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.

RESPONSE TO PETITION FOR REVIEW

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I. INTRODUCTION

Plaintiff-Respondent Wayne Wright, individually and as personal representative for decedent Warren Wright, brought this action against Defendant-Petitioner ExxonMobil Oil Corporation ("Mobil"), seeking compensation for damages arising from the asbestos-related injury and death of Warren Wright, Wayne Wright's father.[1] In an unpublished opinion, the Court of Appeals affirmed a jury verdict for Plaintiff on his "premises liability" claim, one of two independent claims asserted by Plaintiff. Mobil now petitions this Court for review.

Mobil's Petition does not contest the sufficiency of the evidence supporting the premises liability verdict. This includes the sufficiency of the evidence regarding Mobil's negligence, whether that negligence resulted in Mr. Wright's exposure to asbestos, and whether that asbestos exposure was a substantial

[1] Plaintiff-Respondent Wayne Wright is referred to herein as "Plaintiff." Decedent Warren Wright is herein referred to as "Warren Wright" or "Mr. Wright."

factor in causing Mr. Wright's injuries and death. Nor does Mobil contest the Court of Appeals' rulings affirming refusal to give instructions on contributory negligence or assumption of risk, among other holdings. And Mobil's Petition does not complain that any evidence was improperly admitted or excluded at trial.

Instead, Mobil seeks review solely of an instructional issue related to Plaintiff's premises liability claim. The opinion of the Court of Appeals on that subject, however, is not erroneous. To the contrary, the opinion on that issue is consistent with the Restatement (Second) of Torts and the decisions of Washington's appellate courts, and, as such, presents no new, unsettled issues of policy for the Court to decide. As explained herein, Mobil elides meaningful discussion of when an instruction based on section 343A of the Restatement (Second) of Torts is justified and seeks to upset Washington law and depart from the Restatement *sub rosa*. As this case demonstrates, the blanket rule Mobil asks this Court to announce on review—

regarding the purported need for a section 343A instruction in every case—is unwarranted, and this case would be ill-suited to address the issue.

Ultimately, the evidence at trial demonstrated that 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 but presumably cost-saving practices forbidden to Mobil's own employees. Applicable law allows for a finding of liability in such circumstances. Plaintiff respectfully asks this Court to deny Mobil's Petition.

II. STATEMENT OF THE CASE

From roughly 1955 to 1988, Mobil owned and operated a refinery near Ferndale, Washington. 1 RP 734, 887.[2] Mobil was

[2] The Verbatim Report of Proceedings was filed in several volumes. Citations to the Report of Proceedings herein take the form "X RP Y," where X refers to the volume and Y refers to the page(s). Volume 1 contains the consecutively paginated trial transcripts from the Superior Court's court reporters, filed on June 29 and June 30, 2020. Volume 2 contains the hearing

a sophisticated business that, by the late 1970s, had significant knowledge of the hazards of asbestos. It had a large, nation-wide industrial hygiene department dedicated to protecting workers in the workplace, 1 RP 759-60, 777, as well as a medical department and a safety department, which aimed to stay abreast of developments regarding potential workplace hazards, 1 RP 760-61, 775-76. It had long belonged to trade organizations that circulated health and safety information, including information related to asbestos. 1 RP 770-75. Since the 1930s, Mobil knew that asbestos could cause scarring of the lung tissue known as asbestosis, 1 RP 743, and, by the 1960s, it knew asbestos caused mesothelioma, 1 RP 745. Mobil itself even manufactured an asbestos-containing product for a time. 1 RP 753-54.

Accordingly, by 1979, "Mobil was acutely aware of the hazards . . . of asbestos to the human body," "knew what the

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transcripts separately filed by Reed Jackson Watkins on June 29, 2020. Volume 3 contains the Supplemental Report of Proceedings for the Susan Raterman deposition, filed on August 12, 2020.

medical and scientific information was," and "followed all the state of the art," including applicable state and federal regulations. 1 RP 781-82; *see also* 1 RP 741-42, 777, 907. Mobil acknowledged that, at relevant times, those asbestos regulations targeted asbestosis rather than mesothelioma, for which regulatory agencies instead indicated no safe level of exposure was supported by the available scientific evidence. 1 RP 1017-20, 1028. Mobil further conceded that the risks of "take-home" asbestos exposure—exposure to asbestos transported off a worksite on work clothes, for example—was established by 1979. 1 RP 1022.

In 1979, Mobil hired Northwestern Industrial Maintenance ("NWIM") to perform work, including work that involved handling asbestos-containing materials, at its Ferndale refinery. 1 RP 734, 738-40. Compared to Mobil, NWIM was markedly less sophisticated. It had been operating in Washington for only about a year when hired by Mobil. 1 RP 433. At that time, NWIM was run by three men working out of an "old house"

in Burlington, Washington, seemingly without even a place to store tools. 1 RP 433, 438, 864. It had no doctor or industrial hygienist. 1 RP 434. While NWIM employees may have had some general understanding that they should avoid breathing asbestos dust, they did not understand asbestos had been linked to cancer. 1 RP 514-15, 590. They had no formal training or education about asbestos until the first Washington asbestos removal certification class was offered in roughly 1984,[3] 1 RP 477, 563, 590, 1287-88, 1315, (after which they adopted the precautions they had been taught, 1 RP 477-79, 563). NWIM contracted to perform maintenance work at refineries, but it did not hold itself out as having expertise in asbestos abatement. 1 RP 438, 586. No state licensure for asbestos abatement was required, and NWIM's employees had no license or certification in asbestos removal until years later. 1 RP 437, 563. Despite this vast disparity in sophistication, there is no evidence Mobil knew

[3] This was approximately five years after Mr. Wright worked on Mobil's premises.

or sought to ascertain NWIM's knowledge or training regarding asbestos hazards. 1 RP 770-71, 778, 799, 849, 867.

Warren Wright worked for NWIM at Mobil's Ferndale refinery in 1979. 1 RP 734, 738. Mr. Wright died before this action was initiated, and his testimony was not perpetuated. The jury instead heard testimony about his work from co-workers. For example, Brian Daley met Mr. Wright in April of 1979 when they both worked for NWIM at the Ferndale refinery.[4] 1 RP 429-30. They worked together at Mobil, mostly in close proximity, until roughly Christmas of 1979. 1 RP 430, 444, 471. At Mobil, Mr. Wright acted as a "working foreman," largely laboring alongside the other workers. 1 RP 470-71, 571. NWIM performed several different tasks during this time, and NWIM's work with asbestos largely occurred during a roughly three-month period when they were tasked with removing all the old

[4] Robert Muzzy also testified about working at the Ferndale refinery for NWIM with Mr. Wright, though he had less frequent contact with Mr. Wright than did Mr. Daley. 1 RP 1268, 1272, 1279, 1289, 1304.

asbestos-containing insulation from a section of the refinery. 1 RP 444-53, 456-457, 460, 469, 514, 540, 738-40.

The insulation NWIM workers were tasked with removing was in varying states of disrepair, with some coming off intact, some broken or crumbling, and some that needed to be knocked off. 1 RP 457, 460. The workers would drop the insulation to the ground and then shovel it up or use a "Bobcat"[5] to dispose of it in bags or dumpsters. 1 RP 459. Mr. Wright told workers to wet down the insulation, and they hosed it down "to the best of everybody's ability and as much water as they had that was provided that we could get it on there." 1 RP 461, 515-16, 587. The men wore "blue jeans, whatever [they] came to work in." 1 RP 450. At Mr. Wright's direction, they wore 3M 8710 dust

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[5] *Cf. Dep't of Labor & Indus. v. Kaiser Aluminum & Chem. Corp.*, 111 Wn. App. 771, 774, 48 P.3d 324, 327 (2002) ("The Bobcat is a small, four-wheeled, self-propelled, front-end-type loader. Structurally, it consists of a protected cab, and a bucket attached to two sidearms on either side of the cab, which raise and lower the bucket. Two hydraulic cylinders raise and lower the bucket…. An operator sits inside the cab and raises and lowers the bucket with foot controls.").

masks, which Mobil supplied. 1 RP 450, 452-53, 500-01, 503, 1287, 1323-24. Mr. Wright was a stickler for the rules, and he himself always wore a mask. 1 RP 506, 519. At the end of the day, their clothes would be dirty and dusty. 1 RP 469, 555, 589-90, 1333. Contrary to state and federal safety regulations, NWIM workers were not provided with shower facilities, work clothes, laundry service, change rooms with separate lockers for work and street clothes, barriers to segregate off dusty work, or asbestos-related warning signs.[6]

Mobil monitored the work of NWIM. Mobil's corporate witness testified that Mobil representatives were tasked with ensuring contract workers were "observing all of the precautionary procedures and guidelines that they know of and that they should be doing." 1 RP 1045-46. He testified that there would have been "routine visits by management, hygienists,

[6] 1 RP 480-81, 519-20, 554-55, 1277; *cf.* 3 RP 53; Ex. 619. Mobil did supply NWIM with ventilation resources, though notably not for work with asbestos. 1 RP 1292.

[and] safety people," 1 RP 796, and that, specifically with NWIM, it is "inescapable that [Mobil] did do [asbestos air] sampling at the same time that they were working there," 1 RP 766; *see* 1 RP 984-86; 1 RP 1888-90.

Mobil supplied NWIM workers with gloves, tools, and the very 3M 8710 dust masks they used to protect against dust inhalation. 1 RP 450, 459-58, 471-74, 582-83, 1281-83. Mobil controlled access to the water NWIM workers used for wetting down insulation. 1 RP 588 ("[I]t's up to them [Mobil] to say if you could use it…. they controlled that valve, to open and close it."). Mobil tested the air in vessels to ensure it was safe for NWIM personnel to enter. 1 RP 511, 513, 557, 1289. When contract workers like NWIM would handle asbestos, Mobil designated a supervisor or representative to have responsibility for "mak[ing] sure … that they had the right amount of manpower, that they had the protective gear that they needed," and that "contractors [were] following [Mobil's] asbestos handling procedure." 1 RP 1058-60; Ex. 506. Mobil informed

NWIM workers about workplace hazards through work permits, and NWIM workers expected any asbestos-related hazard would have been communicated to them in that way, though sadly Mobil did not do so. 1 RP 1287-88, 1346-47.

Mr. Daley continued to work for NWIM with Mr. Wright after leaving the Ferndale refinery, and Mr. Wright continued to wear a 3M 8710 dust mask around asbestos. 1 RP 565-68. In roughly 1984, Mr. Daley and Mr. Wright attended Washington's first asbestos removal certification class. Thereafter, they began using more robust respirators, improved wetting of asbestos materials, disposable coveralls, warning signs, air monitoring, and barricades to keep people out of their work areas. 1 RP 477-79, 563.

Ultimately, Warren Wright developed mesothelioma as a result of his asbestos exposures, including his exposures at Mobil's Ferndale refinery. 1 RP 628-29, 637, 651, 746. This action by Plaintiff followed, resulting in Plaintiff's verdicts following a multi-week trial.

Mobil appealed, and, among other things, the Court of Appeals affirmed the verdict on Plaintiff's premises liability claim. Mobil now seeks further review solely of that issue.

Significantly, as explained herein, the Court of Appeals also affirmed the trial court's decision to decline to instruct the jury on contributory negligence and assumption of risk. In so holding, the Court of Appeals explained that "[t]he evidence presented showed that [Mr.] Wright took all precautions known at the time to limit his exposure to asbestos" and "complied with the safety measures of the time period as a reasonable person would." Op. 10. The Court of Appeals further noted that, "[w]hile [Mr.] Wright was clearly aware of the 'generalized risk' of asbestos exposure, Mobil did not produce evidence that Wright knew the risk of exposure even with precautions." Op. 12. Mobil notably does not ask this Court to review those conclusions.

III. ARGUMENT

A. Jury instructions must be supported by substantial evidence, and failure to give an instruction is reviewed for abuse of discretion.

"Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law."[7] Even if an instruction is misleading, prejudice must be shown to justify reversal.[8]

"[A] trial court need never give a requested instruction that is erroneous in any respect."[9] Similarly, a court should not give an instruction that is not supported by substantial evidence.[10] "Substantial evidence requires evidence that would convince an

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[7] *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845, 852 (2002) (quotation marks and citation omitted).

[8] *Id*.

[9] *Hendrickson v. Moses Lake Sch. Dist.*, 192 Wn.2d 269, 278, 428 P.3d 1197 (2018).

[10] *Fergen v. Sestero*, 174 Wn. App. 393, 397, 298 P.3d 782, 784 (2013).

unprejudiced, thinking mind of the truth of a declared premise."[11] Evidence is not substantial if it fails to rise above speculation and conjecture.[12]

The decision to give a particular jury instruction is entrusted to the discretion of the trial court.[13] And when a trial court declines to give an instruction for reasons of evidentiary sufficiency, an appellate court reviews for abuse of that discretion.[14]

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[11] *Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn. App. 777, 796, 6 P.3d 583, 593 (2000).

[12] *Fergen*, 174 Wn. App. at 397.

[13] *Taylor v. Intuitive Surgical, Inc.*, 187 Wn.2d 743, 767, 389 P.3d 517, 529 (2017).

[14] *Id*. ("[W]here the parties' disagreement about an instruction is based on a factual dispute, it is reviewed for an abuse of discretion."); *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883, 885 (1998) ("A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion."); *see also id.* at 777-78, 966 P.2d at 888 (reviewing failure to give an instruction for abuse of discretion and stating "[t]he trial judge heard all of the testimony, observed the demeanor of the witnesses, and reviewed all the evidence…. The trial judge was in the best position to hear and weigh the evidence to determine if any of it supported Defendant's self-defense claim.").

B. The trial court's decision not to give a section 343A instruction, affirmed by the Court of Appeals, was correct.

The trial court instructed the jury, consistent with section 343 of the Restatement (Second) of Torts, that Mobil is liable for injuries to its invitees caused by a condition on the premises only if, among other things, Plaintiff demonstrated that Mobil "should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it…." CP 2280. Mobil argues the trial court erred by declining to further give Mobil's proposed instruction that included the following language based on Restatement (Second) of Torts, section 343A:

> A possessor of land is not liable to his business invitee for physical harm caused to him by an activity or condition on the land whose danger is known or obvious to him, unless the possessor should anticipate the harm despite such knowledge or obviousness.

CP at 1787.[15] To justify its proposed instruction based on section 343A, Mobil argues that there was evidence that Mr. Wright had "knowledge of the risk of asbestos exposure." Pet. at 10.

Crucially, this argument misapprehends the sort of "knowledge" relevant to section 343A.[16] The "knowledge" implicated by section 343A is not merely some sort of generalized understanding, as Mobil suggests. To the contrary:

> The word "known" denotes not only knowledge of the existence of the condition or activity itself, but also *appreciation of the danger it involves*. Thus the condition or activity must not only be known to exist, but it must also be recognized that it is dangerous, and *the probability and gravity of the threatened harm must be appreciated*.

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[15] Mobil notes that it proposed similar instructions on other occasions. Pet. at 9. Each of these other instructions contained clear misstatements of law. *See* CP 577 (failing to recognize duty may extend beyond a duty to warn); CP 1489 (same).

[16] As Plaintiff explained to the trial court, the hazards of asbestos are not obvious. 1 RP 1760; *cf.* 1 RP 607 ("Asbestos has what we call no onion properties…. So you can't see it. It has no odor, so you can't smell it. It's not a natural irritant to the skin. So you can be exposed to a substantial amount of asbestos, enough to cause very serious diseases, and be completely unaware of it."). Mobil does not argue otherwise.

Restatement (Second) of Torts § 343A, cmt. b (1965) (emphases added). This standard equates to the knowledge necessary to establish assumption of risk,[17] as the Restatement (Second) of Torts itself indicates[18] and numerous appellate courts examining the issue have concluded.[19]

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[17] *See* Op. 11-12 (explaining assumption of risk standard).

[18] *See* Restatement (Second) of Torts, § 496C, cmt. d (1965) (Implied Assumption of Risk) ("[I]n the case of invitees, the defendant… is relieved of [its duty] when the plaintiff, knowing of the danger, enters and accepts the risk (see § 343A). In such cases the language of the decisions sometimes has rested the liability more or less indiscriminately upon the absence of any further duty, or the assumption of the risk, or both.").

[19] *E.g.*, *De Los Santos v. Scindia Steam Nav. Co.*, 598 F.2d 480, 487 n.5 (9th Cir. 1979) ("The Comments explaining s[section] 343(b) and s[section] 343A(1) show that these limitations on liability are based upon the substance of the… defenses of contributory negligence and assumption of risk."); *Monk v. Virgin Islands Water & Power Auth.*, 53 F.3d 1381, 1384-85 (3d Cir. 1995) ("Section 343A's focus on dangers 'known or obvious' to invitees, along with pertinent commentary, indicated it was intended as a variation on the doctrine of assumption of risk." (footnote omitted)); *Woolston v. Wells*, 297 Or. 548, 554, 687 P.2d 144, 148 (1984) ("§ 343A(1) describes liability of the possessor in terms encompassing the invitee's negligence or assumption of risk…."); *Carrender v. Fitterer*, 503 Pa. 178, 188, 469 A.2d 120, 125 (1983) (interpreting interplay between assumption-of-risk defense and section 343A and stating "to say that the invitee assumed the risk

Here, the jury heard no evidence that Mr. Wright possessed the sort of knowledge that might implicate section 343A. More specifically, there was no evidence that Mr. Wright

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of injury from a known and avoidable danger is simply another way of expressing the lack of any duty on the part of the possessor to protect the invitee against such dangers"); *see also Davis v. Inca Compania Naviera S.A.*, 440 F. Supp. 448, 453 (W.D. Wash. 1977) ("[T]he standards expressed in Restatement §§ 343 and 343A incorporate the common law defense of assumption of risk.").

While a landowner's duties may not in every case perfectly correspond to its invitee's assumption of risk, this is because a landowner may still have a duty *despite* the invitee's knowledge or assumption of risk. *See* Restatement (Second) of Torts § 343A, cmt. f (1965) ("There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger."); *Zinn v. Gichner Sys. Grp.*, 880 F. Supp. 311, 318 (M.D. Pa. 1995) ("In addition to the requirement of a known or obvious danger, a defendant must not have anticipated the danger, notwithstanding its obviousness, to be relieved of its duty under section 343A. Restatement (Second) of Torts § 343A(1). In an assumption of risk analysis, that added element is not required."). In such circumstances, the correlation between knowledge for purposes of section 343A and assumption of risk remains. *See* Restatement (Second) of Torts § 343A, cmt. f ("In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. (See §§ 466 and 496D.)").

appreciated the probability and gravity of any remaining risk *given the precautions he in fact faithfully employed*.[20] Among other things and as Mobil acknowledges, Mr. Wright unfailingly wore a dust mask, Pet. at 5-6 ("Mr. Wright always wore a mask…"), the packaging for which stated the mask would protect the user from asbestos, 1 RP 506-07; Ex. 67.

Indeed, the trial court was well within its discretion to conclude that there was no evidence Mr. Wright had the sort of knowledge necessary to implicate section 343A when it declined to instruct the jury on assumption of risk (or even contributory negligence). *See* CP 2197-98. The Court of Appeals specifically

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[20] Failure to take into account the circumstances actually facing an invitee would disregard the Restatement's admonition that "[t]he word 'known' denotes… appreciation of the danger [an activity] involves." Restatement (Second) of Torts § 343A, cmt. b (1965); *see also id.*, cmt. c (stating that pertinent risk may be not related merely to an activity but to the "manner" in which the activity is "carried on"). Indeed, if a mere abstract understanding of a particular danger was sufficient, section 343A would apply even in circumstances where an invitee apprehended *no danger to him- or herself at all*, for example, where an invitee erroneously believed dangerous radiation was safely contained behind a lead wall.

affirmed the trial court on this point, stating that "[w]hile Wright was clearly aware of the 'generalized risk' of asbestos exposure, Mobil did not produce evidence that Wright knew the risk of exposure even with precautions." Op. 12; *see also* Op. 10 ("The evidence presented showed that Wright took all precautions known at the time to limit his exposure to asbestos…. Wright complied with the safety measures of the time period as a reasonable person would.").

Mobil does not now challenge that ruling in its Petition to this Court. *Accord* RAP 13.7(b). Nor does Mobil attempt to explain why Washington should depart from the Restatement and adopt a more relaxed definition of "knowledge;" if Mobil had a meaningful argument on this subject, Mobil presumably would have made it. Accordingly, a section 343A instruction was inapplicable because there was not substantial evidence that the dangers at issue were "known," and there was no abuse of discretion in declining to so instruct. Furthermore, as the Court of Appeal noted, Mobil remained free to argue the extent of

Mr. Wright's knowledge, but, because of the lack of evidence of knowledge that might implicate section 343A, no argument was actually foreclosed to Mobil by the absence of a section 343A instruction.[21]

C. The Court of Appeals' decision on Plaintiff's premises liability claim is consistent with other Washington appellate authority.

This result is entirely consistent with the decisions of this Court and the Court of Appeals. Indeed, Washington cases Mobil cites indicate that evidence that a hazard is "obvious or known"

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[21] Moreover, in finding for Plaintiff, the jury necessarily concluded that Mobil "should expect that [Mr. Wright] will not discover or realize the danger, *or will fail to protect [himself]against it*." *See* CP 2280 (emphasis added). And section 343A would not relieve Mobil of liability if Mobil "should anticipate the harm despite such knowledge." Mobil has not explained how a section 343A instruction could relieve it of liability given the jury's findings on the section 343 instruction even if the record *had* contained evidence that Mr. Wright possessed the requisite knowledge, which it did not. *Accord Brierley v. Anaconda Co.*, 111 Ariz. 8, 11, 522 P.2d 1085, 1088 (1974) ("It is apparent from an examination of the two instructions that appellee is correct in its position that the concept expressed in the [section 343A] is the same as that in [the instruction based on section 343]....").

is a prerequisite to the applicability of section 343A. *See Suriano v. Sears, Roebuck & Co.*, 117 Wn. App. 819, 826, 72 P.3d 1097, 1101 (2003) ("Washington courts recognize Restatement, *supra*, § 343(A)(1) as the appropriate standard for duties to invitees *for known or obvious dangers*." (Quotation marks omitted, emphasis added)); *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 50, 914 P.2d 728, 731 (1996) ("*Where the danger to an invitee is known or obvious*, the landowner's liability is limited by the Restatement (Second) of Torts § 343A(1)…." (Emphasis added)); *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 139, 875 P.2d 621, 631 (1994) ("[T]his section of the Restatement[, that is, section 343A,] is the appropriate standard for duties to invitees *for known or obvious dangers*." (Emphasis added)).[22] In that regard,

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[22] Cases cited by Mobil further involve scenarios, unlike this case, where there was some evidence that the dangers at issue were obvious or known. *See Suriano*, 117 Wn. App. at 829, 72 P.3d at 1102 ("Here, the sign was an open and obvious obstruction…."); *Iwai v. State, Employment Sec. Dep't*, 129 Wn.2d 84, 94, 915 P.2d 1089, 1093 (1996) ("Mrs. Iwai may have

the comment to the pattern jury instruction presently (and correctly) states that evidence of pertinent knowledge by an invitee is a prerequisite to an instruction based on section 343A. 6 WPI 120.07 cmt. (stating jury should be instructed on both section 343 and section 343A only "[i]n cases involving invitees and known or obvious dangers"). There can be no conflict with that authority here, where there is no evidence the hazard was obvious or known,[23] and there is no need for this Court to issue any clarification.

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known about the ice in the parking lot…."); *Degel,* 129 Wn.2d at 45, 914 P.2d at 729 (injury arising from "a steep embankment" above "a fast-flowing creek"); *Tincani*, 124 Wn.2d at 141, 875 P.2d at 632 ("[T]he jury could reasonably conclude the Zoo should have anticipated harm from the cliff despite its obvious dangers.").

[23] This result is further consistent with Washington authority, discussed above, requiring that jury instructions be supported by substantial evidence.

D. The blanket rule Mobil asks this Court to announce on further review is unwarranted, and no other reason to accept review exists.

As this case demonstrates, the blanket rule Mobil asks this Court to announce—requiring courts to instruct on both sections 343 and 343A in all instances—is not warranted, and it would require the Court to depart from the Restatement and existing case law. And because there was no error in declining a section 343A instruction here, this case is ill-suited to address the issue anyway, as any such pronouncement would necessarily be dicta. Mobil's predictions regarding the confusion and other horribles that will purportedly parade from the Court of Appeals' decision, which is unpublished and nonbinding, are not well-taken, given that the decision specifically reiterates that "it is ordinarily the better practice to give both Section 343 and Section 343A(1) instructions," Op. 8, and that, as explained, it is nevertheless correctly decided and consistent with existing Washington law. Finally, because the decision below does not depart from

established Washington law, no novel policy issues are implicated.

IV. CONCLUSION

The unpublished opinion of the Court of Appeals on Plaintiff's premises liability claim is not erroneous. To the contrary, it is consistent with the Restatement and the decisions of Washington's appellate courts, and, as such, it presents no new, unsettled issues of policy for the Court to decide. Instead, it is Mobil, having elided discussion of when a section 343A instruction is justified, that *sub rosa* seeks to upset Washington law and depart from the Restatement. As this case demonstrates, the blanket rule that Mobil asks this Court to announce on review—regarding the purported need for a section 343A instruction in every case—is unwarranted, and this case would be ill-suited to address the issue. While Plaintiff is confident he will prevail should review be accepted, review is not justified, and Plaintiff asks that the Petition be denied and that justice be delayed no longer.

DATED this 22nd day of April, 2022

I certify that this brief contains 4689 words, in compliance with RAP 18.17.

Respectfully submitted,

s/ Lucas W. H. Garrett

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