No. 1037414

SUPREME COURT
OF THE STATE OF WASHINGTON

JOHN NIECE,

Petitioner,

v.

PIERCE COUNTY RECYCLING COMPOSTING AND DISPOSAL, LLC DBA LRI; and STEARNS, CONRAD AND SCHMIDT CONSULTING ENGINEERS, INC. DBA SCS ENGINEERS,

Respondents.

ANSWER TO PETITION FOR REVIEW

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Cases

Other Authority

I. IDENTITY OF PARTY ANSWERING

John Neice herby answers the Petition for Review filed by Pierce County Recycling, Composting, and Disposal, LLC, d.b.a LRI ("LRI") on December 27, 2024.

II. CITATION TO COURT OF APPEALS DECISION

Mr. Neice requests that this Court deny discretionary review of the Court of Appeals' published opinion dated October 15, 2024, as it relates to the issue of premises liability raised in the Petition for Review by LRI. *See LRI Appendix 1.*

III. ISSUES PRESENTED FOR REVIEW

Did the Court of Appeals correctly determine that there is a genuine issue of material fact, precluding summary judgment, as it relates to premises liability as to Defendant LRI? YES.

IV. STATEMENT OF THE CASE

John Neice refers to the Petition for Review filed by Mr. Neice with this court on December 27, 2024, and incorporates herein the Statement of the Case enumerated therein.

V. ARGUMENT

A. Review is Not Warranted under RAP 13.4(b)

RAP 13.4(b) provides that the considerations governing acceptance of review are:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Indeed, LRI's petition for review makes no reference whatsoever to RAP 13.4(b). Further, the Court of Appeals decision has no conflict with any decision of the Supreme Court or Court of Appeals. As is discussed in Section C below, the Court of Appeals opinion does not conflict with *Payne v. Weyerhaeuser Co.,* 30 Wn. App. 2d 696, 718, 546 P.3d 485 (2024) nor *Eylander v. Prologis Targeted U.S. Logistics Fund,* 2 Wn.3d 401, 403, 539 P.3d 376 (2023) because those decisions

by the Court of Appeals Decision II and the Supreme Court, respectively, pertain to known and obvious dangers, whereas Mr. Neice was never made aware of the dangers of gasses at the landfill, nor were he or his coworkers required to wear gas monitors. CP at 12, 32, 44, 216, 308. The danger in the present matter was not known or obvious, and it would be contrary to Washington law to expand those holdings because, as elaborated in Section C, the sophisticated corporate landowners are in the best position to protect invitees on their land from similar dangers. Review is not warranted under RAP 13.4(b)(1) or (2), nor is there any significant question of law under the Constitution warranting review under RAP 13.4(b)(3). Moreover, LRI does not meet the burden of demonstrating how allowing the Plaintiff to move forward with his premises case impacts the public policy regarding workplace safety. LRI has failed to meet their burden under RAP 13.4(b) to warrant Supreme Court review.

B. Mr. Neice was a business invitee of LRI

LRI owed a duty to Mr. Neice as a business invitee and breached its duty, proximately causing Mr. Neice's injuries.

The Court of Appeals correctly determined that Mr. Neice was a business invitee in his work as a surveyor on the property owned by LRI because he was the employee of an independent contractor that LRI hired. *LRI Appendix 1, Opinion* at 10.

To determine Neice's status, the Court's premises liability analysis cannot begin and end with the contract. Instead, the Court "must look at the substance of the relationship" to determine Neice's status. *Afoa v. Port of Seattle*, 176 Wn.2d 460, 468, 296 P.3d 800 (2013) ("Our premises liability analysis cannot begin and end with the fact that the Port has labeled its contract with Afoa's employer EAGLE as a "license." Instead, we must look at the substance of the relationship to determine Afoa's status.")

In *Afoa,* the Supreme Court held that, "Afoa was plainly a business invitee because he was on the premises for a purpose

connected to business dealings with the Port." *Afoa,* 176 Wn.2d at 468. "The Port is in the business of running an airport, and Afoa was doing airport work. Indeed, he was doing work (loading and unloading airplanes) without which Sea–Tac Airport could not operate. Afoa was unquestionably on the premises for a purpose connected to business, so he is a business invitee." *Id.* "The employees of an independent contractor hired by the landowner are [business] invitees." *Payne,* 30 Wn. App. 2d at 718.

Mr. Neice was on the premises for the purpose of work connected to business dealings with LRI, namely the repair of leachate seeps on the West Slope of the landfill, at the time of the injury. CP 11, 421-423. Further, Mr. Neice was an employee of independent contract Scarcella, hired by LRI and is therefore a business invitee. The Court of Appeals appropriately determined Mr. Neice's status as an invitee. *See LRI Petition for Review Appendix 1, Opinion* at 10 ("Here, Neice was LRI's business invitee because he was the employee of an independent

contractor that LRI hired. *Afoa,* 176 Wn.2d at 467-68.

C. LRI knew, or should have known, of the presence of dangerous landfill gasses and should have required the use of four-way gas monitors; LRI should have expected that Mr. Neice would not discover or realize the danger; and LRI failed to exercise reasonable care to protect Mr. Neice

Because Neice was a business invitee, LRI is subject to liability for physical harm caused to Neice by a condition on the land if LRI:

> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> (c) fails to exercise reasonable care to protect them against the danger.

Johnson v. Liquor & Cannabis Bd., 197 Wn.2d 605, 612, 486 P.3d 125 (2021) (quoting Restatement (second) of Torts § 343).

Subsection (a) provides requirements analogous to the traditional notice requirement, which is proof of actual or constructive notice. *Id.* Actual notice is the same as "knowing" that the condition exists. *Id.* Constructive notice arises where

the condition has existed for such time as would have afforded the proprietor sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger. *Id.*

At a minimum, a genuine issue of material fact exists as to LRI's liability to Mr. Neice as an invitee. LRI knew, or should have known, of the presence of dangerous landfill gases, and further the possibility of Mr. Neice becoming injured by landfill gasses and should have required the use of four-way gas monitors. *See* Klein Declaration, CP at 449-54. LRI's orientation briefing lists the presence of potentially deadly gas as a hazard associated with activities on the landfill. CP 148-149. There is evidence to support that LRI knew or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk of harm to invitees such as Mr. Neice.

The Court of Appeals appropriately determined that at a minimum, a genuine issue of material fact exists for the

"proposition that LRI knew, or by the exercise of reasonable care, would have discovered the possibility of Neice becoming injured by landfill gas." *LRI Petition for Review Appendix 1, Opinion at 10.* The Court of Appeals recognized that as support for this, "[t]he professional engineer who served as Neice's expert witness declared that exposure to landfill gas "is known to result in adverse health effects." CP at 449. Additionally, LRI's orientation briefing lists the presence of potentially deadly gas as a hazard associated with activities on the landfill." *Id.*; CP at 148-149.

There is also a question of fact as to whether LRI should have expected that invitees such as Mr. Neice would not discover or realize the danger, or would fail to protect themselves against it. The Court of Appeals also correctly determined that, at a minimum, a genuine issue of material fact exists as to this element. *LRI Petition for Review Appendix 1, Opinion* at 10-11. Scarsella admitted it did not require its employees to wear gas monitors and the record reflects that LRI and Scarsella worked

closely together, such that LRI cannot claim that it was unaware Scarsella employees were working without gas monitors. *See* CP at 32, 44, 216, 153 ("Scarsella Bros., Inc, admits that. . . did not require Plaintiff or other Scarsella employees to wear or use gas monitors. . ."; "Coordinate all tasks with LRI personnel"; "Do NOT enter a confined space without proper authorization from LRI."). The record suggests that LRI knew that Scarsella employees such as Mr. Neice would not discover or realize the danger or would fail to protect themselves against the danger of landfill gases.

Finally, LRI failed to exercise reasonable care to protect Mr. Neice from the danger. The Court of Appeals also correctly determined that, at a minimum, a genuine issue of material fact exists as to this element. *LRI Petition for Review Appendix 1, Opinion* at 11. Expert Klein opined that the "risk of exposure to landfill gas can be reasonably mitigated" by gas monitors, and described such as "prudent administrative control[s]. . . utilized by the industry to warn users of the hazards of the atmosphere

that they are working in." CP at 452. LRI did not require contractors to wear gas monitors. CP at 32. Other personal protective equipment was required, however, such as hard hat and safety glasses, and LRI could have included gas monitors in its orientation briefing and safe work practices requirements. CP at 152. Mr. Neice was never told that landfill gas could be dangerous or about the landfill gases associated with the work he was performing. CP 308. The day of the incident, shortly before Mr. Neice's injury, the west slope where the excavation and injury occurred smelled especially bad. CP at 11. The fact that work continued, despite the smell, reflects that Neice was not the only employee who did not understand the danger, further demonstrating that LRI failed to exercise reasonable care to protect invitees from the danger.

"A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, **unless the possessor should anticipate the harm despite such knowledge**

or obviousness." *Payne*, 30 Wn.App. 2d at 719 (citing Restatement §343A (1)). If the danger is "open and obvious", LRI is still liable for harm caused thereby if it should have anticipated the harm, despite the open and obvious nature of the danger. *See Afoa,* 176 Wn.2d at 469, and *Kinney v. Space Needle Corp.,* 121 Wn. App. 242, 250, 85 P.3d 918 (2004) (citing *Kamla v. Space Needle Corp.,* 147 Wn.2d 114, 126, 52 P.3d 472 (2002); *Iwai v. State,* 129 Wn.2d 84, 94, 915 P.2d 1089 (1996)). The reasoning is: "if [the invitee] knows the actual conditions, and the activities carried on, and the dangers involved in either, he is free to make an intelligent choice as to whether the advantage to be gained is sufficient to justify him incurring the risk by entering or remaining on the land." *Payne*, 30 Wn. App. 2d at 720.

In this situation, John Neice has testified he was never informed of the potential presence of dangerous gas during excavation. CP 308. LRI failed to alert Mr. Neice as to the danger of landfill gasses, and by Mr. Neice not knowing he was stripped of any opportunity for "intelligent choice" as is

conceptualized in the reasoning behind the standard for open and obvious dangers. *Payne*, 30 Wn. App. 2d at 720. Mr. Neice could not protect himself from a danger he was not aware of. The danger of the landfill gasses was not "open and obvious".

Further, even if this Court were to find that the danger was open and obvious, LRI should have anticipated the harm to employees of Scarsella such as Mr. Neice when LRI was working closely with such employers and was aware that they were not using gas monitors. CP at 153. Even if the danger was open and obvious, LRI is liable for the harm because it should have anticipated the harm due to LRI's unique depth of knowledge about the risks on site. *See Afoa,* 176 Wn.2d at 469*; Kamla,* 147 Wn.2d at 126. This depth of knowledge is exhibited by the LRI requirement that all incidents and emergencies must be immediately reported to LRI, as well as all hazardous chemicals and any unsafe conditions. CP at 149, 153.

The recent Washington State Supreme Court decision in *Eylander,* is not applicable in the present situation because the

Eylander Court discussed the landowner's duty to remediate **known or obvious dangers.** 2 Wn.3d at 403.

Payne reiterates the holding of *Eylander* and is not applicable for the same reasoning. Both decisions are explicitly limited to known or obvious dangers. *Payne*, 30 Wn. App. 2d at 717; *Eylander*, 2 Wn.3d at 404. The dangers at the landfill were not known or obvious. Mr. Neice was never made aware of the dangers of landfill gasses at the landfill, nor were he or his coworkers required to wear gas monitors. CP at 12, 32, 44, 216, 308.

Further, the holding in *Eylander*, as reiterated in *Payne*, would not be appropriately extended to nonobvious dangers because the landowner is in the most appropriate position to ensure that business invitees are protected against nonobvious dangers. Such an extension of the holding in *Eylander* would put business invitees in a variety of settings at risk for exposure to risk for which they are uninformed of, and in many cases (including Mr. Neice) not equipped for or educated to protect

themselves from such dangers. The landowner, as a sophisticated corporate entity with a unique depth of knowledge, rightly bears this responsibility.

Even if it were found by this Court that the danger was open and obvious, *Eylander* and *Payne* are both still distinguishable. In *Eylander,* the Plaintiff did not allege that the landowner retained control and owed duties based on that retention. *Eylander,* 2 Wn.3d at 406. Conversely, here, LRI did retain control over Mr. Neice's work, and Mr. Neice has raised that theory of liability. *See Mr. Neice's Petition for Review* at 11-12. In *Payne,* the company that delegated responsibility completely left the area taken out of service (tank two), and turned things over to the exclusive control of the delegated company for a task (scaffolding) that was completely separate from the type of work of the delegating company (pulp and paper mill). *Payne*, 30 Wn. App. 2d at 706-707. Here, conversely, Mr. Neice worked closely with LRI employees at the job site and LRI was intrinsically involved in the work performed by Mr. Neice,

and the work performed by Mr. Neice was also intrinsically related to the underlying landfill work. Neither *Eylander* nor *Payne* are persuasive here.

D. LRI's breach of duty proximately caused Mr. Neice's injury

To establish direct liability in negligence a Plaintiff must establish the existence of a duty, the breach of a duty, and injury to plaintiff proximately caused by the breach. *Farias v. Port Blakely Co.*, 22 Wn. App. 2d 467, 472, 512 P.3d 574, 581 (2022). Proximate cause consists of cause in fact and legal cause. *Martini v. Post*, 178 Wn. App. 153, 164, 313 P.3d 473 (2013). "Cause in fact, or 'but for' causation, refers to the 'physical connection between an act and an injury.'" *Id.* (quoting *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985)). This connection is demonstrated by showing the harm Plaintiff suffered would not have occurred but for the defendant's act or omission. *Id.* "[L]egal cause is grounded in policy determinations as to how far the consequences of a defendant's acts should extend." *Meyers*

v. Ferndale Sch. Dist., 197 Wn.2d 281, 289, 481 P.3d 1084 (2021).

"Causation is usually a jury question." *Mehlert v. Baseball of Seattle, Inc.*, 1 Wn. App. 2d 115, 119, 404 P.3d 97 (2017). "It becomes a question of law for the court **only** when the causal connection is so speculative and indirect that reasonable minds could not differ." *Id.* [Emph. Added].

LRI was specifically aware of the presence, and hazards, of landfill gas. The LRI Landfill Facility Contractor Orientation Briefing specifically states, "LRI requires that all employees and Contractors utilize proper standard Personal Protective Equipment (PPE) and follow general safe work practices." CP at 413. The LRI document goes on to list a number of PPE and Safe Work Practices. *Id.* LRI did not require the use of 4-way gas monitors. CP at 412-414. Michael Klein, PE, Plaintiff's Expert, concludes this failure by LRI to require the use of 4-gas multimeters "directly caused the dangerous condition on July 24, 2020, and injury to Mr. Niece." CP at 452.

Further, Expert Klein opines "it is more likely than not that Neice would not have suffered an inhalation exposure and injury from the landfill gas" but for LRI's failure to adequately warn and/or to require Scarsella employees to wear gas monitors. *Id.* Right after Mr. Neice got injured, Adam Dietmeyer the Superintendent said he got a different Scarsella employee "away from that area" because an LRI employee's gas monitor was going off. CP at 317. This supports the conclusion that the use of gas monitors was an appropriate protective measure that signaled to people on the jobsite to leave an area due to dangerous levels of exposure, and that LRI should have required such safety precautions for employees of independent contractors on its jobsite, such as Mr. Neice.

Mr. Klein has a clear basis for his expert opinion that LRI proximately caused Mr. Neice's injury, as the purpose of the 4-gas multimeters was to identify gas and warn users of hazards and the identification through this monitor could have mitigated the risk on the site and prevented Mr. Neice's injuries. CP at 452.

LRI's failure, as the landowner, to take safety precautions was the proximate cause of Mr. Neice's injuries. But for LRI's omission and failure to act, Mr. Neice would not have been injured. LRI's assertion that Expert Klein's opinions are conclusory is contrary to the record. Mr. Klein's opinions on proximate cause are supported by his extensive experience in this area and his example of how the use of these gas monitors are the industry standard for preventing this type of injury, and used by LRI employees on the site to prevent injury. CP 452, 454-473.

Further, there are sound policy reasons for why a sophisticated corporate Defendant and landowner, LRI, should be held responsible for the consequences of its failure to require gas monitors on its landfill site. Without such consequences, there is no accountability or means of encouraging such safety measures which can save people working on the site from life-altering injuries.

Mr. Neice was on the property owned by LRI for a purpose

connected to business dealings, and was an employee of an independent contractor hired by LRI, and was thus a business invitee. LRI knew or by the exercise of reasonable care would discover the condition, and should have realized that it involves an unreasonable risk of harm to invitees such as Mr. Neice; should have expected that invitees would not realize the danger or would fail to protect themselves against it; and LRI failed to exercise reasonable care to protect Mr. Neice from the danger. LRI's breach of its duty proximately caused Mr. Neice's life-altering injury when he was exposed to dangerous landfill gases on the west slope and is liable under the premise liability theory.

VI. CONCLUSION

Review is not warranted under RAP 13.4(b) as to the question of LRI's duties under the premises liability theory to invitee Mr. Neice. Mr. Neice was a business invitee of LRI, LRI knew the hazardous gasses were a condition which involved an unreasonable risk of harm to Mr. Neice, and should have expected that he would not realize the danger and failed to

exercise reasonable care to protect him, proximately causing Mr. Neice's life-altering injury from landfill gas exposure.

WORD COUNT CERTIFICATION

Pursuant to RAP 18.17, this answer contains 3396 words.

DATED: January 24, 2025.

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