No. 101176-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON
(Court of Appeals No. 82834-7-1)

KRISTEN EYLANDER, 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,

PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

The petitioner is plaintiff Kirsten Eylander,[1] Personal Representative of the Estate of Jeffry Eylander and daughter of the decedent. Jeffry Eylander died from injuries sustained in a 30-foot fall from an unguarded and dangerous skylight on the Respondents' premises that is the subject of this action.

II. CITATION TO COURT OF APPEALS DECISION

Ms. Eylander seeks review of and reversal of the published decision of Division One of the Court of Appeals, No. 82834-7-1, in which the Court of Appeals affirmed the summary judgment dismissal of the Estate's claims against the Prologis defendants. The Court of Appeals decision is attached in Appendix A.

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[1] The correct spelling of Ms. Eylander's first name is "Kirsten." It is incorrectly spelled as "Kristen" in the caption in this matter.

III. ISSUE PRESENTED FOR REVIEW

Whether a possessor of land can satisfy its non-delegable duty to an invitee on premises by "exercising reasonable care in delegating" its duty to an independent contractor contrary to established Washington law under which one who delegates a non-delegable duty remains responsible and vicariously liable for its breach.

IV. STATEMENT OF THE CASE

A. Facts of the Incident

On June 6, 2017, Jeffry Eylander fell 30 feet to his death while cleaning the roof of the Prologis premises at its "Trans-Pacific 4" warehouse in Fife, Washington.[2] At the time of the incident, Mr. Eylander was working for Commercial Industrial Roofing, Inc. ("CIR"), who had been hired to sweep the roof of the building.

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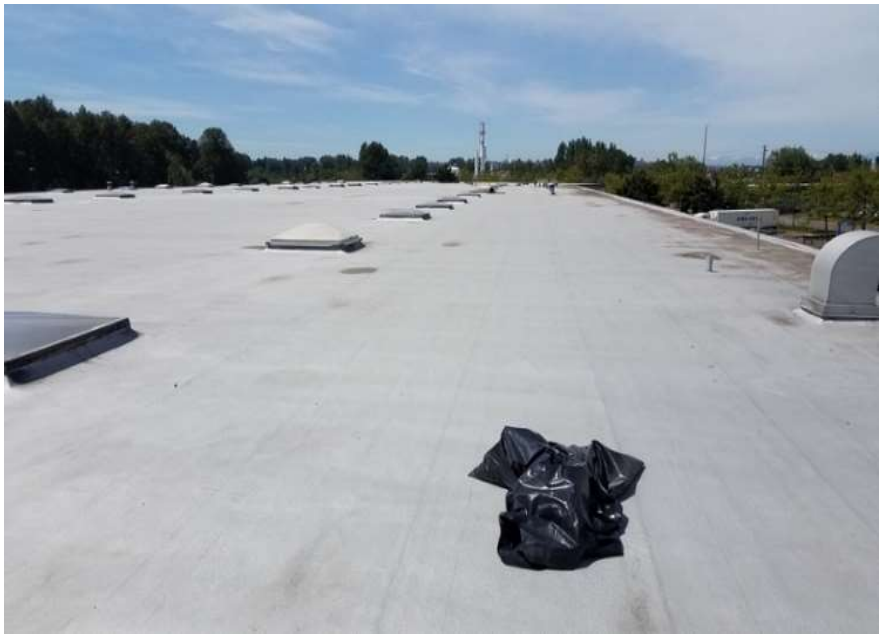
[2] CP 232 (Exhibit B, Attachment 1 to Rick Gleason Declaration; L & I Fatality Assessment Control and Evaluation (FACE))

The building had a flat (low pitch) roof, approximately 150 feet wide by 800 feet long, with 97 skylights arranged as shown below:[3]



Mr. Eylander tripped and fell onto an unprotected skylight with no fall protection. According to safety expert Rick Gleason, these skylights were required to have guards around them or screens capable of withstanding a load of at least 200 pounds applied

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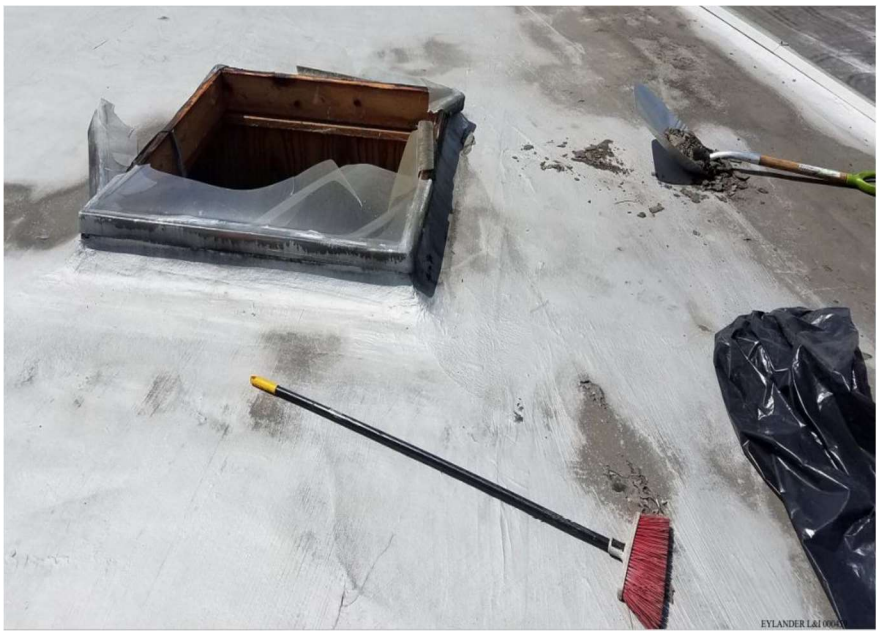
[3] CP 207 (Rick Gleason Declaration); CP 171 (Trans-Pacific 4 Photo)

perpendicularly at any one area on the screen.[4] Prologis admits "The skylight through which Jeff Eylander fell was not guarded by an apparatus to prevent falls."[5] The skylight broke, sending him down onto the concrete floor below.[6] The subject skylight is pictured here:[7]



[4] CP 208, 210 (Rick Gleason Declaration)
[5] CP 237 (Defendant's First Supplemental Answer to Plaintiff's Interrogatory No. 45)
[6] CP 55 (Declaration of Mason Simmons, page 2)
[7] CP 226 (Photo of scene, Rick Gleason Declaration, Exhibit B, page 2)

Some of the skylights had been replaced with skylights that had fall protection, but Prologis's property managers did not know how many had fall protection,[8] and could not identify which skylights had fall protection and which did not.[9] The latent hazards of the unprotected skylights were not created by CIS, whose cleaning work did not include any replacement or repair of the skylights.

Prologis admits they had no permanent anchorage points embedded in the roof, to which personal fall arrest equipment could be attached.[10] Prologis understood that the unguarded skylights on the roof of Trans-Pacific 4 created a fall hazard.[11] Prologis had been told by a roofing consultant as early as 2012 that all 97 skylights

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[8] CP 260 (Deposition of Cindy Duncan, page 58:3-5) and 274 (Deposition of Jo Ann Bahian Dep. page 52:8-11).
[9] CP 363 (Id., page 78:1-7).
[10] CP 261 (Id., pages 60:23 to 61:1)
[11] CP 283 (Deposition of Jo Ann Bahian, pages 107:19 to 107:25)

needed to be replaced but chose only to replace skylights that became damaged or leaked.[12]

Mr. Eylander was doing cleaning work, not roofing work, when he fell. According to CIR's onsite foreman, Ronald Sandvig, CIR only used personal fall restraint equipment during actual roofing work and not when doing a cleaning.[13] When cleaning, CIR used a "safety monitor system," under which one co-worker tells other workers to be careful and watch out for hazards.[14] Mr. Sandvig testified the safety monitor system was selected over other forms of fall protection that were not deemed "cost-effective" given the time allotted for the job and amount CIR was being paid,[15]

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[12] CP 288-293 (2012 Cybercon Annual Roof Inspection Report, Defendant's document #22079); CP 278-279 (Deposition of Jo Ann Bahian, pages 75:24 to 76:5)
[13] CP 328 (Id., page 26:15-19)
[14] CP 208 (Rick Gleason Declaration, page 4:15-16)
[15] CP 329 (Id., page 27:1-13)

which was $1,080.00 plus tax to clean the entire roof.[16] According to Rick Gleason, a "safety monitor" system is only acceptable on a flat or low pitch roof when the skylights are protected.[17]

B. The Court of Appeals Found Prologis Owed Mr. Eylander a Duty as an Invitee on Premises, but Affirmed Summary Judgment Dismissal on the Basis that this Duty Could be Delegated to Mr. Eylander's Employer.

Decedent's daughter, Kirsten Eyelander, was appointed personal representative of the Estate, and filed the subject wrongful death lawsuit against Prologis.[18]

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[16] CP 86 (May 25, 2017 CIR Cleaning Proposal: Exhibit A to the Declaration of Regina Menssen In Support of Defendants' Response to Plaintiff's Motion for Partial Summary Judgment)

[17] CP 229 (Rick Gleason Report, page 5; Emphasis in original)

[18] Two Prologis entities are named defendants in the Complaint, along with reference to a predecessor entity. The Court of Appeals refers to "Prologis Management LLC" as the "landowner and possessor" of the subject property. The relationships between these entities are not at issue here, and they are referred to collectively herein as "Prologis."

The Superior Court granted Prologis's motion for summary judgment dismissal of Plaintiff's claims,[19] and denied the Estate's motion for reconsideration thereof.[20]

The Estate appealed to Division One of the Court of Appeals. According to the Court of Appeals, on appeal the Estate conceded Prologis did not have a statutory duty to Mr. Eylander and did not argue Prologis had a common law duty based upon retained control over his work.[21] The Court of Appeals stated its "analysis is limited to Prologis's alleged liability under the common law from its status as a possessor of land."[22]

The Court of Appeals found it was "well established" and undisputed that Mr. Eylander was an

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[19] CP 372-374
[20] CP 389
[21] Court of Appeals Opinion, No. 76717-8-I (App. Page 4.)
[22] Id.

invitee of Prologis's premises,[23] and noted "Prologis conceded at oral argument that it had a landowner's duty to Eylander to remediate risks from a known or obvious danger" and accepted this concession.[24]

The Court of Appeals found Prologis owed a duty under Restatement (Second) of Torts § 343A:

> Consistent with section 343A, Prologis should have anticipated Eylander would not feel free to disregard his employer's decision to accept the roof cleaning job despite the known and obvious danger presented by the deficient and unguarded skylights. And the type of injury Eylander suffered—death from falling through a skylight—was foreseeable and should have been anticipated.

Court of Appeals Opinion, No. 76717-8-I (App. Pages 5-6). The Court of Appeals acknowledged:

> Under these circumstances, our consideration is limited to common law premises liability of the possessor to an employee of an independent contractor for an injury caused by an obvious danger that was created by the landowner. This is

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[23] Id.
[24] Id., Page 5

> distinct from liability based upon a statute or the possessor's retained right of control.

Id. Pages 6-7. The Court further found it "undisputed that Prologis did not guard that skylight to prevent falls [and] undisputed that CIR chose "an inappropriate fall protection system." Id., Page 2.

Despite the Court of Appeals' findings that Mr. Eylander was an invitee on Prologis's premises, that Prologis owed a duty under Restatement (Second) of Torts § 343A, and that Mr. Eylander was killed as a result of falling through an unguarded skylight, the Court affirmed summary dismissal of the Estate's claims. The Court of Appeals explained its conclusion as follows:

> We accept Prologis's concession that it had a landowner's duty of reasonable care to Eylander based upon his status as an invitee. Because this status originated from his job as the employee of an independent contractor, Prologis could fulfill its duty to Eylander by making a reasonable delegation to his employer of its duty.

Id., Pages 11-12. For the reasons set forth below, the Estate submits that this conclusion is contrary to established Washington law under which duties owed to an invitee are non-delegable and that that those who assign non-delegable duties to independent contractors remain ultimately responsible and are vicariously liable for breaches thereof. This erroneous precedent not only undermines responsibility for duties owed to invitees on premises, but threatens to erode the principles of non-delegable duties in all other contexts as well.

V. ARGUMENT FOR GRANTING REVIEW

In Washington, landowners' duties to invitees are non-delegable. Principals who assign non-delegable duties to independent contractors are directly and vicariously liable for their breach. The Court of Appeals erroneously found that Prologis could satisfy its non-delegable duty by making a "reasonable delegation of its duty to a competent and experienced independent

contractor." Id., Page 1. This decision was erroneously based on Tauscher, which was not a premises liability case, was decided before Stute, and did not involve any non-delegable duties.[25]

This holding renders the non-delegable duty meaningless and is in conflict with numerous decisions of both the Supreme Court and of the Court of Appeals. The Court of Appeals' decision conflicts with this Court's decisions in Afoa II and Vargas, as well as with Division One's opinion in Knutson, Division Two's opinion in Mihaila, and Division Three's opinion in Millican.[26]

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[25] Tauscher v. Puget Sound Power and Light Co., 96 Wn.2d 274, 635 P.2d 426 (1981); Stute v. P.B.M.C. Inc., 114 Wn.2d 454, 463-464, 788 P.2d 545 (1990).

[26] Crisostomo Vargas v. Inland Wash., 194 Wn.2d 720, 452 P.3d 1205 (2019); Afoa v. Port of Seattle (II), 191 Wn.2d 110, 421 P.3d 903 (2018); Knutson v. Macy's W. Stores, Inc., 1 Wn. App. 2d 543, 406 P.3d 683 (Div. 1, 2017); Mihaila v. Troth, 21 Wn. App. 2d 227, 505 P.3d

This decision also conflicts with over a century of Washington law including that set forth by this Court in its 1907 decision in Meyers v. Syndicate Heat & Power Co., its 1951 decision in Myers v. Little Church by the Side of the Rd., and its 1955 decision in Blancher v. Bank of California, among others.[27]

Accordingly, review should be accepted pursuant to RAP 13.4 (b) (1) and (2). The potential destruction of the non-delegable duty doctrine from this dangerous precedent also involves an issue of substantial public interest for which review is appropriate under RAP 13.4 (b) (3).

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163 (Div. 2, 2022); Millican v. N.A. Degerstrom, Inc., 177 Wn. App. 881, 313 P.3d 1215 (Div. 3, 2013).

[27] Meyers v. Syndicate Heat & Power Co., 47 Wash. 48, 91 P. 549 (1907); Myers v. Little Church by the Side of the Road, 37 Wn.2d 897, 227 P.2d 165 (1951); Blancher v. Bank of California, 47 Wn. 2d 1, 286 P.2d 92 (1955).

A. Employees of Independent Contractors Hired by a Landowner are Invitees on Premises.

It is settled law that "employees of independent contractors hired by a landowner are invitees on the landowner's premises." Arnold v. Saberhagen Holdings, Inc., 157 Wn. App. 649, 666-7, 240 P.3d 162 (Div. 2, 2010) *citing* Kamla v. Space Needle Corp.,147 Wn. 2d 114, 125, 52 P.3d 472 (2002); Afoa v. Port of Seattle (I), 176 Wn.2d 460, 468, 296 P.3d 800 (2013); ("Afoa was plainly a business invitee because he was on the premises for a purpose connected to business dealings with the Port.") Here the Court of Appeals acknowledged "It is well established that employees of an independent contractor qualify as invitees on the possessor's premises." Court of Appeals Opinion, No. 76717-8-I (App. Page 4.) Moreover, the Court of Appeals found not only that Prologis owed Mr. Eylander a duty under

Restatement (Second) of Torts § 343A, but that there was evidence this duty was breached. Id., Pages 5-6.[28]

B. The Court of Appeals' Decision is in Conflict with Over a Century of Washington Law Regarding Non-delegable Duties of Possessors of Land to Invitees Including This Court's Holdings in *Meyers*, *Myers*, and *Blancher*, Among Others.

In 1907, this Court decided Meyers v. Syndicate Heat & Power Co., in which an employee of an

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[28] The Court of Appeals misconstrued the relevant holdings of both Arnold and Kamla. It cited Arnold for the proposition that "with exceptions, '[a]n employer of an independent contractor is generally not liable for injuries to the independent contractor's employee.'" App. Page 6, n.15. In fact, the Arnold court concluded "the Arnolds presented a genuine issue of material fact with regard to whether Lockheed breached its duty to Reuben as an invitee." Arnold at 668. The Court of Appeals inaccurately described Kamla as "holding a landowner was not liable to an invitee because it had no duty to prevent the specific injury caused by an obvious danger when it should not have anticipated that type of injury." App. Page 5 n.15. In fact, the Supreme Court in Kamla found the Space Needle owed a duty but found no evidence that this duty was breached: "we believe no reasonable trier of fact could find Space Needle should have anticipated that Kamla would drag his safety line across the open elevator shaft." Kamla at 127.

independent contractor hired by a proprietor landowner was injured when he fell into an unguarded hot water tank in poor lighting conditions. This Court found the employee was an invitee on premises to which the proprietor owed a duty:

> [T]he rule is that **the servant of an independent contractor engaged in work for the contractor on the premises of the proprietor is deemed to be thereon by invitation of the proprietor; and the proprietor owes him the same duty to provide for his safety that it owes to the contractor himself**; namely, that he will 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, but which are known to the employer.

Meyers v. Syndicate Heat & Power Co., 47 Wash. 48, 91 P. 549 (1907) (emphasis added, citations omitted.)

In 1951 this Court decided Myers v. Little Church by the Side of the Rd., in which an employee was injured by a defective elevator. This Court found the employer's duty was non-delegable, and explained what that meant:

> The master's duty to provide the servant with a reasonably safe place to work is nondelegable. Therefore respondent cannot escape liability for the negligence of the elevator company on the theory that the latter was an independent contractor -- and no such contention has been advanced. For the same reason, **respondent cannot insulate itself from liability by proving that it used reasonable care in selecting the elevator company** which was to perform respondent's duty of making reasonable repairs.

Myers v. Little Church by the Side of the Rd., 37 Wn.2d 897, 904, 227 P.2d 165, 170 (1951) (emphasis added, citations omitted.) Myers was cited with approval in this Court's 2013 in Afoa I.[29] In the subject case, Division One cited Myers in a footnote as having been quoted in Afoa I, but did not discuss the case. App. Page 11 n.11

The Myers Court cited the 1908 case of Howland v. Standard Milling & Logging Co. which also applied a non-delegable duty:

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[29] Afoa I, 176 Wn.2d at 475; Myers was also discussed at length in Justice Stephens' dissent in Afoa II, 191 Wn.2d at 136-7.

> It is the fundamental duty of the master to make and keep safe the place in which he requires his servants to work, and this duty cannot be delegated so as to relieve the master from liability for a negligent performance of the duty.

Howland v. Standard Milling & Logging Co., 50 Wash. 34, 37, 96 P. 686, 687 (1908). Also cited by the Myers Court was the 1914 opinion in Mattson v. Eureka Cedar Lumber & Shingle Co., which found the non-delegable duty so well established that no citation to authority was needed:

> It is too well established to require citation of authority that there was a duty upon the part of the appellant to exercise reasonable care to furnish to the respondent a reasonably safe place in which to work. This is a positive nondelegable duty which carries with it the duty of reasonable inspection.

Mattson v. Eureka Cedar Lumber & Shingle Co., 79 Wash. 266, 273, 140 P. 377, 380 (1914). Yet over a hundred years later, here we are.

While many of these cases are in the context of employees or employees of independent contractors,

these same non-delegable duties owed to invitees on premises apply to invitees who are members of the public, with landowners vicariously liable for their breach, as set forth in Blancher:

> Some common law duties are also non-delegable. Thus the land occupier's duty of care of keep the premises reasonably safe for invitees may not be avoided by the employment of independent contractors. **In all these cases the employer is as liable for the conduct of the contractor as though it were his own.**

Blancher v. Bank of California, 47 Wn. 2d 1, 8, 286 P.2d 92 (1955) *quoting* Vicarious Liability, 28 Tulane L.Rev. 204 (emphasis added). In Blancher, the plaintiff was a bank customer who was injured when she fell over a stepladder that had been left on the floor by an independent contractor who was cleaning and renovating the lobby of the defendant bank. This Court held that where "the bank carried on its banking business during the time the cleaning and renovating of its lobby was being effected, it owed a duty to its invitees to provide

and maintain a safe place for the carrying on of its business, and that the performance of such duty was nondelegable." Blancher, 47 Wn. 2d at 9.

None of these cases support the Court of Appeals' decision in this case that non-delegable duties can be satisfied by exercise of reasonable care in their delegation.

C. This Decision is in Conflict with this Court's Decisions in *Afoa II* and *Vargas* that Held Principals are Directly and Vicariously Liable for Breaches of Non-delegable Duties.

In this Court's 2018 Afoa II decision, this Court found that a principal is vicariously liable for breaches of non-delegable duties. Justice Gonzalez wrote for the 5-4 majority:

> An entity that delegates its nondelegable duty will be vicariously liable for the negligence of the entity subject to its delegation ...

Afoa v. Port of Seattle (II), 191 Wn.2d 110, 124, 421 P.3d 903 (2018). In its Vargas decision, this Court

discussed liability for breaches of non-delegable duties as follows:

> We have referred to a general contractor's common law and statutory duties as "nondelegable." Afoa II, 191 Wn.2d at 121 (citing [Kelley v. Howard S. Wright Const. Co., 90 Wn.2d 323, 334, 582 P.2d 500 (1978)]; Kamla, 147 Wn.2d at 122. 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 delegated performance to an independent contractor." Black's Law Dictionary 638 (11th ed. 2019). Although Black's Law Dictionary refers to this responsibility as primary rather than vicarious, **Washington courts have explained that "a nondelegable duty may result in vicarious liability."** Afoa II, 191 Wn.2d at 123; *see also* Millican, 177 Wn. App. at 890-91. "An entity that delegates its nondelegable duty will be vicariously liable for the negligence of the entity subject to its delegation." Afoa II, 191 Wn.2d at 124; *see also* Millican, 177 Wn. App. at 896-97. **Regardless of whether we label this form of liability as direct or vicarious, if a general contractor delegates its own duties to a subcontractor, the general contractor will be liable for the subcontractor's breach of that delegated duty.**

Crisostomo Vargas v. Inland Wash., 194 Wn.2d 720, 738-9, 452 P.3d 1205 (2019).

To be sure, the non-delegable duties examined in Afoa II and Vargas were primarily statutory duties under WISHA[30] and common law safe workplace duties under the retained control doctrine. Since a retention of a right to control is an element of both duties, neither duty is applicable to this case, which involves only duties owed to invitees. However, all three duties are non-delegable, which means erosion or destruction of non-delegability of duties owed to an invitee poses an existential threat to the non-delegability of the other two duties.

Maintaining these non-delegable duties is essential in ensuring full compensation of victims of unsafe practices. CIR, as Mr. Eylander's direct employer is immune from suit under Title 51 RCW, which is typical in these cases. Abolishing or diminishing these non-delegable duties would require the Department of Labor

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[30] Washington Industrial Safety and Health Act of 1973, Chapter 49.17 RCW ("WISHA")

and Industries to subsidize unsafe practices as it would lose its recourse to recover workers' compensation payments from third parties as provided in RCW 51.24.060. Further, relieving landowners of their non-delegable duties would create a race to the bottom for large organizations such as Prologis, big box retail companies, and large-scale landowners to hire the cheapest contractors without any regard for safety.

D. This Decision is in Conflict with Decisions in All Three Divisions of the Court of Appeals Including *Knutson*, *Mihaila*, and *Millican*.

As discussed above, the Court's decisions in Afoa II and Vargas affirmed the 2013 Court of Appeals decision in Millican, in which Division Three found duties under WISHA and the retained control doctrine were non-delegable such that a principal general contractor is vicariously liable for its breach, such that "a violation of WISHA by a subcontractor's employee is therefore not only chargeable to the subcontractor, it is

also chargeable to a general contractor." Millican, 177 Wn. App. at 883 (emphasis added). The Millican court explained general contractors are vicariously liable "even if the principal has itself exercised reasonable care" and that these are "rules of vicarious liability, making the employer liable for the negligence of the independent contractor, irrespective of whether the employer has himself been at fault." Millican, 177 Wn. App. at 890-891, *quoting* Restatement (Second) of Torts, § 424 (1965). The Millican court also explained that "nondelegable duty" equated to "vicarious liability" under the Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 57 cmt. b (2012). Millican at 896.

Here the Court of Appeals cited Millican and Restatement (Second) of Torts § 409 in footnotes 22 and 23 of its opinion, but took them out of context. The Millican court cited the general rule of non-liability

before applying and affirming the exceptions pertaining to non-delegable duties of a general contractor. Millican, 177 Wn. App. At 892. The footnotes refer to the Millican court's citation to Stout v. Warren, 176 Wn.2d 263, 269, 290 P.3d 972 (2012). The Stout case involved a claim for wrongful death arising from the negligence of a bail bonder's independent contractor in "fugitive recovery" of the decedent. The Stout Court found the "inherently dangerous occupation" exception to the non-liability applies only to employees of subcontractors and not to the third-party fugitive decedent. Nothing in either the facts or the legal question in Stout is applicable here.

In Knutson, Division One followed Millican as well as the Restatement (Second) of Agency (1958) in a case in which customers of Bellevue Square Mall were injured when an escalator jammed. Knutson v. Macy's W. Stores, Inc., 1 Wn. App. 2d. 543, 406 P.3d 683 (Div. 1, 2017).

> When a principal's duty of care is nondelegable, it cannot be satisfied merely by using due care in the selection of a contractor. It is satisfied "if, and only if, the person to whom the work of protection is delegated is careful in giving the protection." Restatement (Second) of Agency § 214 cmt. a.
> …
> An actor who owes a nondelegable duty is permitted to delegate the activity to an independent contractor but will remain vicariously liable for the contractor's tortious conduct in the course of carrying out the activity. Millican, 177 Wn. App. at 896, citing Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 57 cmt. b (2012).

Knutson v. Macy's W. Stores, Inc. at 547.

While this case was pending in the Court of Appeals, Division Two issued its opinion in Mihaila v. Troth, 21 Wn. App. 2d 227, 505 P.3d 163 (Div. 2, Mar. 1, 2022). In Mihaila, a roofer was injured when he fell from a ladder onto a grounding rod while working on the defendant landowners' premises. Division Two found the roofer was owed duties as an invitee, and that there were fact questions regarding whether the landowners should have anticipated the harm from the open and

obvious danger. Like this case, duties under WISHA and the retained control doctrine were not implicated. However, the Court of Appeals in this case disregarded the holding in Mihaila on the basis that Mr. Eylander was an employee of an independent contractor to whom the duty could be delegated, whereas the roofer in Mihaila was a solo contractor. (App. Pages 10-11.) This reasoning is circular and erroneous, because there is no support in the case law for the proposition that non-delegable duties can be satisfied by exercise of reasonable care in their delegation. The Court of Appeals decisions in Millican and Knutson, as well as the Supreme Court opinions in Afoa II and Vargas, hold precisely the opposite.

E. This Decision was Erroneously Based on *Tauscher*, Which was not a Premises Liability Case, was Decided Before *Stute*, and did not Involve any Non-delegable Duties.

The Court of Appeals erroneously followed Tauscher in holding that Prologis's duty was satisfied by exercising reasonable care in its delegation. Unlike this case, none of the duties in Tauscher were non-delegable. First, Tauscher was not a premises liability case:

> Specifically, appellant alleged that Puget Power owed Shaw a nondelegable duty to insure [sic] that safety requirements were complied with on the basis of (1) the inherently dangerous nature of Shaw's work, (2) the provisions in RCW 19.29.010, RCW 80.28.010, and WAC 296-45, and (3) the fact that Puget Power was a public franchise. Appellant further contended that the safety provisions were violated and that the violations led to Shaw's death. **Appellant made no allegations that Puget Power was negligent in hiring Potelco, that Puget Power maintained any control over the work site, or that there were any physical defects in Puget Power's equipment or the work site.**

Tauscher v. Puget Sound Power and Light Co., 96 Wn.2d 274, 277, 635 P.2d 426 (1981) (emphasis added).

Further, the Tauscher Court did not address duties under the retained control doctrine. As stated above, retained control was not alleged in Tauscher. The Court stated the issue as follows:

> At issue is whether a public utility owes a nondelegable duty to employees of the utility's independent contractors to take reasonable precautions against work which is inherently dangerous or to ensure compliance with the safety mandates of statutes and administrative rules.

Tauscher v. Puget Sound Power and Light Co., 96 Wn.2d 274, 275, 635 P.2d 426 (1981). The Tauscher Court examined only RCW 19.29.010, RCW 80.28.010, and Chapter 296-45 WAC and found none of these created any non-delegable duties.

RCW 19.29.010 is a pre-WISHA statute that included safety rules for electrical work. The Tauscher Court found "The statute, by its language, does not impose on Puget Power a nondelegable duty to insure

[sic] compliance with the mandates of the statute." Id. at 283-284.

RCW 80.28.010 concerned "Duties as to rates, services, and facilities" of utility companies, which the Tauscher Court found inapplicable because "Appellant has not alleged any defect in Puget Power's service, instrumentalities or facilities." Id. at 286

While Chapter 296-45 WAC sets forth WISHA regulations applicable to electric power generation, transmission, and distribution, the Tauscher Court discussed only the regulation and not the WISHA statutes and found that the WAC provisions did not provide for a non-delegable duty. The 1981 Tauscher decision was prior to the 1990 Stute decision, in which this Court found WISHA statutes including RCW 49.17.060 established that statutory duties under WISHA were non-delegable duties. Stute at 463-464. The 1981 Tauscher decision was also prior to this Court's 1985 and 1988

decisions in Adkins and Goucher which were affirmed in Stute, which established that statutory duties under the specific duty clause of RCW 49.17.060 (2) were owed to employees of subcontractors. Stute at 457-458, *affirming* Adkins v. Aluminum Co. of Am., 110 Wn.2d 128, 153, 750 P.2d 1257, 756 P.2d 142 (1988) and Goucher v. J.R. Simplot Co., 104 Wn.2d 662, 709 P.2d 774 (1985).[31] Thus to the extent Tauscher stands for the proposition that duties under WISHA are delegable, or that such duties can be satisfied by exercising reasonable care in delegation, it is no longer good law.

VI. CONCLUSION

Under longstanding Washington law, non-delegable duties cannot be satisfied by exercising reasonable care in their delegation. The principal may

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[31] Under RCW 49.17.060, "Subsection (2) imposes a specific duty to comply with WISHA regulations" Stute at 457 *citing* Adkins at 153.

assign fulfillment of these duties to an independent contractor, but it remains responsible and vicariously liable for any breach of these duties. Duties owed to an invitee on premises by a possessor of land are non-delegable. For these reasons, the Court of Appeals erred when it determined that Prologis was relieved of its duty by delegating it to CIR. This error is in conflict with numerous decisions of the Supreme Court and the Court of Appeals that go back over a hundred years and that have been recently affirmed. This error also threatens to degrade non-delegable duties beyond those of premises liability, including duties under WISHA and the retained control doctrine as recently affirmed in Afoa II and Vargas. Accordingly, review is warranted under RAP 13.4 (b) (1) and (2). The Estate of Eylander respectfully requests this Court accept review to reverse the Court of Appeals' decision and correct this dangerous mistake.

I hereby certify that this document contains 4,995 words in accordance with RAP 18.17.

Respectfully submitted this 15th day of August, 2022.

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APPENDIX A

Published Opinion, Eylander v. Prologis, Targeted U.S. Logistics Fund, et ano., Division One of the Court of Appeals, No. 82834-7-1 (Filed 7/18/2022)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

KRISTEN EYLANDER, as the Personal Representative of the Estate of Jeffry Eylander, deceased, Appellant, v. PROLOGIS TARGETED U.S. LOGISTICS FUND, f/k/a AMB U.S. LOGISTICS FUND, LP, a Delaware limited partnership, and PROLOGIS MANAGEMENT, LLC, a Delaware limited liability corporation, Respondents.	)	No. 82834-7-I PUBLISHED OPINION

VERELLEN, J. — A possessor of land can have a duty to maintain safe premises for the benefit of invitees, including the employee of an independent contractor hired by the possessor to perform work on the premises. And when such a duty exists, the possessor can satisfy it by exercising reasonable care in delegating to the independent contractor its duty to guard against known or obvious dangers. Here, landowner and possessor Prologis Management LLC made a reasonable delegation of its duty to a competent and experienced independent contractor, Commercial Industrial Roofing, Inc. (CIR). Because Prologis did not breach its duty to CIR's employee, the trial court did not err by granting summary judgment for Prologis.

Therefore, we affirm.

FACTS

Prologis owns and manages dozens of storage facilities around Western Washington. Prologis relied upon independent contractors to inspect, clean, and maintain its facilities. One contractor it relied upon was CIR, and they entered an ongoing master contract in 2015.

In May of 2017, Prologis hired CIR to clean the roof of a cold-storage warehouse in Fife. A few weeks later, on June 6, a crew of CIR employees was sweeping the warehouse roof. Jeffry Eylander was part of that crew. The warehouse had almost 100 skylights in its 126,000 square foot roof. Most, if not all, of the skylights were neither fall-resistant nor guarded against falls, and both CIR and Eylander knew of the risk of severe injury from falling on a skylight.

No one in the crew was wearing a safety harness as part of a fall protection system because it would have required an elaborate temporary system or numerous roof anchors to be installed across the roof. Instead, CIR chose to use a "safety monitor system," whereby a coworker would watch the others work and warn them of hazards.[1] Eylander tripped and fell onto a skylight, broke through it, and fell 30 feet to his death. It is undisputed that Prologis did not guard that skylight to prevent falls. It is also undisputed that CIR chose "an inappropriate fall protection system."[2]

[1] Clerk's Papers at 55, 208.

[2] CP at 229.

In September of 2019, Eylander's estate filed a premises liability claim against Prologis, arguing Eylander was Prologis's invitee and it breached its duty to remediate risks from the skylights. Prologis filed a summary judgment motion and argued it had no duty to Eylander as an invitee. The trial court agreed with Prologis and granted summary judgment, dismissing the estate's claims with prejudice. The estate filed a motion for reconsideration, and the court denied it.

The estate appeals.

ANALYSIS

We review a summary judgment order de novo from the same position as the trial court.[3] We view the facts in a light most favorable to the nonmoving party.[4] Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.[5] We can affirm a grant of summary judgment on any basis supported by the record.[6]

"'A cause of action for negligence requires the plaintiff to establish (1) the existence of a duty owed, (2) breach of that duty, (3) a resulting injury, and (4) a

[3] Afoa v. Port of Seattle, 176 Wn.2d 460, 466, 296 P.3d 800 (2013) (Afoa I) (citing City of Sequim v. Malkasian, 157 Wn.2d 251, 261, 138 P.3d 943 (2006)).

[4] Kamla v. Space Needle Corp., 147 Wn.2d 114, 126, 52 P.3d 472 (2002) (citing Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995)).

[5] Afoa I, 176 Wn.2d at 466 (citing Malkasian, 157 Wn.2d at 261).

[6] Johnson v. Liquor & Cannabis Bd., 197 Wn.2d 605, 611, 486 P.3d 125 (2021) (quoting Washburn v. City of Federal Way, 178 Wn.2d 732, 753 n.9, 310 P.3d 1275 (2013)).

proximate cause between the breach and the injury.'"[7] Eylander concedes Prologis did not have a statutory duty to him[8] and does not argue Prologis had a common law duty based upon retained control over his work.[9] Thus, our analysis is limited to Prologis's alleged liability under the common law from its status as a possessor of land.

It is well established that employees of an independent contractor qualify as invitees on the possessor's premises,[10] and, generally, an invitee is "'entitled to expect'" the possessor will "'exercise reasonable care'" to make its premises safe.[11] The parties do not dispute that Eylander qualified as an invitee because Prologis hired CIR to maintain its warehouse.[12]

To evaluate whether a possessor can be liable for an injury to an invitee due to a danger on its premises, Washington has adopted sections 343 and 343A of the Restatement (Second) of Torts.[13] Section 343 provides the general rule for

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[7] Id. (quoting Tincani v. Inland Empire Zoological Soc., 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994)).

[8] Reply Br. at 27.

[9] Appellant's Br. at 58 (arguing the estate "need not establish that [Prologis] retained control of [CIR's] work to establish [Prologis's] premises liability").

[10] Kamla, 147 Wn.2d at 125 (citing Epperly v. City of Seattle, 65 Wn.2d 777, 786, 399 P.2d 591 (1965); Meyers v. Synd. Heat & Power Co., 47 Wash. 48, 51, 91 P. 549 (1907)).

[11] Tincani, 124 Wn.2d at 138-39 (quoting Restatement (Second) of Torts § 343 cmt. b (1965)).

[12] Kamla, 147 Wn.2d at 125 (citing Epperly, 65 Wn.2d at 786; Meyers, 47 Wash. at 51).

[13] Id. (citing Iwai v. State, 129 Wn.2d 84, 93, 915 P.2d 1089 (1996)).

a hidden or latent danger, and section 343A applies when a condition on the premises is a known or obvious danger. When, as here, a condition presents a known or obvious danger, the possessor has a duty to act when it "'should anticipate the harm despite such knowledge or obviousness.'"[14]

On summary judgment, cases involving an obvious danger can be decided by the nonexistence of a duty.[15] Both at summary judgment and in their briefing to this court, the parties primarily contested whether Prologis owed Eylander a duty of reasonable care as an invitee. But Prologis conceded at oral argument that it had a landowner's duty to Eylander to remediate risks from a known or obvious danger.[16] We accept this concession. Consistent with section 343A, Prologis should have anticipated Eylander would not feel free to disregard his employer's

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[14] Kinney v. Space Needle Corp., 121 Wn. App. 242, 250, 85 P.3d 918 (2004) (quoting Restatement (Second) of Torts, § 343A(1)). A condition is "known" when the landowner and invitee are aware of it, recognize that it is dangerous, and appreciate "the gravity and probability of the threatened harm." Restatement (Second) of Torts § 343A cmt. b. A condition is "obvious" to an invitee and a possessor when "both the condition and the risk are apparent to and would be recognized by a reasonable [person], in the position of the visitor, exercising ordinary perception, intelligence, and judgment." Id. The parties do not dispute that the unguarded skylights presented a known or obvious danger.

[15] E.g., Kamla, 147 Wn.2d at 124-27 (holding a landowner was not liable to an invitee because it had no duty to prevent the specific injury caused by an obvious danger when it should not have anticipated that type of injury); McDonald v. Cove to Clover, 180 Wn. App. 1, 6, 321 P.3d 259 (2014) (holding summary judgment was properly granted where the possessor could not anticipate and, thus, had no duty to protect against harm caused by an invitee's unnecessary decision to encounter an obvious danger).

[16] Wash. Court of Appeals oral argument, Eylander v. Prologis Targeted U.S. Logistics Fund, No. 82834-7-I, at 9 min., 55 sec. through 10 min. 20 sec., http://www.tvw.org/watch/?clientID=9375922947&eventID=2022061049&startStreamAt=595&stopStreamAt=620.

decision to accept the roof cleaning job despite the known and obvious danger presented by the deficient and unguarded skylights.[17] And the type of injury Eylander suffered—death from falling through a skylight—was foreseeable and should have been anticipated. Rather than the existence of a duty, the critical question is whether Prologis exercised reasonable care in satisfying its duty.

Once a possessor has a duty to act, it must remediate the risk of harm by taking steps "'as may be reasonably necessary for [the invitee's] protection under the circumstances.'"[18]

Depending upon the circumstances, multiple layers of nuance govern a possessor's potential liability to an invitee from an alleged breach of its duties.[19] Under these circumstances, our consideration is limited to common law premises liability of the possessor to an employee of an independent contractor for an injury

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[17] See Restatement (Second) of Torts § 343A cmt. f (explaining a possessor of land should anticipate a harm from a danger despite its obviousness when, for example, "the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk").

[18] Tincani, 124 Wn.2d at 139 (alteration in original) (quoting Restatement (Second) of Torts § 343 cmt. b).

[19] For example, an invitee's relationship to the possessor affects what a possessor must do to fulfill its duties. A possessor has different duties to a customer-invitee from those owed to an invitee who is the employee of an independent contractor. Compare Nivens v. 7-11 Hoagy's Corner, 133 Wn.2d 192, 202 n.2, 943 P.2d 286 (1997) (concluding "a special relationship," like that of a common carrier or innkeeper to a patron, exists between a retail business and its customer-invitees), with Arnold v. Saberhagen Holdings, Inc., 157 Wn. App. 649, 663, 240 P.3d 162 (2010) (with exceptions, "[a]n employer of an independent contractor is generally not liable for injuries to the independent contractor's employee") (citing Kelley v. Howard S. Wright Constr. Co., 90 Wn.2d 323, 330, 582 P.2d 500 (1978)).

caused by an obvious danger that was created by the landowner. This is distinct from liability based upon a statute or the possessor's retained right of control.

Generally, a possessor is not liable when an independent contractor's negligence injures one of its own employees.[20] But the possessor can be liable when its own negligence causes an injury to the contractor's employee.[21] Thus, a possessor is not liable to the injured employee of an independent contractor when the possessor fulfilled its duty to the employee by exercising reasonable care in selecting a competent independent contractor with the proper experience and capacity to work in the presence of a known and obvious danger created by the possessor.[22]

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[20] Epperly, 65 Wn.2d at 786 (citing Murk v. Aronsen, 57 Wn.2d 785, 359 P.2d 816 (1961); Campbell v. Jones, 60 Wash. 265, 110 P. 1083 (1910)).

[21] Id. (citing Murk, 57 Wn.2d 785; Campbell, 60 Wash. 265).

[22] See Tauscher v. Puget Sound Power & Light Co., 96 Wn.2d 274, 281-82, 287, 635 P.2d 426 (1981) (concluding a landowner's duty of care to an independent contractor's employee was delegable and the landowner remained liable only where it "retains control over the work place, is personally negligent, is negligent in hiring the independent contractor, or fails to warn of latent defects") (citing Welker v. Kennecott Copper Co., 1 Ariz. App. 395, 403 P.2d 330 (1965); Restatement (Second) of Torts § 343)); Millican v. N.A. Degerstrom, Inc., 177 Wn. App. 881, 890, 313 P.3d 1215 (2013) (generally, a possessor avoids liability for injuries caused by an independent contractor's negligence) (citing Stout v. Warren, 176 Wn.2d 263, 269, 290 P.3d 972 (2012); Restatement (Second) of Torts § 409 (1965)); W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 71, at 510 (5th ed. 1984) (When a possessor has a duty to the employee of an independent contractor, "it is his duty to exercise reasonable care to select a competent, experienced, and careful contractor with the proper equipment, and to provide, in the contract or otherwise, for such precautions as reasonably appear to be called for.") (footnotes omitted).

Inherent in this general rule is that the possessor may choose to exercise reasonable care by contractually delegating its duty over to the competent and experienced independent contractor itself.[23] There are limited circumstances when a possessor's duty to an independent contract's employee is not delegable, such as when it retains the right to control the independent contractor's work.[24] Those circumstances are not present here.

The record reflects that Prologis exercised reasonable care in selecting CIR, a competent and experienced commercial roofing services contractor. We reach this conclusion by considering, first, the scope of the delegation—whether the delegation actually anticipated the harm and required the independent contractor's exercise of reasonable care—and, second, the identity of the delegate—whether it was reasonable for the landowner to conclude the independent contractor would perform the duty.[25]

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[23] Millican, 177 Wn. App. at 890 (citing Stout, 176 Wn.2d at 269; Restatement (Second) of Torts § 409); see Tauscher, 96 Wn.2d at 287 (holding a landowner was not liable to an injured employee of an independent contractor because its duty was delegable and it hired the contractor to perform the work that injured the employee).

[24] See Afoa v. Port of Seattle, 191 Wn.2d 110, 121, 421 P.3d 903 (2018) (Afoa II) (possessor's duties are like an employer's nondelegable duties when it retains control) (citing Kamla, 147 Wn.2d at 123; Kelley, 90 Wn.2d at 334).

[25] See PROSSER AND KEETON ON TORTS § 71, at 510 (explaining a possessor's duty to hire a competent, experienced, and capable independent contractor using a contract that requires the proper care for the risks present); Restatement (Second) of Torts § 409 cmt. b (noting possessor remains liable for injuries to third parties caused by "[n]egligence of the employer in selecting, instructing, or supervising the contractor"); see also Restatement (Second) of Torts § 413 (1965) (recognizing similar concepts to address whether a principal is

Two contracts governed the relationship between Prologis and CIR: a master service agreement from 2015 and the roof cleaning contract from 2017.[26] In the master service agreement, CIR agreed to be "solely responsible for the health and safety of all persons providing the [s]ervices."[27] It also required that CIR "abide by all present and future laws, codes, ordinances, rules and regulations of federal, state, county or municipal governments having jurisdiction."[28] In the 2017 roof cleaning contract, CIR agreed to account for possible dangers on the roof by preparing and posting a safety plan before its employees accessed the roof. Taken together, Prologis required that CIR anticipate unsafe conditions on the roof and take lawful steps to remediate the risks to its employees. CIR accepted these terms. This shows an unambiguous delegation of Prologis's duty to maintain safe premises as to the roof and skylights.

Prologis reasonably concluded that CIR would fulfill this duty. CIR held itself out as a professional roofing company and had been a Prologis contractor for

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vicariously liable for an independent contractor's injury to a third party from a peculiar risk of harm).

[26] The estate asserts that the master service agreement did not apply to the cleaning job because it "governed the performance of structural roofing work only." Reply Br. at 10. This is based upon a misreading of the master service agreement. The agreement expressly served as a "Master Contract," "providing the general terms and conditions for various services to be provided by [CIR]." CP at 140. Those services included "Structural and Roofing Services." CP at 141 (emphasis added). Because the master service agreement covers both structural and roofing services and the estate does not explain why cleaning a roof is not a roofing service, the master service agreement supplemented terms in the roof cleaning contract.

[27] CP at 142.

[28] Id.

two years before the cleaning job. Prologis had been "super happy with [its] work."[29] Prologis's warehouse site manager explained she ensured CIR had its own safety protocols in place, including compliance with all safety regulations. And CIR represented to Prologis that it was capable of far more complex jobs by, for example, bidding to repair and replace the skylights in the warehouse roof. That bid also included a promise to create a site-specific safety plan.

Because the undisputed evidence shows Prologis exercised reasonable care by selecting CIR and reasonably concluded that CIR would fulfill the duty properly delegated to it,[30] the estate fails to establish a breach. There is no genuine question of material fact whether Prologis satisfied its duty to Eylander. Therefore, the trial court did not err by entering summary judgment for Prologis.[31]

Mihaila v. Troth, a recent decision by this court, recognized that, under very different circumstances, a possessor could be liable for an injury to an

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[29] CP at 282.

[30] To the extent the estate hints that Prologis breached because the terms or price of the cleaning contract inhibited CIR's ability to perform, we disagree. When an experienced and capable independent contractor like CIR negotiates a contract for services within its area of competence, a possessor must be able to rely on the contractor's representations about its ability to perform under the negotiated terms. Cf. Skagit State Bank v. Rasmussen, 109 Wn.2d 377, 384-85, 745 P.2d 37 (1987) (a party to a negotiation has no duty to investigate and can rely upon an assertion "where representations were made as to facts peculiarly within the speaker's knowledge") (citing Jenness v. Moses Lake Dev. Co., 39 Wn.2d 151, 234 P.2d 865 (1951)). If the independent contractor believes it cannot fulfill a requirement like employee safety, then that is an issue to be resolved in negotiating the price and terms of the agreement.

[31] See Johnson, 197 Wn.2d at 611 (summary judgment can be affirmed on any basis supported by the record) (quoting Washburn, 178 Wn.2d at 753 n.9).

independent contractor caused by an obvious risk because the solo independent contractor had no choice but to encounter the risk.[32] In Mihaila, the homeowners hired an individual independent contractor to repair their shed.[33] The contractor was injured by an obvious and unavoidable danger adjacent to the shed.[34] The court concluded there were genuine issues of material fact about whether the landowner should have anticipated the solo contractor would choose to keep the job despite the obvious danger.[35] Unlike the circumstances here, there was no question about fulfilling a duty through a reasonable delegation of safety concerns to an injured employee's employer because the injured solo contractor was not protected by an employer's common law duty to provide a safe place to work.[36] Thus, the questions of fact in Mihaila warranting a jury trial are not present here.

CONCLUSION

We accept Prologis's concession that it had a landowner's duty of reasonable care to Eylander based upon his status as an invitee. Because this status originated from his job as the employee of an independent contractor, Prologis could fulfill its duty to Eylander by making a reasonable delegation to his

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[32] 21 Wn. App. 2d 227, 236, 505 P.3d 163 (2022).

[33] Id. at 229-30.

[34] Id. at 230.

[35] Id. at 236-37.

[36] See Afoa I, 176 Wn.2d. at 475 ("At common law, a 'master' has a duty to its 'servant[s]' to maintain a reasonably safe place to work.") (alteration in original) (quoting Myers v. Little Church by the Side of The Road, 37 Wn.2d 897, 901-02, 227 P.2d 165 (1951)).

employer of its duty. Prologis did so. Because the estate does not establish any genuine issues of material fact, the trial court did not err by granting summary judgment for Prologis.

Therefore, we affirm.

WE CONCUR:

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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August 15, 2022 - 2:00 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	82834-7
Appellate Court Case Title:	Kirsten Eylander, Appellant v. Prologis Targeted U.S. Logistics Fund, et al., Respondents

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