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COURT OF APPEALS, DIVISION I,  
OF THE STATE OF WASHINGTON

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GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; ROSARIO CRISOSTOMO FLORES, an individual; and PATRICIA CRISOSTOMO FLORES, a minor child by and through LUCINA FLORES, her natural mother and default guardian,

Appellants,

v.

INLAND WASHINGTON, LLC, a Washington limited liability company,

Respondent,

and

INLAND GROUP P.S., LLC, a Washington limited liability company, RALPH'S CONCRETE PUMPING, INC., a Washington corporation, and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation;

Defendants.

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REPLY BRIEF OF APPELLANTS VARGAS TO BRIEF OF  
RESPONDENT INLAND WASHINGTON, LLC

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## I. INTRODUCTION

Inland Washington LLC urges this Court to ignore the *per se* control of general contractors under Stute and the vicarious liability of general contractors under Millican and under this Court's decision in Afoa II. Inland seeks to turn Washington law on its head by replacing the settled law of a general contractor's *per se* control under Stute with new requirements that actual control be proven and that more than one trade must be working in the same place at the same time.

Inland attempts to escape liability by arguing that self-serving exculpatory contract language between Inland and Hilltop and between Hilltop and Ralph's somehow preclude liability for breaches of non-delegable duties to Mr. Vargas. This is contrary to the inadmissibility of such provisions under Millican and to the opinions of this Court and of the Supreme Court in Afoa I requiring that courts look past such language when considering issues of control. Inland urges this court to ignore Washington law and instead look to out-of-state authority on non-delegable duties from a 1992 New Mexico case and a 1936 Florida case. A review of both cases reveals neither is helpful to Inland's cause. Further, if the New Mexico case is relied upon by this Court, Inland would actually have strict liability for Mr. Vargas's injuries.

In addition to urging this Court to disregard settled Washington law and its own recent opinion in Afoa II, Inland urges this Court to ignore material facts and to resolve factual disputes in its favor, contrary

to summary judgment standards. These facts include the presence of Inland's superintendent on the jobsite and his involvement in setting up the concrete pump truck, facts regarding how the incident occurred, and facts regarding the lack of proper training that would have kept Mr. Vargas and other Hilltop workers out of the danger zone when starting to pump, as required by the Putzmeister pump truck manual and industry standards.

Inland also ignores the opinion of Rick Gleason, Mr. Vargas's construction site expert, and takes his testimony out of context. Mr. Gleason testifies and opines on a more probable than not basis as to the WISHA violations and poor safety practices that caused Mr. Vargas's injury. He acknowledges that there's not much that can be done but to "duck and cover" when a hose whip blowout is imminent. Because no worker should ever be in the danger zone when starting to pump in the first place, the self-preservation act of "ducking and covering" is absurd when offered as a safety plan.

Inland makes other arguments based on irrelevant and inadmissible grounds, including the inadmissible lack of citations by L&I DOSH investigators and Inland's irrelevant attempt to re-litigate the Court's acceptance of review in this matter. Plaintiffs / Appellants respectfully request that this Court affirm Stute and Afoa II and reverse the erroneous dismissal of the general contractor from this case brought under Stute and its progeny.

## II. ARGUMENT IN REPLY

As discussed in Appellants Vargas's opening brief, it is undisputed that Inland was the general contractor on the subject jobsite, and that general contractors have *per se* control over their jobsites under Stute v. P.B.M.C. Inc., 114 Wn.2d 454, 788 P.2d 545 (1990). This means Appellants Vargas do not have to show evidence of retained control as is required for defendants who are not general contractors as described in Kamla v. Space Needle Corp., 147 Wn. 2d 114, 52 P.3d 472 (2002) and Afoa v. Port of Seattle (I), 176 Wn.2d 460, 296 P.3d 800 (2013) *affirming* Afoa v. Port of Seattle (I), 160 Wn. App. 234, 247 P.3d 482 (Div. 1, 2011). Even if this showing were required, Appellants Vargas have set forth sufficient evidence to show that Inland retained the right to control Hilltop's work. This evidence includes the testimony of Inland superintendent Steve Miller and the testimony of Matt Skoog showing Mr. Miller's involvement in the work and in jobsite safety.

General contractors and their equivalents owe non-delegable statutory duties to protect workers from WISHA violations, and non-delegable common law duties to provide workers with a reasonably safe workplace. General contractors are vicariously liable for violations of these non-delegable duties on their jobsites under Millican v. N.A. Degerstrom, Inc., 177 Wn. App. 881, 313 P.3d 1215, (2013) *review denied*, 179 Wn.2d 1026, 320 P.3d 718 (2014) and under this Court's

holding in Afoa v. Port of Seattle (II), 198 Wn. App. 206, 393 P.3d 802 (2017).

Inland devoted a substantial portion of its brief attempting to re-litigate the decision of this Court to accept interlocutory review of this matter.<sup>1</sup> This question was decided by this Court's July 21, 2017 Ruling Granting Discretionary Review in Part and by the Court's December 11, 2017 Order Denying Inland's Motion to Modify said ruling, and need not be addressed. It is axiomatic that since a general contractors' vicarious liability is one basis of Vargas's claims, that basis must be considered in an appeal for summary judgment dismissal of all claims against the general contractor.

**A. General contractors have *per se* control under *Stute*, and owe non-delegable duties to provide a safe workplace free of WISHA violations.**

As discussed in Appellants Vargas's opening brief, Inland applies the wrong legal standard in arguing that Vargas had to show retained control for Inland to owe a duty. The retained control analysis is only appropriate in jobsite owner or landowner cases where the defendant is not a general contractor on a construction site. As previously briefed, under Stute v. P.B.M.C. Inc., a "general contractor's supervisory authority is *per se* control over the workplace, and the [non-delegable duty to provide a safe place to work for employees of subcontractors] is placed upon the general contractor as a matter of law." Stute v. P.B.M.C. Inc., 114 Wn.2d 454, 463-464, 788 P.2d 545 (1990). The Stute Court explained:

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<sup>1</sup> Inland's Brief of Respondent, Pages 8-15

A general contractor's supervisory authority places the general in the best position to ensure compliance with safety regulations. For this reason, the **prime responsibility for safety of all workers should rest on the general contractor.**

...

Thus, to further the purposes of WISHA to assure safe and healthful working conditions for every person working in Washington, RCW 49.17.010, we hold the **general contractor should bear the primary responsibility** for compliance with safety regulations **because the general contractor's innate supervisory authority constitutes sufficient control over the workplace.**

Stute v. P.B.M.C. Inc., 114 Wn.2d at 463-4 (emphasis added).

Since control is established *per se*, the analysis as applied in Kamla, Afoa I, and Arnold as to whether the defendant retained sufficient control to be comparable to that of a general contractor does not apply here.<sup>2</sup>

Even if Inland was not the general contractor and control had to be established under the same standards that apply to jobsite owners who are not general contractors, Appellants Vargas would only need to establish the *right to control*, a showing of *actual control* is not required. The “test of control is not the actual interference with the work of the subcontractor, but the **right** to exercise such control.” Kelley v. Howard S. Wright Const. Co., 90 Wn.2d 323, 330-331, 582 P.2d 500, 505 (1978) (emphasis added); Kamla v. Space Needle, Corp., 147 Wn.2d 114, 121, 52 P.3d 472 (2002).

In Weinert v. Bronco Nat'l Co., Division One found Stute duties applied to an owner / developer where “[t] he owner/developer’s position

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<sup>2</sup> Kamla v. Space Needle Corp., 147 Wn. 2d 114, 52 P.3d 472 (2002), Afoa v. Port of Seattle (I), 176 Wn.2d 460, 296 P.3d 800 (2013) and Arnold v. Saberhagen Holdings, Inc., 157 Wn. App. 649, 666, 240 P.3d 162 (2010) were all cases where the defendants were not general contractors on construction sites, and the retained control analysis was applied in each case to determine if the defendant had retained sufficient control over, or the right to control, the work that was sufficiently analogous to the innate right of control that general contractors have.

[was] **so comparable to that of the general contractor** in Stute that the reasons for the holding in Stute” applied. Weinert v. Bronco Nat’l Co., 58 Wn. App. 692, 795 P.2d 1167 (Div. 1, 1990) (emphasis added); Kamla, 147 Wn.2d at 121. Again, the retained control analysis does not apply to general contractors, who have *per se* control of their job sites. This was recognized by the Washington Supreme Court in Afoa I:

In Kamla, we held that although **general contractors and similar employers *always* have a duty to comply with WISHA regulations**, the person or entity that owns the jobsite is not *per se* liable for WISHA violations. Rather, jobsite owners have a duty to comply with WISHA only if they retain control over the manner in which contractors complete their work.

Afoa I, 176 Wn.2d at 472 (italics in original, bold added), citing Kamla at 125, 52 P.3d 472.

**B. General contractors are vicariously liable for breaches of non-delegable duties as described in Millican and Afoa II.**

As discussed in Appellants Vargas’s opening brief,<sup>3</sup> Inland is vicariously liable for breaches of both common law and statutory non-delegable duties. This Court wrote in Afoa II: “when it comes to breach of common law duties arising from retained control and violations of WISHA, a jobsite owner [who has been found to have retained the right to control the work] has vicarious liability for breach of duties that are nondelegable.” Afoa v. Port of Seattle (II), 198 Wn. App. 206, 393 P.3d 802 (2017) (Div. 1, 2017) (emphasis added). Afoa II affirmed Division Two’s holding in Millican, which examined general contractors’ duties under Stute and explained that general contractors are ***vicariously liable***

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<sup>3</sup> Brief of Appellants Vargas, pages 24-28

for damages caused by breaches of non-delegable duties by subcontractors such that independent negligence of the general contractor need not be shown. Millican v. N.A. Degerstrom, Inc., 177 Wn. App. 881, 313 P.3d 1215, (Div. 2, 2013) *review denied*, 179 Wn.2d 1026, 320 P.3d 718 (2014).

**C. The out-of-state cases cited by Inland are not helpful to its cause; strict liability would apply under New Mexico's example.**

Finding no support under controlling Washington law, Inland resorts to the 1992 New Mexico case of Saiz v. Belen School District, 827 P.2d 102 (N.M. 1992), with a citation to the 1936 Florida case of Kirkland v. City of Gainesville, 166 So. 460 (Fla. 1936).<sup>4</sup> Neither case is helpful to Inland.

The Florida case of Kirkland v. City of Gainesville was brought by the widow of the defendant city's superintendent who was killed as a result of an unsafe electric utility pole. The Florida Supreme Court found the city had a non-delegable duty to keep its poles in reasonably safe conditions. The city argued the deceased superintendent could not recover because he was a city employee whose job included keeping the poles safe. The Florida Supreme Court rejected this argument and upheld the liability verdict against the city. Although non-delegable duties were discussed, nowhere in the opinion was there a discussion of vicarious liability; the word "vicarious" does not appear in the opinion. To the extent that Kirkland v. City of Gainesville is relevant to this case, it would

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<sup>4</sup> Inland's Brief of Respondent, Page 14

be for the proposition that liability for breaches of non-delegable duties are not to be imputed to the injured (or deceased) worker.

Inland's quotation from the New Mexico case of Saiz v. Belen School District does not tell the whole story. While the Saiz court found that vicarious liability did not apply to non-delegable duties, the Saiz court held that *strict liability* applied, as well as joint and several liability. The Saiz court presented the issue as follows:

Today we address whether a nondelegable duty gives rise to direct strict liability for the absence of required precautions or whether it gives rise to vicarious liability for the negligence of the independent contractor.

Saiz v. Belen School District, 827 P.2d at 109. The Saiz court's answer was that strict liability applied. After stating that vicarious liability did not apply in the portion quoted by Inland, the Saiz court went on to explain that strict liability applied and that joint and several liability would also apply:

The common law develops by steps manifesting the imprint of established doctrines. Courts that lengthen the stride of the common law are wont to do so in well-worn and familiar doctrines. So we believe is the character of the imprint on nondelegable duty left by the rationale encompassing "vicarious liability to the same extent as the independent contractor." It should not be required that the contractor be liable. That is not the point. The court determines the presence of a peculiar risk and the need for precautions. The factfinder defines what reasonable precautions were necessary. Liability is based upon a showing of injury proximately caused by the absence of the necessary precautions. What the independent contractor knew or should have known is not at issue.

**The doctrine with the proper fit is that of strict liability** as developed in products liability cases. The liability of the owner or occupier of land rests upon injury proximately caused by defective work thereon as defined by the absence of a precaution made

reasonably necessary in the face of peculiar risks inherent in the work. Once the court has found the need for precautions, it serves the policy underlying nondelegable duties to impose liability on the owner or occupier of land for injury proximately caused by any failure to take reasonable precautions.

**Therefore, we hold that when precautions are not taken against inherent danger, the employer is jointly and severally liable** for harm apportioned to any independent contractor for failure to take precautions reasonably necessary to prevent injury to third parties arising from the peculiar risk. Unless immune pursuant to the Tort Claims Act, the school district in this case is jointly and severally liable for that portion of the damages attributed to both the electrical contractor, whose installation violated minimum state standards, and the architect, who failed properly to supervise the project and inspect the system. In this case, that is the proportion of fault attributable to the failure to take the necessary precaution. This liability would be in addition to any fault apportioned by the jury to the school district for negligent maintenance.

Saiz v. Belen School District, 827 P.2d at 114-115 (emphasis added)(citations omitted). Unfortunately for the plaintiff estate in Saiz,<sup>5</sup> the New Mexico Tort Claims Act provided immunity to government entities for strict liability claims, including the defendant school district.

In this case, Inland is not a government entity and Washington's waiver of sovereign immunity is broader than New Mexico's, with no immunity for strict liability, or vicarious liability for that matter.<sup>6</sup>

Although Washington courts have found that vicarious liability applies to non-delegable safe workplace duties, as discussed above, Appellants

Vargas would certainly not object to this Court adopting New Mexico's

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<sup>5</sup> The Saiz case was "a wrongful death action brought against the Belen School District by the personal representative of a young boy who was electrocuted by a high-voltage lighting system at a high school football game." Saiz, 827 P.2d at 102

<sup>6</sup> See RCW 4.92.090 (waiver of sovereign immunity for claims against the State) and RCW 4.96.010 (waiver of sovereign immunity for claims against local government entities); See e.g. Afoa I and Afoa II (no issues of any sovereign immunity limitations in claims against government entity Port of Seattle)

application of strict liability to breaches of non-delegable duties such that Inland is strictly liable for Mr. Vargas's injuries.<sup>7</sup>

**D. While no showing of retained control is required for general contractors, who have *per se* control over their jobsites, evidence shows that Inland did retain control of Hilltop's work.**

Inland misrepresents certain facts and conclusions as "undisputed."

Inland also improperly resolves facts and inferences from those facts in Inland's favor.<sup>8</sup> For instance, Inland contends it "is undisputed that on May 23, 2013, only Hilltop employees were present in the Incident area."<sup>9</sup> Inland asserts this despite the fact that Ralph's pump operator Anthony Howell was operating the pump when Mr. Vargas was injured, and despite Inland superintendent Steve Miller's testimony that he and Inland superintendent Norm Anderson were on site that day.<sup>10</sup> Even on the page of testimony cited by Inland in support of this assertion, Gordon Skoog

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<sup>7</sup> This Court recently discussed the differences between vicarious liability for breaches of non-delegable duties with strict liability in Knutson v. Macy's W. Stores, Inc., which involved the non-delegable duties of a common carrier escalator owner. This Court explained:

Contrary to the argument of respondents, vicarious liability for the negligence of a contractor is not strict liability. A plaintiff who brings a negligence claim for injury on an escalator must make a prima facie showing of negligence. Summary judgment was properly granted in Tinder when the plaintiff relied solely on a theory of *res ipsa loquitur* to raise an inference of negligence. In contrast, the Knutsons did make a prima facie showing of negligence with their evidence that Schindler's servicing of the escalator was shoddy. Thus, the Knutsons are not seeking to have negligence presumed from the mere happening of the malfunction.

Knutson v. Macy's W. Stores, Inc., 1 Wn. App. 3d 543, 547-548, 406 P.3d 683 (Div. 1, 2017), distinguishing Tinder v. Nordstrom Inc., 84 Wn. App. 787, 791, 929 P.2d 1209 (Div. 1, 1997).

<sup>8</sup> Resolving fact questions in favor of the moving party, Inland, on summary judgment is improper under the summary judgment standard. The facts and reasonable inferences from those facts are considered in a light most favorable to the nonmoving party. Babcock v. Mason County Fire Dist. No. 6., 144 Wn.2d 774, 784, 30 P.3d 1261 (2001).

<sup>9</sup> Inland's Brief of Respondent, page 6

<sup>10</sup> CP 2052-2053 (Deposition of Steve Miller, page 23:24-24:5)

acknowledged that people from other companies were likely in the area at the time.<sup>11</sup> Although there is no requirement that the incident occur in a “common work area,” Inland’s assertion that it “presented undisputed evidence that the specific work area where the Incident occurred was not a common work area” is untrue.<sup>12</sup>

Inland also combines misstatements of the law with distortions of the factual record when it argues that it “is undisputed that Inland exercised no actual control, and retained no right to control, Hilltop’s concrete pour operation when Vargas was injured.”<sup>13</sup> As discussed above, no such showing is required since Inland, as a general contractor, has *per se* control over its jobsite under Stute. But even if a showing of control were required, the facts below support a showing that Inland had both control and the right to control the manner of Hilltop’s work.

As discussed in Appellants Vargas’s opening brief,<sup>14</sup> Inland superintendent Steve Miller testified that his job duties included “coordinating the job” and required him to “play babysitter when somebody cries, solve problems that arise.”<sup>15</sup> Hilltop foreman Matt Skoog

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<sup>11</sup> Hilltop owner Gordon Skoog testified:

Q. Do you know of any other companies that were near that area at that time?

A. I’m sure there’s people from the plumbers, electricians, things like that. I just don’t know.

CP 34, cited in Inland’s Brief of Respondent, page 6

<sup>12</sup> Inland’s Brief of Respondent, Page 26. As discussed extensively in the Brief of Appellants Vargas, pages 18-23, under Stute and Weinert there is no “common work area” requirement. Stute v. P.B.M.C. Inc., 114 Wn.2d at 456; Weinert v. Bronco Nat’l Co., 58 Wn. App. 692, 693-694, 795 P.2d 1167 (Div. 1, 1990). If there were such a requirement under the pre-Stute case of Bozung v. Condo Builders, Inc., 42 Wn. App. 442, 711 P.2d 1090 (1985), as argued by Inland, it is no longer good law.

<sup>13</sup> Inland’s Brief of Respondent, Page 1.

<sup>14</sup> Brief of Appellants Vargas, pages 17-18

<sup>15</sup> CP 2057 (Deposition of Steve Miller, page 42:2-8)

also testified that Steve Miller was involved in the decision as to where to park the pump truck that morning:

Q. Do you know who made that decision as to where to park the pump truck that morning?

A. I believe we all did in order to find the best spot for the pump to sit to pour.

Q. When you say “we all”, who was involved in that?

A. Steve Miller and I and possibly Don from Ralph’s Concrete Pumping.

CP 2180-2181 (Deposition of Matthew Skoog, Pages 59:22-60:3).

Mr. Vargas’s co-worker and son, Oscar Flores, describes how Inland people were constantly on the site and directing the work, including safety aspects.<sup>16</sup> Oscar Flores testifies that the Inland superintendent would often meet with the concrete pumper and the Hilltop foreman to decide how pumping operations should be conducted.<sup>17</sup> The Inland superintendent and other Inland people would be on site telling Hilltop workers what work to do and how to do it, and that Inland people would tell workers what do on the job generally, and especially regarding safety.<sup>18</sup> Mr. Flores also reports Inland people saw workers too close to the end hose when pumping was started, yet did nothing to keep them away.<sup>19</sup>

But despite Inland’s constant presence and Inland’s awareness that Hilltop workers were in the danger zone holding the hose when pumping started, Inland did nothing to stop this practice, did not address it in its

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<sup>16</sup> Ralph’s CP 4440-4443 (Declaration of Oscar Flores, ¶ 5)

<sup>17</sup> Ralph’s CP 4440-4443 (Declaration of Oscar Flores, ¶ 6)

<sup>18</sup> *Id.*, ¶ 6-9

<sup>19</sup> *Id.*

own Accident Prevention Program, and did nothing to ensure it was addressed in the Accident Prevention Program of Hilltop or anyone else. From these facts alone, a jury could find that Inland breached its common law duty “to take reasonable care to provide a safe place of work.” Kelley v. Howard S. Wright Const. Co., 90 Wn.2d at 330.

**E. Evidence shows Mr. Vargas was injured by breaches of common law duties and violations of WISHA regulations.**

As discussed in Vargas’s opening brief,<sup>20</sup> several WISHA regulations were implicated, and a jury could find that one or more of them were violated. Inland takes issue with the word “should” in WAC 296-155-682 (8)(b)(xv)(C) (“Aggregate should not exceed 1/3 the diameter of the delivery system.”) and argues that the regulation “is only a suggestion.”<sup>21</sup> At the very least the jury should be able to consider a violation of this specification as evidence of negligence under RCW 5.40.050, which provides, in part: “A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence ....” RCW 5.40.050; *See also* WPI 60.03.<sup>22</sup> Even industry standards that are privately issued and have no force of law are admissible as evidence of

<sup>20</sup> Brief of Appellants Vargas, pages 31-33

<sup>21</sup> Inland’s Brief of Respondent, Page 30. Inland argues the word “should” makes the regulation a suggestion and not mandatory. However, the Oxford Dictionary defines “should” as “Used to indicate **obligation, duty, or correctness**, typically when criticizing someone’s actions.” <https://en.oxforddictionaries.com/definition/should> (last visited Feb. 19, 2018) (emphasis added). *See also* Merriam-Webster Dictionary (“should” defined as “used in auxiliary function to express **obligation**, propriety, or expediency.”) <https://www.merriam-webster.com/dictionary/should?src=search-dict-hed> (last visited Feb. 19, 2018) (emphasis added).

<sup>22</sup> “The violation, if any, of a [statute] [ordinance] [administrative rule] [internal governmental policy] is not necessarily negligence, but may be considered by you as evidence in determining negligence.” WPI 60.03

negligence. Nordstrom v. White Metal Rolling and Stamping Corp., 75 Wn.2d 629, 453 P.2d 619 (1969). The Nordstrom court found the ladder code published by the American Standards Association to be relevant and admissible on the question of negligence, and approved the trial court's jury instruction in this regard. This was despite the defendant's plant manager's testimony that the code was merely a "suggestive code for a basic standard for ladders." Nordstrom, 75 Wn.2d at 644 (Hale, J. dissent).

**1. There are fact questions as to whether Hilltop's "duck and cover" training was actually provided, and to whether it could ever be considered "safe."**

Inland argues that "hilltop trained its workers about hose-whip 'blow outs,'" citing to the Oct. 31, 2016 Declaration of Matt Skoog.<sup>23</sup> In this Declaration, Matt Skoog claims:

Hilltop workers ... are taught to stop working, drop what they are doing, and duck out of the way immediately as soon as they hear the sound of the pump signaling that a blow out is about to happen. This training is repeated and exercised throughout the work of all Hilltop employees.

CP 1717 (Declaration of Matt Skoog, ¶ 9). As discussed in Vargas's opening brief, there are fact questions as to whether this "training" was actually in place prior to Mr. Vargas's injury.<sup>24</sup> Hilltop owner Gordon Skoog admitted that there was no written accident prevent program

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<sup>23</sup> Inland's Brief of Respondent, page 5, citing to CP 1717.

<sup>24</sup> Brief of Appellants Vargas, pages 10-11

addressing the hazards of plugs or blow outs before Hilltop submitted its “addition” to its safety book at the L&I inspector’s request.<sup>25</sup>

The assertions of Gordon Skoog and Matt Skoog that such “training” was provided is contradicted by the testimony of Oscar Flores, who worked for Hilltop for 2 ½ years prior to the incident.<sup>26</sup> He had worked on the North City Apartment job during previous concrete pouring operations involving Ralph’s Concrete Pumping, as well as on another job for Inland and Ralph’s.<sup>27</sup> Mr. Flores testifies that Inland personnel did not tell anyone about how to avoid hose whip injuries.<sup>28</sup>

**2. Even if Hilltop’s “duck and cover” training was actually provided, it does not protect workers from hose whip injuries; workers must be trained to stay out of the danger zone when starting to pump.**

Alan Woods, the training manager for Putzmeister America, who manufactured the subject concrete pumping equipment, testified as to facts regarding its use.<sup>29</sup> Mr. Woods testified that workers should be kept out of the danger zone when starting to pump, which is any time the pump starts as opposed to just the first pumping operation of the day.<sup>30</sup> He testified to other issues, including bending of the end hose, use of reducers, and

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<sup>25</sup> CP 2027-2028 (Deposition of Gordon Skoog, pages 76-77.); CP 1992 (Hilltop’s addition to safety book)

<sup>26</sup> Ralph’s CP 4440-4443 (Declaration of Oscar Flores; ¶ 5) **“Ralph’s CP” Refers to the Clerk’s Papers designated by and filed by defendant Ralph’s Concrete Pumping, Inc., in Case No. 76893-0-I, which is linked to this case.**

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* ¶ 9-11)

<sup>29</sup> Ralph’s CP 4446-4522. (Deposition of Alan Woods, March 16, 2017 (Volume 2)).

<sup>30</sup> Ralph’s CP 4499-4522 (*Id.*, Pages 226-231 and 248-249)

responsibilities of the pump operator.<sup>31</sup> He also testified that “duck and cover” was not an adequate safety plan:

Q. Based on your experience, why wouldn't you use those words [duck and cover]?

A. Because you cannot get away from it fast enough when it happens.

Q. How fast does it happen, if you know?

A. Instantly.

Q. When you say “instantly,” less than a second?

A. Yes.

Ralph's CP 4498 (Deposition of Alan Woods, 207:13-23

(objections omitted)); CP 4491-4498 (Id., Pages 200-207).

**3. Evidence supports findings that Mr. Vargas's injuries were also caused by air in the hopper and excessive aggregate size.**

Inland misleadingly states “the un rebutted evidence shows the concrete-pump hopper was always full.” While it is true that Miles' concrete truck driver Derek Mansur testified that the hopper was full, this self-serving testimony is uncorroborated as Mr. Mansur was the only one who could see the hopper at the time.<sup>32</sup> As described below, there is at least evidence concerning the way hose whips occur from which the jury could determine that a low hopper caused air to get into the system.<sup>33</sup>

In support of Appellants Vargas's claims that unsafe equipment was a cause of Mr. Vargas's injuries,<sup>34</sup> Putzmeister America training manager Alan Woods testified that a missing vibrator could result in a “bridge” of concrete that allows air to get into the hopper and cause the air

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<sup>31</sup> Ralph's CP 4505 (Id., Pages 232-241 (bending and reducer issues)); Ralph's CP 4515-4520 (Id., Pages 242-247 (responsibilities of pump operator))

<sup>32</sup> See CP 2103-2109 (Deposition of Derek Mansur, pages 58-64)

<sup>33</sup> Note that “the law does not distinguish between direct and circumstantial evidence.” WPI 1.03. There may also be more than one proximate cause of an event. WPI 15.01.

<sup>34</sup> Use of unsafe equipment violates WAC 296-155-682 (8)(b)(iii)

to “release explosively.”<sup>35</sup> In support of Appellants Vargas’s claims that the rock was too big for the hose, Putzmeister representative Thomas Hurley testified that oversized aggregate rock makes plugs more likely.<sup>36</sup>

**F. Expert testimony supports Appellants Vargas’s claims.**

Inland also incorrectly and misleadingly argues that “no expert stated on a more-probable-than-not basis” that WISHA was violated or Mr. Vargas’s injury was caused by Inland’s failure to keep workers out of the danger zone when starting to pump.<sup>37</sup> While Inland implies that expert testimony is required to support construction site safety claims, no such testimony is required. Inland cites no authority for such a proposition. Regardless, Appellants Vargas’s claims are supported by expert testimony. This includes testimony of construction safety expert Rick Gleason, concrete construction operations expert Al Hockaday, and concrete truck expert Glenn Murphy.

**1. Rick Gleason, concrete safety expert testifies to Inland’s poor safety culture and failure to coordinate safety as required of a general contractor.**

Safety expert Rick Gleason testifies there is not much a worker can do besides “duck and cover” when a hose whip is imminent. Because no worker should ever be in the danger zone when pumping is started, the self-preservational act of “ducking and covering” is absurd when offered as a safety plan. Mr. Gleason also testifies that hose whip injuries can be caused by introducing air in the system by allowing the hopper to run low,

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<sup>35</sup> Ralph’s CP 4467-4485 (*Id.*, Pages 176-194; Page 192:12-14 (“release explosively.”))

<sup>36</sup> Ralph’s CP 4486-4490 (*Id.*, Pages 195-199)

<sup>37</sup> Inland’s Brief of Respondent, Pages 29-30

by a clog or plug resulting in excessive pressure in the system that explodes when released, or a combination of the two.<sup>38</sup> He also testifies that Inland should have coordinated with the subcontractors to ensure the aggregate size did not exceed one-third of the hose diameter. He explains:

Inland fell below the standard of care by specifying the type of concrete that would be delivered, but not understanding that it could be up to 1.5 inches in diameter, and that the code is pretty clear that aggregate should not exceed one-third the diameter of the delivery pumping system.

CP 2353 (Deposition of Rick Gleason (Vol. 2), pages 122:2-7).

While the violent hose whip injury was caused by air, by a plug, or by a combination, Mr. Gleason testifies that the incident was ultimately caused by a lack of coordination on the jobsite, failure to establish and enforce an adequate accident prevention program under WAC 296-115-110, and a poor safety culture established or allowed by Inland.<sup>39</sup> Mr.

Gleason elaborates:

Inland as the general contractor had a nondelegable duty for safety and health of everyone on the job site, not just their own employees, and that they should have identified in their site safety plan the hazards of concrete pumping as a specific element that needed to be addressed from the overall safety plan, and made sure that all the subcontractors were coordinating the plan initially in the concrete pumping job assignment to make sure there was an overall culture of safety that was developed for the entire site. This would have included where the best place to set up the concrete pump would be, to have the right size -- ensure that the right size pump was ordered, to make sure the public wasn't endangered in any capacity, maybe flagging and traffic control would be necessary. And I listed a specific WAC code there, 296-155-

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<sup>38</sup> See CP 2135-2146 (Deposition of Rick Gleason (Vol. 1), pages 44, 62-63, 75-78, and 105; See also CP 2147-2165 (May 1, 2015 Report of Rick Gleason); See also CP 2166-2173 (American Concrete Pumping Association bulletin)

<sup>39</sup> See CP 2347-2380 (Deposition of Rick Gleason (Vol. 2), pages 113-116, 120-122, 127-136, 142-143, 147-149, 259-266, and 315-18)

110(3)(g), and that requires an on-the-job review of the practices to perform the initial job assignment safely.

So in this case, the initial job assignment is safely pumping concrete, involving three different subcontractors for Inland. And I felt like that wasn't adequately addressed either in the accident prevention plan or by Steve Miller, their superintendent. Also, there were power lines also nearby. And it seemed in the end that the aggregate was too big and the boom was too short, and too narrow, to go from five to a four to a three. And this was allowed because Inland wasn't effectively coordinating all of the safety elements that needed to be addressed and everything involving how important the start-up is of a concrete pumping operation. Mr. Miller wasn't out there, wasn't watching, wasn't involved when the accident occurred. He was in his office trailer. And that's the worst case time, when the concrete pump truck arrives, when the setup is there, from everybody's exposure, when a problem could occur.

CR 2354-2356 (*Id.*, pages 127:16-129:3).

**2. Al Hockaday, concrete construction operations expert testifies to Inland's unsafe practices.**

Al Hockaday is Plaintiffs' expert in concrete construction operations. At the time of his deposition, he was a Senior Safety Manager for Dragados and Seattle Tunnel Partners on the Seattle SR 99 viaduct replacement tunnel project, and his previous experience includes having responsibility for safety oversight for all the concrete pump operators and all the equipment at Conco Pumping.<sup>40</sup> Mr. Hockaday testifies as to the need for coordination between the Redi-mix driver, the concrete placement contractor, and the general contractor,<sup>41</sup> and the importance of these safety issues to be part of the Accident Prevention Program.<sup>42</sup> He described how violations of WAC 296-155, Part O, and the WISHA health

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<sup>40</sup> Ralph's CP 4523-4559 (Deposition of Al Hockaday, March 17, 2017, Pages 1-37)

<sup>41</sup> Ralph's CP 4592-4594 and 4616-4633 (*Id.*, Pages 148-150; Pages 172-189)

<sup>42</sup> Ralph's CP 4600-4601 (*Id.*, Pages 156-157)

workplace standards caused Mr. Vargas's injury.<sup>43</sup> When asked about the general contractor's contribution to the injury, he explained:

A. There's multitude of things that contributed.

Q. Such as?

A. Such as the general contractor is required to ensure that their subcontractors have procedures in place so they can conduct safe work.

Q. How does the general contractor go about requiring subcontractors to have procedures in place, as far as you understand that role of a general contractor?

A. My understanding of the role of general contractor -- because I've been a general contractor safety manager for most of my career -- is that it's not just the general contractor's employees that have to be managed for their safe work practices. There are risk assessment of hazards in the workplace. But the general contractor has to ensure that the subcontractors also meet or exceed the general contractor's safety-accident prevention plan. They have to make sure that they have received proper training. They have to receive -- they have to make sure that the subcontractors are performing risk assessment, identify the hazards, so to speak, and they implement the plan and they train them to make sure that they understand, in any language, what needs to be done to complete that work in a safe manner.

Q. You said they. Who is they?

A. The general contractor. The general contractor has to ensure that the subcontractor has adequate, effective, safe practices and training in place [including safety orientations and pre-task planning]

...

Safety orientations. Those safety orientations dictate what hazards are on the job site, what scopes of work are on the job sites, what other trades are going to be doing on the job sites. Simultaneous operations planning, so that all subcontractors understand that if they're doing work that could cause an impact or a hazard to another contractor, that they communicate that.

Pre-task planning. Execution of the safety plan or program. Evaluation of the safety plan and program, auditing activities to make sure that they are in conformance with site plans for safety, for work plans. That goes for quality, too, and production. Making sure that the training is documented, and also evaluating the process. Once they have evaluated the processes, they have the responsibility of doing a gap analysis

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<sup>43</sup> Ralph's CP 4583-4588 (*Id.*, Pages 124-129)

and making any prudent improvements to the safe work plans, job hazard analysis, activity hazard analysis, whatever it is called.

Ralph's CP 4584-4586 (Deposition of Al Hockaday, Pages 125:16-127:22). He testifies as to how Inland's inadequate safety practices caused the incident, including the following:

- Q. As you sit here today, do you have any opinions as to what aspects of the role of a general contractor relating to safety Inland failed to perform, if any, at this particular site that caused the hose whip incident?
- A. Yes, there are many that I have looked at. The main -- the main one that I look at for this particular case is that they did not ensure that there was a safe practice in place for -- not the hose whip, but for the crew to be hose whipped. A member of the crew that would receive an injury from a hose whip. There was no safe procedure -- written procedure in place by Inland. They didn't ensure that.
- Q. Okay.
- A. Not an adequate one.
- Q. Have you looked at the safety plans and programs for Inland in this case?
- A. Yes, I have.

Ralph's CP 4587-4588 (*Id.*, Pages 128:23-129:14).

**3. Glenn Murphy, Redi-mix concrete truck operations expert testifies to Inland's "negative safety culture."**

Glenn Murphy is Plaintiffs' Redi-mix concrete truck operations expert, who testifies regarding a number of issues pertaining to the operations and responsibilities of concrete pump drivers.<sup>44</sup> Mr. Murphy also discussed the "negative safety culture" on the subject project.<sup>45</sup> Although his testimony was mostly focused on Redi-mix truck operations,

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<sup>44</sup> Ralph's CP 4634-4713 (Deposition of Glenn Murphy, March 8, 2017); Ralph's CP 4714-4718 (Report of Glenn Murphy, Exhibit 11 to his deposition)

<sup>45</sup> Ralph's CP 4641-46-42 (*Id.*, Pages 31-32) and Ralph's CP 4702-4703 (*Id.*, Pages 115-116)

he also addressed the role and responsibilities of the general contractor Inland in coordinating operations between the driver, the pump operator, and the pouring crew, including the following:

A. It depends on what Inland's specific role was in the decision process that led to somebody taking the wrong size pump, showing up to do a job where a big one had been before and was now needed and sending a mixer driver there who sees three-inch hook-up on that pump and can't tell the guy what size rock he's carrying.

Ralph's CP 4709 (Deposition of Glenn Murphy, March 8, 2017, Page 127:5-11). He also explained:

Q. What is the general contractor's responsibilities regarding safety at a construction project in general?

A. All of them. It's your ass. It's your contract. It's your people on the ground. It's, I think, a little bit why we're here.

Ralph's CP 4711-4712 (*Id.*, Page 137:25-138:5).

**G. The lack of citations issued by L&I DOSH is irrelevant and inadmissible.**

The lack of citations by inspectors from the Department of Labor and Industries Division of Occupational Safety and Health ("L&I DOSH") in general or with respect to any WISHA code are inadmissible. With respect to traffic citations, "Washington has long held a traffic citation is not admissible in a subsequent civil case to prove the party committed the driving lapse." Hadley v. Maxwell, 144 Wn.2d 306, 314 n.3, 27 P.3d 600 (2001) *citing* Billington v. Schaal, 42 Wn.2d 878, 882, 259 P.2d 634 (1953). The same reasoning applies here. While L&I DOSH inspectors may be called at trial, their testimony as to the lack of citations would have the conclusory effect of telling the jury that no WISHA regulations

were violated. “No witness may express an opinion that is a conclusion of law or that tells the jury what result to reach.” Carlton v. Vancouver Care, LLC, 155 Wn. App. 151, 168, 231 P.3d 1241 (Div. 2, 2010) *citing* Tortes v. King County, 119 Wn. App. 1, 12, 84 P.3d 252 (Div. 1, 2003).

Allowing such testimony would allow admission of irrelevant and confusing evidence, such as facts related to the prosecutorial discretion of L&I DOSH, including the budget, resources, and priorities for enforcement actions, including the need to litigate in the event that the citation is challenged. As described above, Appellants Vargas have obtained ample evidence to prove that Inland is responsible for several WISHA violations which caused Mr. Vargas’s injury. But to obtain this proof the depositions of numerous witnesses were needed, and the opinions of several experts were obtained. The litigation process has included extensive briefing and many hearings at the trial level as well as the present appeals before this Court. Ultimately the case may need to be tried after remand to Superior Court. It would be unrealistic to expect L&I DOSH to go through a similarly extensive and expensive litigation process in order to enforce a few thousand dollars’ worth of citations. This also illustrates the need for plaintiffs such as Appellants Vargas acting as private attorneys general in the civil justice system in order to enforce WISHA and make Washington workplaces safer.

### III. CONCLUSION

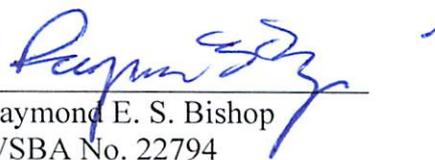
For the reasons set forth above, and in their opening brief, Plaintiffs / Appellants Vargas respectfully request that the trial court's dismissal of their claims against admitted general contractor Inland Washington LLC be reversed, and that they be awarded costs on appeal.

Respectfully submitted this 20<sup>th</sup> day of February, 2017.



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