NO. 100768-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WAYNE WRIGHT, INDIVIDUALLY AND
AS PERSONAL REPRESENTATIVE FOR THE
ESTATE OF WARREN WRIGHT,

Plaintiff/Respondent,

v.

EXXONMOBIL OIL CORPORATION,

Defendant/Petitioner.

RESPONDENT'S OPPOSITION TO THE WESTERN STATES PETROLEUM ASSOCIATION'S AMICUS MEMORANDUM BRIEFING

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

The Rules of Appellate Procedure require that amicus curiae "avoid repetition of matters in other briefs." RAP 10.3(e). And yet, the amicus curiae brief submitted by the Western States Petroleum Association ("WSPA") in support of the Petition for Review of Defendant-Petitioner ExxonMobil Oil Corporation ("Mobil") says nothing new. Accordingly, like Mobil's Petition, WSPA's amicus brief fails to justify review by the Washington Supreme Court.

WSPA begins its analysis with the erroneous assumption that the danger here was known or obvious. As such, WSPA provides no legal analysis on what knowledge is necessary to implicate section 343A and no factual demonstration of how the record contained substantial evidence of that knowledge. This critical omission taints WSPA's entire argument for review.

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

WSPA concedes that a jury instruction on section 343A should only be given "if there is substantial evidence to support it." *See* Amicus Br. at 5; *see also id.* at 10 ("Where the evidence is more than 'sufficient to encompass' the known or obvious exception in § 343A . . ."); *id.* at 14 ("When a danger is known or obvious, the jury must be instructed on known or obvious dangers."). And yet, it conducts no analysis on the "knowledge" necessary to implicate section 343A. *See generally id.* Indeed, WSPA's only mention of decedent Warren Wright's knowledge comes in a summary of Mobil's case theory. *See id.* at 10-11.

This omission—disregarding the sort of "knowledge" relevant to section 343A—undercuts WSPA's entire argument for review. The "knowledge" implicated by section 343A is not merely some sort of generalized understanding. To the contrary, for a hazard to be known, section 343A requires that the invitee not only recognize the existence of the condition or activity itself,

but also that the condition or activity is dangerous as well as the probability and gravity of that danger. Restatement (Second) of Torts § 343A, cmt. b (1965). In other words, for section 343A to be implicated and a corresponding instruction to be warranted, there must be substantial evidence that Warren Wright knew not only of the asbestos at his workplace but also the probability and gravity of the risk presented by that asbestos.

The jury heard no such evidence. More specifically, there was no evidence that Warren Wright, given the safety precautions that he took, appreciated any remaining asbestos-related danger. As the Court of Appeals correctly concluded, "[w]hile [Mr.] Wright was clearly aware of the 'generalized risk' of asbestos exposure, Mobil did not produce evidence that [he] knew the risk of exposure even with precautions." Op. 12. WSPA has no answer to this absence of evidence or the conclusion that follows: an instruction on section 343A was unnecessary because there was no substantial evidence that the dangers at issue were "known."

Accordingly, contrary to WSPA's assertion, this case does not conflict with *DeKoning v. Williams*, 47 Wn.2d 139, 286 P.2d 694 (1955). In fact, *DeKoning* only requires a specific instruction "if there is any evidence to support it." *Id.* at 141. In cases such as this one, where no substantial evidence supports the specific instruction, *DeKoning* instructs that no specific instruction is needed. *See id.*

II. THE COURT OF APPEALS' OPINION IS CONSISTENT WITH THE RESTATEMENT, PATTERN INSTRUCTIONS, AND WASHINGTON PRECEDENT

Because no substantial evidence supported the existence of a known or obvious danger here, the trial court's decision not to give a section 343A instruction and the Court of Appeals' affirmation of that decision is perfectly consistent with existing authority. The Restatement (Second) of Torts commentary cited by WSPA explicitly states that section 343A should be read with section 343 only when "the condition is known to the invitee, or is obvious to him." *See* Amicus Br. at 12 (quoting Restatement (Second) of Torts § 343 cmt. a (1965)). Similarly, Washington's

pattern instructions advise that a section 343A instruction is only necessary in "cases involving . . . known or obvious dangers." *Id.* at 12-13 (quoting 6 Wash. Practice: Washington Pattern Jury Instructions: Civil 120.07). Because this case does not involve a known or obvious danger, the Restatement and pattern instructions support omission of a section 343A instruction.

For the same reason, WSPA is incorrect that the Court of Appeals' opinion conflicts with case law. WSPA's authorities all require a known or obvious hazard to trigger application of section 343A. *See Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 139, 875 P.2d 621 (1994) (cabining section 343A to "known or obvious dangers"); *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 50, 914 P.2d 728 (1996) (limiting liability under section 343A only "[w]here the danger . . . is known or obvious"); *Suriano v. Sears, Roebuck & Co.*, 117 Wn. App. 819, 826, 72 P.3d 1097 (2003) (recognizing section 343A as appropriate standard "for known or obvious dangers"); *Jarr v. Seeco Constr. Co.*, 35 Wn. App. 324, 326, 666 P.2d 392 (1983)

(same). In fact, every one of WSPA's cases involves precisely what is lacking here: a known or obvious danger. *See Tincani*, 124 Wn.2d at 141 (concerning "obvious dangers" of cliff); *Degel*, 129 Wn.2d at 45 (involving "steep embankment" above "fast-flowing creek"); *Suriano*, 117 Wn. App. at 829 ("Here, the sign was an open and obvious obstruction[.]"); *Jarr*, 35 Wn. App. at 325 (concerning "obviousness of the danger" of sheetrock piles). There can be no conflict between the Court of Appeal's opinion and this authority.

III. WSPA'S FEARS REGARDING THE PURPORTED CONSEQUENCES OF THE COURT OF APPEALS' UNPUBLISHED OPINION ARE UNFOUNDED

WSPA dramatizes the impact of the Court of Appeals' opinion, predicting that the unpublished, nonbinding, and narrow opinion will "permit Washington trial courts to abdicate their constitution duty to declare the law completely" and "nullif[y] the liability limitation for all premises owners or occupiers in Washington." Amicus Br. at 4. The reality is much less dramatic. As the Court of Appeals here specifically reiterated, "it is

ordinarily the better practice to give both Section 343 and Section 343A(1) instructions." Op. 8. Because this case does not implicate section 343A, it does not, as WSPA prophesies, eliminate its protections for all premises owners, and, as explained, further review by this Court would necessarily result in ratification of the decision to omit a section 343A instruction in this case.[1]

WSPA's desire to apply section 343A here, in the absence of a known or obvious danger, disregards the Restatement's admonition that "[t]he word 'known' denotes... appreciation of

[1] In addition, premises liability claims are limited no matter the effect of this case. Premises liability necessarily depends on a plaintiff's status, for example, as an invitee or licensee. Liability to invitees lies only where a premises owner knew or should have known both of the danger at issue and that an invitee will not realize or protect against it, and only where the premises owner fails to take reasonable precautions. Reasonable care, in turn, depends on the circumstances confronting the premises owner and is limited by what is foreseeable. And premises claims are subject to the full panoply of affirmative defenses that may apply in any case. *Accord H.B.H. v. State*, 192 Wn.2d 154, 177, 429 P.3d 484, 496 (2018) (rejecting arguments about "limitless liability" because such protections exist).

the danger [an activity] involves." Restatement (Second) of Torts § 343A, cmt. b (1965). Furthermore, it would help excuse the sort of condemnable conduct at issue in this case: Mobil invited unsophisticated contract workers onto its premises and then, with Mobil's knowledge, allowed those workers to unknowingly endanger themselves by engaging in unsafe and illegal but presumably cost-saving practices forbidden to Mobil's own employees. The law—including section 343A, with its knowledge requirement—allows for liability in such circumstances, as it should.

IV. CONCLUSION

For the foregoing reasons and for the reasons stated in Plaintiff's Response to Petition for Review, the opinion of the Court of Appeals is neither erroneous nor does it meet the criteria for review by the Supreme Court. While Plaintiff is confident he will prevail should review be accepted, he asks that review be denied.

DATED this 21st day of June, 2022.

I certify that this document contains 1354 words, in compliance with the RAP 18.17.

Respectfully submitted,

SCHROETER, GOLDMARK & BENDER

s/ Chen-Chen Jiang

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

CERTIFICATE OF SERVICE

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

James A. Flynn
Emily Villano
ORRICK, HERRINGTON & SUTCLIFFE LLP.
1152 15TH Street NW
Washington, DC 20005
Counsel for ExxonMobil Oil Corp.

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

Daniel A. Rubens
ORRICK, HERRINGTON & SUTCLIFFE LLP.
51 West 52nd Street
New York, NY 10019
Counsel for ExxonMobil Oil Corp.

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

Carolyn Frantz
Robert McKenna
Mark Parris
ORRICK, HERRINGTON & SUTCLIFFE LLP.
701 5th Ave., Suite 5600 Seattle, Washington 98104
Counsel for ExxonMobil Oil Corp.

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

Malika Johnson Christopher Marks Alice Serko Tannenbaum Keale One Convention Place 701 Pike Street, Suite 1575 Seattle, WA 98101 **Counsel for ExxonMobil Oil Corp.**	☐ Via Facsimile ☐ Via First Class Mail ☐ Via Email ☒ E-Service through the Electronic Portal
Rory D. Cosgrove Tierney E. Vial Carney Badley Spellman, PS 701 5th Ave, Suite 3600 Seattle, WA 98104 **Counsel for Western States Petroleum Association**	☐ Via Facsimile ☐ Via First Class Mail ☐ Via Email ☒ E-Service through the Electronic Portal
Jackson Wilder Maynard, Jr. Building Industry Association of Washington 300 Deschutes Way, SW, Suite 300 Tumwater, WA 98501 **General Counsel for Building Industry Association of Washington**	☐ Via Facsimile ☐ Via First Class Mail ☐ Via Email ☒ E-Service through the Electronic Portal
D. Michael Reilly Ryan P. McBride Lane Powell PC 1420 Fifth Avenue, Suite 4200 Seattle, WA 98101 **Counsel for Washington Retail Association**	☐ Via Facsimile ☐ Via First Class Mail ☐ Via Email ☒ E-Service through the Electronic Portal

David R. Fine K&L GATES LLP 17 N. Second St., 18th Fl. Harrisburg, PA 17101 (717) 231-4500 **Counsel for the Chamber of Commerce of the United States of America**	☐ Via Facsimile ☐ Via First Class Mail ☐ Via Email ☒ E-Service through the Electronic Portal
Robert B. Mitchell K&L GATES LLP 925 Fourth Ave., Suite 2900 Seattle, WA 98104-1158 (206) 623-7580 **Counsel for the Chamber of Commerce of the United States of America**	☐ Via Facsimile ☐ Via First Class Mail ☐ Via Email ☒ E-Service through the Electronic Portal
Andrew R. Varcoe Jonathan D. Urick U.S. CHAMBER LITIGATION CENTER 1615 H Street NW Washington, DC 20062 (202) 463-5337 **Counsel for the Chamber of Commerce of the United States of America**	☐ Via Facsimile ☐ Via First Class Mail ☐ Via Email ☒ E-Service through the Electronic Portal

DATED: June 21, 2022, at Bremerton, Washington.

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

SCHROETER GOLDMARK BENDER

June 21, 2022 - 4:04 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,768-0
Appellate Court Case Title:	Wayne Wright v. ExxonMobil Oil Corp.

The following documents have been uploaded:

- 1007680_Briefs_20220621160247SC956295_3101.pdf
  This File Contains:
  Briefs - Answer to Amicus Curiae
  The Original File Name was RespWSPAAmicus.pdf

A copy of the uploaded files will be sent to:

- Csims@SGB-Law.Com
- aaron@rockelaw.com
- aserko@tktrial.com
- bobb@awb.org
- breen@sgb-law.com
- cfrantz@orrick.com
- cmarks@tktrial.com
- cosgrove@carneylaw.com
- dawnelle.patterson@klgates.com
- dekelaita@sgb-law.com
- drubens@orrick.com
- evillano@orrick.com
- jacksonm@biaw.com
- jiang@sgb-law.com
- johnl@wahospitality.org
- jwmaynard2003@yahoo.com
- mcbrider@lanepowell.com
- mclafferty@sgb-law.com
- mieling@sgb-law.com
- mjohnson@tktrial.com
- mparris@orrick.com
- mtiegen@tktrial.com
- reillym@lanepowell.com
- rmckenna@orrick.com
- rob.mitchell@klgates.com
- rutzick@sgb-law.com
- sea_wa_appellatefilings@orrick.com
- seattle.service@tktrial.com
- vial@carneylaw.com
- whalen@sgb-law.com
- wright@sgb-law.com

Comments:

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

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

Note: The Filing Id is 20220621160247SC956295