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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

JOHN HYMAS,

Appellant,

v.

UAP DISTRIBUTION, INC., a foreign corporation; CROP PRODUCTION SERVICES, INC., a foreign corporation; and AGRIUM U.S., INC., a foreign corporation,

Respondents.

REPLY BRIEF OF APPELLANT

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I. SUMMARY OF REPLY

Hymas' opening brief detailed that UAP owed him a duty under RCW 49.17.060(2) and a duty under general premises liability law. UAP responded by arguing it had not duty under RCW 49.17.060(2) because, allegedly, its conduct on the construction project was not analogous to a general contractor and that it did not retain the right to control the work and jobsite safety. UAP almost exclusively relied upon one sentence in the contract that stated Narum would control the manner and method of its work. UAP chose not to address the main clause of the UAP-Narum contract showing UAP retained a right of control. In the contract UAP required Narum to "cooperate fully" with any instructions UAP may issue during the construction project. Washington courts interpret contracts as a whole, not by any one provision, and any ambiguity is construed against the drafter. When the two clauses are read together, it is apparent that Narum was to control its work, *but* if UAP desired to involve itself in the work, Narum had to heed UAP's instructions. When viewed in the light most favorable to Hymas, UAP's contract, conduct, and other relevant factors show that it retained the right of control and acted as a general contractor on the project.

Lastly, with regard to the premises liability claim, UAP conceded the existence of all the elements under the *Restatement (Second) of Torts*

§§ 343 and 343A, as adopted by our Supreme Court. UAP simply argued that §§ 343 and 343A do not apply to this case. As shown below, UAP is wrong.

II. ARGUMENT

A. UAP's Argument That The Issues Hymas Raises Are Not Appealable Is Without Merit

UAP asserted two arguments in an attempt to preclude this court from reaching the merits of Hymas' appeal. First, UAP claimed this court "must" disregard Hymas' issues pertaining to assignments of error numbers two through four, and number six because the trial court did not reach those issues.[1] The only authority cited by UAP to support its argument is *Kitsap County v. Smith*, where in a footnote the court opted to not consider an issue in part because the record on review was not adequately developed.[2] RAP 9.12 specifies what issues the Court of Appeals considers:

> On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and *issues called to the attention of the trial court.*

Emphasis added. Our Supreme Court has clarified that an appellate court reviewing summary judgment need not only review matters "considered"

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[1] Brief of Respondent ("Br. of Resp't") at 14-15.

[2] 143 Wn. App. 893, 909 n.18, 180 P.3d 834 (2008).

by the trial court, but should review matters that were "called to the attention" of the trial court.[3] Moreover, this court reviews summary judgments *de novo*, which means it uses the trial court's record but reviews the evidence and law without regard to how the trial court ruled.[4] Here, Hymas raised all of the issues presented on appeal before the trial court. Both parties extensively briefed the issues and supplied voluminous documents supporting their respective positions. The record is adequate for this court's review. UAP's tactical decision not to present any opposition to these issues before this court was done at its own peril.

UAP also argued that Hymas invited the error that he now complains of.[5] Hymas did not invite an error. Hymas' position has been and is that either there are no material factual disputes and Hymas is entitled to partial summary judgment as a matter of law, or, at the least, disputed material facts preclude summary judgment for UAP.

Our Supreme Court has previously rejected an argument similar to UAP's. In *Davis v. Early Construction Company* both the plaintiff and the defendant asked the trial court to rule as a matter of law whether the tortfeasor was an employee of the plaintiff's employer or an employee of

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[3] *Mithoug v. Apollo Radio*, 128 Wn.2d 460, 462, 909 P.2d 291 (1996).

[4] *See* the definition of *de novo*, BLACK'S LAW DICTIONARY 94 (7th ed. 1999).

[5] Br. of Resp't at 15-16.

the defendant.[6] The court ruled, finding the tortfeasor an employee of the defendant. The defendant objected to a jury instruction that reflected the court's ruling. After a jury verdict for the plaintiff, the defendant appealed, arguing that factual disputes precluded the trial court from ruling that the tortfeasor was an employee of the defendant as a matter of law. The plaintiff raised the same invited error argument that UAP raises here. The plaintiff claimed that since the defendant argued to the trial court that it could rule as a matter of law on the issue and since the trail court did so, the defendant invited the error that he now complains of. The Supreme Court rejected the plaintiff's invited error argument. The Supreme Court then granted the defendant a new trial because the issue regarding the tortfeasor's employee status presented a factual question for the jury to decide, even though the defendant had maintained at the summary judgment hearing that the issue was one which could be decided as a matter of law.[7]

In the present case, Hymas' position has never changed. In his opposition to UAP's summary judgment motion before the trial court, Hymas stated:

> Plaintiff believes the evidence shows, as a matter of law, that UAP owed him a duty. At the very least, there is a

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[6] 63 Wn.2d 252, 260, 386 P.2d 958 (1963).

[7] *Id.* at 261.

> question of fact regarding whether UAP retained a sufficient amount of control to justify imposing a duty to ensure WISHA compliance."[8]

For UAP's assertion that Hymas is now arguing the "exact opposite" to be true, Hymas would have had to argue before the trial court that *UAP's* motion for summary judgment should be granted. UAP's argument is without merit.

B. UAP Owed Hymas A Duty Under RCW 49.17.060(2) To Ensure WISHA Compliance

Several material facts, at a minimum, raise a genuine dispute as to whether UAP owed Hymas a duty. Jobsite owners/developers have a nondelegable duty to ensure WISHA compliance when they "play a role sufficiently analogous to general contractors to justify imposing upon them the same nondelegable duty to ensure WISHA compliance when there is no general contractor."[9] When a jobsite owner has "retaine[d] control or supervisory authority over the performance of a subcontractor's work" then the owner is sufficiently analogous to a general contractor for

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[8] CP 354 (lines 9-13).

[9] *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 123-24, 52 P.3d 472 (2002). *See also*, *Afoa v. Port of Seattle*, 160 Wn. App. 234, 245, 247 P.3d 482 (2011), rev. granted, __ Wn.2d __ (2011) ("The rule set forth in *Stute* has been extended to other parties who are sufficiently analogous to justify imposing statutory liability."); *Kinney v. Space Needle Corp.*, 121 Wn. App. at 248 ("While jobsite owners are not per se liable under the statutory requirements of RCW 49.17, they may retain a similar degree of authority to control jobsite work conditions and subject themselves to WISHA regulations.").

the duty to arise.[10] "Whether the right to control has been retained depends on the parties' contract, the parties' conduct, and other relevant factors."[11]

1. The UAP-Narum contract gave UAP the right to control the work and the jobsite safety

In the UAP-Narum contract, UAP retained several specific rights, which when considered as a whole show UAP retained the right to control the work, including jobsite safety enforcement. First and foremost, under the subheading of "SUPERVISION AND CONSTRUCTION PROCEDURES", the contract specified that "[t]he Contractor shall cooperate fully with the Owner."[12] Courts have construed the term "shall" as indicating a mandatory obligation.[13] That phrase is underlined in the contract, which shows UAP added the words to the AIA form contract.[14]

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[10] *Afoa v. Port of Seattle*, 160 Wn. App. at 245 (citing *Weinert v. Bronco Nat'l Co.*, 58 Wn. App. 692, 696, 795 P.2d 1167 (1990)).

[11] *Id.* at 239 (citing *Phillips v. Kaiser Aluminum & Chem. Corp.*, 74 Wn. App. 741, 750, 875 P.2d 1228 (1994)).

[12] CP 336.

[13] *Parkland Light & Water Co. v. Bd. of Health*, 151 Wn.2d 428, 437, 90 P.3d 37 (2004).

[14] The UAP-Narum contract is a modified AIA form contract entitled A107-1997. "AIA" stands for The American Institute of Architects. See their website at http://www.aia.org/contractdocs/index.htm. By reviewing the UAP-Narum contract, one can discern that the underlined language was added to the form contract and the language with a line through it was stricken from the form contract. The contract itself states it is a "modified" AIA contract. CP 333 (§ 5.1.1). UAP's area manager Brian Jones acknowledged such at his deposition. CP 257 (39:7-19). Viewing the evidence and the inferences therefrom in the light most favorable to Hymas, it also appears UAP drafted

As stated in Hymas' opening brief at pages 30-31, this provision means that Narum had a mandatory obligation to follow UAP's instructions if and when given. UAP did not dispute this plain reading of the contract in its Respondent's Brief and, therefore, concedes this point.[15]

Moreover, the "shall cooperate fully" with the owner language is virtually identical to the language in the contract at issue in *Afoa v. Port of Seattle.*[16] The contract in *Afoa* stated that the contractor "shall comply with the written or oral instructions" of the owner.[17] There is no difference in meaning between the language used in the *Afoa* contract and the language used on the UAP-Narum contract. UAP conceded that the provision requiring the contractor to comply (i.e., cooperate) with the owner's instructions shows that the owner retained the right to control the manner and method of the work:

> ...as Hymas himself points out, rather than allow the contractor and its employees to determine the means and

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this contract. Brian Jones testified that he understood the basic terms of the contract because UAP's lawyers had explained it to him – the inference being UAP's lawyers drafted the contract. CP 257 (39:23-40:3). Compare that testimony to Wayne Narum's testimony where he could not answer questions about the basic terms of the contract because, as he testified, "I did not read the contract." CP 321 (71:12-15).

[15] *S&K Motors v. Harco Nat'l Ins. Co.*, 151 Wn. App. 633, 645, 213 P.2d 630 (2009) (finding that because respondent did not present contrary argument on an issue, respondent conceded the issue.).

[16] 160 Wn. App. 234, 247 P.3d 482 (2011), rev. granted, 171 Wn.2d 1031, 257 P.3d 664 (2011).

[17] *Id.* at 243.

> methods of their work ... the agreement in *Afoa* required both the contractor and its employees to "comply with written or oral instructions issued by the [owner]."[18]

The court in *Afoa* found that this contract language raised a genuine issue of material fact as to whether the owner in *Afoa* retained the right to control the work.

The UAP-Narum contract contains another provision showing UAP retained the right to control the work. UAP retained the right to terminate a specialty contractor for any and no reason and to use its own forces to perform work within the scope of a specialty contractor's contract. The unlimited right to terminate and take over work is intended to, and did, give UAP the right to control the work on the construction project.[19] UAP apparently does not dispute that those provisions gave UAP an element of control over the work being performed.

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[18] Br. of Resp't at 34. It should also be noted that UAP misstated the facts of *Afoa*. UAP claims that the "contract" in *Afoa* stated that the independent contractors' employees were required to obey the jobsite owner rather than their own employer if there was a dispute between the two. Br. of Resp't at 34. Contrary to UAP's assertion, the contract at issue in *Afoa* contained no such provision. Rather, a witness submitted a declaration stating that, which the Port of Seattle disputed. *Afoa v. Port of Seattle*, 160 Wn. App. at 243-44. UAP also claimed that in *Afoa* the employees of the independent contractor were required to "take a safety test from the jobsite owner itself." Br. of Resp't at 35. The opinion in *Afoa* actually shows that the plaintiff claimed the owner trained him, but the Port of Seattle claimed "it had nothing to do with training Afoa..." 160 Wn. App. at 244.

[19] UAP responds to this argument by arguing the declaration from construction safety expert Mark Lawless should not be considered. While we believe Mr. Lawless was discussing industry standards and was not engaging in contract interpretation, regardless, the contract speaks for itself, as detailed in this brief.

UAP simply responded by arguing one sentence in the UAP-Narum contract is controlling. That one sentence states that Narum will have control over the manner and method of its work. UAP's reliance on that one sentence is improper. Contracts are to be construed as a whole document, rather than just by one particular clause.[20] A fair reading of the entire contract reveals that while it was understood Narum would control its own work, should UAP desire to involve itself with the work and/or project safety, then Narum was obligated to heed UAP's instructions. Any ambiguity about what these provisions mean when read together should be resolved in Hymas' favor since UAP drafted the contract.[21]

The UAP-Narum contract language at issue is similar to the contractual language at issue in *Kennedy v. Sea-Land Services*.[22] In *Kennedy* an employee of an independent contractor was killed. His personal representative brought suit against Sea-Land, the entity that owned/occupied the land and hired the independent contractor.[23] The contract stated that the independent contractor's work "shall be subject

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[20] *Dew v. Pearson*, 602, 607, 132 P. 412 (1913).

[21] *Joinette v. Local 20, Hotel & Motel Rest. Employees & Bartenders Union*, 106 Wn.2d 355, 364, 722 P.2d 83 (1986). See footnote 14, above, showing that a reasonable inference from the record on appeal is that UAP drafted the contract.

[22] 62 Wn. App. 839, 816 P.2d 75 (1991).

[23] *Id.* at 842.

entirely to the internal direction and control of [the independent contractor]."[24] Sea-Land, like UAP, argued that this one provision conclusively showed that it did not retain the right to control the independent contractor's work.[25] The contract, however, also stated the independent contractor shall be "subject always to direction and supervision of Sea-Land, necessary to the performance of [the independent contractor's] obligations hereunder."[26] The personal representative argued that this provision showed Sea-Land retained the right to control the work.[27] The Court of Appeals agreed, finding the contract ambiguous.[28] The Court of Appeals reversed the trial court's summary judgment dismissal and remanded for trial.[29]

Another problem with UAP's nearly exclusive reliance on one sentence in the contract is that it places form over substance and leads to absurd results. Washington courts do not give blind credence to

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[24] *Id.* at 857.

[25] *Id.* at 846, 857-58.

[26] *Id.*

[27] *Id.* at 857-58.

[28] *Id.* at 858.

[29] *Id.* at 861.

contractual labels and provisions that are at odds with established law.[30] If all that is necessary to evade jobsite safety responsibilities is to have a single sentence in a contract, regardless of other provisions in the contract or the parties' actual conduct, then all owner/developers would include this sentence. Allowing sophisticated owner/developers to so easily circumvent jobsite safety responsibilities would undermine the strong public policy of promoting worker safety that is behind WISHA and *Stute v. P.B.M.C.*[31]

The UAP-Narum contract also required Narum to follow the Washington Administrative Code, which provides specific directives on the manner and method that must be used for concrete work. Predictably, UAP argued that its contract merely required Narum to comply with all applicable laws.[32] This is the very argument rejected by the Court of

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[30] *Washington Imaging Servs., LLC v. Dep't of Revenue*, 171 Wn.2d 548, 563, 252 P.3d 885 (2011) (refusing to follow contract provision stating charge was a pass through tax); *Dolan v. King County*, No. 82842-3, 2011 LEXIS 657 (Washington State Supreme Court, Aug. 18, 2011) (refusing to follow contract provision that stated attorneys working for public defender organizations were independent contractors, not public employees); *Folson v. Burger King*, 135 Wn.2d 658, 673, 958 P.2d 301 (1998) (refusing to rely on a contract provision when determining whether a Burger King franchise was a franchisee or an agent of Burger King Corporation); *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187, 1195 (9th Cir. 1996) (refusing to follow contract language that specified workers were independent contractors, not employees).

[31] 114 Wn.2d 454, 461-633, 788 P.2d 545 (1990).

[32] Br. of Resp't at 35-36.

Appeals in *Afoa v. Port of Seattle*.[33] UAP attempted to distinguish *Afoa* by arguing that in *Afoa* the owner was the entity that drafted the regulations.[34] There is absolutely no indication in the *Afoa* opinion suggesting that distinction was a consideration for the court.

UAP further argued that it did not owe Hymas a duty because the UAP-Narum contract delegated safety enforcement to Narum.[35] As stated in Hymas' opening brief, since UAP retained the right to control the work, UAP had a *nondelegable* duty to ensure WISHA compliance.[36] UAP's attempt to delegate a nondelegable duty has no effect on UAP's liability to Hymas.

2. UAP's conduct shows that it had the right to control the work and the jobsite safety

Not only did UAP's contract grant it authority and control over the jobsite, UAP's conduct also established it had authority and control. As stated in Hymas' opening brief, both UAP and Narum understood UAP had the right to raise safety concerns and order corrections.[37] UAP in fact

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[33] 160 Wn. App. 234, 244, 247 P.3d 482 (2011).

[34] Br. of Resp't at 35.

[35] Br. of Resp't at 33-34.

[36] *Afoa v. Port of Seattle*, 160 Wn. App. at 244 (citing *Kamla v. Space Needle*, 147 Wn.2d 114, 122, 52 P.3d 472 (2001)).

[37] Hymas' opening brief at 11-13, and 33.

exercised this right by raising safety concerns about the "leg" of the trench that crossed a nearby road. That was a different section of the very trench into which Hymas ultimately fell. Narum responded to UAP's concerns about the "leg" by putting up a barricade.

UAP argues that the record is equivocal regarding these facts. What UAP fails to appreciate is that on review of an order granting summary judgment, all facts and reasonable inferences from those facts must be viewed in the light most favorable to the nonmoving party.[38] The facts as presented by Hymas are accurate inferences from the record when viewed in this light. For example, Wayne Narum testified:

> Q: And so ***UAP had some discussions with you regarding safety*** when you were performing work on that leg; is that correct?
>
> A: ***Yes.***
>
> Q: Do you recall exactly what the safety issue was that was being discussed?
>
> A: Just a very large, deep hole.
>
> Q: ***They*** wanted to make sure nobody fell into it or –
>
> A: Correct. Or vehicles.
>
> Q: And what did you do to satisfy ***UAP's concerns***?

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[38] *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 302, 178 P.3d 995 (2008).

A: We barricaded it up.[39]

This testimony shows UAP raised the safety concern about the unguarded trench and directed remediation. While UAP pointed to testimony indicating Wayne Narum did not recall who initiated the conversation,[40] who initiated the conversation is not a material fact. What is a material fact is that during that conversation UAP raised safety concerns about the unguarded trench, and in response thereto, Narum took corrective action. Narum was not free to act in any way it chose. This evidence establishes that UAP had innate supervisory authority over the construction project. An entity having innate authority over the jobsite has a duty to ensure compliance with WISHA safety regulations because "innate supervisory authority constitutes sufficient control over the workplace."[41] This evidence also shows that UAP exercised its retained contractual right to control the work. As stated above, the UAP-Narum contract mandated that Narum cooperate fully with any instructions given or concerns raised by UAP. Narum had no choice but to take corrective action in response to UAP's concerns. If Narum failed to cooperate with

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[39] CP 59 (98:18-24), 61-62 (100:24-101:11) (emphasis added).

[40] Br. of Resp't at 32.

[41] *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 464, 788 P.2d 545 (1990). It should be noted that in Hymas' opening brief at pages 19-20, footnotes 102 through 105 should reference *Stute v. P.B.M.C.*, not *Kinney v. Space Needle*.

UAP, Narum's contract would likely be terminated, since the UAP-Narum contract provided UAP could terminate a specialty contractor without cause.

UAP also disputed the material fact that it coordinated the work between the various specialty contractors working on the jobsite.[42] However, UAP's plant supervisor, Harold Priest, unequivocally testified that multiple specialty contractors worked on the jobsite at the same time.[43] Mr. Priest further testified that UAP was responsible for coordinating the work between the multiple specialty contractors.[44] The word coordinate means "to place or arrange in proper order or position."[45] The fact that UAP coordinated the work between the multiple specialty contractors shows that it had and exercised innate and contractual supervisory authority over the work being performed.

3. Other relevant factors justify imposing a duty on UAP to ensure WISHA compliance

In addition to the aforementioned, there are several other relevant factors that justify imposing a duty on UAP to ensure WISHA compliance.

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[42] Br. of Resp't at 26-27.

[43] CP 143, 146 and 159-160.

[44] CP 146.

[45] Webster's Encyclopedic Unabridged Dictionary of the English Language, 1st ed., 321-22.

First and foremost, UAP's conduct was analogous to that of a general contractor. As detailed in Hymas' opening brief at pages 20-26, UAP's conduct essentially mirrored that of a general contractor. UAP hired multiple specialty contractors through a bidding process, paid the contractors directly, coordinated the work between the specialty contractors, used its own forces on the jobsite, and single handedly orchestrated a four million dollar construction project. UAP is a large commercial enterprise, experienced in coordinating construction projects, who acted as a developer on this project.

UAP relied on *Rogers v. Irving* to support its position that hiring multiple specialty trades does not make it analogous to a general contractor.[46] The court in *Rogers* made no such statement. In *Rogers*, the court found the homeowner was not an employer under RCW 49.17.020(3) and, therefore, did not owe a duty under RCW 49.17.060(2):

> Rogers argues that Irving was, in effect, his own general contractor for the building of his home, and had the requisite innate supervisory authority over the workplace that was determinative in both *Stute* and *Weinert*. But even if this is so, Irving does not have the duty of an employer unless he also fits within the statutory description of "employer." The definition of "employer" is a threshold requirement. An entity that does not meet the definition is not an employer, and there is no need to ask, as in *Stute* and

[46] Br. of Resp't at 25.

> *Weinert,* whether the entity in question has supervisory authority comparable to a general contractor.[47]

There is no dispute in the present case that UAP is an employer. *Rogers* can be further distinguished since the defendant was a homeowner building his own home, not a large commercial enterprise that regularly participates in construction projects and was building a four million dollar commercial structure.[48] Moreover, our Legislature has defined general contractor in RCW 18.27.010(5) as a person who hires more than one specialty trade on a single project.

UAP asks this court to ignore the fact that it had previously entered into numerous other construction contracts, arguing the court should only focus on the UAP-Narum relationship.[49] The fact that UAP has engaged in many construction projects, contracting directly with numerous specialty contractors, is relevant to the inquiry as to whether UAP was

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[47] 85 Wn. App. 455, 461, 933 P.2d 1060 (1997).

[48] *See, e.g., Rogers v. Irving,* 85 Wn. App. at 463 (the court drew a distinction between homeowners and business enterprises: "Homeowners, not being business enterprises, are typically ill-equipped to assume the duties that Rogers' interpretation of "employer" would impose upon them."). *See also, Kennedy v. Sea-Land Service,* 62 Wn. App. 839, 854, 816 P.2d 75 (1991) ("[A]n inexperienced widow employing a contractor to build a house is not to be expected to have the same information, or to make the same inquires, as to whether the work to be done is likely to create a peculiar risk of physical harm to others, or to require special precautions, as a real estate development company employing a contractor to build the same house.") (quoting Restatement (Second) of Torts § 413, comment *f* (1965)).

[49] Br. of Resp't at 25-26.

analogous to a general contractor and was familiar with and understood the operations of a construction project.

UAP also claims it was not in the best position to ensure WISHA compliance due to its purported ignorance of WISHA regulations. The test for determining owner liability under RCW 49.17.060(2) is whether the owner acted like a general contractor and retained the right of control, not whether it was in the best position to enforce WISHA regulations. The "best position" language in the cases analyzing this issue primarily focus on the owner or general contractor's *role* on and *authority* over a construction project, not their actual knowledge of WISHA requirements. Our Supreme Court in *Kelly v. Howard S. Wright Construction Company*, noted that there is a real threat of danger on a construction project and reasoned that the best way to ensure that safety precautions are taken is to make the general contractor responsible for them.[50] In *Stute v. P.B.M.C., Inc.*, our Supreme Court stated "as a practical matter, the general contractor is in the best position to coordinate work or provide expensive safety features to protect employees of subcontractors. ... A general contractor's supervisory authority places the general in the best position to ensure compliance with safety regulations."[51] The Court of Appeals has

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[50] 90 Wn.2d 323, 331, 582 P.2d 500 (1978).

[51] 114 Wn.2d 454, 462-64, 788 P.2d 545 (1990).

ruled, "[t]he basis for imposing the duty to enforce [safety regulations] on a general contractor exists with respect to an owner/developer who, like the general contractor, has the same innate overall supervisory authority and is in the best position to enforce compliance with safety regulations."[52]

Here, as shown above, UAP had innate supervisory authority over the construction project. This authority derived from the UAP-Narum contract, and from UAP's assumption of the role of a general contractor on the project. UAP tactically chose not to hire a general contractor, believing it could perform those tasks. UAP was in the best financial position to ensure WISHA compliance. UAP is a multinational commercial enterprise with access to substantial financial resources. UAP's parent company, Agrium, had net earnings in 2009 of $366 million.[53] Like a general contractor, UAP exercised financial control over the specialty contractors by controlling the payment to the contractors. As for UAP's self-proclaimed ignorance of safety procedures, UAP could easily have hired a construction safety officer to assist in fulfilling its nondelegable duty to ensure WISHA compliance. If an owner/developer

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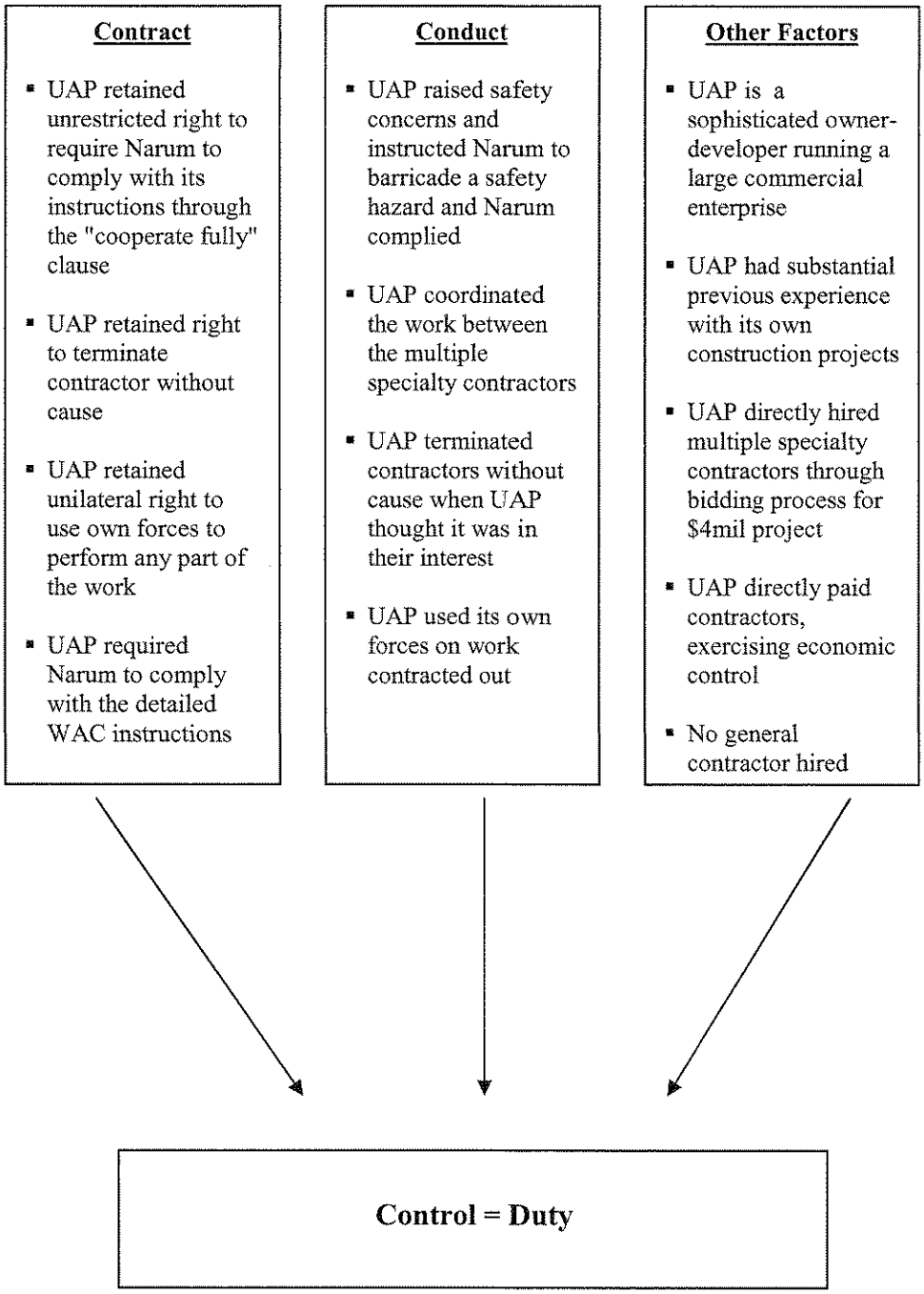
[52] *Doss v. Itt Rayonier, Inc.*, 60 Wn. App. 125, 128, 803 P.2d 4 (1991).

[53] *See http://www.agrium.com/includes/2009_Agrium_Annual_Report(1).pdf.*

assumes the role of general contractor, the owner/developer must assume the unique duties and obligations of a general contractor.

Some of the facts showing control can be depicted as follows:



C. As A Premises Owner, UAP Owed A Duty Of Care To Hymas, A Business Invitee

UAP conceded that (1) UAP was the property owner, (2) Hymas was a business invitee, (3) the unguarded trench was a known unsafe condition on UAP's land, (4) UAP failed to exercise reasonable care to protect Hymas from the unsafe condition, and (5) Hymas' injury should have been anticipated despite the open and obvious nature of the unsafe condition. UAP simply advances the amazing argument that the standards plainly set forth in the *Restatement (Second) of Torts* §§ 343 and 343A, and adopted by our Supreme Court, do not apply to this case. Accordingly, if §§ 343 and 343A apply to this case, this Court should reverse the trial court's dismissal of this claim and instruct the trial court to grant summary judgment to Hymas on the issues of duty and breach.

UAP cites five cases to support its position.[54] Those cases are readily distinguishable. Four of the cases relied upon by UAP have nothing to do with the *Restatement (Second) of Torts* §§ 343 or 343A.[55] The only case that references §§ 343 and 343A is *Golding v. United Homes*, but in that case (from 39 years ago) the Court of Appeals refused

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[54] Br. of Resp't at 41-45.

[55] *Lamborn v. Phillips Pac. Chem.*, 89 Wn.2d 701, 575 P.2d 215 (1978); *Epperly v. Seattle*, 65 Wn.2d 777, 399 P.2d 591 (1965); *Phillips v. Kaiser Aluminum & Chem. Corp.*, 74 Wn. App. 741, 875 P.2d 1228 (1994); *Winfrey v. Rocket Res.*, 58 Wn. App. 722, 794 P.2d 1300 (1990).

to follow the standard set forth in §§ 343 and 343A, as detailed in Hymas' opening brief.[56]

The Washington Supreme Court did not adopt § 343A until June of 1994 in *Tincani v. Inland Empire Zoological Society*.[57] Only one of the cases relied on by UAP was issued after *Tincani*. That case is *Phillips v. Kaiser Aluminum*, which was issued a mere 19 days after *Tincani*.[58] Besides *Phillips*, no case since *Tincani* has applied the theory advanced by UAP to allow a property owner to escape liability. To the contrary, since *Tincani*, Washington courts have consistently applied §§ 343 and 343A to workplace hazard exposures.[59] Since it is clear that §§ 343 and 343A are the law in Washington and apply to independent contractor employees, the cases relied on by UAP are inapposite. Indeed, the Court of Appeals

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[56] 6 Wn. App. 707, 710-11, 495 P.2d 1040 (1972). *See also*, Hymas' opening brief at pages 45-46.

[57] 124 Wn.2d 121, 139, 875 P.2d 621 (1994).

[58] And again, the *Phillips* case did not involve §§ 343 or 343A.

[59] *See, e.g.*, *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 125-26, 52 P.3d 472 (2002); *Afoa v. Port of Seattle*, 160 Wn. App. 234, 248-49, 247 P.3d 482 (2011); *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn. App. 649, 666-67, 240 P.3d 162 (2010), rev. denied, 171 Wn.2d 1012 (2011); and *Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 249-50, 85 P.3d 918 (2004).

recently rejected similar arguments based on case law that predated *Tincani*.[60]

Based on the cases that predate the adoption of § 343A, UAP argues that Narum's conduct (excavating the trench) created the unsafe condition and, therefore, UAP can escape its liability as the property owner. Recent cases show that UAP's theory is untenable. The case of *Arnold v. Saberhagen Holdings, Inc.* is most telling.[61] In that case, a worker was exposed to asbestos while working as an insulation installer for an independent contractor on premises owned by the defendant. The worker died from mesothelioma. His personal representative brought suit for, *inter alia*, general premises liability. The unsafe condition that harmed the worker was caused solely by his and his employer's own conduct. Specifically, the decedent's conduct of installing insulation created asbestos dust, that he then inhaled.[62] Nonetheless, the Court of Appeals reversed the trial court's summary dismissal of the plaintiff's claim.

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[60] *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn. App. at 669 (rejecting the defendant's argument based on case law that predated the Supreme Court's adoption of § 343A in *Tincani*).

[61] 157 Wn. App. 649.

[62] *Id.* at 654 ("The work created dust that coated the insulator's clothing.").

Moreover, unlike *Epperly* where the unsafe condition was a temporary apparatus created by the independent contractor to assist with its construction of a dam, the unsafe condition on UAP's land was a permanent physical condition on the land whose creation was ordered by UAP. As the court in *Epperly* stated, "[the apparatus was] not part of the dam, as it was to be completed."[63] Here, the unguarded trench was part of the fertilizer plant, as it was to be completed per UAP's instruction.

Similarly, in *Phillips*, the unsafe condition was the plaintiff's act of chain sawing aluminum, which then made the aluminum unstable, not a condition on the defendant's land.[64] In *Lamborn*, there was no unsafe condition; the plaintiff fell off his own truck.[65] In *Winfrey*, the court found that high voltage electricity was an unsafe condition and affirmed a jury verdict in favor of the plaintiff.[66] Unlike *Epperly*, *Phillips*, and *Lamborn*, there can be no question that a very large, unguarded permanent trench was an unsafe condition on UAP's land. Nowhere does UAP challenge that fact. In summary, UAP concedes all the elements of a claim under §§

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[63] 65 Wn.2d at 780.

[64] 74 Wn. App. at 746, 749 ("Phillips presented no evidence showing a defective or dangerous condition in the premises").

[65] 89 Wn. App. at 703-704.

[66] 58 Wn. App. at 725-26.

343 and 343A. This court should reverse the trial court with instructions to grant Hymas' Motion for Partial Summary Judgment on this issue.

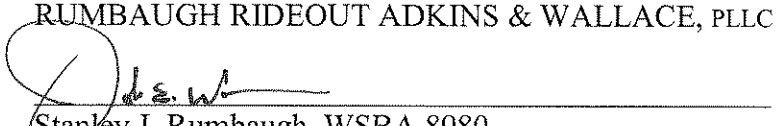
III. CONCLUSION

Hymas presented sufficient evidence to raise a genuine factual dispute as to whether UAP acted similarly to a general contractor and retained the right to control the work and jobsite safety. Hymas has also shown that UAP, as the property owner, owed Hymas a duty to use reasonable care to protect him from unsafe conditions on UAP's land. The trial court should not have dismissed his case. This court should reverse, instruct the trial court to enter partial summary judgment on the elements of duty and breach on the premises liability claim, and remand for trial.

DATED this 20th of September, 2011.

Respectfully submitted,

RUMBAUGH RIDEOUT ADKINS & WALLACE, PLLC



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of Washington State that on the date entered below, I sent via first class mail, postage prepaid and email pursuant to agreement of counsel, a copy of this brief to:

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DATED this 20th day of September, 2011.

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