Supreme Court 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

AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT/PETITIONER

Jackson Wilder Maynard, Jr.
General Counsel
WSBA No. 43481
Building Industry Association of Washington
300 Deschutes Way SW, Suite 300
Tumwater, WA 98501
(360) 352-7800

Counsel for Amicus Building Industry Association of Washington

Cassidy Ingram
WSBA No. 56063
Ryan W. Sternoff
WSBA No. 37021
Ahlers Cressman & Sleight PLLC
1325 4th Ave Suite 1850
Seattle, WA 98101
(206) 287-9900

Counsel for Amicus Associated Builders and Contractors of Washington

Jeremy Bartels
WSBA No. 36824
The Bartels Law Firm, PLLC
50 16th Ave, Suite A
Kirkland, WA 98033
(425) 629-3013

Counsel for Amicus Washington Farm Bureau

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Restatements

Other Authorities

I. INTRODUCTION

The Court of Appeals' decision threatens to erode an important limitation on premises liability for all Washington landowners, but its negative consequences extend further. The decision also undermines an overlapping principle of Washington tort law: that one who engages an independent contractor is not responsible for the workplace injuries of the contractor's employees.

Premises owners frequently invite the employees of contractors onto their premises. And some on-site workplace accidents are inevitable, regardless whether the premises are reasonably safe for invitees. It makes little sense to assign responsibility for those harms to the premises owner. The contractor and its employees are the ones with the knowledge and expertise to address the risks incident to their labors. And as the facts of this case demonstrate, the contractor—not the premises owner—controls whether its employees perform their work with appropriate precaution. The Restatement (Second) of

Torts § 343A's "known or obvious" exception to premises liability ensures that premises owners do not shoulder responsibility for injuries in these circumstances.

The Court of Appeals' decision, however, disregards the Restatement's carefully calibrated limitations on the duty of Washington premises owners to invitees. Instead, it opens a back door to saddling premises owners with liabilities as a routine matter whenever a contractor's employee is injured. The decision will therefore be enormously consequential: imposing unjustifiable costs on any industry that depends on the independent-contractor model, and increasing the likelihood that workers are harmed on the job. This Court's review is thus necessary to correct the Court of Appeals' error.

II. INTEREST OF THE *AMICI CURIAE*

The identity and interests of the *amici curiae* are detailed in the accompanying Motion.

III. ARGUMENT

A. The "known or obvious" exception is necessary to appropriately cabin the duties of a premises owner to the employees of contractors.

In Washington, "one who engages an independent contractor … is not liable for injuries to employees of the independent contractor resulting from their work." *Kelly v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 330, 582 P.2d 500 (1978). That bright-line rule flows from basic tort law principles: the person best positioned to avoid a danger should be held accountable for resulting harms. And the employer of a contractor, definitionally, lacks control over how the contractor manages the employee's labor. *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 119, 52 P.3d 472 (2002) ("The difference between an independent contractor and an employee is whether the employer can tell the worker how to do his or her job."); *see* Restatement (Second) of Torts § 409 ("[S]ince the employer has

no power of control … [the contractor] is the proper party to be charged.").

The rule makes sense in light of why employer-contractor relationships arise. As the high court of Iowa explained:

> Employers typically hire contractors to perform services beyond the employers' knowledge, expertise, and ability. The contractors' knowledge and expertise places them in the best position to understand … the risks to which workers will be exposed …, and the precautions best calculated to manage those risks. These realities dictate that the persons in the best position to take precautions … are the contractors.

Van Fossen v. MidAmerican Energy Co., 777 N.W.2d 689, 698 (Iowa 2009).

A contrary rule would cause numerous inefficiencies. For one, premises owners would be required to monitor the employees of contractors. Moreover, "employers would be required to develop … expertise in their contractors' fields so as to be prepared to understand even the ordinary risks" and adopt appropriate safeguards. *Id.* In effect, it would force employers to engage in micromanagement of a project for which they have

no expertise, undermining the very purpose of hiring a contractor.

While premises owners retain some duty of care to workers on their land, that duty must be carefully circumscribed to ensure that workplace safety remains the contractor's responsibility. These restrictions are necessary because employees of contractors frequently seek to hold the employer liable for their workplace injuries under a theory of premises liability—notwithstanding that the employer lacks any control over the employee's labor. *See, e.g.*, *Kamla*, 147 Wn.2d at 125-27; *Kessler v. Swedish Hosp. Med. Ctr.*, 58 Wn. App. 674, 678-79, 794 P.2d 871 (1990).

In these cases, § 343A's "known or obvious" exception is critical to maintaining the proper allocation of burdens of harm. A contractor and its employees are typically the parties with the knowledge necessary to protect against risks incident to their labor, knowledge that the "known or obvious" exception enables courts and juries to properly consider. This, in turn, prevents

contractors and their workers from shifting the costs of failing to take appropriate safety precautions to the premises owners who hired the contractors *because of their expertise*. Further, it maintains the principle that an employer is not responsible for injuries where the contractor controls the workplace.

The Court of Appeals' decision, however, permits courts to forego § 343A's limitation on the duties of premises owners. It thus allows plaintiffs to circumvent the traditional rule delimiting an employer's duties to a contractor's employees. This Court's review is necessary to close the loophole the Court of Appeals' decision opens.

To see the impact of the Court of Appeals' decision, consider this Court's decision in *Kamla v. Space Needle Corp.*, 147 Wn.2d at 114. There, the owner of the Space Needle (the Space Needle Corporation) hired a contractor to install a fireworks display. One of the contractor's employees was injured after he dragged his safety line across an open elevator shaft and it was snagged by a moving elevator. *Id.* at 118. The

Court first determined that the owner had not "retained control" over the employee's work and thus could not be sued as an employer. *Id.* at 121-22. Next, the Court determined that the owner owed the contractor's employee no duty as a premises owner, either. *Id.* at 125-27.

This outcome, guided by a definition of premises liability outlined by *both* §§ 343 and 343A, *id.* at 125, focused on the knowledge of the contractor and its employee. The contractor's team had "over 100 years of experience" in fireworks installation. *Id.* at 126-27. And the injured employee had worked for the contractor on Space Needle displays the past two years. *Id.* at 127. It was the "[contractor's] expertise, [the employee's] two years of personal experience …, and [the employee's] *own acute awareness* of the danger posed" that foreclosed premises liability. *Id.* at 127. (emphasis added.)

As the Court clearly identified, the contractor and employee in *Kamla* had the requisite knowledge to avoid the hazard associated with their contracted labor. But without

§ 343A, this Court could not have accounted for that knowledge, and it may have inappropriately held the owner responsible for the injury—even as the contractor and employee were better-positioned to prevent harms.

Another example, *Golding v. United Homes Corp.*, 6 Wn. App. 707, 495 P.2d 1040 (1972), also illustrates why the Court of Appeals' decision is mistaken. In *Golding*, a developer hired a contractor to carry out construction of a sewage system. An accident occurred while laying pipe, in part due to the fact that the "ground was sandy, unstable and dry," and the contractor had not ensured that its workers "shor[ed]" up the trenches. *Id.* at 708. The injured employee sued under a premises liability theory.

Analyzing the case under the rubric of §§ 343 and 343A, the Court rejected the contention that it was the owner's duty to protect the employee against the soil conditions. *Id.* at 709-12. As the Court explained, "knowledge concerning the nature and condition of the soil" was held equally by the contractor, its

employees, and the owner. *Id.* at 711-12. Further, the employee could not fault the owner for the absence of appropriate precautions in light of the soil conditions. After all, the owner had "no control or direction over the performance of the contracted work." *Id.* at 710. Responsibility for workplace safety accordingly fell to the contractor, and the owner "owe[d] no duty to protect [the employee] from the negligence of his own master." *Id.* at 712. Section 343A thus rescued the premises owner from blame in circumstances where it lacked "superior knowledge" of either the dangerous condition or means to avoid it. *Id.*

And in the instant case, the Plaintiff's expert evidence of asbestos exposure was premised on the contractor's faulty implementation of safety protocols, including failure to ensure the fit of protective masks and to use so-called wet methods to decrease airborne particles. *See* Mobil C.O.A Brief at 24-25 (citing 3 RP 32, 57, 71). Yet Mobil was held liable, despite the contractor's greater expertise: Mr. Wright was himself the

working foreman who trained and enforced safety measures, including masks, at the jobsite. *See id.* (citing 1 RP 452-53, 500-01, 504-07).

As these cases demonstrate, premises actions involving contractors' employees often turn on the manner of the employees' labor, not whether the owner properly protected them from on-premises dangers. Yet the premises owner has no control over the manner of that work. Should the premises owner be liable when a window-cleaner falls from a tall building because he placed a ladder on an outside ledge rather than clean from the interior? *Kessler*, 58 Wn. App. at 678. Or when an excavator operates equipment without rollover protection and is injured after he rolls over a slope of ground? *Bozung v. Condo. Builders, Inc.*, 42 Wn. App. 442, 447-450, 711 P.2d 1090 (1985). In these cases, the contractor and its workers knew of the dangerous conditions and the relevant safety precautions, but nevertheless performed their labor in a manner that did not appropriately account for the danger. The protections afforded

by § 343A shield the premises owner from shouldering harms resulting from these circumstances.

In short, § 343A and the "known or obvious" exception to premises liability critically preserve the rule that an employer is not liable for injuries to the employees of independent contractors resulting from their labor. Because the Court of Appeals' decision here erroneously treated the § 343A limitation as superfluous, review and correction by this Court is warranted.

B. Eliminating the "known or obvious" exception would transform industries that depend on the independent contractor model for the worse.

By denying § 343A its place in Washington tort law, the Court of Appeals' decision improperly shifts responsibility for the safety of the employees of contractors to premises owners. That reallocation would result in extensive harm. It would resurrect inefficiencies that the traditional rule regarding contractors is designed to avoid. And as a result, it would substantially increase costs on key sectors of Washington's economy—particularly in industries Washingtonians depend on

for key services, like homebuilding and agriculture. Moreover, none of this would advance the safety of Washington's workforce.

Under existing law, an employer may relinquish control over workplace safety to an independent contractor with comparative knowledge and expertise over how to do the job. Yet if the employer had a separate obligation as a premises owner to ensure the safety of the contractors' employees, the employer would necessarily be required both to monitor and control the labor of the contractors' employees as well as obtain the knowledge and expertise to recognize what safety precautions might be required. In other words, it would deprive employers, who double as premises owners, of the benefits of the independent-contractor model.

That outcome would be immensely inefficient—increasing the costs of any project that would typically involve an independent contractor. Consider the effects on just one prominent industry: the construction sector, which heavily

depends on the model of contracted labor. Eighty percent of home builders subcontract three-quarters or more of their total work. *See* Nat'l Ass'n of Home Builders (NAHB), *The Effects of Misclassifying Workers as Independent Contractors* 2 (May 8, 2007). That is because of the numerous, specialized tradespeople needed to build even a simple, single-family home: cement workers, pile drivers, drywallers, electricians, pipe plumbers, glaziers, metalworkers, septic and sewer specialists—and more. *Id.* Requiring the premises owner to oversee the performance and safety of each of these subsets of labor would drastically increase overall construction costs, resulting in higher prices for home buyers and commercial development projects.

That result would interfere with a massive segment of Washington's economy, with potentially disastrous consequences for an already squeezed housing market. Construction contributed $25.7 billion of the state's GDP in 2019. Assoc. Gen. Contractors of Am., *The Economic Impact of Construction in the United States and Washington* (Sept. 23,

2020), https://tinyurl.com/3t4cwrdb. And there are over twenty thousand construction firms in Washington. *Id.* Every 100 homes constructed in Washington adds:

- $31.8 million in income for Washington residents,
- $9.4 million in taxes and other revenue, and
- 343 Washington jobs.

NAHB, *The Economic Impact of Home Building in Washington* 2 (August 2021).

The construction industry is already facing pressures in the form of increased costs, for both supply and labor. Paul Roberts, *To build or not to build: Construction rebound has been fast on Eastside, slow in Seattle*, Seattle Times (Dec. 20, 2021), https://tinyurl.com/3t36bxzr. And housing construction has long failed to keep pace with demand, leading to a shortage and driving a crisis in both home and rent prices. *See* Richard McGahey, *America's Failure to Build is Driving Home Prices Ever Higher*, Forbes (June 25, 2021), https://tinyurl.com/23enm5tw; Dan Bertolet, *Washington's*

Shortage of Homes is Squeezing Communities Throughout the State, Sightline Inst. (Sept. 8, 2021), https://tinyurl.com/3ea5nysh. According to a recent report, Washington is 268,988 housing units short, Bldg. Indus. Ass'n of Wa., *Washington's Housing Attainability Crisis* 2 (May 2022), https://tinyurl.com/meeuvb4t, and 85% of residents cannot afford a median-priced home, *id.* at 5. Every $1,000 in added costs prices out another 2,000 households. NAHB, *Households Priced Out of the Market by a $1,000 Price Increase* (2022), https://tinyurl.com/3pa4brzf. The negative effects of imposing greater, unjustified costs on this industry alone cannot be overstated.

These costs are devoid of any counterbalancing benefits. In fact, allocating responsibility for the safety of workers to premises owners would likely *increase* accidents. Consider the case where laypeople hire a contractor to perform repairs on their home. *E.g.*, *Stimus v. Hagstrom*, 88 Wn. App. 286, 944 P.2d 1076 (1997). In *Stimus*, it made no sense to expect the

homeowners to ensure that the roofer perform her labor with appropriate caution. *Id.* at 289, 296. The homeowners had hired a contractor exactly because of its "superior knowledge" of roof repair—including how to do it safely. *Id.* at 296. Premises owners who employ contractors are often like the homeowners in *Stimus*: not specialized in the field, and thus ill-equipped to monitor worker safety. Allowing contractors to shift responsibility for injuries to premises owners, therefore, would ultimately endanger the safety of Washington's workforce.

In sum, this Court should preserve § 343A and the "known or obvious" exception to premises liability. The Court of Appeals' decision comes at substantial and unwarranted cost.

IV. CONCLUSION

For the foregoing reasons, this Court should grant the petition for review.

This document contains 2,500 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 6th day of June 2022.

/s/ *Jackson Wilder Maynard, Jr.*
Jackson Wilder Maynard, Jr.
General Counsel
WSBA No. 43481
Building Industry Association of Washington
300 Deschutes Way SW, Suite 300
Tumwater, WA 98501
(360) 352-7800__

/s/ *Cassidy Ingram*
Cassidy Ingram
WSBA No. 56063
Ahlers Cressman & Sleight PLLC
1325 4th Ave Suite 1850
Seattle, WA 98101
(206) 287-9900____

/s/ *Jeremy Bartels*
Jeremy Bartels
WSBA No. 36824
The Bartels Law Firm, PLLC
50 16th Ave, Suite A
Kirkland, WA 98033
(425) 629-3013

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing **Brief of Amicus Curiae** to be served on counsel for all other parties in this matter via this Court's e-filing platform.

Dated June 6, 2022.

/s/ Jackson Wilder Maynard, Jr.
Jackson Wilder Maynard, Jr.

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

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- wright@sgb-law.com

Comments:

Sender Name: Jackson Maynard - Email: jacksonm@biaw.com
Address:
300 DESCHUTES WAY SW STE 300
TUMWATER, WA, 98501-7719
Phone: 360-352-7800 - Extension 108

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