

FILED
SUPREME COURT
STATE OF WASHINGTON
6/11/2019 4:46 PM
BY SUSAN L. CARLSON
CLERK

No. 96527-7

Court of Appeals No. 76717-8-1
(Linked with No. 76893-0-1)

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by
and through WILLIAM DUSSAULT, his Litigation Guardian ad
Litem; LUCINA FLORES, an individual; ROSARIO CRISOSTOMO
FLORES, an individual; and PATRICIA CRISOSTOMO FLORES, a
minor child by and through LUCINA FLORES, her natural mother
and default guardian,

Petitioners,

v.

INLAND WASHINGTON, LLC, a Washington limited liability
company,

Respondent,

and

INLAND GROUP, P.S. LLC, a Washington limited liability company,
RALPH'S CONCRETE PUMPING, INC., a Washington corporation,
and MILES SAND & GRAVEL COMPANY d/b/a/ CONCRETE
NOR'WEST, a Washington corporation,

Defendants.

ANSWER TO BRIEFS OF AMICI CURIAE

Preg O'Donnell & Gillett, P.L.L.C.
John K. Butler
WSBA 28528
David E. Chawes
WSBA 36322
901 Fifth Avenue, Suite 3400
Seattle, WA 98164
(206) 287-1775

Masters Law Group, P.L.L.C.
Kenneth W. Masters
WSBA 22278
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033

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INTRODUCTION

This brief generally responds to the *amici* in this case, the Building Industry Assoc. of Washington (BIAW) – with whom Inland agrees – and the Department of Labor & Industries (L&I), Washington State Assoc. for Justice Foundation (WSAJF), Pacific Northwest Reg. Council of Carpenters (PNWRCC), and Washington State Labor Council (WSLC) (collectively, Vargas’s *amici*) – who generally miss the point. As the Court can see from its briefing, Inland has never argued that it has no nondelegable duties under ***Kelley v. Howard S. Wright Const. Co.***, 90 Wn.2d 323, 582 P.2d 500 (1978), ***Stute v. P.M.B.C. Inc.***, 114 Wn.2d 454, 788 P.2d 545 (1990), or their progeny. The questions here – and the reasons that both trial judges dismissed Vargas’s claims – involve breach and causation.

Specifically, ***Stute*** expressly requires a general contractor (or “GC”) *either* to “furnish safety equipment or to contractually require subcontractors to furnish adequate safety equipment relevant to their responsibilities.” ***Stute***, 114 Wn.2d at 464. ***Kelley*** requires GCs “to guard against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen.” ***Kelley***, 90 Wn.2d at 332 (citation omitted). Inland met these duties. The trial court properly dismissed Inland.

ARGUMENT

A. Vargas's amici do not understand why the trial court granted summary judgment or grapple with this perplexing issue at the edges of the control doctrine.

Vargas's amici spend a great deal of time talking about duty.

Inland does not now deny, and never has denied, that it has *per se control* over the entire worksite and owes the specific RCW 49.17.060(2) WISHA duty to all employees on the worksite, including Vargas. The bulk of Vargas's amici briefing is thus irrelevant.

The issue here is not duty. **Kelley, Stute**, and their progeny, say that as the GC, Inland has *per se control* over the entire worksite – hence the duty. **Stute**, 114 Wn.2d at 464. But those cases do not say that Inland has *per se liability*. That is inaccurate *dicta* from **Kamla v. Space Needle Corp.**, a case that did not even involve general contractors – **Kamla** is an owner case. 147 Wn.2d 114, 122, 52 P.3d 472 (2002). L&I has taken that *dictum* and run with it. It is trying to impose *per se liability* on GCs, issuing citations to them for subcontractors' WISHA violations – indeed, *instead* of citing the subcontractors. See *Amicus BIAW* at 15-19.¹

¹ Here, of course, Inland was not cited for any WISHA violations. CP 1722 (L&I's Compliance Safety and Health Officer: "There were no violations for Inland"); CP 1724 ("This inspection resulted in no violations"); CP 1725 ("No violations were cited. No penalties were assessed"). Vargas produced no evidence of any specific WISHA violation. CP 121-25.

This recent trend is dangerous. While (as several *amici* note) Washington has a good construction-safety record in general, making GCs strictly liable for any employee's WISHA violation will gradually erode worker safety. Subcontractors must and should be held accountable for their safety violations, or they will become lax regarding WISHA regulations. The GC's *per se* control and specific WISHA duty to all employees on the site are insufficient, by themselves, to protect all employees.

This is true because the subcontractors *are the experts*, not only regarding the specific job they are doing, but as to the proper safety procedures necessary to performing that job. GCs like Inland simply cannot have that detailed, job-specific expertise. The larger issue is, where a GC hires an expert subcontractor and contractually requires it to provide a WISHA-compliant exclusive worksite, does the GC violate WISHA? That is not and cannot be the law.

The answer is specific and detailed. In *Kamla*, a dissenting Justice Tom Chambers identified the sort of issue at stake here (in the context of an owner's potential liability under the specific WISHA duty). The Court asks "whether the duty to comply with specific WISHA regulations runs to the employees of the independent contractor." 147 Wn.2d at 139. "Relevant to this inquiry will be

whether the principal is able and competent to enforce WISHA compliance given its experience, training, or supervision of the work.” *Id.* “***There will be hard cases requiring us to develop more nuanced rules***, but this case does not present a perplexing issue at the edges of the doctrine.” *Id.* (emphasis added).

This leads to the specific, perplexing issue at the heart of this case, and at the edge of the control doctrine: where, as here, the GC hires a subcontractor with specific expertise, as to which the GC is not able or competent to enforce specific WISHA compliance because it lacks the necessary experience or training in – or even the supervision of – the subcontractor’s specialized work, is the GC *per se* liable for any WISHA violation committed by the expert subcontractor? Not duty, not control, but liability.

For the safety of workers in Washington, the answer must be no. It is simply dangerous to create a situation in which, when a GC hires an expert subcontractor, it is yet *required* to retain control over WISHA safety compliance in that subcontractor’s exclusive work zone. Having two “employers” in charge of safety will not increase safety – particularly where, as here, one of them (the GC) has no expertise in the subcontractor’s specialty.

In **Stute**, for instance, the specific issue was fall protection. As the GC, “P.B.M.C. knew that employees of the subcontractor were working on the roof without safety devices.” 114 Wn.2d at 456. As a policy matter, this Court held that where, unlike here, the GC knows of the violations and is in the best position to provide protection for all workers on the site, its “supervisory authority is *per se* control over the workplace . . . as a matter of law.” *Id.* at 464. Crucially here,

It is the general contractor’s responsibility to furnish safety equipment or to contractually require subcontractors to furnish adequate safety equipment relevant to their responsibilities.

Id. (emphasis added).

Inland does not have expertise in pouring concrete for a multistory project, so it hired Hilltop, contractually requiring it to comply with WISHA safety regulations. CP 1669-93 (“Subcontract”). The Subcontract required Hilltop to safely perform work in its own work areas, to hold and attend safety meetings, and to comply with WISHA safety rules and regulations. CP 1669-71, 1675, 1684, 1687-88, 1692-93.² The Subcontract also required Hilltop to agree “with

² Hilltop employed Vargas for six years prior to the incident. CP 32, 117. Vargas attended many Hilltop safety-training classes (some taught by Hilltop Supervisor Matt Skoog) on safe concrete-pumping operations and pump-hose risks. CP 2001. Hilltop’s training included how to deal with pump hose-whip “blow outs.” CP 1717.

any written instructions given by” Inland. CP 1672. Inland did not retain control over – or even the right to control – Hilltop’s work.

Thus, *Inland complied with its specific WISHA duty under Stute*. None of the *amici* even address this issue. Their briefing is not helpful, although WSAJF acknowledges the complexity. *Amicus* WSAJF 14-15 n.4. This Court is faced with examining the minute details of this incident to determine whether the trial court correctly granted summary judgment *because Vargas failed to show any WISHA violation – or indeed any action that Inland could have taken to prevent Vargas’s injury*. The details show the answer is yes.

Hilltop supervised and controlled the concrete-pour site. CP 1705. Matt Skoog was Hilltop’s supervisor in charge of maintaining overall control of the concrete pour. CP 1710. Vargas was Hilltop’s lead employee – second-in-command only to Skoog. CP 1712. No one from Inland was involved with this pour. CP 35.

Rather, Hilltop hired Ralph’s Concrete Pumping (“Ralph’s”) to pump concrete from the Miles supply truck into the wall forms Hilltop erected. CP 34-36. Ralph’s sent a Putzmeister-manufactured concrete-pump truck to the Project, equipped with an adjustable boom approximately 47 meters (154 feet) long. CP 71, 77. Ralph’s provided this concrete-pump truck and a qualified pump-truck operator solely

under Hilltop's control. CP 69, 71-72 ("All operators are loaned servants acting under the sole supervision and control of Lessee [Hilltop] who is solely responsible for their actions"); CP 197-98 (Hilltop rented equipment from Ralph's multiple times before the incident using the same form daily-rental agreement).

Miles's concrete trucks delivered the wet concrete directly into the hopper of Ralph's pump-truck, while Miles's truck driver monitored the concrete level in the hopper. CP 68. Monitoring ensures that concrete levels remain above the pump inlet, preventing air from entering the system; if air gets in, it can compress inside the supply line; if compressed air reaches the end of the delivery hose, it may "whip" around when the air is suddenly released. CP 67.

Only Hilltop employees were present in Hilltop's work area. CP 34. No other trades were present, so that Hilltop "could focus on doing our work properly and safely during the pour." CP 1716. The Hilltop employee overseeing the pour would typically instruct Ralph's operator where to pour concrete, but would give no instructions on how to operate the pump truck. CP 2206. Rather, Anthony Howell, Ralph's pump operator, checked in with Hilltop Supervisor Skoog at about 7:00 a.m., and perhaps also with Inland superintendent Steve Miller, who told him where to set up the pump and showed him the

walls they were pumping that day. CP 1902. It took Howell about 45 minutes to set up the pump, including putting out his outriggers, unfolding his boom, and getting his slurry ready for the first Redi-mix concrete truck from Miles to show up at 8:00 a.m. CP 1903.

Howell set up the pump truck and hooked up the hose. CP 1902, 1908, 1910-11. After slurring the pump, Howell kinked the hose put a “halo” ring on it to keep concrete from dripping out. CP 1910. Howell then laid the boom out flat and laid the hose extending from the end of the boom on top of the wall. CP 1911. After the halo ring was taken off the end of the hose and the hose was unkinked, Howell turned on the pump. CP 1911-12.

Derek Mansur, the Miles concrete-delivery-truck driver, said the hopper was full of concrete. CP 2095, 2107. Howell controlled the boom and the pump by wireless remote control. CP 66, 1924. Howell knew the potential hazard of the pump-hose “danger zone” and had the responsibility for keeping the Hilltop pouring crew out of this “zone.” CP 1812, 1814, 1927-28.

The Putzmeister safety manual in Ralph’s pump truck at the site on the day of the incident provided a general safety rule for workers to stay out of the “danger zone” around the hose end when pumping begins. CP 3573, 3575-76. The manual cautions of the

“considerable risk of injury from the end hose striking out when starting to pump.” CP 1964. The manual defines the “danger zone” for the hose end as having a diameter of “twice the end hose length” and requires the pump operator to ensure “that no-one is standing in the danger zone.” CP 1966. The manual prohibits workers from holding or being near the hose when pumping begins. CP 1971. Putzmeister defines “starting to pump” as the “period from when you begin to move concrete with the pump, to the time you have a continuous flow of concrete from the end hose.” CP 2311-12.

Vargas and two other Hilltop employees “were positioned on the scaffolding next to the concrete forms.” CP 1716. Skoog and Howell were standing together on the previously-poured concrete deck near the wall-pour site. CP 1711, 1911-12. Howell said the three were on the scaffolding by the hose, with Vargas standing about 12 feet from the end of the hose. CP 1913, 1923; see CP 1951 (photo of Vargas’ location). Scoog said Vargas was holding the end of the hose, while the two other Hilltop employees stood by, ready to assist. CP 1706-07. Skoog controlled the start of the pour by signaling Ralph’s pump-truck operator to start pumping. CP 1711.

After they began, the remote control signal to the pump truck was lost, automatically shutting down the pump. CP 1924. Howell’s

remote control had stopped controlling the pump, so Howell moved 50 feet closer to his pump. CP 1708-09. Howell moved to re-establish a connection with the truck, then signaled to the Hilltop workers that they were going to start the pump back up. CP 1917, 1922 CP 1951-52 (photos showing locations). The pump took “one full stroke and it went off like a shotgun”. CP 1922. Mansur heard the RPMs of the concrete pump rev-up twice, but said the actual amount of concrete pumped was less than one stroke. CP 2106-08. When Howell restarted the pumping, the concrete supply hose whipped and violently struck Vargas in the head, rendering him unconscious. CP 1709, 1742, 1745, 1930-31.

Many of the above facts are taken directly from Vargas’s own briefing. The trial court looked at these facts in the light most favorable to Vargas, but could find no allegations that Inland failed in its **Stute** duties. As noted *supra*, L&I did a thorough investigation and did not cite Inland – notwithstanding its implication here that WISHA violations did occur. This was a sudden and unexpected event that only a person with expertise in this work could have foreseen and prevented. That is why Hilltop was solely in charge of safety at the time. That is why Inland hired an expert.

B. Vargas and his *amici* are seeking strict liability against general contractors.

In light of the facts stated above, Inland lacked the necessary training, experience, and supervision for this pour, was not present, was not negligent, and otherwise met its WISHA obligations. The trial court correctly refused to make Inland a mere insurer of all employees on the worksite. RP 93. The only way liability could be established under these facts is to apply *per se* liability – more commonly known as strict liability – against general contractors in Washington. That would be as unjust as it is damaging to construction projects and dangerous to workers.

As noted *supra*, **Stute** holds that the general contractor's responsibility is "to furnish safety equipment or to contractually require subcontractors to furnish adequate safety equipment relevant to their responsibilities." 114 Wn.2d at 464 (emphasis added). As explained *supra*, Inland did so. This Court has never imposed strict liability against general contractors, nor has it retreated from this holding in **Stute**. It should not do so here.

While Inland unquestionably has a nondelegable duty to oversee WISHA compliance, **Stute** makes clear that where, as here, the GC contractually requires a subcontractor to furnish adequate

safety relevant to *their* responsibilities, it has met its WISHA duty. There is simply no dispute that Inland contractually required Hilltop to ensure WISHA compliance *as to its responsibility for this pour*.

The plaintiffs' bar nonetheless argues that recognizing a GC's *per se control* over the worksite "necessarily includes placing vicarious liability on a general contractor for a subcontractor's failure to provide a safe workplace and to comply with safety regulations." *Amicus WSAJF* at 5. It cites nothing for this assertion, as no case so holds. Rather, it must concede that the general common law rule is that one who employs an independent contractor is not liable for injuries to its employees, except where the employer "retains control over some part of the work." *Id.* Here, it is undisputed that Inland did not retain control over any part of the work.

The plaintiffs' bar must also concede ***Kelley***'s holding that the GC's duty is to take "reasonable steps within its supervisory authority . . . to guard against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen." *Id.* at 6 (emphases added) (quoting ***Kelley***, 90 Wn.2d at 332 (quoting ***Funk v. General Motors Corp.***, 220 N.W.2d 641 (Mich. 1974))). As noted *supra*, this makes sense when one is discussing fall protection at a large construction project

(as in both **Kelley** and **Stute**) which constitutes a readily observable, avoidable danger in common work areas that creates a high degree of risk to a significant number of workers. But where, as here, one is discussing a discrete job for which the subcontractors have specialized expertise and exclusive control, placing liability on a general contractor will not increase safety.

On the contrary, general contractors are generalists. They certainly have a nondelegable duty to all workers for readily observable, avoidable common dangers. But **Stute** – and common sense – dictate that expert subcontractors should be solely in charge of safety in their exclusive work areas, so the GC may meet its WISHA duties by contractually requiring subcontractors to comply with WISHA regulations relevant to their responsibilities. Again, it is undisputed that Inland did so here. Hilltop was in charge.

Failing to recognize the well-reasoned limitations of **Kelley** and **Stute**, the plaintiffs' bar argues that Inland's *per se* control over the worksite "necessarily imposes upon the general contractor liability for the failure to comply with safety regulations by subcontractors under the general's supervision." *Amicus* WSAJF at 9 (emphasis added). For this it relies on vicarious liability under **Millican v. N.A. Degerstrom, Inc.**, 177 Wn. App. 881, 313 P.3d

1215 (2013), *rev. denied*, 179 Wn.2d 1026 (2014), albeit failing to address the conflict between *Millican, Stute/Kelley* (discussed *supra*) and *Afoa v. Port of Seattle*, 191 Wn.2d 110, 421 P.3d 903 (2018) (*Afoa II*).

In *Afoa II*, this Court identified the truth that WISHA does not incorporate vicarious liability (191 Wn.2d at 122):

WISHA does not expressly provide for vicarious liability when employers are concurrently negligent. . . . WISHA requires employers to “comply with the rules, regulations, and orders promulgated under this chapter.” RCW 49.17.060(2). Nothing in chapter 49.17 RCW suggests that the legislature intended to impose joint and several liability for WISHA violations.

The Court holds that “liability for breach of a nondelegable duty does not undermine the fault allocation under RCW 4.22.070.” *Id.*

Similarly, no “common law right [exists] to hold tortfeasors with a nondelegable duty vicariously liable for another entity’s breach of the same duty.” *Id.* A “nondelegable duty does not supersede fault allocation under RCW 4.22.070” (*id.* at 128), so an entity with a nondelegable duty cannot escape “its proportionate share of responsibility” by delegation. *Id.* at 122 n.10. And while a plaintiff can establish vicarious liability by proving agency – which turns on retaining the right to control (*id.* at 124-28) – here, it is undisputed that Inland retained no right to control Hilltop’s work.

Afoa II expressly limits **Millican**: “*Millican* does not stand for the proposition that another entity cannot be separately responsible for work site safety.” *Id.* at 124. But Vargas and his *amici*’s arguments make clear that **Millican** is incorrect and harmful. It contradicts **Kelley** and **Stute**, and it creates the risk – which appears to have been actualized by L&I – that subcontractors with an independent duty for safety will not be cited for their WISHA violations, in favor of a “deep pocket” general contractor who retains no right to control the manner of the subcontractor’s work. This is unsafe for workers.

Despite this, *amicus* WSAJF broadly claims – without citing legal authority – that vicarious liability does not amount to strict liability because the injured worker “is required to prove the subcontractor’s violation of the safety regulation and the subcontractor’s negligence.” *Amicus* WSAJF at 15. **But the subcontractor is immune.** See, e.g., RCW 4.22.070 (“The entities whose fault shall be determined . . . shall not include those entities immune from liability to the claimant under Title 51 RCW”). Vargas and his *amici* fail to explain *how* they – or Inland, or anyone else – can prove the subcontractor’s violation or negligence, where the jury is *forbidden* from assigning fault to the subcontractor.

For the same reason, their argument that Inland can buy insurance under RCW 4.24.115(1)(b) for this strict liability is equally unavailing. If Inland is required to argue that Hilltop was *not* negligent in order to avoid vicarious liability in Vargas's case, it cannot turn around and argue that Hilltop *was* negligent in a subsequent indemnity action. And even if it could, there will be no jury verdict that Hilltop *was* negligent in the Vargas action. This circular multiplicity of lawsuits just increases the costs of litigation and of construction.

Similarly, L&I is seeking a rule that the GC is *always* liable for a subcontractor's WISHA violations, rather than the existing law under ***Kelley***, ***Stute***, and ***Afoa II***, discussed *supra*, that a GC *may be* liable if the injury is caused by a danger in a common work area that is readily observable and avoidable and creates a high degree of risk to a significant number of workers. *See generally Amicus* L&I. L&I otherwise mischaracterizes Inland's arguments as *relying on* vicarious liability (*id.* at 11) or seeking to *overturn Stute* (*id.* at 12). Inland is arguing that ***Stute*** is controlling and that vicarious liability is a mistake made only in ***Millican*** – which is incorrect and harmful. As *amicus* BIAW makes clear, L&I changed the rules after ***Kamla*** incorrectly stated that ***Stute*** and its progeny impose *per se* liability, not just *per se* control. ***Kamla***, 147 Wn.2d at 122.

In a footnote, L&I purports to retract its argument for strict liability – realizing “this was an incorrect position.” *Amicus* L&I at 15 n.8. It even argues that it is not seeking strict liability here because Inland would have a defense *in a WISHA enforcement action*. *Id.* at 14. This is not a WISHA enforcement action. If Inland is vicariously liable for Hilltop’s alleged violation, then Inland cannot defend itself before a jury – Hilltop is not even a party. Regardless of the “knew or could have known” standard in WISHA enforcement actions, vicarious liability leaves general contractors defenseless.

That is not the law under ***Kelley*** or ***Stute***, or under ***Afoa II***, which explains that the nondelegable duties under RCW 49.17.060 are *direct* duties, not vicarious duties. This Court should hold that where, as here, a GC hires an expert subcontractor and contractually requires it to furnish adequate safety relevant to its exclusive responsibilities, but an injury nonetheless results from a danger in the subcontractor’s exclusive control area that was not readily observable, but rather was a sudden and unexpected event, the GC is not liable as a matter of law unless the GC itself violated WISHA. The Court should overrule ***Millican***’s erroneous and dangerous vicarious liability rule, which is contrary to ***Afoa II***, where nothing in WISHA imposes vicarious liability.

C. The trial judges were right: Vargas would impose impossible duties on general contractors.

Amici WSLC and PNWRCC set forth conclusory factual allegations that go well beyond the record. *Amicus* WSLC at 6-8; *Amicus* PNWRCC at 6-8. Be that as it may, they at least touch upon the factual complexities at issue in this case, discussed *supra* § A. *Id.* But Vargas's *amici* fail to reach the real issue, discussed *supra*.

Amicus WSLC asserts that evidence supports "the finding" (of course, no findings were made here) "that one or more WISHA violations caused Mr. Vargas's injuries." *Amicus* WSLC at 7. WSLC then says the manual on the pump truck established a "danger zone" within which Vargas was standing;³ asserts a "failure to train";⁴ mentions the aggregate rock size *vis a vis* the hose size; and notes the lack of a vibrator in the pump truck, and a broken antenna. *Id.* at 7-8. Like Vargas and his other *amici*, WSLC apparently wants this Court to impose new duties on Inland, including controlling exclusive work areas where it has no expertise; training the subcontractors' employees (again) on issues within their own expertise; inquiring

³ This simply proves that Inland required, and Ralph's provided, a safety plan onsite the day of the incident, which is all that WISHA requires.

⁴ Vargas has never asserted a failure to train, and the evidence cited *supra* is to the contrary – Vargas attended trainings on hose-whip blow outs.

about and controlling the size of the rocks in the aggregate (which is set by an *engineer*) and the hose that delivers the wet concrete; and checking all the equipment on every independent contractor's truck, right down to making sure an antenna is working properly.

These requirements would go far beyond anything WISHA – or common sense – requires of a GC. Yet nonetheless, this is precisely what Vargas argued to the trial court (RP 70):

So the general contractor needs to make sure that, you know, any pump truck that's brought on to its project is going to be safe.

It's going to have, you know, a working antenna, it's going to have, you know, working vibrators.

It's going to be safe, you know,

it's going to have the right equipment for the job.

You know, using a hose big enough to handle the rock, that sort of thing. [Paraphrasing altered.]

In short, *general* contractors must have all the detailed knowledge that its trade-specialist subcontractors have, on pain of strict liability.

But GCs do not have this sort of detailed expertise regarding the myriad – at least dozens – of separate trade specialties involved in a large construction project. This Court risks enormous disruption of the construction industry if it follows this sort of advice.

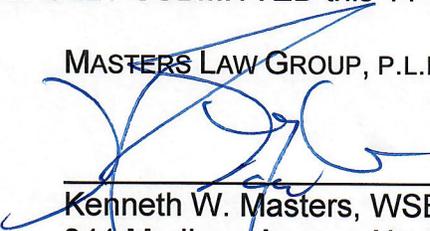
CONCLUSION

Vargas's *amici* make broad – and somewhat flip – assertions that Inland's concerns for worker safety are "overwrought," but placing strict – or even vicarious – liability on GCs has serious practical consequences. The GCs in **Stute** and **Kelley** were in the best position to provide fall protection for all trades on a high-rise construction project. But here, the detailed duties Vargas wants to place on Inland will only make workers less safe. And holding GCs vicariously liable for immune entities' "negligence" is grossly unjust.

If Inland and other GCs *must* accept liability for WISHA violations by anyone on the site, then they either must eliminate subcontractors (so the GC will receive Worker's Comp. immunity) or must impose direct and detailed control over trades who are much better equipped to handle worker safety. Confusing the chain of command for worker protection is a dangerous idea.

RESPECTFULLY SUBMITTED this 11th day of June 2019.

MASTERS LAW GROUP, P.L.L.C.



Kenneth W. Masters, WSBA 22278
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033
ken@appeal-law.com
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **ANSWER TO BRIEFS OF AMICUS CURIAE** on the 11th day of June 2019 as follows:

Co-counsel for Respondent

Preg O'Donnel & Gillet, P.L.L.C.	___	U.S. Mail
John Butler	<u> x </u>	E-Service
David Chawes	___	Facsimile

901 – 5th Avenue, Suite 3400
Seattle, WA 98164
jbutler@pregodonnael.com
dchawes@pregodonnael.com
mallen@pregodonnael.com
mmunson@pregodonnael.com
hvanburen@pregodonnael.com

Counsel for Petitioners

Bishop Legal	___	U.S. Mail
Raymond E. S. Bishop	<u> x </u>	E-Service
Derek K. Moore	___	Facsimile

19743 – 1st Avenue South
Normandy Park, WA 98148
ray@bishoplegal.com
derek@bishoplegal.com
tara@bishoplegal.com
margarita@bishoplegal.com

Counsel for Amicus Curiae Department of Labor & Industries

Washington Attorney General's Office	___	U.S. Mail
Anastasia Sandstrom	<u> x </u>	E-Service
800 – 5 th Avenue, Suite 2000	___	Facsimile

Seattle, WA 98104
anas@atg.wa.gov

Counsel for Amicus Curiae Building Industry Association of Washington

Jackson Wilder Maynard, Jr. _____ U.S. Mail
Hannah S. Marclely x E-Service
111 – 21st Avenue SW _____ Facsimile
Olympia, WA 98501
jacksonm@biaw.com
hsells@freedomfoundation.com
jwmaynard2003@yahoo.com
hannahatlaw@gmail.com

Counsel for Amicus Curiae Washington State Labor Council

Barnard Iglitzin & Lavitt, LLP _____ U.S. Mail
Dmitri Iglitzin x E-Service
18 West Mercer Street, Suite 400 _____ Facsimile
Seattle, WA 98119
iglitzin@workerlaw.com
woodward@workerlaw.com

Counsel for Amicus Curiae Pacific Northwest Regional Council of Carpenters

Haglund Kelly LLP _____ U.S. Mail
Joshua Stellmon x E-Service
Matthew E. Malmshheimer _____ Facsimile
200 SW Market Street, Suite 1777
Portland, OR 97201
jstellmon@hk-law.com
mmalmshheimer@hk-law.com

Counsel for Amicus Curiae Washington State Association for Justice Foundation

Daniel E. Huntington	<input type="checkbox"/>	U.S. Mail
422 West Riverside, Suite 1300	<input checked="" type="checkbox"/>	E-Service
Spokane, WA 99201	<input type="checkbox"/>	Facsimile
Valerie D. McComie		
4549 NW Aspen Street		
Camas, WA 98607		
danhuntington@richer-wimberley.com		
valeriemcomie@gmail.com		

Counsel for Defendant Miles Sand & Gravel Company d/b/a Concrete Nor'West

Lee Smart, P.S., Inc.	<input type="checkbox"/>	U.S. Mail
Steven G. Wraith	<input checked="" type="checkbox"/>	E-Service
1800 One Convention Place	<input type="checkbox"/>	Facsimile
701 Pike Street		
Seattle, WA 98101		
sgw@leesmart.com		
vf@leesmart.com		

Counsel for Defendant Inland Group, P.S. LLC

Aiken, St. Louis & Siljeg, P.S.	<input type="checkbox"/>	U.S. Mail
David P. Hansen	<input checked="" type="checkbox"/>	E-Service
801 – 2 nd Avenue, Suite 1200	<input type="checkbox"/>	Facsimile
Seattle, WA 98104		
hansen@aiken.com		

Counsel for Defendant Ralph's Concrete Pumping, Inc.

Christie Law Group, P.L.L.C.
Robert L. Christie
Thomas P. Miller
2100 Westlake Avenue North, Suite 206
Seattle, WA 98109
bob@christielawgroup.com
tom@christielawgroup.com
stefanie@christielawgroup.com

U.S. Mail
 E-Service
 Facsimile



Kenneth W. Masters, WSBA 22278
Attorney for Respondent

MASTERS LAW GROUP

June 11, 2019 - 4:46 PM

Transmittal Information

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Appellate Court Case Title: Gildardo Crisostomo Vargas, et al. v. Inland Washington, LLC, et al.
Superior Court Case Number: 13-2-32219-6

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- paulw1@atg.wa.gov
- ray@bishoplegal.com
- stefanie@christielawgroup.com
- tara@bishoplegal.com
- tom@christielawgroup.com
- valeriemcomie@gmail.com
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- woodward@workerlaw.com

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