No. 101176-8

(Court of Appeals No. 82834-7-I)

SUPREME COURT OF THE STATE OF WASHINGTON

KRISTEN EYLANDER, as the Personal Representative of the Estate of Jeffry Eylander, deceased,

Petitioner,

v.

PROLOGIS TARGETED U.S. LOGISTICS FUND, LP, f/k/a AMB U.S. LOGISTICS FUND, LP, a Delaware Limited Partnership, and PROLOGIS MANAGEMENT, LLC, a Delaware limited liability corporation,

Respondents.

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENTS

Respondents Prologis Targeted U.S. Logistics Fund, LP and Prologis Management, LLC (collectively "Prologis") answer Petitioner Kirsten Eylander, individually and on behalf of the Estate of Jeffry Eylander's (collectively the "Estate"), Motion for Discretionary Review.

B. COURT OF APPEALS DECISION

The Estate brought claims against Prologis arising out of the death of Jeffry Eylander, the employee of an independent roofing contractor Prologis hired to perform roofing work on a warehouse it owned in Fife, Washington. The Estate alleged that Prologis breached the duty owned to Eylander as a business invitee. The trial court granted Prologis' motion for summary judgment and Division I of the Court of Appeals affirmed.

In upholding the dismissal, Division I recognized that, as the employee of an independent contractor, Eylander was an invitee of Prologis' premises. Accordingly, the scope of Prologis' duty was defined by sections 343 and 343A of the

Restatement (Second) of Torts.[1] Division I found that Prologis did not breach any duty owed to Eylander because Prologis selected a competent and experienced commercial roofing contractor, Eylander's employer Commercial Industrial Roofing ("CIR"), and required CIR to abide by all applicable rules and regulations and provide a safe work environment for its employees. CIR also promised to anticipate any unsafe conditions on the roof and take the steps required by law to remediate the risk to its employees. A copy of the decision is in the appendix to the petition.

C. ISSUES PRESENTED FOR REVIEW

Whether a possessor of land can satisfy its delegable duty to an invitee on premises by exercising reasonable care in delegating its duty to an independent contractor?

[1] Division I correctly noted that the Estate did not allege that Prologis retained control over the roofing work; and, therefore, did not owe a duty under the retained control doctrine.

D. STATEMENT OF THE CASE

1. Background.

On June 6, 2017 Eylander fell through a skylight while working for independent contractor CIR on the roof of a Prologis-owned building. Clerk's Papers ("CP") 3. Eylander, who was an employee of CIR was working under its supervision and direction on June 6, was not wearing fall protection.

Prologis purchased the building, a large commercial warehouse, in 2003. CP 237. The building was originally built with plexiglass skylights that did not have built-in fall protection, which is typical of 1970s-era skylights. *See* CP 121-22.

In 2012, following a routine inspection and to address "Leak History," Prologis' roof consultant, Cybercon, recommended (among other things) that Prologis plan a future capital expenditure to replace 50 of the building's 97 skylights in 2015 and the rest in 2018. CP 288-89. In 2014, the roof experienced several leaks and, in 2015, Cybercon recommended Prologis plan its 2017 budget to include funding to replace the

entire roof system and remove all (not previously replaced) skylights and replace them with new skylights with built-in fall protection. CP 296-97. Prologis completed the project in 2018. CP 275.

2. CIR agreed to provide a site-specific safety plan for its work on the building.

On May 25, 2017, Prologis contracted with CIR to "[p]erform a general roof cleaning and debris disposal" on the building. CP at 86. CIR was familiar with the conditions on the roof because it had previously done roofing work for Prologis on that building. *See* CP 122, 140-51, 286.

Unlike CIR, Prologis is not a roofing company or a roof safety design expert and is not qualified to create safety protocols. Accordingly, it hires professional roofing companies to do roofing work at its warehouses and requires those contractors to adhere to applicable safety regulations and to create their own site-specific safety protocols. CP 62, 276-77, 337, 339. Consistent with this, Prologis' contract with CIR

required CIR to "[c]reate and post a Site-Specific Roofer safety plan and post [it] on site in advance of accessing the roof." CP 331. CIR did prepare the required site-specific safety plan before its employees started work on June 6, 2017. CP 75, 90. Each of CIR's employees, including Eylander, signed off on that site-specific safety plan, called a Fall Avoidance Work Plan. CP 90.

CIR's Fall Avoidance Work Plan for June 6, 2017 identified site-specific hazards, including "skylights/openings" (among others). CP 90. The plan informed the CIR crew (to the extent they didn't already know) that there were skylights on the roof of the warehouse and that those skylights were "HAZARDS." *Id.* CIR's Fall Avoidance Work Plan also included a "Method of Protection" selected by CIR's foreperson. CIR's foreperson chose a monitoring system—rather than "full harness[es]"—as the method of fall protection for its employees on that project. *Id.*

CIR did not provide Prologis with a copy of its Fall Avoidance Work Plan nor was Prologis present on the roof when CIR did its work. *See* CP 363.

3. The Prologis/CIR Service Agreement.

In addition to the May 25, 2017 contract, Prologis and CIR had an overriding Service Agreement for work CIR performed for Prologis. CP 131. Section 1.07 of the Agreement specified that "[t]he Contract Price includes all labor, materials, tools, equipment, supplies, implements and appliances necessary for the proper execution and completion of the Service." CP 140. Section 4.01 specified that:

> Contractor agrees to abide by all present and future laws, codes, ordinances, rules and regulations of federal, state, county or municipal governments having jurisdiction ("Applicable Law"). Contractor shall be solely responsible for the health and safety of all persons providing the service and shall immediately notify Owner if Contractor receives notice of the violation of any Applicable Laws in the performance of the Services, and shall cause such violations to be immediately corrected.

CP 142 (emphasis added). In Section 17, CIR again promised to "conduct all business activities in full compliance with applicable laws, rules and regulations" and "[p]romote a safe and healthy work environment in accordance with all applicable regulations." CP 339.

4. CIR was free to use any method it wanted to ensure it provided the required safe work environment.

Nearly all roofs present various safety hazards, thus, professional roofing contractors like CIR are required to follow federal and state safety regulations to protect their employees, including regulations related to unprotected skylights. *See* CP 155; Chapter 296-155 WAC; Chapter 296-880 WAC. CIR, as the roofing professional, determined the applicable standards and Prologis trusted CIR to abide by both the contract and the law to implement whatever measures were necessary to maintain safety given the specific conditions on the roof (hence requiring a site-specific safety plan). CP 131, 276, *see also* CP 363-64 (Prologis does not review a roofer's fall prevention plans because "[w]e're

not the experts. We're not the ones with that – that's not ours to manage and take care of."); CP 366 (Prologis' maintenance staff did not review roofing company fall protection or safety protocols).

Prologis testified that a roofing contractor (like CIR) could use whatever safety measure it chose, including installing embedded anchors for a harnessed fall arrest system.[2] CP 262. CIR opted to not use a fall arrest system of any type on June 6, 2017. CP 124.

5. Eylander knew about the conditions on the roof, including the skylights.

It is undisputed that CIR and Eylander not only knew about the skylights and the risks they posed, they discussed them

[2] The Estate alleges that the roof should have had pre-existing anchors on the roof, but logic dictates that permanently affixed anchors would threaten safety, not serve it. Specifically, they would create a potential (latent) hazard to individuals on the roof – either due to a tripping hazard or an increased risk of failure due to exposure to elements, lack of regular use, and lack of per-use inspection by roofing experts.

before starting work that morning. CP 74-75. CIR's foreman testified:

> A: The first thing you do on the roof is we have a meeting about 10 to 15 feet away from the ladder and talk about fall protection.
>
> Q: Okay.
>
> A: Skylights, the roof edge, et cetera.
>
> Q: And that's something you do on every job?
>
> A: Yes. It's required.
>
> Q: Okay. Do you remember having that meeting the day of this accident?
>
> A: Yes.
>
> Q: And then once that meeting happens, do the employees sign off, as we see at the bottom of Exhibit 1?
>
> A: Yes.
>
> Q: Okay. Once you got up on the roof, were you able to observe that there were skylights?
>
> A: Yes. Part of the meeting.
>
> Q: All right. And you see on Exhibit 1, it has -- under Hazards, it has "Skylights/Opening" checked?

A: Yes.

Q: And is that because there were skylights on this roof?

A: Yes.

Q: At some point that day before the accident, did you look at the skylights that were up there?

A: Yes.

***

Q: … When you were up on the roof before the accident happened, was it obvious to you that these -- that the skylights on this roof were made of plexiglass?

A: Yes.

***

Q: Okay. Go ahead and tell me what you were going to say about -- what do you do when you're up on the roof and you see that there are skylights?

A: We've done repairs there before; and all of the lead guys in the service department know that those are like 1970s skylights. So we know there's no fall protection, so we avoid them.

CP 74-77. The foreman also confirmed that Eylander knew the roof had skylights that did not have fall protection built into them:

> Q: So when you and your crew got up on the -- this particular roof on June 6th, 2017, before the accident happened, you knew that these skylights did not have fall protection; is that right?
>
> A: Yes.
>
> Q: To your knowledge, did Mr. Eylander know that there were skylights on this roof that did not have fall protection?
>
> [Objection]
>
> Q: Go ahead. That was an objection to the form of my question. That was just to preserve an objection. But go ahead and answer if you can.
>
> A: Oh. Yes, because we had been there on leaks before, and he knew.
>
> ***
>
> Q: Okay. Shortly before Mr. Eylander fell through this skylight, did you or someone on the crew warn him about the fact that he was getting close to a skylight?
>
> A: Yes, I did.

Q: And what did you say to him?

A: Watch the skylight.

CP 77-78, 80. Finally, Eylander's co-worker, Mason Simmons, testified that Eylander warned him (Simmons) about the skylights:

Q: Did you know that these were unguarded skylights on the roof of this building before you started the work?

A: Yes, sir. I believe I had somebody tell me beforehand that they were unguarded and be careful.

Q: Do you remember who that was?

A: I don't remember specifically. I think it might have been Jeff because he was my foreman that day, the guy I was with.

Q: Jeff Eylander?

A: Yes, sir.

Q: So do you believe that Jeff Eylander told you that there were unguarded skylights on this roof and to be careful.

A. Yes sir.

CP 129.

E. ARGUMENT

1. Discretionary Review Should Be Denied.

Under RAP 13.4(b) Considerations Governing Acceptance of Review, this Court will accept a petition for review in limited circumstances. Here, the Estate seeks review under RAP 13.4(b)(1) and (2), which allow review only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals…

Contrary to the Estate's assertion, Division I followed extensive precedent from this Court and others that holds that a landowner is not a guarantor of safety. No case, including the cases relied upon by the Estate, imposes a nondelegable duty upon a landowner to the employee of an independent contractor, absent the owner retaining control over the contractor's work.

2. The Estate does not cite to any case in conflict with Division I's decision that Prologis is not directly liable to the Estate.

The Estate appears to allege that Division I erred in finding that Prologis was not directly liable (though the Estate's arguments are focused almost solely on vicarious liability). The Estate's only liability theory is that Prologis breached a duty to Eylander arising from of his status as an invitee.

Washington has adopted Restatement (Second) of Torts §§ 343 and 343A (Am. Law Inst. 1965) to define the duty of a landowner to an invitee. *McDonald v. Cove to Clover*, 180 Wn. App. 1, 4, 321 P.3d 259 (2014). Under Section 343,

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

> (c) fails to exercise reasonable care to protect them against the danger.

The mere existence of a hazardous condition does not impose a duty upon a landowner and the landowner need not deliver a jobsite that is free from hazards. *Kamla v. Space Needle*, 147 Wn.2d 114, 126-27, 52 P.3d 472 (2002). Rather, Section 343A states:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land <u>whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness</u>.

(Emphasis added); *see also Epperly v. City of Seattle*, 65 Wn.2d 777, 786, 399 P.2d 591 (1965) ("Although the owner is under a duty to furnish reasonable protection against hidden dangers known, or which ought to be known to him and not to the contractor or his servants, his duty extends only to latent dangers which the contractor or his servants could not reasonably have discovered and of which the owner knew or should have

known."). In short, Sections 343 and 343A impose a reasonableness standard.

Moreover, the scope of the duty to an invitee is not uniform; our courts have recognized that different obligations arise depending on the circumstances, including the nature of the premises, the expertise of invitee, the relationship between the parties, and whether the hazardous condition was open and obvious. *See, e.g., Kamla*, 147 Wn.2d at 126-27 (Space Needle not liable under the Restatement where plaintiff and his employer were experts and were "acutely aware" of the conditions on the premises); *Stimus v. Hagstrom*, 88 Wn. App. 286, 296, 944 P.2d 1076 (1997) ("The duty owed by the [landowner] to the roofers…must be examined in light of the expectations and knowledge of the parties."); *Hymas v. UAP Distrib. Inc.*, 167 Wn. App. 136, 162-63, 272 P.3d 889 (2012) (one who enters a factory is not entitled to expect the same preparation for his safety as he would expect when entering the factory's executive offices) (citing Restatement § 343 cmt. e); *Sudbeck v. Eagle*

Transp., Inc., 16 Wn.App.2d 1025, 2021 WL 321663, at *3 (2021) (unpublished) (no liability where plaintiff, through his expertise, was in a superior position to know the risks he might encounter while performing work for the defendant); *Dombrowski v. Corp. of the Catholic Archbishop of Seattle*, 15 Wn. App. 2d 1037, 2020 WL 7027543, at *3-4 (2020) (unpublished) (even if the defendant created an unreasonable risk of harm by allowing children's recess near a walkway, the defendant should not have anticipated plaintiff would be harmed by the open and obvious danger); *Gaona v. Glen Acres Golf & Country Club*, 184 Wn. App. 1036, 2014 WL 6439921, at *4 (2014) (unpublished) (no liability where the landowner should not have anticipated that a professional landscaper would not discover and anticipate the dangers associated with diseased trees on the property).

Although the Estate attempts to slip in the word latent in its arguments, it does not have a straight-faced argument that the skylights were anything but open and obvious. It is undisputed

that Eylander fully appreciated the risks presented by the skylights – he signed the site-specific Fall Avoidance Work Plan, attended the CIR meeting prior to starting work, received a verbal warning from the CIR foreman, and warned his co-worker about the skylights.

Because there was no latent condition, Prologis did not breach a duty if it could not reasonably anticipate that Eylander and/or CIR would not protect themselves from known hazards. *Kamla*, 147 Wn.2d at 126-27. Prologis hired an experienced roofing company (the Estate does not allege Prologis was negligent is hiring CIR); CIR promised to comply with all required safety regulations and provide a safe workplace for its employees; CIR promised to provide a site-specific safety plan; and CIR was familiar with the roof, knew about the skylights, and knew that they were unguarded. As held by this Court in *Kamla*, these undisputed facts establish that Prologis did not breach a duty under Sections 343 or 343A as a matter of law.

Importantly, the Estate does not cite to any case that conflicts with Division I's holding a landowner is not liable to the employee of an independent contractor where the landowner (1) did not retain control over the contractor's work; and (2) takes precautions via express contractual terms requiring compliance with all safety standards.

3. No Washington Court has held that Sections 343 and 343A impose a non-delegable duty, thus, Prologis cannot be vicariously liable for CIR's negligence.

The Estate's primary argument is that Division I erred in not finding that Restatement Sections 343 and 343A impose a nondelegable duty upon a landowner to the employee of an independent contractor such that Prologis can be held liable for CIR's negligence.[3] A nondelegable duty is "'[a] duty for which the principal retains primary (as opposed to vicarious) responsibility for due performance even if the principal has

[3] However, the Estate did not plead a claim premised on CIR's negligence. CP 5. Thus, its arguments regarding nondelegable duty are inapplicable.

delegated performance to an independent contractor.'" *Vargas v. Inland Wash., LLC*, 194 Wn.2d 720, 738, 452 P.3d 1205 (2019) (alteration in original) (citations omitted). When a nondelegable duty exists, the principal can be held liable even in the absence of its own negligence. *Millican v. N.A. Degerstrom, Inc.*, 177 Wn. App. 881, 890-91, 313 P.3d 1215 (2013).

A nondelegable duty only arises in limited circumstances and only when allowed by statute, contract, or common law. *Id.* at 891-92. Importantly, the existence of a duty of care alone does not establish a nondelegable duty. *See, e.g., Niece v. Elmview Group Home*, 131 Wn.2d 39, 54, 929 P.2d 420 (1997) (group home owed a duty to its resident due to their special relationship, but that special relationship did not impose a nondelegable duty). Rather, a nondelegable duty must be premised on a recognized responsibility so important to the community that it cannot be delegated. *Millican*, 177 Wn. App. at 892.

A nondelegable duty, or vicarious liability, can also arise when a principal is accountable for the actions of an agent.

Wilcox v. Basehore, 187 Wn.2d 772, 789, 389 P.3d 531 (2017) (citation omitted). But "a principal who hires an independent contractor is not liable for harm resulting from the contractor's work" unless the principal retains control over the details of the work. *Id*. (citations omitted); *Moss v. Vadman*, 77 Wn.2d 396, 402, 463 P.2d 159 (1970) ("We have repeatedly held that a prerequisite of agency is control of the agent by the principal.")

Except in limited circumstances, a principal ordinarily only owes a duty to third parties – not to the employees of independent contractors. *Millican*, 177 Wn. App. at 892. Indeed, our courts have only identified a nondelegable duty to independent contractor's employee in two specific scenarios: (1) A general contractor because "the general contractor's innate supervisory authority constitutes sufficient control over the workplace." *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 464, 788 P.2d 545 (1990). And (2) "a jobsite owner who exercises pervasive control over a work site should keep that work site safe

for all workers." *Afoa v. Port of Seattle*, 191 Wn.2d 110, 117, 421 P.3d 903 (2018) (*Afoa II*).

Here, the Estate does not have a claim premised on statute, contract, or a common law that imposes a nondelegable duty – the Estate's claims before Division I were based solely on a landowner's duty to an invitee under Sections 343 and 343A. Unlike the duties owed by a general contractor or landowner with retained control, our courts do not impose a nondelegable duty under the Sections 343 and 343A. *See Afoa II*, 191 Wn.2d at 121 (a jobsite owner will only have a duty analogous to that of an employer or general contractor if the owner maintains a significant degree of control over the work).

In fact, this Court has implicitly endorsed delegating to an independent contractor the responsibility of ensuring its own employees' safety. In *Kamla*, this Court found the Space Needle not liable to the business invitee/employee – even though the Space Needle knew the contractor's employees were working near unguarded elevator shafts (with no fall protection), but did

not stop the elevators. 147 Wn.2d at 125-26, 132. Not only was the unguarded elevator shaft open and obvious, (1) the plaintiff knew of the danger; (2) the plaintiff's employer was experienced in working at heights at the Space Needle; and (3) the employer "had independently devised a safety system" for the work. 147 Wn.2d at 127. Based on these facts, this Court found the Space Needle did not breach its duty to the plaintiff invitee. Stated differently, in holding the Space Needle not liable under Sections 343 and 343A, this Court indirectly endorsed the Space Needle's ability to delegate safety to the independent contractor who managed the project and implemented safety rules. *Id.*; *see Tauscher v. Puget Sound Power & Light Co.*, 96 Wn.2d 274, 281-82, 635 P.2d 426 (1981) (an owner is permitted to shift from himself to an independent contractor liability for injuries sustained by the contractor's employee).

4. The case law is not in conflict –Sections 343 and 343A do not impose a nondelegable duty.

The Estate confuses the issues in this case by conflating the duties owed by a general contractor, project owner with retained control, and a landowner to a business invitee. By citing to various cases without recognizing the differences in how each theory of liability is applied, the Estate misrepresents the holdings to argue that Division I's decision is contrary to this Court's precedent. It is not, which is abundantly clear when reading the cases in their entirety and in the appropriate context.

a. Division I's decision is consistent with this Court's precedent.

Division I's decision doesn't conflict with this Court's holdings in *Afoa II*, 191 Wn.2d 110; *Vargas v. Inland Washington, LLC*, 194 Wn.2d 720, 452 P.3d 1205 (2019); *Meyers v. Syndicate Heat & Power Co.*, 47 Wn. 48, 91 P. 549 (1907); *Myers v. Little Church by the Side of the Road* 37 Wn.2d 897, 227 P.2d 165 (1951); or *Blancher v. Bank of California*, 47 Wn.2d 1, 286 P.2d 92 (1955).

Afoa II does not hold that a landowner is vicariously liable for an independent contractor's failure to provide its employees with a safe workplace. Rather, *Afoa II* states that when a jobsite owner exerts the requisite control over the work, it can be vicariously liable for the independent contractor's negligence. More specifically, this Court held the Port of Seattle wasn't vicariously liable for the negligence of non-party, empty-chair airlines, because the Port did not have a nondelegable duty to ensure the airlines provided a safe workplace where the plaintiff did not establish that the Port retained control over the airlines. *Id*. at 909-10.

Vargas concerned a general contractor's vicarious liability when (1) it delegates its nondelegable statutory duty to comply with WISHA; and (2) an entity over which it exercises control is negligent. 194 Wn.2d at 738. *Vargas* did not hold that Sections 343 and 343A created a nondelegable duty – it was concerned only with the duties of a general contractor. *Id*. at 738-39.

Meyers articulated that a premises owner owed a general duty to individuals invited on its premises to maintain the premises "in a reasonably safe condition for the uses the contractor or servant is entitled to make of them, and will not expose him to hidden dangers of which he is not aware." 47 Wn. at 54. Since *Meyers*, this Court adopted Sections 343 and 343A to define the duty owed to an invitee and premises liability jurisprudence has expanded and clarified since 1907. However, nothing about *Meyers* is inconsistent with, nor is it relevant to, Division I's decision here. Eylander was not injured on a latent hazard and *Meyers* did not declare the landowner owed a nondelegable duty to a non-employee.

Myers, which pre-dates Washington's Industrial Insurance Act, imposed a duty upon an employer (referred to as "master") to his employee ("servant"). 37 Wn.2d 903. The duty arose because of the existence of the master/servant relationship between the plaintiff and defendant. *Id*. at 904. This is consistent with more recent decisions like *Stute* because the employer

necessarily controlled the aspects of the employee's work. By contrast, an independent contractor is not a "servant," thereby entitling him/her to the duty owed by a "master," unless the landowner retains control over the contractor's work. *Moss*, 77 Wn.2d at 402. Moreover, *Myers* does not stand for the notion that a landowner owes a nondelegable duty to the employee of an independent contractor due to his/her status as an invitee.

Finally, *Blancher* contemplated the duty of a landowner under a different Restatement provision; specifically, Section 416, which states that a landowner "who employs an independent contractor to do work, which the employer should recognize as necessarily requiring the creation…of a peculiar risk of bodily harm to others unless special precautions are taken, is subject to liability for bodily harm" caused by the independent contractor's negligence.[4] 47 Wn.2d at 8. In finding that the defendant bank

[4] The Estates reliance on *Blancher* is equally misplaced because it did not argue liability under Section 416 below and it cannot raise new theories of liability for the first time on appeal.

owed a nondelegable duty to its customer (who tripped on the contractor's ladder in the bank lobby), the Court noted that the bank controlled the premises, knew that the remodel project was going to create a risk of harm, and continued to stay open for its customers. *Id*. at 8-9. The Court also differentiated between harm caused to a customer and to an individual working directly with the independent contractor. *Id*. at 9. This Court later clarified in *Tauscher*, that Section 416 (and others) only applied to a duty owed to outside third parties and not to employees of an independent contractor harmed by the contractor's negligence.[5] 96 Wn.2d at 281-82. *Taucher* further cautioned about expanding a landowner's duty to the employees of independent contractors, citing various policy reasons, including the risk that owners would try to avoid liability by using their own less-experienced employees instead of hiring specialized

[5] *Tauscher* cited Section 343 for the standard for determining a landowner's negligence. *Id.*

contractors. *Id*. at 281. In short, *Blancher* is not controlling here and does not conflict with Division I's decision.

b. Division I's decision is consistent with its prior holdings as well as the holdings in Divisions II and III.

Like this Court's precedent, Division I's decision does not conflict with the appellate court decisions in *Knutson v. Macy's West Stores*, 1 Wn. App.2d 543, 406 P.3d 683 (2017); *Mihaila v. Troth*, 21 Wn. App.2d 227, 505 P.3d 163 (2022) or *Millican*, 177 Wn. App. 881:[6]

In *Knutson*, Division I looked at the duty owed by a common carrier escalator owner and operator. 1 Wn. App.2d at 546. Prologis is not a common carrier and *Knutson* neither conflicts with Division I's decision here nor does it expand the common carrier duty to impose a nondelegable duty on anyone other than the escalator operator/owner defendant in that case.

[6] Br. at 15.

Id. at 549 ("the issue on appeal is whether [defendant] can be held liable as a common carrier, not as an owner of premises.").

In *Mihaila*, Division II recognized that the landowners were not the guarantor of safety and would not be liable to their invitee if they could not reasonably anticipate that the invitee would not protect himself from a known danger. 21 Wn. App.2d at 233-34. Division II applied the facts of that case to determine there was a question of fact as to whether the homeowner should have foreseen that the contractor would not take steps to protect himself from harm. *Id*. at 235. Notably, the hazard in *Mihaila* was potentially unavoidable and could not be guarded against with the use of industry-specific safety practices. *Id*. at 236. Additionally, there was no discussion of contract in *Mihaila* promising strict adherence with all safety regulations or promising to provide a safe workplace. *Id*. at 229-30. Regardless, *Mihaila* did not hold that a landowner is always liable when an open and obvious condition exits nor did it preclude summary judgment when the landowner should not

anticipate that the contractor will fail to protect himself from known hazards.

Finally, as the Estate concedes, *Millican* only addresses the duties owed by a general contractor to its subcontractor's employee, which the Estate also concedes is not at issue here. 177 Wn. App. at 885; Br. 25, 27.

F. CONCLUSION

For all of the reasons outlined above, this Court should not accept review of this case.

I hereby certify that this document contains 4,952 words in accordance with RAP 18.17.

RESPECTFULLY SUBMITTED this 14th day of September, 2022.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the below date, I caused to be served, via the Washington State Appellate Courts' Portal, and email, a true and correct copy of this document to:

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DATED this 14th day of September, 2022, at Seattle, Washington.

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