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 BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") 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, like this one, that raise issues of concern to the nation's business community.

The National Association of Manufacturers (the "NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12.8 million men and women, contributes $2.77 trillion to the U.S. economy annually, has the largest economic impact of any

major sector, and accounts for nearly two-thirds of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

As evidenced by the Court's acceptance of review, this case has implications beyond the interests of the parties. The Court of Appeals erred in concluding that a jury instruction on Restatement (Second) of Torts § 343 (1965) includes the same knowledge element as would an instruction on Restatement (Second) of Torts § 343A (1965). Not only is the Court of Appeals' holding mistaken; in addition, it threatens a significant and deleterious shift in how Washington law allocates responsibility in premises-liability cases.

Amici urge this Court to reverse the judgment of the Court of Appeals. Where there is evidence that, if credited by the jury, supports the application of § 343A, a trial court *must* charge on the elements of § 343A and commits reversible error if it refuses.

INTRODUCTION

Washington follows both § 343 and § 343A of the Restatement (Second) of Torts. Section 343 makes the possessor of land liable to an invitee who is harmed on the premises if the possessor knows of a dangerous condition and should expect that invitees will not discover or realize the danger or that invitees will fail to protect themselves from it. Because the possessor's duty is focused on ensuring that invitees have the requisite knowledge, § 343A limits the liability that § 343 would otherwise impose if the condition and its danger are known by or obvious to the invitee (subject to certain exceptions not relevant here).

In *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 875 P.2d 621 (1994), and other cases, this Court has explained that, where there is evidence of such knowledge or obviousness, both § 343 and § 343A define the scope of the possessor's duty to his invitees. And that only makes sense. Section 343 establishes the possessor's general duty toward a

hypothetical invitee, and § 343A limits that duty if the actual invitee knows of the dangerous condition.

In this case, despite indisputable evidence that the decedent, Warren Wright, knew he was encountering asbestos when he supervised a crew at an oil refinery and knew that asbestos was dangerous,[1] the trial court refused to charge the jury on § 343A. The Court of Appeals excused that error by concluding, among other things, that § 343 addresses the issue of the invitee's knowledge, which makes the failure to charge on § 343A harmless, and that there is no Washington authority requiring an instruction under § 343A.

The Court of Appeals was mistaken. Section 343 focuses on the *possessor's* expectation of the invitee's knowledge, whereas § 343A focuses on the *invitee's* actual (subjective) knowledge. ExxonMobil Oil Corporation ("Mobil") was entitled to have the jury instructed on § 343A. The error is anything but

[1] *Amici* refer to Warren Wright as "Mr. Wright" and to his son and the personal representative of his estate as "the plaintiff."

harmless because the jury, which is presumed to heed the trial court's instructions, had only § 343's broad imposition of liability before it but not § 343A's limitation. As a result, Mr. Wright's actual knowledge was rendered irrelevant, even though that knowledge obviated Mobil's duty to warn under § 343.

The Court of Appeals' error, if approved, would cause a sea change in Washington premises-liability law. A possessor of land could be held liable based only on what it might expect an invitee to know, without any regard for what the specific invitee actually knew. That significant expansion of the possessor's duty would run counter to both the Restatement and decades of Washington law.

The goal of the law is to make sure that an invitee knows of the potential danger. Section 343 imposes a duty on the possessor of land to provide that knowledge; § 343A provides that, even if the possessor of land does not do so, it will not be liable if the invitee otherwise knows of the danger. The two sections work together with a common purpose of ensuring that

the invitee has knowledge. Without § 343A's limitation, brick-and-mortar businesses could be held liable even though the invitee knew of the danger—which would shift the thrust of the rule from ensuring knowledge to punishing the possessor for not providing knowledge even where the invitee already had it.

Amici ask the Court to reverse the judgment of the Court of Appeals and to hold that, where a jury is presented with substantial evidence that a purportedly dangerous condition is known by or obvious to the plaintiff, the trial court should instruct the jury in accordance with Restatement (Second) of Torts § 343A as well as § 343.

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, including Mobil. 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.*, No. 812989-1-I, 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 that such known or obvious

dangers relieve the owner of liability. The appeals court recognized this Court's jurisprudence requiring an instruction on both § 343 and § 343A when the evidence warrants it and did not question that there was sufficient evidence for the jury to find the requirements of § 343A met. *Wright*, No. 81289-1-I, 2021 WL 5879009, at *4. Nevertheless, the Court of Appeals excused the trial court's refusal to charge on § 343A by asserting that § 343—on which the trial court did offer a jury instruction—"include[s] the element of the invitee's knowledge." *Id*.

This Court granted Mobil's petition for review.

ARGUMENT

I. Where there is evidence that an invitee knew of a purportedly dangerous condition on the premises, the trial court must instruct the jury on § 343A.

A. Sections 343 and 343A address different scenarios. When there is evidence that an invitee knew of the purportedly dangerous condition, the trial court must instruct the jury on both sections to give a complete and accurate statement of the law.

This Court has adopted both § 343 and § 343A of the Restatement (Second) of Torts. *See Tincani*, 124 Wn.2d at 138–

39. The drafters of the Restatement explained that Section 343 "should be read together with § 343A . . . ." Restatement (Second) of Torts § 343, cmt. a.

That guidance only makes sense. Section 343 imposes liability on a possessor of land for harm to a business invitee if the possessor knows or should know of a dangerous condition and should expect that invitees will not discover, realize, or protect themselves from the dangerous condition. Thus, in every regard, § 343 examines the knowledge of the possessor of land and no one else. Even when it refers to what invitees would discover, realize, or protect themselves from, § 343 speaks in terms of what the possessor of land would expect.

By contrast, § 343A speaks to the knowledge of the *invitee*. Section 343A limits the liability imposed by § 343 if the purportedly dangerous condition is known or obvious to the invitee. Thus, even if the requirements of § 343 are met—meaning that the possessor of land has the requisite knowledge of the condition and expectation about what an invitee might

discover or realize—no liability should be imposed if the invitee already knows of the condition and its potential danger.

The interplay between § 343 and § 343A reasonably implements the principle guiding the Restatement's treatment of premises liability for invitees. An invitee is entitled to "nothing more than knowledge of the conditions and dangers he will encounter if he comes." Restatement (Second) of Torts § 343A, cmt. e. Section 343 imposes on the possessor of land the duty to warn an invitee if the possessor knows of a dangerous condition on the premises but expects that invitees will not detect it, and § 343A relieves the possessor of that duty if the invitee actually knows about the condition.

Washington courts have consistently recognized that § 343A limits the liability otherwise imposed by § 343. Thus, in *Tincani*, this Court held that § 343A "is the appropriate standard for duties to invitees for known or obvious dangers." 124 Wn.2d at 139. "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). For that reason, as the Court of Appeals acknowledged, "it is ordinarily the better practice to give both Section 343 and Section 343A(1) instructions" where a defendant presents evidence of a plaintiff's knowledge of a dangerous condition. *Wright*, No. 81289-1-I, 2021 WL 587009, at *4 (quoting *Suriano v. Sears, Roebuck & Co.*, 117 Wn. App. 819, 831, 72 P.3d 1097 (2003)).

The Washington Pattern Jury Instructions go further, insisting that "[i]n cases involving invitees and known or obvious dangers, the jury *should* be instructed in accordance with both sections 343 and 343A of the Restatement." 6 Washington Practice: Washington Pattern Jury Instructions: Civil 120.07 cmt. at 797 (7th ed. 2019) (emphasis added).

This is precisely the sort of case in which the trial court should have instructed the jury on § 343A. As the jury heard, Mr. Wright knew that dangerous asbestos was present when he was working at the Mobil refinery. He "took all precautions known

at the time to limit his exposure to asbestos"; he "religiously" wore an OSHA-approved respirator; and he encouraged others to do the same. *Wright*, No. 81289-1-I, 2021 WL 587009, at *5. Given Mr. Wright's undisputed knowledge that there was asbestos and that it was dangerous, the trial court should have instructed the jurors on § 343A and its limiting effect on § 343. But the court refused to do so.

B. The Court of Appeals' rationale ignores the language of the Restatement and the presumption that jurors will heed the trial court's instructions.

The Court of Appeals recognized that charging on both § 343 and § 343A would have given the jurors a more complete statement of the law, but it concluded that the single instruction on § 343 "was not an incorrect or misleading statement of the law"; that "the given instruction [on § 343] included the element of the invitee's knowledge"; that "[e]ven without the section 343A instruction, Mobil had the opportunity to argue that Wright knew of the danger and knew to protect himself against it"; and

that "no case has explicitly required a court to issue both instructions." *Wright*, No. 81289-1-I, 2021 WL 587009, at *4.

The Court of Appeals was mistaken.

1. While the instruction as given accurately captured § 343, it was undoubtedly an incorrect and misleading statement of the applicable law because it omitted the critical limits in § 343A.

For the reasons noted above, the Court of Appeals' suggestion that the § 343 instruction alone "included the element of the invitee's knowledge" is wrong. *Wright*, No. 81289-1-I, 2021 WL 587009, at *4. By its terms, § 343 addresses only what the possessor of land knows or expects about a hypothetical invitee's knowledge. Unless it instructs the jury on § 343A, the trial court does not direct the jurors to the possibility that the invitee's subjective knowledge negates any liability that the jury might otherwise impose under § 343.

2. The Court of Appeals further erred by concluding that any jury-instruction error was harmless because

Mobil was able to argue to the jury about Mr. Wright's knowledge. A jury is presumed to heed the trial court's instructions. *State v. Lord*, 117 Wn.2d 829, 861, 822 P.2d 177 (1991). Jurors charged on § 343 alone might well hear a closing argument discussing the invitee's subjective knowledge and find it reasonable. But unless instructed to consider that fact, jurors would have to ignore it as legally irrelevant.[2] Without an instruction, jurors would have no choice but to conclude (erroneously) that they could not rely on the invitee's subjective knowledge as a basis to refuse to find liability. The trial court never told the jurors that they had that option. Put another way,

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[2] The jurors were instructed:

> It . . . is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

CP 2250. *See also* CP 2251 ("You should disregard any remark, statement, or argument [of counsel] that is not supported by the evidence or the law as I have explained it to you.").

the Court of Appeals' assertion amounts to an assumption that the jurors would not heed the only instruction they were given but rather defer to an uncharged exception argued by a party, based on facts that the jurors were never told were even relevant.

3. To the extent the Court of Appeals was correct that no Washington case has yet mandated that an instruction be given on § 343A when there is appropriate evidence, *Amici* ask this Court to provide that explicit command in this case. The Restatement and this Court's implementation of it fully support such a holding.

II. The plaintiff's arguments cannot save the Court of Appeals' holding.

The plaintiff tries to counter this straightforward analysis by arguing that the evidence at trial was insufficient to warrant an instruction on § 343A, that any error was harmless, and that § 343A is itself an anachronism. *See* Respondent's Suppl. Br. at 11–28. He is wrong on all counts.

A. There was sufficient evidence of Mr. Wright's knowledge of the condition and the danger it posed to warrant a jury instruction.

In his supplemental brief, the plaintiff questions the sufficiency of the evidence that Mr. Wright had the sort of knowledge that § 343A requires.

As a threshold matter, this argument seems to presume that Mobil had to prove the extent of Mr. Wright's knowledge to warrant a jury instruction, but that is not so. "[A] party is entitled to have the trial court instruct on its theory of the case if there is substantial evidence to support it." *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 135, 606 P.2d 1214 (1980). In its supplemental brief in this Court and elsewhere, Mobil has addressed the considerable evidence of Mr. Wright's actual knowledge.

The plaintiff contends that Mobil needed more specific evidence to warrant a § 343A instruction, but this contention finds no support in the Restatement or the case law. The plaintiff further suggests that Mobil's argument asks the Court to embrace

a "laxer" standard for § 343A, but this is not what *Amici Curiae* understand to be Mobil's position. Mobil simply asks the Court to apply § 343A in a way consistent with its precedents. Section 343A refers to whether the dangerous condition is known by or obvious to the invitee. Comment b fleshes out the requirement in the context of an invitee's subjective knowledge by explaining that the invitee must know that the condition is dangerous and appreciate "the probability and gravity of the threatened harm." Restatement (Second) of Torts § 343A, cmt. b.

The jurors heard evidence that Mr. Wright was a foreman on NWIM's remediation crew who undeniably knew that his work involved exposure to asbestos, who knew that asbestos is dangerous, who led daily safety meetings, who instructed his crew to wear masks, and who always himself wore a mask. 1 RP 449, 452–53, 502–03, 505–07 and 519. While that uncontested, substantial evidence of knowledge would seem dispositive, it was at the very least enough to warrant a jury instruction on § 343A.

The plaintiff suggests in his supplemental brief that the knowledge necessary to implicate § 343A is akin to the knowledge necessary to prove voluntary assumption of the risk. But the elements necessary for a § 343A instruction and an assumption-of-the-risk defense are distinct. 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.'" *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 636, 244 P.3d 924 (2010) (quoting *Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 453, 746 P.2d 285 (1987)). Section 343A does not require the same elements. A premises owner may contend, as Mobil 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 also 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).

In addition, while both § 343A and assumption of the risk focus on a plaintiff's knowledge, assumption of the risk imposes a higher burden on the defendant: it must show not only that the plaintiff knew of the danger but also that plaintiff had specific knowledge of the "nature, character and extent which make it unreasonable." Restatement (Second) of Torts § 496D (1965), cmt. b. Section 343A does not require this.

B. The plaintiff's argument that the jury's finding on § 343 necessarily negates application of § 343A is illogical and at odds with this Court's precedents.

The plaintiff's second argument is no more helpful to his position. He argues that, because the jury was instructed on § 343 and then found liability, it necessarily determined that Mobil "should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it." Respondent's Supp. Br. at 23 (quoting § 343(b)). The plaintiff then points to § 343A and its statement that a possessor of land is not liable for a condition on the premises whose danger is

known or obvious to invitees, "unless the possessor should anticipate the harm despite such knowledge or obviousness." § 343A. From that, the plaintiff contends that the finding of liability on § 343 necessarily satisfies the exception in § 343A.

The most basic problem with the plaintiff's theory, of course, is that it would read § 343A out of the law: a finding that § 343(b) has been satisfied would in every case invoke the exception to § 343A. The drafters of the Restatement plainly understood § 343(b) to address something different than § 343A. Otherwise, they would not have bothered to include § 343A and, most assuredly, would not have stated that § 343A should be understood as a limitation on § 343. *See* Restatement (Second) of Torts § 343, cmt. a ("This section should be read together with § 343A."). This Court must have had the same understanding or it would not have adopted § 343A in addition to § 343. *See Tincani*, 124 Wn.2d at 139. The plaintiff points to no case in which a court has accepted his argument.

C. The plaintiff's skeletal argument that the Court should abandon § 343A ignores the history of the open-and-obvious doctrine and § 343A's effect.

The plaintiff's third argument is likewise without merit. The plaintiff argues that § 343A is a legal relic that conflicts with Washington's contributory-fault statute. Because § 343A should be scrapped, the plaintiff suggests, the trial court's failure to instruct on it somehow does not matter.

As an initial matter, the plaintiff's account of the relevant history is inaccurate. Far from archaic, § 343A is a modern softening of the traditional common-law open-and-obvious rule, under which liability to an invitee was completely barred if a dangerous condition was open and obvious. *See Kentucky River Med. Ctr. v. McIntosh*, 319 S.W.3d 385, 388–89 (Ky. 2010). As the Kentucky Supreme Court explained, most courts that opted against the common-law rule adopted § 343A of the Restatement (Second) of Torts, which, as noted, includes an exception to the more rigid, historic doctrine. *Id*. at 389. Indeed, in *McIntosh*, the Kentucky court adopted the Restatement approach after

reviewing the options and determining that "this Court concludes that the modern trend, as embodied in the Restatement (Second) of Torts, is the better position." *Id*. at 390.

Of course, this Court long ago adopted the Restatement approach, embracing the "modern trend." *See Degel*, 129 W.2d at 50. Only a few states have abandoned the traditional open-and-obvious doctrine without adopting § 343A in its place. *See Steigman v. Outrigger Enters., Inc.*, 267 P.3d 1238, 1247 (Haw. 2011). As the Hawaii Supreme Court explained, those few courts that have refused to embrace § 343A interpret the open-and-obvious rule as an element of comparative fault such that it may be incompatible with their comparative-negligence regimes. *Id*. at 1249. Most states, however, understand the issue to be one of the scope of the possessor's duty. *Id*. at 1247. This Court has likewise treated the rule, as modified by § 343A, as a limitation on duty. *See Tincani*, 124 W.2d at 139 ("We conclude, as did the Court of Appeals, that this section of the Restatement is the

appropriate standard for duties to invitees for known or obvious dangers.").

This Court has appropriately balanced the interests of possessors of land and their invitees by adopting both § 343 and § 343A, and it should not retreat from that precedent.

CONCLUSION

This Court should reverse the judgment of the Court of Appeals and hold that, where a jury is presented with substantial evidence that a purportedly dangerous condition is known by or obvious to a plaintiff, the trial court should instruct the jury in accordance with Restatement (Second) of Torts § 343A as well as § 343.

This document, excluding the parts exempted from the word count by RAP 18.17, contains 4,194 words.

DATED this 12th day of September 2022.

Respectfully submitted,

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