No. 103614-1

THE 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., and LEONARDI LANDSCAPING, INC.,

Petitioners,

HOL-MAC CORPORATION dba DONKEY FORKLIFTS; and JOHN DOES 1-5,

Defendants.

RESPONDENTS' ANSWER TO *AMENDED* MEMORANDUM OF *AMICUS CURIAE* ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON IN SUPPORT OF PETITIONS FOR REVIEW

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I. INTRODUCTION

Amicus curiae Associated General Contractors of Washington ("AGC") submitted a memorandum in support of the petitions for review of general contractor C4Digs, Inc., and subcontractor Leonardi Landscaping, Inc. AGC contends that the Court of Appeals decision in *Aucoin v. C4Digs*, Inc., 32 Wn. App. 2d 103, 555 P.3d 884 (2024), "involves an issue of substantial public interest" that should be determined by this Court. Memo. at 2, 5 (citing RAP 13.4(b)(4)). Because neither the petitions for review nor AGC's memorandum demonstrate that RAP 13.4(b)'s standard is met here, this Court should decline to accept review.

II. LEGAL ARGUMENTS IN RESPONSE TO MEMORANDUM OF *AMICUS CURIAE*

The Court of Appeals decision is a straightforward application of this Court's retained control exception jurisprudence and longstanding principles of summary judgment. Applying those principles, the Court concluded that general

contractor C4Digs owed a duty to Ducas Aucoin, the employee of an independent contractor, if the general contractor retained the right to control the manner in which Ducas delivered materials to C4Digs' jobsite. *Aucoin*, 32 Wn. App. 2d at 114, 116. AGC's arguments in support of review misapprehend both the Court of Appeals decision and this Court's decisional authority.

A. Consistent with this Court's Retained Control Exception Jurisprudence, the Court of Appeals Decision Limits the Scope of the Duty Based on Principles of Control

AGC first asserts that the Court of Appeals decision "creates a new standard" without defining the "scope" or "limits" of that standard. Memo. at 2, 6. This is not so. The decision properly applies the retained control exception adopted by this Court nearly fifty years ago. Consistent with this Court's decisional authority applying that doctrine, the Court of Appeals decision limits the scope of the duty by the scope of the retained control over the work. Review is not warranted.

Nearly half a century ago, this Court adopted the retained control exception to the general common law rule of nonliability to employees of an independent contractor. *Kelley v. Howard Wright S. Const. Co*., 90 Wn.2d 323, 330-31, 582 P.2d 500 (1978). The doctrine applies when the general contractor "retains control *over some part of the work*. The general contractor then has a duty, *within the scope of that control*, to provide a safe place to work." *Kelley*, 90 Wn.2d at 330 (emphases added). In *Kamla v. Space Needle Corp*., this Court explained that "the proper inquiry [is] whether there is a r*etention of the right to direct the manner in which the work is performed*, not simply whether there is an actual exercise of control over the manner in which the work is performed." 147 Wn.2d 114, 121, 52 P.3d 472 (2002) (emphasis added). Washington law is clear—the duty under the retained control exception is defined by the scope of the retained control. *Vargas v. Inland Washington, LLC*, 194 Wn.2d 720, 731, 452 P.3d 1205 (2019); *Afoa v. Port of Seattle*, 176 Wn.2d 460, 476-77, 296 P.3d 800

(2013) (*Afoa I*); *Kamla*, 147 Wn.2d at 121; *Kelley*, 90 Wn.2d at 330; *Farias v. Port Blakely Co*., 22 Wn. App. 2d 467, 473, 512 P.3d 574 (2022). *See also Afoa v. Port of Seattle*, 191 Wn.2d 110, 115, 421 P.3d 903 (2018) (*Afoa II*) (describing doctrine as applied in *Afoa I*).

In *Aucoin*, the Court of Appeals properly applied this longstanding authority to the specific facts of the case. The Court recognized that the accident resulting in Ducas's death "arguably "occur[red] offsite." 32 Wn. App. 2d at 109. Then, after thoroughly analyzing this Court's retained control jurisprudence, the Court of Appeals determined that the "same basic control principles" apply. *Aucoin*, 32 Wn. App. 2d at 116. Consistent with this Court's decisional authority, the Court of Appeals concluded that C4Digs owed a duty to Ducas Aucoin "if it had or retained the right to control the manner of [Ducas's] work when he delivered pavers to the [jobsite]." *Aucoin*, 32 Wn. App. 2d at 114, 116. Based on the testimony of C4Digs' project manager that he had previously directed other deliveries away

from the location where the accident occurred, the Court determined that genuine issues of material fact remain regarding whether C4Digs retained the right to control Ducas's work. *Aucoin*, 32 Wn. App. 2d at 116-117.

Contrary to AGC's argument, the standard applied in Aucoin is hardly "new"—this Court adopted the retained control doctrine nearly half a century ago. *Kelley*, 90 Wn.2d at 330-31. And, as the Court of Appeals recognized, the duty under the retained control doctrine is not boundless, as AGC suggests here. Rather, a general contractor has a duty under this doctrine only "'within the scope of [the retained] control.'" *Aucoin*, 32 Wn. App. 2d at 115 (quoting *Vargas*, 194 Wn.2d at 731).

Nevertheless, AGC faults the Court of Appeals for not "placing limits on this test." Memo. at 6. This argument misapprehends the basis for the Court of Appeals decision. Although the Court recognized that the case presented a new factual circumstance—that the accident occurred "adjacent to the acknowledged workplace," *Aucoin*, 32 Wn. App. 2d at 109—the

Court applied the same retained control doctrine that has been the law in Washington for nearly fifty years. As this Court has repeatedly explained, the duty under that doctrine is limited by the scope of the retained control. *Vargas*, 194 Wn.2d at 731; *Afoa I*, 176 Wn.2d at 476-77; *Kamla*, 147 Wn.2d at 121; *Kelley*, 90 Wn.2d at 330. AGC's argument that there are no "limits" to the duty is simply incorrect. As the Court of Appeals plainly held, C4Digs' duty is limited by whether the general contractor "had or retained the right to control" the manner in which Ducas delivered the pavers to the jobsite. *Aucoin*, 32 Wn. App. 2d at 114, 116.

AGC additionally requests that this Court accept review of the *Aucoin* decision to "clarify how a general contractor satisfies" the duty recognized by the Court of Appeals.[1] Memo.

[1] AGC takes issue with the Court of Appeals' pronouncement that C4Digs "exerted control over deliveries and was in the best position to implement and enforce safety measures to protect workers." *Aucoin*, 32 Wn. App. 2d at 119. It asserts that the "mere power to enforce rules does not automatically make one liable anytime they are broken." Memo.

at 8. But these are questions of breach, not of duty. The issue before the Court of Appeals was simply whether issues of fact remain regarding whether C4Digs owed a duty to Ducas to provide safe working conditions. *Aucoin*, 32 Wn. App. 2d at 107-08. Accordingly, neither the Court of Appeals nor this Court should address what conduct by C4Digs may be sufficient to satisfy any such duty. Indeed, the issue of breach is a factual question for the jury. *Vargas*, 194 Wn.2d at 730.

AGC is incorrect that there is "no defined scope or limit" to the duty recognized in the Court of Appeals decision. Consistent with this Court's longstanding retained control

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at 7. But the Court of Appeals decision did not establish liability; it simply determined that factual issues regarding control precluded summary judgment dismissal of the wrongful death claim. *Aucoin*, 32 Wn. App. 2d at 119. Moreover—and significantly—that the obligation to ensure safety is placed on the entity with the "power to enforce rules" is precisely the point of the retained control doctrine. As this Court has explained, its "doctrine seeks to place the safety burden on the entity in the best position to ensure a safe working environment." *Afoa I*, 176 Wn.2d at 479. That entity, as the Court of Appeals recognized, is the one with the right to control the performance of the work. *See Aucoin*, 32 Wn. App. 2d at 115.

jurisprudence, the Court of Appeals held that C4Digs had a duty to duty to Ducas only within the scope of the general contractor's right to control the performance of Ducas's work. *Aucoin*, 32 Wn. App. 2d at 114, 116. The scope of the duty arising from the retained control exception is limited by the scope of the retained control—not by the geographic location of the accident. AGC's argument that the Court of Appeals should have imposed geographical "limits" on that duty is without merit.

B. The Court of Appeals Decision Properly Applied Longstanding Summary Judgment Principles to Conclude that Issues of Fact Remain Regarding Control

AGC further argues that the Court of Appeals decision "deviates from" how our courts have "determine[d] control" under the retained control doctrine. Memo. at 3. This argument, too, is premised on a misapprehension of the Court of Appeals decision.

In concluding that issues of fact remain regarding whether C4Digs retained the right to control the manner of Ducas's work,

the Court of Appeals properly considered evidence that C4Digs had previously exerted control over deliveries when it directed other delivery drivers away from the steeply sloped street where Ducas was ultimately killed. *Aucoin*, 32 Wn. App. 2d at 116-17. Based on this evidence of prior control over deliveries—which the Court properly considered in the light most favorable to the Aucoins—the Court determined that "a reasonable jury could conclude that C4Digs had or retained the right to control the manner of [Ducas's] work when he delivered pavers [from the steeply sloped street] because he was unable to access the designated loading/unloading zone." *Aucoin*, 32 Wn. App. 2d at 117.

AGC argues that the Court's decision "conflates control with awareness," thus "imput[ing] control" on C4Digs based on the general contractor's "awareness" of prior delivery attempts at the location where the accident occurred. Memo. at 9. Not so. The Court's decision is premised not on an "awareness" by C4Digs of prior delivery attempts at the location of the accident,

but on the testimony of C4Digs' project manager that *he had exerted control over those prior delivery attempts*. The Court properly concluded that this evidence raised an issue of fact regarding C4Digs' retention of the right to control Ducas's delivery.

AGC suggests that the Court of Appeals erred by concluding that issues of fact remain regarding control because C4Digs was not informed of when the delivery would occur. Memo. at 11-12. This argument is directly at odds with this Court's directive that "a general contractor cannot shirk its duties merely by vacating the premises." *Vargas*, 194 Wn.2d at 733. And, contrary to AGC's assertion, *Kelley* does not hold that the general contractor must have "had the *opportunity* to supervise" the work. Memo. at 12 (citing 90 Wn.2d at 331). Rather, "[t]he test of control" is not the general contractor's "actual interference with the work," but its "right to exercise such control" over the work. *Kelley*, 90 Wn.2d at 330-31.

AGC further suggests that C4Digs' "responsible

behavior" of designating an unloading zone and prohibiting other delivery drivers from unloading on the adjacent steeply sloped street should absolve it of any liability. Memo. at 11. Again, these arguments *are relevant to breach*—whether C4Digs' conduct was sufficient to satisfy its duty—*not to duty*, the only question before the Court of Appeals.

Finally, AGC's contention that the Court's decision conflicts with the "unpreventable employee misconduct" defense is without merit. *See* Memo. at 12-13. First, this statutory affirmative defense—RCW 49.17.120(5)(a)—is a "defense to certain WISHA violations." *Legacy Roofing, Inc. v. Dep't of Labor & Ind.*, 129 Wn. App. 356, 370, 119 P.3d 366 (2005). It does not apply to the negligence claim asserted by the Aucoins here. Moreover, and significantly, the record is devoid of evidence of "misconduct" by Ducas Aucoin. Indeed, as the Court of Appeals recognized, Ducas unloaded the pavers on the dangerously sloped street "[b]ecause the loading/unloading zone was blocked" by a vehicle *that C4Digs had permitted to be*

parked there. *Aucoin*, 32 Wn. App. 2d at 107. There is no conflict between the Court of Appeals decision and the unrelated statutory defense set forth in RCW 49.17.120(5)(a).

C. Rather than Undermining "Safety Programs," the Court of Appeals Decision Properly Concludes that Duty Should be Imposed on the Actor Best Able to Prevent Harm

AGC's contention that the Court of Appeals decision "could destabilize existing safe workplace programs" is a red herring. *See* Memo. at 15. The Court of Appeals decision is a straightforward application of the retained control doctrine, which limits the scope of a general contractor's duty to the scope of its retained control over the work. *See, e.g., Vargas*, 194 Wn.2d at 731; *Afoa I*, 176 Wn.2d at 476-77; *Kamla*, 147 Wn.2d at 121; *Kelley*, 90 Wn.2d at 330. AGC fails to demonstrate how the Court's mere application of longstanding law will create "uncertainty" in the enforcement of worksite safety programs.

Rather than undermining worksite safety, the Court of Appeals decision adheres to the policy underlying this Court's

adoption of the retained control doctrine: "where the general contractor is in the best position to control job safety, it has a duty to do so, and the scope of its control defines the scope of its common law duty." *Aucoin*, 32 Wn. App. 2d at 115.

D. The Petitions Do Not Involve an "Issue of Substantial Public Interest" Warranting Review under RAP 13.4(b)(4)

AGC fails to demonstrate that the petitions here involve an "issue of substantial public interest" under RAP 13.4(b)(4). First, AGC has not shown that the Court of Appeals' application of longstanding law to the facts of this case "will have significant impact on the construction industry." Memo. at 17. Moreover, even had AGC made such a showing, this Court has never held that an impact on purely private business interests—like that asserted here—constitute issues of "substantial public interest."

Instead, as the Aucoins explained in their answers to the petitions, this Court has accepted review under RAP 13.4(b)(4) when the underlying decision implicated: a vast swath of sentencing proceedings and the potential to chill policy actions

by attorneys and judges in other proceedings, *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005); questions regarding parental rights under the Indian Child Welfare Act, *In re Adoption of TAW*, 184 Wn.2d 1040, 387 P.3d 636, 636-38 (2016); public safety concerns resulting from the removal of "an entire class of sex offenders" from registration requirements, *Matter of Arnold*, 189 Wn.2d 1023, 408 P.3d 1091, 1092-93 (2017); and the "constantly changing threat" of and "chaos wrought by COVID-19" in correctional facilities, *Matter of Williams*, 197 Wn.2d 1001, 484 P.3d 445, 446-47 (2021).

AGC baldly asserts that the purported "impact on the construction industry" by the Court of Appeals decision "implicates issue of substantial public importance." Memo. at 17. This Court has never so held. It should decline to do so now.

III. CONCLUSION

The Court of Appeals decision is a straightforward application of this Court's retained control doctrine. AGC has failed to show that the petitions filed here involve "issues of

substantial public interest," as required to warrant review under RAP 13.4(b)(4). For the reasons set forth herein, and in the Aucoins' answers to the petitions, this Court should deny review.

Respectfully submitted this 31st day of January 2025.

The undersigned certifies that this answer consists of 2,491 words in compliance with RAP 18.17(c)(10).

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CERTIFICATE OF SERVICE

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