NO. 103614-1

SUPREME COURT OF THE STATE OF WASHINGTON

JODY AUCOIN, individually and as personal representative of the Estate of DUCAS AUCOIN; HOLLAND AUCOIN; and TELLIS AUCOIN,

Respondents,

v.

C4DIGS, INC.,

Petitioner,

and

LEONARDI LANDSCAPING, INC.,

Petitioner

AMENDED MEMORANDUM OF *AMICUS CURIAE* ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON IN SUPPORT OF PETITIONS FOR REVIEW

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae is the Associated General Contractors of Washington ("AGC"). AGC was formed in 1922 and is one of Washington's oldest and largest professional trade associations. AGC represents the majority of commercial, industrial, and public works contractors in the State, and is a nationally chartered chapter of the Associated General Contractors of America. AGC's Washington membership encompasses almost 700 general contractors, subcontractors, and associates.

AGC is committed to fostering safe and productive worksites. AGC's Safety Team partners with Washington State Department of Labor & Industries on safety audits and developing rules and enforcement practices applicable to the construction industry. Accordingly, AGC and its members have substantial interest in the creation and interpretation of safety standards in Washington.

II. ISSUES OF CONCERN TO AMICUS

AGC submits this memorandum because the Court of Appeals' decision in *Aucoin v. C4Digs, Inc.*, 32 Wn. App. 2d 103, 555 P.3d 884 (2024) ("Decision") will create confusion and arbitrary rule enforcement in Washington's construction industry.

The Decision concerns a matter of first impression: does a general contractor's duty to provide a safe workplace extend to prohibited activity occurring outside the project site, regardless of whether the contractor knows of it? The Court of Appeals ruled as much in the Decision. Respectfully, the Decision raises significant questions necessitating review under RAP 13.4(b)(4):

First, the Decision created a new standard (*i.e.* a matter of first impression) but did not include any scope or guidance for the same. For example, the Decision frequently refers to an accident that occurred "adjacent" to the worksite, but did not explain why proximity is relevant, how close is "adjacent", or if adjacency is the limit for purposes of its new standard. This Court

should review to establish appropriate guidance and parameters, if this new standard survives appeal.

Second, the Decision deviates from the typical way Washington courts determine "control." It found that the general contractor was aware that, in the past, other parties attempted to improperly deliver material outside the worksite's designated delivery area. The Decision then leapt to the conclusion that the general contractor's past experience with prior improper deliveries meant it had "control" over any future improper delivery attempts by others. That type of past experience is far short of "retained control" of all future incidents, particularly an incident involving other parties and where the contractor had no knowledge it was happening. It also ignores that contractors typically are not responsible for a worker's intentional rule-breaking (known as 'unpreventable employee misconduct').

Third, the Decision creates an ambiguous standard for the State of Washington Department of Labor & Industries' ("Department") worksite inspections. General contractors

understand their obligation to provide a safe worksite. AGC's Safety Team works with the Department by performing generalized safety audits of its members, meaning the Department need only conduct "focused" inspections at such worksites. Because the Decision deviates from traditional worksite boundaries, thereby expanding a contractor's duties beyond the site and citing what the contractor may or may not know or experienced elsewhere, it is unclear what this means for purposes of site inspections, particularly "focused" ones.

Review should be granted to decide these important issues. This Court should clarify what workplace safety duty, if any, a general contractor owes for offsite accidents.

III. PROCEDURAL BACKGROUND & RULING

AGC generally adopts the procedural background from the petitions submitted by Leonardi Landscaping ("Leonardi") and C4Digs, Inc. ("C4Digs").

IV. LEGAL DISCUSSION

Per RAP 13.4(b)(4), this Court should review the scope of the Decision's control test for offsite accidents. Otherwise, general contractors face ambiguous and expanded duties without defined limits. And it is unclear how the Decision's new standard interacts with recognized legal doctrines and the permitted scope of Department worksite inspections. Review is necessary.

A. The Decision considered what safety duties general contractors owe outside the worksite, which is a matter of first impression. It applied a control-based test, but it did not articulate any scope or limits.

This Court should accept review because the Decision did not set scope or limits for a general contractor's liability for offsite accidents.

Aucoin was the employee of a material supplier. He was injured offsite during an unscheduled delivery. The supplier was improperly delivering materials off-site without the general contractor's knowledge or presence, and did not use the dedicated delivery area at the project site. Washington law has

not heretofore addressed whether a general contractor owes a safety duty in this circumstance.

The Court of Appeals adopted a test focused on whether the general contractor had control over the offsite worker. It explained: "where the accident at issue occurs at a location that is adjacent to the acknowledged 'workplace'—*the same basic control principles determine whether the general contractor owes a worker a statutory and common law duty* to provide a safe workplace." *Id*. at 13 (emphasis added). Yet its analysis hinged on whether "C4Digs had or retained the right to control the manner of Aucoin's work when he delivered pavers to the construction site." *Id*.

The Court of Appeals erred by not placing limits on this test. For example, the Decision believes it noteworthy that the accident happened "adjacent" to the worksite, that seemingly falls away for purposes of C4Digs' potential duty (whether it 'had or retained the right to control'). *See id*. at 3, 13. If proximity to the jobsite is important, then that should be clarified by this

Court, including whether the location need be visible from the worksite or whether a "non-adjacent" event is outside a contractor's duty. Without such clarification, general contractors are left with a confusing and potentially limitless standard.

Similarly, the Decision references that C4Digs "exerted control over deliveries and was in the best position to implement and enforce safety measures to protect workers." *Decision* at 16. Putting aside the obvious retort that mere power to enforce rules does not automatically make one liable anytime they are broken, the Decision does not identify relevant factors. Because C4Digs' designated a permitted load/unload zone at the site, does that mean it retained control over all deliveries regardless of location? Or is its creation of a delivery zone how a general contractor should act and appropriately fulfill its safety duties? If C4Digs was informed that a vendor was unloading material outside that designated area, how should it respond? Should it tell the vendor to stop, or will that make C4Digs liable for any other delivery

event by others in the future? This Court should grant review to clarify how a general contractor satisfies a duty for offsite safety.

Further, the Decision offers trial courts no instruction regarding how to apply this new standard. The Decision acknowledges Aucoin made his delivery without Leonardi or C4Digs' awareness. How many past experiences with others, or how similar must they be, or how should they be responded to, to establish control of future events? The Court of Appeals did not explain. This, too, needs to be clarified.

General contractors need guidance on what circumstances give rise to an offsite safety duty and how to satisfy that duty. There is no defined scope or limit to when this potential duty is owed. AGC is concerned that the Decision will lead to arbitrary and inconsistent enforcement and litigation, with no clear legal test or guidance to resolve disputes. This places an unfair and heavy burden on the construction industry and the courts.

B. The Decision's "control" analysis is premised on the general contractor's knowledge that other people had to be directed to the load/unload zone. This deviates from Washington's established control analysis and creates potential conflict with the unpreventable-employee-misconduct defense.

This Court should also accept review because the Decision conflates control with awareness. Under Washington law, a general contractor's safety duty relies on control. The Decision imputes control based solely on C4Digs awareness that other, unrelated parties previously attempted offsite delivery. The Decision found that C4Digs did not allow offsite deliveries and, further, knew nothing of the event in question (or even who Aucoin or his employer were).

A general contractor's common law duty is "to provide a safe place of work" within its retained control. *Vargas v. Inland Washington, LLC*, 194 Wn.2d 720, 731, 452 P.3d 1205 (2019) (*citing Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978)). Under the Washington Industrial Safety and Health Act ("WISHA"), a general contractor has "innate supervisory control" over the worksite and therefore has "per se

control" over it. *Id*. at 735–36 (citing *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 788 P.2d 545 (1990)).

The right to exercise control arises where the "general contractor has the authority to supervise a given area," so it "must ensure that the area is safe." *Vargas*, 194 Wn.2d at 733. Examples of this control include the general contractor's right to direct onsite work, hire subcontractors, and require the use of safety equipment. *Id*. at 734; *see also Kelley*, 90 Wn.2d at 331 (general contractor retained control due to its "right to require use of safety precautions such as lines or nets, or to halt dangerous work in adverse weather conditions.").

The Decision departs from this well-recognized analysis. It imputes potential control on C4Digs because in the past it had "exerted control over deliveries and was in the best position to implement and enforce safety measures to protect workers."

Decision at 16.[1] In other words, due to prior delivery attempts by others when C4Digs was aware it was happening.

But the Decision is not concerned with how C4Digs set rules prohibiting the conduct that occurred here. It found that C4Digs created a permitted loading/unloading zone at the site. *Decision* at 2. It also found C4Digs instructed deliveries happen in that zone, and no one should deliver outside it. *Id*. at 13–14. The Decision used these examples of C4Digs' responsible behavior to make it liable for a prohibited offsite delivery, i.e. that stopping others from improper conduct meant C4Digs had control over a future delivery it didn't even know about. *Id*. at 6.

That is inconsistent with Washington's control analysis. Control arises out of their "authority to supervise a given area." *Vargas*, 194 Wn.2d at 733. C4Digs did not have supervisory control over the area where Aucoin unloaded paving equipment.

[1] The Decision's control analysis affects the construction industry beyond general contractors. Subcontractors or other vendors could be subject to the same unpredictable and arbitrary standards.

That area was outside the worksite and C4Digs' designated load/unload zone. Courts assess "retained control" by analyzing whether the general contractor had the *opportunity* to supervise or direct work. *See Kelley*, 90 Wn.2d at 331. C4Digs did not have that opportunity with Aucoin or his employer (SiteOne) because it did not know SiteOne was even delivering. *Decision* at 3. In fact, C4Digs had no direct contract or contact with SiteOne and did not know it was involved with the project at all. *See C4Digs' Petition for Review* at 4.

Confusing unrelated past experiences with control will burden general contractors and expand their existing worksite safety duties in unpredictable ways. If this Decision stands, a general contractor could be deemed to have control over an unknown supplier merely because of its interactions with wholly different suppliers.

In addition to the flaws above, the Decision overlooks the concept of unpreventable-employee-misconduct defense and seemingly cannot co-exist with it.

This defense is available where a general contractor proves that a safety program was in place, communicated to employees, effectively enforced, and that it took steps to identify and correct violations. *Pro-Active Home Builders, Inc. v. Washington State Dep't of Labor & Indus.*, 7 Wn. App. 2d 10, 20, 465 P.3d 375 (2018), *as amended* (Jan. 8, 2019). The general contractor must show that the employee's conduct that resulted in a citation "was idiosyncratic and not foreseeable." *Id*. at 21.

The Decision is in tension with this defense. A general contractor cannot foresee an unknown supplier engaging in prohibited off-site conduct. Further, even a known supplier's decision to deliver materials after hours without any coordination is "idiosyncratic" and, by definition, not foreseeable.

The Decision's ruling goes beyond the established case law defining "control" and is premised on C4Digs' limited knowledge of the actions of other people. This Court should review and assess whether C4Digs' limited knowledge can constitute control.

C. The Decision creates a vague standard for worksite inspections and undermines the effectiveness of existing safety programs.

This Court should also accept review due to the Decision's potential impact on the defined safety standards across Washington. The construction industry and Department collaboratively on effective worksite inspections. But the Decision destabilizes the expectations of worksite compliance.

The Court of Appeals explained that the general contractor may owe a "duty to provide a safe workplace" for the offsite accident location. *Decision* at 13. This raises questions about how this duty will be enforced. The Department conducts inspections of construction worksites in accordance with chapter 49.17 RCW. This includes authorization of inspections for "[a]ny such workplace and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein." RCW 49.17.070(1)(b); *see also* WAC 296-900-12005.

The Decision expands the potential scope of these safety inspections. General contractors' compliance obligations are now ambiguous beyond the borders of their worksite.

This obligation could destabilize existing safe worksite programs. For example, AGC's Safety Team and the Department collaborate on the scope of worksite inspections.[2] AGC conducts site audits, so the Department need only conduct "focused" inspections. The intent, for those enrolled in this program, is to clarify the scope and reduce the inspection burden on the Department. The Department has even issued an internal directive (Directive 2.25) regarding same. Each contractor must pass AGC's audits to remain a member.

The Department encourages participation in these safety audits. It recognizes their value by offering "focused inspections" for members of the AGC Safety Committee and similar safety organization across Washington's construction

[2]The Associated General Contractors of Washington, *AGC Safety Team Brochure*, (May 2018), https://www.agcwa.com/wp-content/uploads/2019/08/SafetyTeam_Brochure_-_May2018.pdf

industry.[3] These inspections concentrate on potential hazards that are most likely to cause fatalities and/or injuries. This allows the Department to focus its time on key worksite hazards.

The Decision creates uncertainty for how the Department will enforce worksite safety programs. The Department's focused inspections begin with targeted review of certain parts of the defined worksite. The participating general contractors understand where the Department inspections intend to focus on.

The ability to target certain parts of the worksite is upended when the boundaries of the worksite are erased. Is the inspector now there to canvass the neighborhood – where does the inspection start or end? The Decision raises questions about how the Department will inspect and enforce worksite safety when the general contractor's duties are not tied to the worksite.

[3] Department of Labor and Industries, Division of Occupational Safety and Health, *Focused Inspections at Construction Worksites* (June 20, 2024), https://lni.wa.gov/dA/fe6d33cc4b/DD225.pdf

V. CONCLUSION

AGC respectfully asks that this Court grant C4Digs' and Leonardi's petitions for review. This Decision implicates issues of substantial public importance and will have significant impact on the construction industry in Washington.

This document contains 2498 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 14th day of January, 2025.

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DATED this 14th day of January 2025, at Seattle, Washington.

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s/ Rachel Leigh
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January 14, 2025 - 12:30 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	103,614-1
Appellate Court Case Title:	Jody Aucoin et al. v. C4DIGS, Inc., et al.

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