himself notes, these cases could only have the possibility of “reversing” *Golding* if *Golding* had held “that §§ 343 and 343A do not apply to employees of independent contractor [*sic*].” Brief, p. 47.

Clearly, *Golding* did not hold that these sections are inapplicable; indeed, it held the opposite. As such, Hymas’s argument concerning *Golding*’s reversal falls flat.<sup>6</sup>

## VI. CONCLUSION

The result here is clear. Narum and UAP entered into an agreement which unambiguously gave Narum the right to control the means and methods of its work. Both Narum and UAP uniformly testified that thereafter Narum did, in fact, control the means and methods of its work. Moreover, there is no competent evidence to support Hymas’s wishful assertions that the parties somehow ignored these provisions. As a result, the trial court’s decision must be upheld.

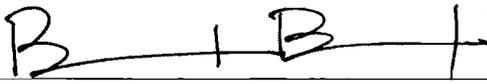
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<sup>6</sup> It is also worth noting that neither *Kamla* nor *Kinney* had the facts in front of it to overrule *Golding* on premises liability, even had the courts there wanted to do so. In both of these cases, the allegedly “dangerous condition” was already extant on the property when the contractors arrived, and thus the pertinent question before those courts was what responsibility the landowner had to warn and protect the contractors’ employees from those *preexisting* conditions. *Kamla*, 52 P.3d at 474; *Kinney*, 121 Wash. App. 242, 85 P.3d 918, 922 (Wash. App. Div. 1, 2004). Accordingly, neither had occasion to discuss how §§ 343 and 343A might apply to a situation where the landowner handed over a safe piece of property to a contractor which the contractor then made unsafe for its own employees.

Similarly, the law is clear that a premises owner is not responsible for protecting the employees of a contractor from the contractor's negligence. There is no dispute that the premises at issue were safe when they were handed over to Narum. Nor is there any disagreement that Narum was solely responsible for the creation and maintenance of the allegedly dangerous condition which injured Hymas. As such, it is also patent that UAP can have no liability. Again, the trial court's decision must therefore be upheld.

RESPECTFULLY SUBMITTED this 19th day of August 2011.

BANDUCCI WOODARD SCHWARTZMAN

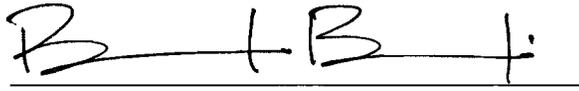
By   
Brent Bastian, admitted *pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by the method indicated below to the following this 19th day of August 2011.

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