No. 103614-1

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 84921-2-I

WASHINGTON STATE COURT OF APPEALS
DIVISION ONE

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

Respondents,

v.

C4DIGS, INC.,

Petitioner,

and

LEONARDI LANDSCAPING, INC.,

Petitioner

PETITIONER C4DIGS, INC.'S RESPONSE TO ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON'S AMICUS MEMORANDUM

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I. INTRODUCTION

Petitioner C4Digs, Inc. ("C4Digs") submits this reply to the amicus memorandum of the Associated General Contractors of Washington ("AGC"). This is submitted in accordance with this Court's January 22, 2025 letter authorizing responsive briefing.

AGC's amicus memorandum hits the nail on the head. The Court of Appeals' decision (the "Decision") creates an overbroad and vague standard for workplace safety. It broadly applies a general contractor's onsite safety obligations beyond the physical boundaries of the construction project without any parameters or guidance. And it departs from prior case law on the retained-control exception. Instead of requiring the right to exercise control, the Decision applies this exception based only on the general contractor's awareness of the actions of other suppliers.

AGC details this Decision's impact on the construction industry. This upends both well-developed legal tests and the

basic operations of a construction worksite. AGC's compelling concerns demonstrate the need for review.

II. RESPONSE TO AGC'S AMICUS MEMORANDUM

C4Digs is in accord with AGC's arguments and adopts them by reference.

AGC's perspective is valuable here. It is a professional trade association representing the voices and interests of commercial, industrial, and public works contractors in Washington. It has a comprehensive understanding of the on-the-ground effects of laws and regulations for the construction trade.

C4Digs is a Seattle-based general contractor. It welcomes AGC's perspective on how this Decision impacts not only the parties in this case, but also construction professionals across the state.

1. AGC's analysis correctly observes that the Court of Appeals' ruling on a matter of first impression created an overbroad and vague test. The Decision imposed an offsite workplace-safety duty without any parameters or defined scope.

AGC correctly observes that the Court of Appeals resolved a matter of first impression in a way that causes turmoil for the construction industry. The Decision's newly articulated test lacks the necessary limits or defined scope.

This expansive ruling concerned an issue of "first impression," as acknowledged in the Decision. *See Decision* at 5 (observing that "no Washington court has previously held that a general contractor has a statutory or common law duty to provide a safe workplace."). The Court of Appeals resolved this open question by ruling that the "same basic control principles determine whether the general contractor owes a worker a statutory and common law duty to provide a safe workplace" for the offsite accident. *Id*. at 13.

AGC correctly explained that this is a significant expansion of a contractor's safety duties. A general contractor

owes a duty to provide a safe workplace to subcontractors and independent-contractors under the retained-control exception because of innate supervisory authority, including "'per se control over the workplace.'" *Vargas v. Inland Washington, LLC*, 194 Wn.2d 720, 736, 452 P.3d 1205 (2019) (analyzing this duty under Washington Industrial Safety and Health Act) (quoting *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 788 P.2d 545 (1990)). And general contractors owe a common law duty "'within the scope of that control, to provide a safe place of work.'" *Id*. at 731 (quoting *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978)).

The Decision untethers this duty from any previously recognized scope. It focused on a variety of other facts, including that C4Digs established and permitted a specific delivery area, as well as the fact that Aucoin's crash was "adjacent" to the worksite. *Decision* at 2–3. The Decision also acknowledged that Aucoin made the delivery without providing any notice to the general contractor. *Id*. at 3.

As AGC explains, this Decision's analysis imposes an overbroad and ambiguous test on general contractors. Is retained control tied to "per se control over the workplace," as noted in cases such as *Vargas*, or is it now based solely on the general contractor's awareness of independent contractors? And how does that apply to this situation, where C4Digs was not even aware of the material supplier at issue?

All of these questions arise out of the Decision, but no guidance is given. A grant of review allows this Court to place appropriate limits on the general contractor's workplace-safety duty.

AGC's amicus memorandum also demonstrate that Aucoin misapprehends the impact of this Decision. Aucoin contends that this is a routine application of the retained-control exception. It argues that this is consistent with a general contractor's liability where it "'retains control over some part of the [independent's contractors'] work.'" *Aucoin's Answer to C4Digs' Petition for Review* at 2 (quoting *Kelley*, 90 Wn.2d 323).

So "'[t]he general then has a duty, within the scope of that control, to provide a safe place to work.'" *Id.*

Aucoin's opposition to review by this Court misreads the Decision and misunderstands the construction industry. General contractors need to know their scope of responsibility. And they need to know how to mitigate against risk. As AGC asks: is there anything C4Digs should have done beyond permitting a designated delivery zone? If one material supplier attempts delivery offsite, does that mean a general contractor has retained control over each and every material supplier's delivery in the future? General contractors need to know how their onsite safety duty applies offsite, *if at all*.

Review of this ruling on a "matter of first impression" is justified. The Decision creates expansive and vague liability across the construction industry. This Court now has a chance to eliminate this confusion and clarify the applicability and scope of a contractor's workplace-safety duty.

2. AGC's analysis demonstrates how the Decision conflicts with Washington law, justifying review under RAP 13.4(b)(1) and (2).

In addition to the Courts of Appeals ambiguous test for workplace-safety duties, AGC also correctly observes that the Decision expands the definition of control far beyond prior case law.

Under the retained-control exception, an employer is not liable for injuries incurred by an independent-contractor unless that employer retains control over the manner in which the independent contractors works. *See Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 119–120, 52 P.3d 472 (2002). The "test of control is not the actual interference with the work of the subcontractor, but the right to exercise such control." *Kelley*, 90 Wn.2d at 330–31.

Washington courts only apply this exception in circumstances where a general contractor or owner demonstrably is involved or has the right to be involved with an independent contractor's work. *Phillip v. Kaiser Aluminum & Chemical*

Corp., 74 Wn. App. 741, 875 P.2d 1228 (1994) is illustrative of how this exception is applied. There, the owner and operator of a worksite hired an independent contractor to dismantle and remove a piece of equipment. *Id.* at 743. The owner/operator provided the independent contractor with the tools and the protective equipment to perform this work. *Id.* And the owner/operator's supervisor routinely met with the independent contractor, discussing safety and giving directions on the daily performance of work. *Id*. The Court of Appeals applied the retained-control exception because of the owner/operator's significant involvement in the independent contractor's work. *Id*. at 752–53 (holding that the owner/operator "was in charge of the way in which the work was done" and that "these facts show a right to control safety-related matters, and an outgrowth of that right was a common law duty of care.").

That heightened level of involvement contrasts with cases where Washington courts declined to apply the retained-control exception. In *Kamla*, this Court declined to apply the exception

because a worksite owner did not retain control by simply letting the independent contractor on to the worksite. *Id.*, 147 Wn.2d at 121–22. Similarly, in *Shingledecker v. Roofmaster Products Co.*, 93 Wn.App. 867, 971 P.2d 523 (1999), the Court of Appeals declined to apply this exception where a roofing company ordered materials from a supplier. *Id*. at 872. The roofing company only told the supplier when and where it wanted the materials delivered. *Id.* It did not specify the means of delivery. *Id*. In other words, courts look for some form of retained control. Courts do not apply this exception just because a general contractor and independent contractor interacted or had a business relationship.

AGC correctly observes that the Decision departs from this control analysis. C4Digs had no direct contract or contact with Aucoin's employer, nor was C4Digs aware it was involved with the project. Instead, the Decision relies on C4Digs creating a permitted delivery area at the site and its instructions to other suppliers to unload there. *Decision* at 2, 13–14.

AGC identifies how this analysis departs from the case law and creates problems for contractors in this state. Washington courts consider whether a general contractor had the right to exercise control over a specific independent contractor. This analysis should not use a general control's knowledge of one independent contractor's actions to infer control over a separate independent contractor (that the general contractor had no knowledge of). The records shows that C4Digs did not retain any control over Aucoin.

AGC further details how this Decision will impact the construction industry if it is not reviewed. A general contractor may be found to retain control over every supplier, even suppliers it is unaware of, just because it interacts with one supplier. This changes the exception from being about control to being solely about knowledge. That is contrary to Washington case law.

AGC explains how this Decision departs from the retained-control exception and how it will impact the

construction industry. The Decision substitutes "knowledge" for the "retained control" requirement and expands a general contractor's duties to every hypothetical supplier and subcontractor, regardless of their actual relationship. This "retained control" analysis further necessitates review.

3. AGC's analysis demonstrates the Decision's statewide impact on the construction industry, justifying review under RAP 13.4(b)(4).

The Decision undermined the established scope of a construction worksite. AGC details the practical implications of this ruling.

AGC understands how contractors manage their sites. Its members are subject to "inspections for "[a]ny such workplace and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein." RCW 49.17.070(1)(b). Contractors prepare for those inspections not only by rigorously reviewing their sites, but also by working with the Washington State Department of Labor & Industries in programs such as AGC's Safety Team. *See AGC's Amicus*

Memorandum at 15–16. This creates clear expectations and standards, helping contractors ensure a safe worksite.

These previously clear expectations will be undermined by the Decision. General contractors understand that they must provide a safe worksite and they implement the necessary precautions accordingly. As an example, if roofers are coming onsite and risk being exposed to air contaminants while performing their work, the general contractor provides the necessary personal protective equipment for those roofers. The general contractor establishes the worksite, assigns the work, and protects workers from the resulting risk on that worksite.

But the Decision creates uncertainty about where that duty ends. If those same roofers hit a car while driving to the worksite, would the general contractor be liable? Would it matter if the roofers were near their own office? What about if they were "adjacent" to the worksite? And if the general contractor was aware that a different subcontractor had separately been in an accident, would that mean the general contractor needed to

mitigate the risk so it could not happen to any other subcontractor?

The Decision creates questions about a general contractor's safety obligations, but it does not provide any answers. This means general contractors do not have any guidance on how to meet these new potential bases for liabilities. The Decision's impact on the construction industry necessitates review. This Court should set the appropriate limitations on the worksite-safety duty.

III. CONCLUSION

AGC's amicus memorandum further demonstrates the need for review. This voice for Washington's construction industry details how the Decision undermines existing Washington law, is contrary to the public interest, and creates uncertainty for the trade's day-to-day operations. This Court should grant review under RAP 13.4(b)(1), (2), (4).

This document contains 1,967 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 6th day of February, 2025.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 6th day of February, 2025.

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