E

No. 94525.0
(COA No. 73753-8-I)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRANDON APELA AFOA,

Respondent,

v.

PORT OF SEATTLE,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION AND IDENTITY OF RESPONDENT

In 2007 at age 25, Plaintiff / Respondent Brandon Afoa was paralyzed and his life expectancy cut short from injuries suffered as a ground service employee at Sea-Tac Airport. Sea-Tac is owned by the Port of Seattle. It is the law of this case that the Port is an "employer" for purposes of ch. 49.17, RCW ("WISHA"),[1] and that the Port is analogous to a general contractor for purposes of common-law control liability.[2]

> The Port is the only entity with sufficient supervisory and coordinating authority to ensure safety in this complex multiemployer work site. If the Port does not keep Sea–Tac Airport safe for workers, it is difficult to imagine who will.[3]

After a six-week trial the jury agreed, finding that the Port controlled the manner of work of Brandon's direct employer. CP 4839. That finding is the law of the case on appeal.[4] After the trial court reduced the verdict by 74.8%, and because he has been hospitalized multiple times since remand, Brandon requested direct review "to ensure that [he] ... is not forever denied his recovery."[5] But Department I unanimously denied direct review,[6] which constitutes a finding that this case raises no significant question of constitutional law, no conflict with

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[1] *Afoa v. Port of Seattle*, 176 Wn.2d 460, 473, 296 P.3d 800 (2013) (*citing*, RCW 49.17.020(4)) (hereafter "Afoa I").
[2] *Id.* at 474.
[3] *Id.* at 478-79 (citations omitted).
[4] *Pier 67, Inc. v. King County*, 71 Wn.2d 92, 94, 426 P.2d 610 (1967).
[5] SGDR at 3 (Wash.S.Ct. No. 91995-0, July 30, 2015).

among Washington appellate decisions, and no fundamental issue of broad public import. RAP 4.2(a). *Nothing has changed since then* except that Brandon is now 35. The Port's arguments have been heard and rejected multiple times by the appellate courts, including this Court.[7] There is no "massive expansion" of liability here, merely prudent application of 120 years of Washington precedent protecting worker safety,[8] in fulfillment of the special obligation to protect worker safety under Washington State Constitution, Art. II §35.

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[6] Order (Wash.S.Ct. No. 91995-0, Sept. 28, 2016)

[7] *Afoa I, supra; Afoa v. Port of Seattle,* 2017 WL 1049671 (WA Div. 1 2017); *id.,* 160 Wn. App. 234, 247 P.3d 482 (Div. 1 2011). Actually, one Port argument was accepted: "federal preemption ... does not qualify as a fundamental and urgent issue of broad public import ...." *Port's Answer to Statement of Grounds for Direct Review* (No. 91995-0, Aug. 20, 2015). That's essentially the same argument Brandon puts forth here.

[8] *Kamla v. Space Needle Corp.,* 147 Wn.2d 114, 122, 52 P.3d 472 (2002); *Stute v. PBMC,* 114 Wn.2d 454, 463-64, 788 P.2d 545 (1990); *Kelley v. Howard S. Wright Const. Co.,* 90 Wn.2d 323, 332-33, 582 P.2d 500 (1978); *Guy v. Northwest Bible College,* 64 Wn.2d 116, 118, 390 P.2d 708 (1964); *Myers v. Little Church by the Side of the Road,* 37 Wn.2d 897, 904, 227 P.2d 165 (1951) (*cited with approval, Afoa I,* 176 Wn.2d at 475); *Cotton v. Morck Hotel Co.,* 32 Wn.2d 326, 336, 201 P.2d 711 (1949); *Buss v. Wachsmith,* 190 Wash. 673, 680, 70 P.2d 417 (1937); *Carlson v. P.F. Collier & Son Corp.,* 190 Wash. 301, 311, 67 P.2d 842 (1937); *Pellerin v. Washington Veneer Co.,* 163 Wash. 555, 563, 2 P.2d 658 (1931); *Haverty v. Int'l Stevedoring Co.,* 134 Wash. 235, 243-44, 235 P. 360 (1925); *Britton v. Rumbaugh,* 128 Wash. 445, 449, 222 P. 899 (1924); *Acres v. Frederick & Nelson,* 79 Wash. 402, 409-10, 140 P. 370 (1914); *Dumas v. Walville Lumber,* 64 Wash. 381, 386, 116 P. 1091 (1911); *Westerlund v. Rothschild,* 53 Wash. 626, 627-28, 102 P. 765 (1909); *Tills v. Great Northern Ry. Co.,* 50 Wash. 536, 541, 97 P. 737 (1908); *Howland v. Standard Milling & Logging Co.,* 50 Wash. 34, 37, 96 P. 686 (1908); *Comrade v. Atlas Lumber & Shingle Co.,* 44 Wash. 470, 474, 87 P. 517 (1906); *Ball v. Megrath,* 43 Wash. 107, 110, 86 P. 382 (1906); *Dossett v. St. Paul & Tacoma Lumber Co.,* 40 Wash. 276, 286, 82 P. 273 (1905); *O'Brien v. Page Lumber Co.,* 39 Wash. 537, 545, 82 P. 114 (1905); *Sroufe v. Moran Bros. Co.,* 28 Wash. 381, 396, 68 P. 896 (1902); *Costa v. Pacific Coast Co.,* 26 Wash. 138, 142, 66 P. 398 (1901); *McDonough v. Great Northern Ry. Co.,* 15 Wash. 244, 258, 46 P. 334 (1896); *Millican v. N.A. Degerstrom, Inc.,* 177 Wn. App. 881, 890-93, 896-97, 313 P.3d 1215 (Div. 3 2013), *rev. den.,* 179 Wn.2d 1026 (2014); *Neil v. NWCC Investments V, LLC,* 155 Wn. App. 119, 121-22, 229 P.3d 837 (Div. 1), *rev. den.,* 169 Wn.2d 1018 (2010); *Kinney v.*

This Court should again find that no substantial public interest is served by further Supreme Court review, and it should allow judgment to be entered at last. *Justice delayed is justice denied.*

II. ISSUES FOR REVIEW

Brandon Afoa opposes review. If review is granted, Brandon will assert two issues raised in, but not reached by, the Court of Appeals:

1. Was it reversible error under CR 12(i) to grant the Port's motion to amend to add "empty chair" defenses against previously known airline nonparties after it was too late for them to be joined?

2. Was it reversible error to refuse to hold the Port bound under res judicata and/or collateral estoppel to the prior Federal Court dismissal of the same claims against the airlines?

III. LEGAL ARGUMENT IN OPPOSITION TO REVIEW

A. There is No Clear Conflict Between State and Federal Law; State Worker Safety Law Complements Federal Law

The Port seeks review to present the untenable proposition that OSHA/WISHA worker safety regulation is impliedly preempted on what a Port Senior Manager called the "inherently dangerous environment" of the airfield, RP 3061/13-19; Ex. 112, despite the fact that WISHA is directly authorized by Congress, 29 U.S.C. §667(b), pursuant to express Congressional intent "to assure ... safe and healthful working conditions ... by encouraging the States to assume the fullest responsibility for the

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Space Needle Corp., 121 Wn. App. 242, 249, 85 P.3d 918 (Div. 1 2004); *Marsland v. Bullitt Co.*, 3 Wn. App. 286, 292, 474 P.2d 589 (Div. 1 1970).

administration and enforcement of their occupational safety and health laws." 29 U.S.C. §651(b)(11).[9] The Port asserts a clear conflict between state and federal law, despite the federal mandate that States should control *worker safety*, 29 U.S.C. §667(b), while the FAA should control *air transport safety.* 49 U.S.C. §40103(a), (b).[10] It asserts a clear conflict although the FAA *does not* pervasively regulate *ground services on the ramp*, and its ground service circulars are purely advisory.[11]

This Court should decline to review implied conflict preemption because the Port has failed to demonstrate any clear conflict between federal and state law, and because WISHA is not an obstacle to the accomplishment of Congressional purposes, but instead serves Congressional intent *both* to protect worker safety and health, *and* to help ensure air transport safety. WISHA was *federally approved*, 29 CFR 1952.120, under §18(b) (29 U.S.C. §667(b)) of OSHA, which creates *reverse preemption* in favor of state law over federal law:

> Congress not only reserved certain areas to state regulation, but it also, in §18(b) of the Act, *gave the States the option of pre-empting federal regulation entirely.*[12]

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[9] The Port abandoned its express preemption and implied field preemption arguments.
[10] *United Air Lines, Inc. v. OSHA Appeals Bd.*, 32 Cal.3d 762, 767, 769-71, 187 Cal.Rptr. 387, 654 P.2d 157 (1982) ("UAL v. OSHA").
[11] *Id.* at 774-77 (where FAA regulation is merely potential, it does not preempt actual worker safety regulation).
[12] *Gade v. National Solid Wastes Mngmt. Ass'n,* 505 U.S. 88, 97, 102 (1992) (emphasis added).

1. Implied Preemption is Narrow and Disfavored

"Federal preemption is governed by the intent of Congress ...."[13] A tangential conflict between federal and state law is not enough: "for a state law to fall within the pre-empted zone, it must have some direct and substantial effect" on the federal regulation.[14]

> [T]here is a strong presumption against finding preemption in an ambiguous case and the burden of proof is on the party claiming preemption.... State laws are not superseded by federal law unless that is the clear and manifest purpose of Congress.[15]

"The presumption against preemption is even stronger with state regulation regarding matters of health and safety."[16]

2. There is No Colorable Claim of Conflict Preemption Here

Implied conflict preemption occurs (1) when compliance with both laws is impossible or (2) when a state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.[17]

a. The Port is Not Penalized for Exercising Control

The Port complains that it is impossible to comply with FAA and TSA regulations (14 CFR part 139; 49 CFR part 1541), while also

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[13] *Inlandboatmen's Union of the Pacific v. Dept. of Transp.*, 119 Wn.2d 697, 701, 836 P.2d 823 (1992); *accord, Martin v. Midwest Express Holdings, Inc.*, 555 F.3d 806, 808 (9th Cir. 2009) ("The touchstone of preemption is congressional intent.").
[14] *English v. General Elec. Co.*, 496 U.S. 72, 85 (1990).
[15] *Progressive Animal Welfare Soc. v. Univ. of Washington*, 125 Wn.2d 243, 265, 884 P.2d 592 (1994) (*quoting, Washington State Physicians Ins. Exch. & Assoc. v. Fisons Corp.*, 122 Wn.2d 299, 327, 858 P.2d 1054 (1993)); *accord, e.g., Estate of Becker v. AVCO Corp.*, 187 Wn.2d 615, 387 P.3d 1066, 1069 (2017).
[16] *Fisons*, 122 Wn.2d at 327.

complying with its nondelegable duties under WISHA and common-law to maintain a safe workplace, and that it is being penalized for rules it is required to enact. But as the Court of Appeals correctly held, the Port is not penalized for *ensuring safety,* but for *failing to ensure safety. Afoa v. Port, Pet.,* App. B at 19. Even if it were accurate that federal law required Port control over worker safety in the ramp area where Brandon was injured (it is not accurate – see next section), control is not what triggers liability. Port control creates the *duty*, but absent a breach of duty and causation, there would be no liability. *The penalty follows on the breach of duty, not the control.* There is no conflict because no federal law commands the Port to breach its state duty by failing to maintain a safe workplace, or failing to follow WISHA regulations. Indeed, federal law, to the extent the FAA tells the Port to operate a safe airport,[18] and because Congress intended Washington state to impose "sanctions" for violations of its regulations,[19] is totally in harmony with state law.

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[17] *Inlandboatmen's Union,* 119 Wn.2d at 702.

[18] An FAA Advisory Circular states that each certificated operator at the 575 airports around the country should be ultimately responsible for safety at its own airport, Ex. 183 ¶6(a), p.3; RP 1885-86/20-8, 1958/2-9, but as demonstrated in Section II(A)(2)(b) *infra,* neither it nor any Federal regulation imposes any mandatory requirements regarding worker safety on the ramp, where Brandon was injured.

[19] Congress intended that a system of penalties for worker safety violations be part of OSHA. 29 USC §651(b)(10) ("The Congress declares it to be its purpose and policy … to assure … safe and healthful working conditions … by providing an effective enforcement program which shall include … sanctions for any individual violating this prohibition …").

The Port's primary argument for review raises no serious issues deserving of this Court's attention.

b. The Port's Impossibility Argument is Factually Unfounded, and Would Therefore Waste this Court's Time

The Port argues that to comply with FAA regulations it was required to adopt Rules governing the safe operation of ground service vehicles, and now it is being penalized for exercising that control. *Pet.* at 9-10. But the Port admitted, and the evidence clearly shows, that the FAA does not approve the Port's Rules, and while it does approve the Airport Certification Manual ("ACM"), the FAA does not approve any particular method of compliance with Part 139.[20] The Rules applicable at Seatac, and the training video for driving in the nonmovement area, were written and created by *the Port*, not by the FAA, the airlines, or the ground service operators.[21] The Port has broad discretion in meeting FAA requirements, and it wrote its Rules to govern what it wanted to control.[22]

Not only does the Port write its own rules, but there is no clear federal mandate regarding Port regulation of ground service operations in the ramp (nonmovement) area where Brandon was hurt. According to former FAA airport certification manager Benedict Castellano:

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[20] *Brief of Appellant/Cross-Respondent,* at 34 ("BA"); RP 1941/3-6, 1941-42/18-4, 1943-44/10-20.
[21] RP 1365-66/1-1, 1371/15-19, 1372/14-22.
[22] RP 2978-79/11-1, 2793/9-19; 2999/9-20; 3002/16-19.

> Part 139 ... do[es] not contain a lot of requirements on the ramp area. Most of Part 139 deals with runways and taxiways or that part of the airport known as the movement area....

RP 1900/1-4. Mr. Ehl, the Port's Sea-Tac CEO, agrees: "I ... am unaware of any federal regulation which requires an airport certification holder to retain the right to control, actually control, or undertake any obligation to maintain, inspect, or service ... motor vehicles used by ground service vendors ... at [Sea-Tac]." CP 3196. The Subpart D regulations relied upon by the Port bear out Mr. Castellano and Mr. Ehl. Of the twenty-two separate regulations in Subpart D, only one is titled "Pedestrians and ground vehicles." 14 CFR §139.329. This federal rule first requires the airport operator to "[l]imit access to *movement areas and safety areas* only to those ... ground vehicles necessary for airport operations." *Id.* §139.329(a) (emphasis added). "Safety areas" are extensions off the runways and taxiways for use in emergencies, and thus within the movement area. *Id.* §§139.5 (definitions), 139.309 ("Safety areas"). This regulation has very little to do with operations on the ramp.

This rule also requires the airport operator to, "[e]stablish and implement procedures for the safe and orderly access to and operation in *movement areas and safety areas* by ... ground vehicles," *id.* §139.329(b), and ensure control over ground vehicles "in *movement areas or safety areas*", *id.* §§139.329(c), (d). The Port tries to stretch the

"access to" language to reach Brandon's collision. *Pet.* at 9 n.3. But very little control over a small part of the nonmovement area satisfies the "access to" language: the Port must paint a clear control line distinguishing the two areas (it has); and aircraft and vehicles on the ramp must switch over communication from the Port-operated Ramp Tower to the FAA-operated Control Tower, as well as have proper credentials, before entering the movement area (they do). Section 139.329(b), is not even close to a clear federal mandate to generally regulate ground service operations on the ramp – especially in the area near to the gates, where Brandon's injuries occurred.

The other provisions of Part 139 focus mainly on the movement and safety areas, not the ramp, and on air transport safety, not worker safety.[23] Because these regulations and the WISHA regulations and common-law safe workplace duties are like "ships passing in the night" governing different duties in different locations, the Port totally fails from the outset to carry its strong burden of showing a clear conflict between any specific federal enactment and either WISHA or state common law. "The possibility of interference does not justify preemption."[24]

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[23] *See, App.* 1 (*BR* at 33-34 n.94). The Port-drafted Safety Management Systems ("SMS") document admits this: "Under ... Part 139 (14 CFR Part 139), airports ... are required to perform regular ... self inspections (139.327) of the airfield *with a focus on the movement area including runways and taxiways.*" CP 4260 (emphasis added).
[24] *DLI v. State,* 111 Wn.2d 586, 589, 762 P.2d 348 (1988); *English,* 496 U.S. at 90.

This Court should not grant review when the basic premise of the issue is simply wrong. The basic premise of the Port's implied conflict argument – that there *is federal regulation overlapping state regulation of worker safety on the ramp* – is wrong.[25]

This is not an area in which further guidance is required from this or any other Court. This Court's decision in *Inlandboatmen's Union, supra,* 119 Wn.2d 697, already holds that WISHA regulation of Washington State Ferries is not field or conflict preempted by Coast Guard regulation of onboard crew safety. *Id.* at 705-09. And just this past January, the scope of field preemption under the FA Act was carefully analyzed by this Court in *Estate of Becker, supra,* 187 Wn.2d 615, with special reference to Congressional actions in 1989 and 1994 which demonstrate that "Congress, far from expressing an intent to preempt state law [under the FA Act], has avoided federal preemption in all but the most limited circumstances." *Id.* at ¶29, 387 P.3d at 1071.

b. The Uniformity Argument Misstates the Law

[25] Nor is there any preemption based on TSA regulations. TSA's core mission is *transportation security,* not *worker safety.* 49 USC §114(d); *id.* §44903(c). The Port does not explain in its Petition how there would be any conflict with TSA regulations. Its brief asserts that TSA requires airports to control access to the airfield, *BA* at 35, but the Port controlled access to the airfield long before TSA came along, and TSA only adds a security identification program which has nothing to do with worker safety, ground services, or inspection and maintenance of equipment. RP 1028-29/14-5, 1311-12/16-9, 1334/4-12, 2382/15-25.

The Port argues that the FA Act is intended to create a uniform safe and efficient air transport system, and a "unique" Washington rule creates "patchwork" regulation to the detriment of uniformity. *Pet.* at 11-13. There is no "patchwork". Twenty-eight states (including Washington) have promulgated their own worker safety regulations, while the rest follow federal OSHA.[26] Under OSHA, the general or prime contractor's liability is *nondelegable.*[27] Therefore, those 22 states that follow OSHA have the same nondelegable duty rule as Washington. For the other twenty-eight states, OSHA requires that their standards at least equal "the standards promulgated under [OSHA] ... which relate to the same issues ...." 29 U.S.C. §667(c)(2). Therefore, the same nondelegable duty to comply with safety rules that pertains under OSHA must be applied by all the states. Nondelegability is not a "patchwork" rule.

Likewise, Washington's common-law nondelegable duty of the person or entity in control to provide a safe workplace accords with majority common law throughout the nation. As even the Port's opening brief recognized, *Kelley* adopted it from Restatement (Second) Torts

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[26] https://www.osha.gov/dcsp/osp/approved_state_plans.html (accessed April 25, 2017).

[27] "In no case shall the prime contractor be relieved of overall responsibility for compliance of this part for *all work to be performed under the contract.*" 29 CFR §1926.16(a) (emphasis added). "[T]he prime contractor assumes all obligations prescribed as employer obligations under the standards contained in this part, *whether or not he subcontracts any part of the work.*" *Id.* §1926.16(b) (emphasis added).

§414 (1965).[28] And the Restatement (Third) Torts provides: "The label 'nondelegable duty' ... signals that the actor will be vicariously liable for the contractor's tortious conduct in the course of carrying out the activity." *Id.* §57 cmt. b.[29] Washington's rule accords with general tort law, and is no threat to uniformity in regulation of air transport safety.

But even if Washington stood alone, WISHA and common-law protection of worker safety on the ramp *complements*, rather than obstructs, achievement of the FA Act's purpose of air transport safety. Regulation of ground service workers operating 100,000 pound pushbacks next to fully fueled aircraft *increases* overall safety for passengers. RP 899/4-25, 1519-20/22-7, 1503-04/9-23. Assessing damages against worker safety violations that might also imperil air transport safety does not "penalize" what Federal law requires, or create an "obstacle" to the "full purposes" of Congress; rather, the opposite is true: by ensuring worker safety, State law supports the Congressional purposes expressed in *both* OSHA and the FA Act.

The Port's preemption argument is so weak that it would only waste this Court's time, while unduly delaying justice for Brandon.

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[28] *BA* at 9-10 (*citing,* Restatement (Second) Torts §414, and *Kelley,* 90 Wn.2d at 330.
[29] *See also, id.* §13: "A person whose liability is imputed based on the tortious acts of another is liable for the entire share of comparative responsibility assigned to the other, regardless of whether joint and several liability or several liability is the governing rule ...."

B. The Special Verdict Form was Proper, and because it Only Affects these Parties, it is Not Grounds for Review

The particularized wording of a Special Verdict Form (which was based on the Port's own proposed language), while of great importance to the parties to this case, is simply not a matter of substantial public interest deserving of review by the highest policy-making Court of this State. "Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied."[30] "[T]he trial court has considerable discretion in how the instructions will be worded ...,"[31] which is reviewed for abuse of discretion.[32] The trial court did not abuse its discretion by selecting and then slightly modifying the Port's proposed Interrogatory #1. *See, App.* 2.

In *Kamla,* after reviewing prior case law, this Court "distill[ed] the principles evident in our case law" to: "*whether there is a retention of the right to direct the manner in which the work is performed* ...."[33] In *Afoa I,* this Court went over this entire ground again, and held:

> *Kelley* and *Kamla* stand for the proposition that when an entity ... retains control *over the manner in which work is done on a work*

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[30] *Hue v. Farmboy Spray Co.,* 127 Wn.2d 67, 92, 896 P.2d 682 (1995).
[31] *Roberts v. Goering,* 68 Wn.2d 442, 455, 413 P.2d 626 (1966); *accord, e.g., State v. Ng,* 110 Wn.2d 32, 41, 750 P.2d 632 (1988).
[32] *Hue,* 127 Wn.2d at 92 n.23; *Douglas v. Freeman,* 117 Wn.2d 242, 256, 814 P.2d 1160 (1991).
[33] *Kamla,* 147 Wn.2d at 121 (emphasis added).

> *site,* that entity has a duty to keep common work areas safe because it is best able to prevent harm to workers.[34]

Interrogatory #1 asks the jury to determine whether "the defendant retained a right to control the manner in which ... (EAGLE) performed its work ...." CP 4839. This correctly applies the law.[35]

The "manner of work" test of *Afoa I* is the law of this case.[36] Interrogatory #1 correctly applies the law of *Afoa I.* Use of the word "and" would have made Interrogatory #1 erroneous, by conditioning recovery on control over maintenance of a particular vehicle rather than over the manner of work.[37] The broader test used by this Court in *Afoa I,*

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[34] *Afoa I,* 176 Wn.2d at 478 (emphasis added); *accord,* Restatement (3d) Torts §56, cmt. c ("the hirer must retain some degree of control over the manner in which the work is done, such that the contractor is not entirely free to do the work in the contractor's own manner"); Restatement (Second) Torts §414.

[35] From time to time, while stating this "manner of work" test, *Afoa I* added "and instrumentalities" to "the manner", 176 Wn.2d at 472, 473, 478, but it never stated any intent that this or many other variations on the control liability formulation would change its meaning or create a two-prong test for "control" as is claimed by the Port. *App.* 3 (*Afoa I* Control Test Variations). Division One correctly found that "[c]ontrol over the manner of work necessarily encompasses control over the maintenance of instrumentalities used in performing that work." *Afoa v. Port, Pet.* App. B at 9.

[36] *Roberson v. Perez,* 156 Wn.2d 33, 41, 123 P.3d 844 (2005); *Lutheran Day Care v. Snohomish County,* 119 Wn.2d 91, 113, 829 P.2d 746 (1992); RAP 12.2. The Port cites inapposite cases for the subsidiary rule that unobjected jury instructions can become the "law of the case", *Pet.* at 14, but that *cannot abrogate the appellate ruling on remand.* None of the Port's cited cases involved remand at all, let alone remand where the issue had been decided by the appellate court. The primary application of law of the case is that *appellate rulings govern the trial court on remand. Roberson v. Perez,* 156 Wn.2d at 41. The trial court could not alter the law of the case by disregarding the mandate.

[37] The Port's argument is "much ado about nothing" because the evidence did in fact demonstrate that the Port exercised particularized control over maintenance of each pushback under its "red-tag" authority. *See, Afoa v. Port, Pet.,* App. B at 16. Counsel for Mr. Afoa objected to the Port's request for "and" on the grounds that it would impermissibly narrow the "control" test of *Afoa I,* and stated that if the Court was inclined to change "or" to "and", "we would renew our request to just say that, 'Did the defendant retain a right to control the manner and instrumentalities of Plaintiff's work,'

Kamla, and *Kelley,* control over "the manner of work," was the only wording that covered all the issues raised by the evidence.[38]

The Port also argues that Interrogatory #1 permitted the jury to find control liability in the absence of a causal connection to injury. *Pet.* at 16-17. But proximate cause was properly instructed here.[39] The jury's finding of causation is well supported by the evidence, including the Port's "red-tag" powers. *Afoa v. Port, Pet.,* App. B at 16. The jury was not allowed to find liability in the absence of proximate cause.

By adding "or maintained its equipment" to the Special Verdict Interrogatory #1, the trial court permitted the Port to argue its theory of the case, emphasizing control over pushback maintenance. *See, id.,* App. B at 10-11. This alleged ground for Supreme Court review raises no issue more compelling than "we lost but we think we should have won." That obviously falls far short of satisfying the criteria of RAP 13.4(b).

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period." RP 3247/7-12. It was not reversible error for the trial court to refuse to make the Interrogatory erroneous under the evidence in the case.

[38] Trial evidence of control extends well beyond maintenance of the pushback, to Port control over access to the airfield, parking the cargo loader, permitting clutter around the South Satellite, and detailed control over daily ground service work. *BR* at 12-14.

[39] CP 4792 (Inst. #10 – definition of proximate cause); *see also,* CP 4800 (Inst. #16 – Burden of Proof – "The plaintiff has the burden of proving ... that the defendant's negligence was a proximate cause of the injury to the plaintiff."); CP 4796 (Inst. #13 "The plaintiff claims that defendant's conduct was a proximate cause of injuries and damages to plaintiff.").

C. Tort Reform Did Not Abrogate Nondelegable Duty

The Port says that the Tort Reform Act was enacted to protect the public purse by reducing municipalities' damages to their share of fault. *Pet.* at 17. That's only half the story. The legislature actually said that:

> [I]t is the intent of the legislature to reduce costs associated with the tort system, *while assuring that adequate and appropriate compensation for persons injured through the fault of others is available.*

Laws of 1986, ch. 305 §100 (emphasis added). Division One's decision is fully consistent with this legislative intent. It is the Port's position, which would deny Brandon 74.8% of the jury's assessment of fair damages, which is inconsistent with the intent of the legislature under Tort Reform.

The Port asserts a conflict between Division One's decision and *Clark v. Pacificorp*,[40] which reads RCW 4.22.070(1) to require allocation of fault against every entity that caused plaintiff's damages. *Pet.* at 17-18. *Clark,* however, does not involve or discuss any question of vicarious liability or nondelegable duty, so it is not on point. Furthermore, in *Clark* there was no evidence of manipulation of several liability to deny the plaintiff adequate compensation, as there is in this case.[41] *Clark* expressly reaches its conclusion *in order to protect the plaintiff's recovery,* noting

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[40] 118 Wn.2d 167, 181, 822 P.2d 162 (1991), *abrogation recog'd in, Willoughby v. Dept. of Labor & Indus.*, 147 Wn.2d 725, 739 n.8, 57 P.3d 611 (2002)
[41] *BR* at 58-63, 67-69.

that "*[p]articipation by each entity ensures a just allocation of fault.*"[42] The policies at play here, in which the Port and airlines, all covered by a common insurer and represented by the same counsel, have defied CR 12(i) and manipulated RCW 4.22.070 to attempt to deny plaintiff full recovery, are very different from those relied upon by this Court in *Clark.*

There is no basis in RAP 13.4(b)(1), (2) or (4), to accept further review of this case while Brandon languishes in paralysis and suffering. *For at least 120 years*, Washington common law has imposed *a nondelegable duty* on employers and owners to *provide a safe workplace and safe equipment* both to direct employees and to employees of independent contractors.[43] After enactment of the Tort Reform Act, this Court has continued to hold that the party best able to control safety at the jobsite has a nondelegable duty to provide a safe workplace.[44] Division One's holding on the effect of nondelegability and vicarious liability under the Tort Reform Act is consistent with caselaw of Division Three,[45] which is itself supported by Prosser on Torts and the Restatement.[46]

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[42] *Clark,* 118 Wn.2d at 181 (emphasis added).
[43] *See* Note 8, *supra.*
[44] *Kamla,* 147 Wn.2d at 122; *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.,* 128 Wn.2d 745, 758, 912 P.2d 472 (1996); *Stute,* 114 Wn.2d at 463-64; *accord, e.g., Millican,* 177 Wn. App. at 890-93, 896-97; *Neil v. NWCC,* 155 Wn. App. at 121-22.
[45] *Millican,* 177 Wn. App. at 890-93, 896-97.
[46] *Id.* at 892 (*quoting,* W. Page Keeton, et. al., *Prosser and Keeton on the Law of Torts* at 512 (West 5th Ed. 1984)); *id.* at 896-97 (*quoting,* Restatement (Third) Torts §57 cmt. b (2012), *and,* Restatement (Second) ch.15, topic 2, intro. note).

The Port misses the point by stressing that the Legislature *can* abrogate the common law, while failing to raise a credible argument that it *did* abrogate the longstanding nondelegable duty doctrine. The employer's nondelegable duty to maintain a safe workplace is based on control, and because the same 'right to control' test that imposes liability under *Kelley, Stute, Kamla* and *Afoa I,* also establishes 'agent' and 'servant' vicarious liability, the nondelegability of the duty to furnish a safe workplace is consistent with RCW 4.22.070(1)(a)'s preservation of joint and several liability for persons "acting as the agent or servant of a party." *Id.* "'It is a well-established principle of statutory construction that the common law ... ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.'"[47] Because the Tort Reform Act expressly provides for continued vicarious liability, RCW 4.22.070(1)(a), abrogation is not clear and explicit.

"The Legislature is presumed to be aware of judicial interpretation of its enactments."[48] Thus, it is presumed to be aware of the 1978 decision in *Kelley* that former RCW 49.16.030, predecessor to the WISHA specific duty clause of RCW 49.17.060(2) applicable in this

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[47] *Potter v. Wash. State Patrol,* 165 Wn.2d 67, 77, 196 P.3d 691 (2008) (*quoting, Norfolk Redev. & Housing Auth. v. Chesapeake & Potomac Tel. Co.,* 464 U.S. 30, 35-36 (1983) (internal quotations omitted)); *accord, Philippides v. Bernard,* 151 Wn.2d 376, 385, 88 P.3d 939 (2004).

[48] *Friends of Snoqualmie Valley v. King Cty.,* 118 Wn.2d 488, 496, 825 P.2d 300 (1992).

case, "created a nondelegable duty on the part of a general contractor to provide a safe place of work for employees of subcontractors on the job site." *Kelley, supra,* 90 Wn.2d at 333. *Against that legal backdrop, it chose to preserve vicarious liability for agents and servants.* There is *no clear indication* that the Legislature intended to abrogate *Kelley* or the long line of authority supporting it. In the words of the Tort Reform Act, the Port, as the super-authoritative control over everyone at Sea-Tac, *"shall be responsible"* for any fault attributed to the airlines or EAGLE.[49]

Finally, abrogation of nondelegable duty must be avoided under the rule that, "[w]hen two statutes are in apparent conflict, this court will, if possible, reconcile them to the end that each may be given effect."[50] If nondelegable duty law was deemed abrogated by Tort Reform, that would create a conflict between RCW 4.22.070 and WISHA/OSHA. Under WISHA, the specific duty to comply with WISHA as to every worker on the jobsite is expressly imposed on "each employer." RCW 49.17.060(2). Under the law of this case, the Port is a statutory WISHA

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[49] RCW 4.22.070(1)(a) (emphasis added). The Port seeks to distinguish *Johnson v. REI,* 159 Wn. App. 939, 247 P.3d 18 (Div. 1 2011), relied on by Division One to show that a vicariously liable entity cannot defeat vicarious liability through fault apportionment under RCW 4.22.070, *Afoa v. Port, Pet.* App. B at 23-24, on the grounds that *Johnson* involved statutory vicarious liability, whereas this case supposedly only involves common-law vicarious liability. *Pet.* at 19. But as just demonstrated, the Port is subject to *both* the statutory vicarious liability of the specific duty clause of RCW 49.17.060(2), and common-law vicarious liability under the 120 years of authorities in favor of the controlling entities' nondelegable duty to maintain a safe workplace. *App.* 2, p.44 n.126.
[50] *King v. DSHS,* 110 Wn.2d 793, 799, 756 P.2d 1303 (1988).

"employer" analogous to a general contractor, and therefore its responsibility under federal OSHA is *nondelegable.*[51] Washington worker safety standards must equal or exceed OSHA standards. 29 USC §667(c)(2); RCW 49.17.010. Construing RCW 4.22.070 to allow the general contractor to shift some of its safety duty, as urged by the Port, *would drop WISHA below the OSHA nondelegability standard,* thus creating a conflict between RCW 4.22.070 on the one hand, and 29 USC §667(c)(2) and RCW 49.17.010, .060(2), on the other hand.

IV. CONCLUSION

Enough is enough. The public interest in adequate and appropriate compensation to tort victims without such protracted delay that they die waiting, outweighs the Port's anemic arguments for a fourth appellate hearing. Under the law, the facts, and common human decency, review should be DENIED.

Respectfully submitted this 8th day of May, 2017.

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[51] *Afoa I,* 176 Wn.2d at 473; 29 CFR §1926.16(a), (b).

Appendix 1

No. 91995-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRANDON APELA AFOA,

Respondent & Cross-Appellant,

v.

PORT OF SEATTLE,

Appellant.

BRIEF OF RESPONDENT / CROSS APPELLANT BRANDON APELA AFOA

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None of the other twenty Part D rules touch on worker safety or inspection, maintenance or placement of GSE, and those few whose application includes the ramp area have nothing to do with worker safety.[94]

[94] *See,* 14 CFR §139.301 "Records" (main purpose is keeping records on other substantive rules); *id.* §139.303 "Personnel" (requires airport to employ sufficient qualified personnel to comply with these rules, and to "[t]rain all persons who access *movement areas and safety areas*", §139.303(c) (emphasis added)); *id.* §139.305 "Paved areas" and §139.307 "Unpaved areas" (while applicable to the ramp as well as the movement area, these two rules focus on the surface beneath "aircraft", have no applicability to inspection, maintenance or placement of GSE, and focus on *air safety,* not *worker safety*); *id.* §139.309 "Safety areas" (extensions off the runways and taxiways for use in emergencies, and thus within the movement area, and focused on *air safety,* not *worker safety*); *id.* §139.311 "Marking, signs, and lighting" (all within runways, taxiways, and movement area, focused on *air safety,* not *worker safety*); *id.* §139.313 "Snow and ice control" ("on each movement area," *id.* §139.313(a)); *id.* §§139.315, .317, .319 "Aircraft rescue and

firefighting: Index Determination," "Aircraft rescue and firefighting: Equipment and agents," "Aircraft rescue and firefighting: Operational requirements," (indexed to length of air carrier aircraft and average daily departures, rules specify number of vehicles and firefighting agents required, and other equipment, communications, staffing, training and response times requirements for firefighters); *id.* §139.321 "Handling and storing of hazardous substances and materials" (policies for the same, especially focusing on fueling agents; nothing to do with other ground support services); *id.* §139.323 "Traffic and wind direction indicators" ("information to pilots" on "each runway", focused on *air safety,* not *worker safety*); *id.* §139.325 "Airport emergency plan" (for "[a]ircraft ... accidents," "[b]omb incidents," structural or fuel "fires", "[n]atural disaster", "[h]azardous materials ... incidents," "[s]abotage, hijack ... and other unlawful interference," power outages, and "[w]ater rescue situations," *id.* §139.325(b), *not* worker injury or death); *id.* §139.331 "Obstructions" (requires marking, lighting or removal of FAA-determined "obstructions", focused on *air safety,* not *worker safety*); *id.* §139.333 "Protection of NAVAIDS" (prohibits airport construction that interferes with the air traffic control signal or facilities); *id.* §139.335 "Public protection" (airport must prevent inadvertent entry to the *movement area,* and provide reasonable protection of persons and property from "aircraft blast"); *id.* §139.337 "Wildlife hazard management" (airport operator must act to "alleviate wildlife hazards wherever they are detected", including formulating a "wildlife hazard management plan", focused on *air safety,* not *worker safety*); *id.* §139.339 "Airport condition reporting" (requires airport operator to collect and disseminate to air carriers (not GSPs) information regarding conditions "on movement areas, safety areas, or loading ramps", including surface irregularities and snow and ice, or "[o]bjects on the movement area or safety areas", or "[a]ny other condition ... that might ... adversely affect the safe operations of air carriers," thus focused on *air safety,* not *worker safety*); *id.* §139.341 "Identifying, marking, and lighting construction and other unserviceable areas" (this applies to construction or unserviceable areas "on or adjacent to any movement area or any other area of the airport on which air carrier aircraft may be operated," *id.* §139.341(a)(i), and to construction equipment or roads "which might affect the safe movement of aircraft on the airport," *id.* §139.341(a)(ii), thus focused on *air safety,* not *worker safety*); *id.* §139.343 "Noncomplying conditions" (when "uncorrected unsafe conditions exist on the airport," the airport operator "must limit air carrier operations to those portions of the airport not rendered unsafe by those conditions" – again, directed to air carriers, not ground service operators, and *air safety,* not *worker safety*).

Appendix 2
AFOA v. PORT OF SEATTLE
SPECIAL VERDICT Q#1

Did the Port of Seattle ...

Afoa's Proposal: "retain the right to control the manner and instrumentalities of the work performed by plaintiff Brandon Afoa or his employer, EAGLE?" CP 3119

Port's Proposal: "retain a right to direct the manner in which the plaintiff's employer, ... EAGLE, performed or completed the maintenance of the equipment used by EAGLE to provide ground support work for the non-party air carriers (China Airlines, LTD, Hawaiian Airlines, Inc., EVA Airways Corporation, and British Airways, PLC)?" CP 4673

SV Q#1: "retain a right to direct the manner in which the plaintiff's employer, ... EAGLE, performed <u>its work</u> or ~~completed the~~ maint<u>ained</u> ~~enance of the~~ <u>its</u> equipment used ~~by EAGLE~~ to provide ground support work for the non-party air carriers (China Airlines, LTD, Hawaiian Airlines, Inc., EVA Airways Corporation, and British Airways, PLC)?" CP 4839

Appendix 3
AFOA v. PORT OF SEATTLE
AFOA I, 176 Wn.2d 460 – CONTROL TEST FORMULATIONS

"work done on a jobsite." *Id.* at 470, heading title
"work" *Id.* at 477 ¶44; *Id.* at 477 ¶45

"the manner in which contractors complete their work." *Id.* at 472 ¶25
"the manner and instrumentalities of work being done on the jobsite." *Id.* at 472 ¶27; *Id.* at 473 ¶32
"the manner and instrumentalities of work done by EAGLE and Afoa." *Id.* at 478, heading title
"the manner in which work is done on a work site," *Id.* at 478 ¶47
"the manner in which work is done at Sea-Tac Airport." *Id.* at 481 ¶54

"over EAGLE and Afoa" *Id.* at 474, heading title; *Id.* at 474 ¶34; *Id.* at 482 ¶57
"over a work site" *Id.* at 475 ¶35; *Id.* at 477 ¶43; *Id.* at 481 ¶55
"over workplace safety" *Id.* at 475, heading title
"over workplace safety at Sea-Tac Airport" *Id.* at 481, heading title
"over some part of the work" *Id.* at 477 ¶43 (discussing *Kelley*)
"over Sea–Tac Airport and the manner in which work is performed" *Id.* at 478 ¶46

"in the best position to ensure a safe working environment." *Id.* at 479 ¶49
"the movements of all workers on the site to ensure safety." *Id.* at 479 ¶49
"worker safety in a large, complex work site like Sea–Tac Airport and is in the best position to control safety" *Id.* at 481 ¶54

SUPREME COURT OF THE STATE OF WASHINGTON

BRANDON APELA AFOA, an individual, Respondent, vs. PORT OF SEATTLE, a Local Government Entity in the State of Washington, Petitioner.	No. _____ (COA No. 73753-8-I) CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I, Jennifer Moran, legal assistant at Sullivan Law Firm, hereby certify that on the date set forth below I caused the within AFOA'S ANSWER TO PETITION FOR REVIEW to be filed with the Clerk of the Court of Appeals, Division One, by ABC legal messenger, and caused a copy of the same to be served via ABC legal messenger and electronic mail to local appellate counsel for Petitioner, and electronic mail only to out of state appellate counsel, at the following addresses:

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Jennifer Marroquin