NO. 94525-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRANDON APELA AFOA, an individual,

Respondent/Cross-Petitioner,

vs.

PORT OF SEATTLE, a Local Government Entity in the State of Washington,

Petitioner/Cross-Respondent.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Judith H. Ramseyer, Judge

REPLY TO ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Page

Other Jurisdictions

Statutes

Rules and Regulations

Other Authorities

060240.000107/738142

Plaintiff Brandon Afoa's employer contracted with four air carriers to provide ground support services. The jury allocated 74.8% of the fault for the accident amongst those four carriers. In connection with this allocation, plaintiff has raised two new issues in his answer to petitioner/defendant Port of Seattle's Petition for Review. The Port is thus filing this reply. RAP 13.4(d).

I. RESPONDENT'S NEW ISSUES

If this Court grants the Port's petition, plaintiff seeks review of two new issues, restated as follows:

A. Did the trial court abuse its considerable discretion in allowing the Port to amend its affirmative defenses under CR 12(i) to assert the fault of the four air carriers that had retained plaintiff's employer to provide ground services, where plaintiff had already unsuccessfully sued them in a separate suit by the time the Port sought to amend?

B. Are the judgments in favor of the air carriers in plaintiff's federal suit against them res judicata against the Port, or do they collaterally estop the Port, from arguing that the carriers were at fault, where the Port was not a party to or in privity with them in plaintiff's suit against the carriers?

II. STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS.

Plaintiff Brandon Afoa began work for EAGLE in August 2007. Four air carriers—China Air, Hawaiian Airlines, British Airways, and EVA Airways— contracted with EAGLE for ground services at Seattle-Tacoma International Airport. (Exs. 322-25) Plaintiff's accident occurred on December 26, 2007. (CP 5; RP 2247)

B. STATEMENT OF PROCEDURE.

1. Pretrial Proceedings Pre-Plaintiff's Federal Case.

Plaintiff sued the Port in February 2009. He did not join as defendants the four air carriers that EAGLE was providing services for at the time of the accident. In its Answer, the Port raised the fault of others as an affirmative defense. (CP 1-10, 15)

Summary judgment was granted in favor of the Port. Plaintiff's motion to reconsider was denied. After more than 3 years on appeal, the trial court's decision was reversed, and the matter was remanded for trial. (CP 488-500) *Afoa v. Port of Seattle*, 176 Wn.2d 460, 296 P.3d 800 (2013) (hereinafter *Afoa I*), *aff'g* 160 Wn. App. 234, 247 P.3d 482 (2011).

2. Plaintiff's Federal Case Against the Air Carriers.

In December 2010, plaintiff filed a separate suit in state court against, among others, the four air carriers, claiming that they were

negligent and had violated WISHA. This second action was removed to federal court. (For ease of reference, it will be called "federal case" or "federal suit.") (CP 6921, 7020-48, 7050-57)

In 2013, after this Court decided *Afoa I*, Afoa sought to amend his federal complaint to name the Port as a defendant. The federal court denied his motion (CP 6922, 7119-23), stating, among other things (CP 7122, 7123) (emphases added):

> ...Plaintiff's failure to join the Port earlier was the result of "***inexcusable neglect***"....
>
> ....
>
> ... ***For reasons only Plaintiff can know, he decided not to sue the Airline Defendants ... in that same suit [as the Port].*** The Court agrees with Plaintiff that trying his claims against [the] Port will result in duplicative proceedings that will waste the resources of the courts and the parties, and may result in inconsistent judgments. ***Those unfortunate outcomes, however, are the result of Plaintiff's decision not to name all potential tortfeasors in his initial action against the Port.*** The Court cannot skirt the rules of civil procedure and deny Defendants the benefit of a federal forum in an effort to conserve limited judicial resources.

By July 2014 the federal court had dismissed all four air carriers on summary judgment. (CP 6858,-67, 6909, 7300-01) Plaintiff did not appeal.

3. State Court Proceedings Post Filing of Federal Case.

In the meantime, although plaintiff was arguing in federal court that the air carriers were at fault, in this suit he was repeatedly but unsuccessfully trying to prevent allocation of fault to them. (CP 3174-84,

3389-402, 4688-92, 5460-802, 5935-36, 6189-212, 8061-68, 8484-507, 8876-78) The trial court, however, permitted the Port to amend its answer to identify the carriers as nonparties at fault, explaining (CP 8062):

> Afoa did sue the Airlines and, in his multiple Complaints, repeatedly asserted the Airlines' fault. As a result, the Port's failure to amend earlier has not prejudiced Afoa.

At the close of the evidence at trial, plaintiff's motion for judgment as a matter of law that fault could not be allocated was denied. The jury found each air carrier 18.7% at fault. Judgment was entered against the Port for its share of fault. Plaintiff unsuccessfully renewed his motion to preclude allocation. (RP 3203; CP 4840-42, 8993-9007, 9197-209) Ultimately, three different trial judges rejected his many attempts to preclude fault allocation. (CP 3174-84, 5935-36, 8876-78, 9197-209)

On appeal, plaintiff never challenged the sufficiency of the evidence supporting the allocation of fault to the air carriers. Instead, he claimed that fault should not have been allocated to them because (1) the Port had a nondelegable duty, (2) the trial court should not have permitted the Port to amend its answer to identify the air carriers as nonparties at fault under CR 12(i), and (3) the federal court judgment dismissing his claims against the air carriers was res judicata against, and collaterally estopped, the Port from claiming the air carriers were responsible for the accident. Division I agreed the Port had a nondelegable duty that

prevented allocation such that the Port was vicariously liable for the air carriers and did not reach the merits of the remaining arguments as moot. *Afoa v. Port of Seattle,* 198 Wn. App. 206, ¶¶ 2, 53, 393 P.3d 802, 806, 817 (2017).

Plaintiff now seeks discretionary review of the CR 12(i), res judicata, and collateral estoppel claims in the event this Court grants the Port's petition.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS CONSIDERABLE DISCRETION IN ALLOWING THE PORT, UNDER CR 12(i), TO AMEND TO ASSERT THE AIR CARRIERS' FAULT.

Plaintiff's argument that the trial court abused its discretion is without merit, and the Court should not grant review of this issue. More than 5 years before trial, plaintiff knew, and argued before a federal court, that the air carriers were responsible for his injuries. Unable to point to any actual prejudice, plaintiff urged Division I to "create[] a *special rule of prejudice*" for CR 12(i) tailored specifically to relieve him of the effects of the harm that resulted from his failure to name the carriers as defendants in this action. (Brief of Respondent/Cross-Appellant 64) (emphasis in original). Nothing in the facts of this case could possibly support the extraordinary remedy of creating a new standard as proposed by plaintiff.

Specifically, plaintiff claims the trial court abused its discretion by allowing the Port to amend its answer to name the carriers under CR 12(i) "after it was too late for them to be joined." (Answer to Petition for Review 3) But leave to amend shall be freely given when justice so requires. *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983). A ruling allowing a pleading amendment is reviewed only for manifest abuse of discretion. *Wilson v. Horsley,* 137 Wn.2d 500, 505, 974 P.2d 316 (1999). Delay is relevant, but only if it causes undue hardship or prejudice, which must be proven by more than mere conclusory assertions. 100 Wn.2d at 349; *Appliance Buyers Credit Corp. v. Upton*, 65 Wn.2d 793, 800, 399 P.2d 587 (1965); *Walla v. Johnson,* 50 Wn. App. 879, 884, 751 P.3d 334 (1988); *Caruso*, (amendment permitted to add a new claim 5 years and 4 months after the original complaint); *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.,* 166 Wn.2d 475, 483-84, 209 P.3d 863 (2009) (court's refusal to permit amendment to add a new defendant just a month before trial was an abuse of discretion).

Plaintiff claims that he was prejudiced by the amendment because the federal court and the jury below reached inconsistent outcomes on the question of the air carriers' liability. The fact that plaintiff pressed his claims against the Port on one action and against the air carriers in a different action, however, was completely under his control. Plaintiff

could have sued the air carriers in this suit anytime between the end of 2007, when the accident occurred, to at least December 4, 2009, when the plaintiff filed his first appeal, but failed to do so. (CP 493) In fact, from the filing of this action to the filing of the *Afoa* I appeal, plaintiff had nearly 11 months to join the carriers as defendants in this suit. (CP 1, 493-500) He failed to do so.

Indeed, no fewer than three different judges have looked askance at plaintiff's original decision to pursue his claims only against the Port, and indicated that this is the source of plaintiff's current difficulties. Judge Coughenour had earlier stated, "***For reasons only Plaintiff can know, he decided not to sue the Airline Defendants***"; Judge Ramseyer said, "But ***the decision of who to sue and when to sue them was Plaintiff's***;" Judge Allred declared, "***[Plaintiff not being able to sue the air carriers in the instant action] is the consequence of Afoa's litigation choices (including the decision to sue the Port and the Airlines separately)***." (CP 3176, 7123, 9199) (emphases added).

In short, that the air carriers and the Port were never defendants in the same suit was not due to when the Port moved to amend its answer. Rather, it was "***the result of Plaintiff's decision not to name all potential tortfeasors in his initial action against the Port.***" (CP 7123) (emphases

added). The trial court did not abuse its discretion in allowing the Port to amend its answer to assert fault against the air carriers.[1]

B. THE PORT IS NOT BOUND BY THE FEDERAL COURT'S DECISION.

Plaintiff also claims the federal suit collaterally estops, or acts as res judicata against, the Port's arguing the jury should allocate fault to the air carriers in this action. (Answer to Petition for Review 3) The Port was not a party to or in privity with a party to the federal action, so neither res judicata nor collateral estoppel applies.

Res judicata, or claim preclusion, bars the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). The doctrine requires identity between a prior judgment and a subsequent action as to, among other things, persons and parties. *Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 396, 429 P.2d 207 (1967).

Similarly, a party claiming collateral estoppel must prove that the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication. In addition, collateral estoppel will not be applied where it would work an injustice on the nonmoving party.

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[1] It should be noted that plaintiff admitted in the proceeding below that he was not claiming that the amendment precluded him from adequately preparing his defense to the argument that the airlines were at fault or taking additional discovery. (CP 8058; Brief of Respondent at 62)

Christensen v. Grant Cty. Hosp. Dist. No. 1, 152 Wn.2d 299, 305, 96 P.3d 957 (2004); *McDaniels v. Carlson*, 108 Wn.2d 299, 303, 738 P.2d 254 (1987).

Plaintiff's collateral estoppel/res judicata issue statement at page 3 of his Answer to Petition for Review omits the undisputed fact that the Port was not a party to the federal court action. (CP 6195) The primary issue is privity.

1. There Was No Privity.

Due process concerns forbid estopping a party who never appeared in a prior action. *Blonder-Tongue Labs., Inc. v. University of Illinois Foundation,* 402 U.S. 313, 329, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971); *see Owens v. Kuro,* 56 Wn.2d 564, 568, 354 P.2d 696 (1960) (estoppel inapplicable to stranger to a judgment). Privity is thus construed strictly. *Spahi v. Hughes-NW, Inc.,* 107 Wn. App. 763, 775, 27 P.3d 1233, 33 P.3d 84 (2001); *see McDaniels v. Carlson,* 108 Wn.2d 299, 306, 738 P.2d 254 (1987). This Court has explained "privity" as follows:

> "Privity does not arise from the mere fact that persons as litigants are interested in the same question or in proving or disproving the same state of facts. Privity ... is privity as it exists in relation to the subject matter of the litigation, and the rule is construed strictly to mean parties claiming under the same title. It denotes mutual or successive relationship to the same right or property...."

United States v. Deaconess Medical Center, 140 Wn.2d 104, 111, 994 P.2d 830 (2000) (quoting *Owens,* 56 Wn.2d at 568; *Loveridge,* 125 Wn.2d at 764). The same privity definition applies to collateral estoppel and res judicata. *Owens,* 56 Wn.2d at 568; *Barlindal v. City of Bonney Lake,* 84 Wn. App. 135, 143, 925 P.2d 1289 (1996).

Plaintiff claims that privity exists because the Port was directing the defense of the carriers. There is no evidence, however, that the Port exercised the quantum of control over the air carriers' defense in the federal action that would be necessary to establish privity. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 39, *cited with approval in Loveridge,* 125 Wn.2d at 764 & n.17. While Plaintiff points to the fact that the same lawyer represented the airlines in the federal suit and the Port below, that fact is insufficient to establish the requisite control by the Port to establish privity. *See, e.g., Perez-Guzman v. Gracia,* 346 F.3d 229, 234 (1st Cir. 2003), *cert. dented,* 541 U.S. 960 (2004); *Yorulmazoglu v. Lake Forest Hosp.,* 359 Ill. App. 3d 554, 834 N.E.2d 468, 474-75 (2005). There is no evidence the Port determined the carriers' legal theories and proof in the federal suit. The carriers did exactly what any defendant in their position would do—they argued they were not liable.

Similarly, the Port and the airlines do not enjoy the type of special relationship between parties that can, in rare circumstances, support a

finding of privity, such as class actions or suits by trustees or guardians, *Taylor v. Sturgell,* 553 U.S. 880, 894-95, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008). Furthermore, the carriers could not have properly represented the Port's interests in the federal case, since they were arguing they were not at fault, while the Port in the instant case was arguing that they were.

Finally, the fact that a few of the Port's employees testified in the federal case does not create privity between the Port and the carriers. Plaintiff is really arguing for application of the "virtual representation" doctrine. But that doctrine can apply only where the nonparty participated in the former adjudication, the issues were fully and fairly litigated there, the evidence and testimony was identical, and the fact that there were two separate suits was due to the improper conduct of the nonparty to the later suit. *Garcia v. Wilson,* 63 Wn. App. 516, 520-21, 820 P.2d 964 (1991). Plaintiff cannot meet any of these factors.

There were substantial differences between the way the issue of the air carriers' liability was litigated in the federal suit and this action. For example, Port employees did not testify in the federal action, as they did in the instant matter, as to all aspects of the air carriers' retention of the right to control, *e.g.,* that the carriers provide and operate aircraft, are entitled to veto the Port's capital budget items over $2.5 million, require the ground service operators with which they contract to carry out their flight

operation services "in accordance with the Carrier's instructions," and typically have air carrier safety representatives present when a flight is being worked to ensure the ground service operator is following carrier standards. (RP 2874, 2967-68, 3003-04, 3019-20; Exs. 675-78)

The above notwithstanding, the doctrine cannot apply here because the existence of the later federal action was the result of the conduct of the plaintiff, not the Port. Not only was there nothing preventing plaintiff from joining the air carriers in this suit before the limitations period ran, plaintiff's failure to join the Port in a timely fashion in federal court was due to, as the federal court found, plaintiff's "'inexcusable neglect.'" (CP 7122) Indeed, both federal ***and*** state courts recognized the carriers were not joined in the instant matter because plaintiff had inexplicably failed to do so. (CP 3176, 7123, 9199)

Finally, the United States Supreme Court has rejected the virtual representation doctrine. In *Taylor v. Sturgell,* 553 U.S. 880, 128 S. Ct. 1261, 171 L. Ed. 2d 155 (2008), Justice Ginsburg, speaking for a unanimous Court, held the doctrine strays too far from the "fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party," would lead to the circumvention of "protections, grounded in due process" as well as time-consuming and expensive discovery, and requires district courts to apply imprecise and

"opaque" standards to evaluate whether the doctrine should apply. *Id.* at 898, 901.

Because the Port was neither a party nor in privity with a party in the federal case, neither collateral estoppel nor res judicata applies to it.

2. Collateral Estoppel Would Work an Injustice.

Collateral estoppel also requires a showing that its application will not result in an injustice to the party to which it is to be applied. *Christensen v. Grant Cty. Hosp. Dist. No. 1,* 152 Wn.2d 299, 307, 96 P.3d 957 (2004). This requirement is rooted in procedural unfairness. *State v. Vasquez,* 148 Wn.2d 303, 308, 59 P.3d 648 (2002). It would have been unjust to estop the Port from arguing the jury should allocate fault to the carriers when the Port was not a party to the federal case nor in privity with them.

In fact, plaintiff admitted not wanting to sue the carriers. (CP 8059, 8061-62) This admission makes questionable his efforts to prove his case against them in federal court. For example, the carriers obtained summary judgment in part because plaintiff failed to cite any WISHA regulations that might apply, although the jury in the instant case was instructed the carriers could be responsible under WISHA. (CP 4811, 4815-25, 6864)

To deprive the Port of its day in court to prove the carriers' fault would thus be unjust. And as Judge Allred said, "it would be a misuse of

the collateral estoppel and res judicata doctrines to allow Afoa to vehemently assert Airline liability in the Airline lawsuit, lose that lawsuit, and then use that loss to obtain a ruling in this case—as a matter of law—that the Airlines bear no fault under RCW 4.22.070(1)." (CP 3179)

IV. CONCLUSION

Plaintiff could have avoided the new issues raised in his answer had he simply timely joined the four air carriers in this suit. If this Court should grant review of the Port's petition, it should reject plaintiff's CR 12(i), res judicata, and collateral estoppel arguments.

The trial court did not abuse its discretion in allowing the Port to amend its answer to assert the air carriers were at fault, when plaintiff could have sued the air carriers in the same suit as the Port and had, in fact, sued the air carriers in a different suit before the Port sought to amend. There is no res judicata or collateral estoppel where, as here, plaintiff sued the Port in one case and the air carriers in another, and the Port was not a party to the federal suit, did not control the carriers' defense therein, and the Port did not cause, by manipulation or tactical maneuvers, the carriers to have been sued in a suit to which the Port was not a party. Furthermore, collateral estoppel does not apply because it would work an injustice on the Port to deprive it of the ability to argue that the air carriers were at fault.

Dated this 24th day of May 2017.

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