No. 100768-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WAYNE WRIGHT, individually and as Personal Representative for the Estate of Warren Wright,

Respondent,

v.

EXXONMOBIL OIL CORPORATION,

Petitioner.

AMICUS MEMORANDUM OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF REVIEW

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters pending before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus curiae* briefs in cases that, like this one, raise issues of concern to the nation's business community.

Refusal to instruct the jury on the law governing dangers that are known or obvious to a business invitee threatens every business that has physical premises—which is to say, nearly all businesses. The Court of Appeals upheld this refusal despite repeated holdings by this Court and others that premises liability for "known or obvious" hazards is governed by Restatement (Second) of Torts § 343A (19657) and that, where the evidence

would permit a jury to find that a danger is known or obvious, the jury should be instructed in accordance with Section 343A.

The petition raises an issue of substantial public interest that should be determined by this Court. It satisfies the criteria in RAP 13.4(b)(1) and (2) as well. The Court should grant review.

STATEMENT OF THE CASE

In 1979, Northwestern Industrial Maintenance (NWIM) performed maintenance jobs at Mobil's Ferndale refinery. NWIM employed Warren Wright as a working foreman on a crew that, over three months, removed insulation from pipes, pumps, and other equipment in an out-of-service refinery unit. The NWIM workers knew that the insulation contained asbestos. They used respirators and took other precautions, including using wet methods to minimize airborne particles.

Mr. Wright worked for NWIM until 1988, performing services at other refineries. He died in 2015. An autopsy revealed mesothelioma. His son sued 3M (the maker of the facemasks Mr. Wright wore) and the owners of four refineries where he worked.

All defendants other than Mobil settled. At the end of the trial, the jury returned a verdict of $4 million, which was reduced after set-offs to $2.27 million plus attorneys' fees, costs, and interest.

Plaintiff based his negligence claim for asbestos exposure on two theories: first, that Mobil retained control over NWIM and failed to exercise ordinary care in overseeing its work; and second, that Mobil failed to use ordinary care to protect Wright as a business invitee. The only evidence of Mobil's control over the work was a contract provision requiring NWIM to follow prevailing safety laws. An instruction permitting the jury to find for plaintiff on this evidence, the Court of Appeals held, "is directly contrary to the case law establishing that a right to ensure compliance with relevant laws and regulations does not constitute retained control." *Wright v. 3M Co.*, 20 Wn. App. 2d 1028, 2021 WL 5879009, at*3 (2021) (unpublished). "Such an error is presumed prejudicial and requires reversal." *Id.*

Nevertheless, the Court of Appeals did not reverse, instead upholding the verdict on plaintiff's second theory, premises

liability. According to the Court of Appeals, a business invitee such as Mr. Wright can recover for physical injuries caused by a condition on the premises if the owner (a) knows or should know about the condition and should realize that the condition involves an unreasonable risk of harm to invitees, (b) should expect that the invitees will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect the invitees against the danger. Even where the danger is known or obvious to an invitee, the Court of Appeals held, the jury need not be instructed on known and obvious dangers. Mobil seeks review of this holding.

ARGUMENT

I. The decision of the Court of Appeals conflicts with decisions of this Court and the Court of Appeals.

In *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 139, 875 P.2d 621 (1994), this Court held that the trial court "did not instruct the jury correctly . . . on the [defendant's] duty regarding known or obvious dangers. Under Restatement (Second) of Torts § 343A," the Court continued,

> (1) A possessor of land is not liable to . . . 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.

Id. This section "is the appropriate standard for duties to invitees for known or obvious dangers." *Id*. (citations omitted).

"Where the danger to an invitee is known or obvious, the landowner's liability is limited by the Restatement (Second) of Torts § 343A(1)," this Court reiterated in *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 50, 914 P.2d 728 (1996). As the Court of Appeals acknowledged elsewhere in its opinion, Mr. Wright knew that dangerous asbestos was present where he was working at the Mobil refinery. He "took all precautions known at the time to limit his exposure to asbestos," he wore an OSHA-approved respirator "religiously," and he encouraged others to do the same. *Wright*, 20 Wn. App. 2d 1028, *5.

The trial court's refusal to instruct the jury under Section 343(A), as Mobil requested, was error. The Court of Appeals' insistence that it "was not legal error" (*id.*) and refusal to reverse

on this basis conflicts with the decisions of this Court as well as published decisions of the Court of Appeals.[1]

The Court of Appeals deemed the absence of a Section 343A instruction inconsequential because Section 343 includes the element of invitee knowledge.[2] The Court of Appeals was wrong. Whether a premises owner—here, Mobil—should have expected that invitees generally would not discover or realize the danger of asbestos in pipe insulation is a very different question from whether the NWIM crew, and Mr. Wright in particular, knew about it. Under Section 343A, the jury would have focused on **his** knowledge. Section 343A(1) says the landowner is "not liable" to invitees for physical harm caused by a condition "whose danger is known or obvious to them . . . ."

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[1] *See Suriano v. Sears, Roebuck & Co.*, 117 Wn. App. 819, 825–29, 72 P.3d 1097 (2003); *Bozung v. Condominium Builders, Inc.*, 42 Wn. App. 442, 447–48, 711 P.2d 1090 (1985).

[2] This was plaintiff's argument when he objected to the giving of a Section 343A instruction. *See* RP 1759–61. There is no truth to the suggestion that the trial court rejected Mobil's Section 343A instruction because there was insufficient evidence to support it.

Plaintiff's response to the petition for review does not try to defend the Court of Appeals' reasoning. Instead, plaintiff seeks to avoid review of the trial court's instructional error, an error of law, by arguing about the sufficiency of the evidence. Plaintiff asserts that it was proper to refuse to instruct on Section 343A because the evidence was insufficient to show contributory negligence or assumption of the risk. Plaintiff's conflation of these issues is contrary to Washington law.

It is up to the jury to decide whether a premises owner violated its duty to an invitee. On that question, the plaintiff bears the burden of proof. The trial court must instruct the jury in accordance with the law. If there is no basis to claim that a danger is known or obvious, then Section 343A does not come into play. If there is, however—and here, there plainly was—both *Tincani* and *Degel* hold that the jury must be instructed under Section 343A to properly evaluate the liability of the landowner.

The scope of a landowner's duty to business invitees does not depend on whether the landowner can prove an affirmative

defense such as contributory negligence or assumption of the risk. Equally, absence of contributory negligence or assumption of the risk cannot excuse the trial court's error in failing to properly instruct the jury on the duty of a premises owner.

To establish an express or implied primary assumption of risk, this Court has held, the defendant must prove that "the plaintiff (1) had full subjective understanding (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk." *Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 453, 746 P.2d 285 (1987); *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 636, 244 P.3d 924 (2010). Section 343A does not require the same elements. A premises owner may contend, as it does here, that it had no duty, not just that its duty (if any) was negated by the plaintiff's knowing, voluntary assumption of risk:

> The duty-creating exception and the duty-negating defense are not two sides of the same coin—as one would expect, since not only our Supreme Court, but the authors of the *Restatement*, recognize both the exception and defense.

Hvolboll v. Wolff Co., 187 Wn. App. 37, 48, 347 P.3d 476 (2015).

II. The trial court's error was not harmless.

After holding that the trial court's refusal to instruct the jury under Section 343A was not erroneous, the Court of Appeals offered that "any error in the trial court's failure to provide the section 343A instruction was harmless" because "Mobil was able to argue its theory of the case." *Wright v. 3M Co.*, 20 Wash. App. 2d 1027, *5. This suggestion does not withstand scrutiny.

Jury instructions, as the Court of Appeals acknowledged, "'(1) cannot be misleading, (2) must allow counsel to argue their theory of the case, and (3) must properly inform the jury of the applicable law, when read as a whole.'" *Id.* at *2 (quoting *Spencer v. Badgley Mullins Turner, PLLC*, 6 Wn. App. 2d 762, 787, 432 P.3d 821 (2018). One out of three is not sufficient. After all, the jury must be able to apply counsel's argument, not just listen to it.

To be sure, an erroneous instruction is not reversible unless it is prejudicial. But prejudice is assumed if the instruction is a clear misstatement of the law. *Id.* That was the case here.

And even if the instructions as given were merely misleading, prejudice is obvious: a $4 million verdict hangs by one thread, a finding of premises liability where the jury was not instructed properly on known or obvious dangers.

III. Mobil's petition raises an issue of substantial public interest that should be determined by this Court.

Every business with physical premises has invitees, a category that includes visitors, customers, patrons, and vendors. *See* Restatement (Second) of Torts § 332 (1965); *McKinnon v. Wash. Fed. Sav. & Loan Ass'n*, 68 Wn.2d 644, 649, 414 P.2d 773 (1966). It is of vital interest to businesses, therefore, that the legal standards governing their duties to invitees be stated clearly and applied consistently. This includes their duties with respect to known and obvious hazards. If an invitee knows about a hazard on the premises—as would be reflected, for example, in taking deliberate precautions to minimize exposure to a known hazardous substance—Section 343A teaches that the landowner is not liable to that invitee.

The issue of known or obvious dangers can arise in a variety of contexts. Consider a ski operator that hires an expert to evaluate and mitigate the risk of avalanches. Under the Court of Appeals' analysis, such an expert would be treated no differently than a novice skier who wanders unknowingly into an avalanche zone. The premises owner could be found liable to the avalanche expert for harm due to an avalanche under Section 343 even though Section 343A makes clear that the owner is not liable for physical harm caused by known or obvious dangers.

To take another example, consider a customer in a retail store who sees the supports for a floor sign protruding into a walkway, understands the hazards they present, and manages to trip over the sign anyway. The Court of Appeals' approach would treat such a person no differently than a customer who never saw the sign, even though the first customer (though not the second) indisputably knew about it.

To bring the point closer to home: a restaurateur might decide to renovate an old building that an inspector tells her has

asbestos-laden floor tiles. The restaurateur hires a remediation company to remove the tiles. Should the remediation company's employees—business invitees, each of them—be able to sue the restaurateur for exposing them to asbestos, without facing an instruction that addresses known or obvious dangers?

This Court's cases answer that question with an emphatic "no." Whenever known or obvious hazards are present, as the comment to WPI 120.07 states, an instruction based on Section 343A should also be given:

> In cases involving invitees and known or obvious dangers, the jury should be instructed in accordance with both sections 343 and 343A of the Restatement (Second) of Torts (1965).

Stating that an instruction "should be given" means nothing if, as the Court of Appeals in this case held, there are no consequences for failing to give it. Jury instructions must set forth accurately the law that the jury is obliged to apply. Where, as here, a known and obvious danger is present, it is reversible error to fail to instruct the jury in accordance with Section 343A.

CONCLUSION

This Court should grant the petition for review.

This document, excluding the parts exempted from the word count by RAP 18.17, contains 2,227 words.

DATED this 24th day of May 2022.

Respectfully submitted,

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