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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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NO. 64545-5-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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BRANDON APELA AFOA,

Appellant/Cross-Respondent,

v.

PORT OF SEATTLE,

Respondent/Cross-Appellant,

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Appeal from Superior Court of King County

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**BRIEF OF RESPONDENT/CROSS-APPELLANT**

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**ORIGINAL**

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## I. INTRODUCTION

Mr. Afoa's attorneys contend that the Port owed a duty to Mr. Afoa under WISHA, under the doctrine of retained control, and as a business visitor invitee. (App. Br. at 14-15.) These contentions are made even though the necessary facts upon which such duties are based are entirely absent in the Afoa case. As is evidenced herein, the claims asserted by Mr. Afoa's attorneys on his behalf are not "well grounded in fact" and are not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law." CR 11(a).

Throughout the Brief of Appellant, Mr. Afoa's attorneys repeatedly make legal and factual assertions which are not supported by the facts and/or which are directly contrary to the explicit language of the Washington Industrial Safety and Health Act, Chapter 49.17 RCW and Washington case law. The provisions thereof, and without exception the case law interpreting the same, are clear that a contractual relationship of employment must exist at some level in order for a duty to arise towards an injured worker under RCW 49.17.060. (See the definitions of "employer" and "employee" set forth in RCW 49.17.020(4) and (5), respectively.)

As the attorneys for Mr. Afoa know, there is no such contract of employment between the Port with any of the entities involved in this case. For this reason alone, Mr. Afoa's claim under WISHA against the Port has never had the necessary factual basis upon which such a claim can be brought.<sup>1</sup> To bring such a claim in the absence of such an elemental fact necessarily amounts to the filing of a frivolous claim in violation of CR 11 and RAP 18.9.

Mr. Afoa's attorneys continually ignore or misrepresent the indisputable fact that the contracts that the Port has with EAGLE and the air carriers are license agreements, not personal service contracts. These license agreements simply grant to the licensees the non-exclusive use of the Air Operations Area of Seattle-Tacoma International Airport ("STIA") in

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<sup>1</sup> In every case cited by Mr. Afoa's attorneys, an employment agreement exists between the jobsite owner and a general contractor, subcontractor, or independent contractor who in turn has a contract of employment with the injured worker: *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 750 P.2d 1257 (1988); *Awana v. Port of Seattle*, 121 Wn. App. 429, 432, 89 P.3d 291 (Div. 1, 2004); *Davis v. Baugh Indus. Contractors. Inc.*, 159 Wn.2d 413, 150 P.3d 545 (2007); *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 75 Wn. App. 480, 487-88, 878 P.2d 1246 (1994), *rev'd on other grounds*, 128 Wn.2d 745, 912 P.2d 472 (1996); *Goucher v. J.R. Simplot Co.*, 104 Wn. 2d 662, 709 P.2d 774 (1985); *Husfloen v. MTA*, 58 Wn. App. 686, 794 P.2d 859 (Div. 1, 1990); *Kamla v. Space Needle Corp.*, 147 Wn. 2d 114, 52 P.3d 472 (2002); *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978); *Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 85 P.3d 918 (Div. 1, 2004); *Rogers v. Irving*, 85 Wn. App. 455, 463, 933 P.2d 1060 (Div. 2, 1997); *Smith v. Myers*, 90 Wn. App. 89, 950 P.2d 1018 (Div. 2, 1998); *Stute v. P.B.M.C.*, 114 Wn.2d 454, 788 P.2d 545 (1990); *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799 (6<sup>th</sup> Cir.1984); and *Weinert v. Bronco Nat. Co.*, 58 Wn. App. 692, 795 P.2d 1167 (Div. 1, 1990).

common with others to conduct air and ground service operations. No where is there any evidence whatsoever that these license agreements with the Port constitute “contracts with one or more persons, the essence of which is the personal labor of such persons . . . .” RCW 49.17.020(4). To the contrary, nothing in the license agreements even remotely suggests that the licensees are performing work for the Port.

Likewise, it is black letter law in the state of Washington that liability under the common law doctrine of retained control for injuries to independent contractors and their employees exists only where an independent contract of employment exists and control is retained over the manner in which the independent contractor’s work is performed or completed. Not only is there no evidence that EAGLE, the air carriers, and their employees were independent contractors of the Port, there is no evidence whatsoever that the Port retained control over the manner in which they performed or completed their work. As set forth in the Statement of Facts, and in the declarations of Mr. Afoa and Mr. Gaoa, the evidence is totally to the contrary. The entirety of the facts set forth in these two declarations evidence nothing more than the Port exercising its rights as a landowner and operator of an international

airport in accordance with the Port's Rules & Regulations and the agreements it has with its licensees.

In addition, the attorneys for Mr. Afoa repeatedly misstate the arguments of the Port in this case. For example, Mr. Afoa's attorneys contend that the employer requirement set forth in RCW 49.17.060 "does not require the Port have any 'personal labor contract' or any formalistic employer-employee-independent contractor relationship with Mr. Afoa as demanded by the Port." (App. Br. at 25; see also App. Br. at 27; emphasis supplied.) Such a statement is deceptively false.

The Port has never "demanded" that there exist a direct contractual relationship of employment between Mr. Afoa and the Port. Incidentally, if such a situation actually existed, then the Port would be immune from liability pursuant to RCW 51.04.010, just as EAGLE is immune from suit under the facts of this case. See e.g., *Doty v. Town of South Prairie*, 122 Wn. App. 333, 93 P.3d 956 (2004), *aff'd*, 155 Wn.2d 527, 120 P.3d 941 (2005).

Likewise, there is no evidence to support the argument of counsel that Mr. Afoa was a business visitor invitee. In owning and operating STIA, the Port provides a place where airplanes can take off and land. As part of its operation of STIA, the Port gives certain air carriers a nonexclusive license

to use the Air Operations Area in common with others. If a vendor such as EAGLE obtains a contract to provide ground support services for one or more of these carriers, then the Port can issue a license to such a vendor solely for that purpose. In no way do these facts suggest that the Port invited EAGLE or Mr. Afoa to do work for the Port at STIA. Notwithstanding, Mr. Afoa's attorneys contend that Mr. Afoa was a business visitor invitee.

These are just a few examples of the arguments made by Mr. Afoa's attorneys throughout the Appellant's brief which have no basis in fact or law. As discussed in detail below, the Appellant's claims against the Port are totally devoid of factual and legal merit. The Port did not owe Mr. Afoa a duty under RCW 49.17.060, under the common law, or as a business visitor invitee.

## **II. ASSIGNMENTS OF ERROR**

- A. DID THE TRIAL COURT ERR IN DENYING THE RESPONDENT'S MOTION FOR CR 11 SANCTIONS IN ITS NOVEMBER 20, 2009 ORDER.**

## **III. STATEMENT OF THE CASE**

- A. MR AFOA'S ACCIDENT.**

The Appellant, Brandon Afoa, was critically injured at approximately 12:45 a.m. on December 26, 2007, while working at Seattle Tacoma

International Airport. (CP 62:1-4, 84, 96) This injury occurred while Mr. Afoa was operating a tug/pushback vehicle. (CP 72, 84, 71) This type of vehicle is used to maneuver large aircraft to and from the passenger gate areas located at STIA. (CP 65:7-10, 66:13-18, 22, 84, 88)

As part of the accident sequence, Mr. Afoa was driving the tug/pushback towards Gate S16 when he lost control of the vehicle. (CP 67:1-11,71:6-9, 72:21-25, 73:3-8, 84, 90, 92) Alvin Luna, who also was employed as a ramp agent for EAGLE, was standing on the tarmac and saw Mr. Afoa driving the tug/pushback. (CP 63:14-25, 64:1-14, 68:10-16; 86, 92, 94) When the tug/pushback was about 30-40 feet from the accident site, Mr. Luna heard Mr. Afoa yelling and screaming for help. (CP 69:17-25, 84, 86, 92, 94) Mr. Luna heard Mr. Afoa say, "Help me, help me, help me, -- brakes, brakes, brakes." (CP 67:1-6, 73:3-8, 75:7-15, 84, 86, 92, 94) According to reports from Mr. Luna and another eye witness, Eric Mallabo, the tug/pushback was moving relatively slowly at about 100 feet from the accident site but then began to go faster at about 50 feet from the accident site. (CP 98) Mr. Luna then saw the tug/pushback strike the right side of a K-loader. (CP 67:7-11, 70:20-22, 75:17-21, 76:2-4, 84, 86) A K-loader or main deck loader is used to lift cargo into the belly of large aircraft. (CP 84)

This main deck loader was parked next to a support wall for the jetway which extends from Gate S16 into the tarmac to where large aircraft are parked for passenger ingress and egress. (CP 88)

It is not known exactly what caused the accident. Mr. Roger Redifer, the EAGLE Station Manager at STIA, assumed in his description of the accident that Mr. Afoa may have pushed on the throttle pedal instead of the brake. (CP 98) In the EAGLE Injury/Incident Report Form (Supervisor) it is reported that inoperable brakes or brake failure may have caused the accident. (CP 99) However, two subsequent inspections of the tug/pushback, one by EAGLE employees on the day of the accident and another by an outside vendor on or about February 22, 2008, revealed that the brakes were working well. (CP 97, 103-111, 112)

**B. THE PORT OF SEATTLE.**

The Port of Seattle is a Port District and municipal corporation authorized by RCW 53.04.010. The Port is divided into four divisions – aviation, capital development, real estate, and seaport – which are supported by a number of corporate divisions. (CP 122) See [www.portseattle.org](http://www.portseattle.org).

**C. SEATTLE-TACOMA INTERNATIONAL AIRPORT.**

The Seattle-Tacoma International Airport is a general aviation airport which is owned by the Port and where applicable regulated by the Federal Aviation Administration. With some exceptions, STIA is open to all aircraft whose pilots desire to land and take off from the facility. (CP 123)

**D. SCHEDULE OF RULES & REGULATIONS NO. 4.**

The Port has adopted the Sea-Tac International Airport Schedule of Rules & Regulations No. 4 (“Rules & Regulations”). These Rules & Regulations were adopted “to provide for the safety and proper conduct of persons and property using [Sea-Tac].” The Port governs aircraft operations at STIA by way of Section 7 of the Rules & Regulations. (CP 123)

Mr. Afoa was injured in the Air Operations Area (“AOA”) at STIA. The AOA is defined in the Rules & Regulations as the area enclosed by the airport security fence, including ramps, aprons, runways, taxiways, gate positions, airport parking areas, and FAA facilities. In general, the AOA is used for aircraft to maneuver to and from the runways and the areas, usually terminal gates, where the passengers embark and disembark the aircraft. Portions of the paved surface or tarmac of the AOA contain various marked pathways, comparable to city streets, upon which different types of vehicles,

such as trucks and tug/pushbacks, move about to and from their various destinations. Depending upon the area where a particular activity is occurring, vehicles also are allowed to move about the tarmac outside of the various marked pathways. (CP 123)

The Port governs motor vehicle operations at STIA in the same way it governs aircraft operations, that is, by way of the Rules & Regulations, as contained in Section 4 thereof. (CP 123-124) Pursuant to Section 4 of the Rules & Regulations, motor vehicle operations within the AOA are governed generally by the provisions of the Washington State Motor Vehicle Codes and Traffic Directions procedures, and signals for turns, lights, and safe-driving precaution are to be in conformity therewith. (CP 124)

In addition to addressing aircraft and motor vehicle operations, as well as other activities and operations at STIA, the Rules & Regulations contain methods of enforcement as set forth in Section 8, titled Enforcement. Addressed in Section 8 are the procedures by which the Port is authorized to issue general violation notices and specific violation notices with respect to driving violations; driving violation procedures; security violations; sanitary, stormwater and industrial waste violations; smoking policy violations;

miscellaneous violations; construction and alteration violations; tenant violations; and labor activity violations. (CP 124)

No where in the Rules & Regulations does the Port undertake any obligation to maintain, inspect, or service the motor vehicle equipment which is used by the licensees to perform work for the air carriers which land and take off at Sea-Tac. Likewise, the Port does not undertake any such obligation independent of the Rules & Regulations. Also, the Port does not undertake any obligation to control the use of the tarmac by air carriers and licensees other than as set forth in the Rules & Regulations. (CP 124)

When violations of the Rules & Regulations are observed by Port officials, then the procedures to address such violations may be implemented in accordance with the provisions set forth in Section 8. In addition, the Rules & Regulations specifically provide that “[t]he Port assumes no responsibility for loss, injury, or damage to persons or property on the Airport or using the Airport facilities.” (CP 124)

**E. EAGLE AVIATION GROUND LOGISTICS ENTERPRISE, INC.**

Eagle Aviation Ground Logistics Enterprise, Inc. (“EAGLE”) is an airline ground support vendor that provides ground services operations for air carriers that fly in and out of STIA. (CP 124) EAGLE does not do work for

the Port as an independent contractor or in any other capacity. (CP 124) The Port did not and does not employ, manage, or supervise EAGLE or any of its employees, including Brandon Afoa, either directly or indirectly. (CP 124-125)

**F. GROUND SERVICE OPERATOR LICENSING AGREEMENT.**

In order to perform ground services for an air carrier at STIA, EAGLE was required to apply for and obtain from the Port a license agreement titled Ground Service Operator Licensing Agreement (“License Agreement”). (CP 124-125) This License Agreement is required of all companies providing aircraft ground handling operations within the AOA at STIA. (CP 125) A prerequisite condition to the issuance of the License Agreement to EAGLE was proof that EAGLE had received a Certification of Carrier Support from an air carrier holding a current operating agreement with the Port. (CP 125) The License Agreement provides that EAGLE’s **only** use of the AOA shall be for the purpose of providing aircraft ground handling services, including, among other things, aircraft movement and the storing/parking of EAGLE’s equipment. (CP 125) The Port did not contract with EAGLE for services related to ground operations at STIA pursuant to the License Agreement. (CP 125) The License Agreement merely provided EAGLE permission to

conduct ground handling services, including, among other things, aircraft movement and the storing/parking of EAGLE's equipment, related only to EAGLE's Certification(s) of Carrier Support for air carriers that fly in and out of STIA. (CP 125)

The License Agreement between the Port and EAGLE is not an employment agreement between the Port and EAGLE or between the Port and Mr. Afoa. (CP 125) By its express terms, it is a license agreement authorizing EAGLE to perform work for air carriers that have contracted with EAGLE for ground support services. (CP 125) The only reason that EAGLE and its employees performed work and/or operated machinery at STIA at the time of Mr. Afoa's injury is because EAGLE had obtained the prerequisite Certification(s) of Carrier Support. (CP 125-126) If EAGLE had not obtained one or more Certifications of Carrier Support, pursuant to which it was authorized to perform work for an air carrier, then the License Agreement would not have been issued to EAGLE. (CP 126)

The License Agreement between the Port and EAGLE contains a number of provisions which address the responsibility of EAGLE to maintain, inspect, or service the motor vehicle equipment which EAGLE uses in its performance of work for the air carriers from which it has obtained a

Certification of Carrier Support. These provisions are contained in paragraph 11. of the License Agreement. (CP 126)

Paragraph 11.A, states that “[a]ll equipment brought onto the Premises by [EAGLE] shall remain the sole responsibility of [EAGLE].” Paragraph 11.B. states that the Port “accepts no liability for [EAGLE’s] equipment.” Paragraph 11.E. states that EAGLE “shall be solely responsible for the maintenance of its equipment while on the Premises for the duration of the License.” (CP 126)

In paragraph 9 of the License Agreement, EAGLE agreed that it “shall comply with all Port regulations including the Port’s [Rules & Regulations], and all applicable federal, state and local laws and regulations.” (CP 207)

#### **G. THE SIGNATORY LEASE AND OPERATING AGREEMENT.**

The Signatory Lease and Operating Agreement is a use agreement between the Port and an airline which conducts flight operations in and out of STIA. It is not an agreement between the Port and EAGLE. The Signatory Lease and Operating Agreement grants to an airline the rights of occupancy and nonexclusive use in common areas located within the Seattle-Tacoma International Airport, “subject at all times to the exclusive control and management by the Port.” (See, e.g. CP 392, 402-403)

In the Signatory Lease and Operating Agreement at Article 2.2.1, the Port and the airline agree that the Port “grants to Airline a nonexclusive license to use the Air Operations Area, in common with others, subject at all times to the exclusive control and management by the Port.” (CP 403) The phrase “exclusive control and management” is included in the Signatory Lease and Operating Agreements for a specific reason. That is, the Port is subject to a significant number of FAA requirements and grant assurances. In order to stay in compliance with and not violate these FAA requirements and grant assurances, the Port must retain the exclusive control and management of what happens in the AOA to the extent of the Port's operations and the movement of aircraft. The phrase "exclusive control and management" as that phrase is used in the Signatory Lease and Operating Agreement is intended to convey to the airlines that if an airline's use of the AOA conflicts with Port operations, then the Port can exercise control and management of that area to eliminate the conflict. For example, if an aircraft is parked for too long a time period at a common use gate, such as Gate S-15, or if the aircraft is in need of maintenance, then the Port can require the airline to move its aircraft to a different location on the AOA so that the common use gate can be used by other aircraft and airlines. (CP 563)

The Signatory Lease and Operating Agreement is not intended to convey, nor do the words themselves convey, any agreement by the Port to control or manage the actual operations of the airline or the maintenance of its aircraft while the airline exercises its license to use the Air Operations Area. Likewise, since the Signatory Lease and Operating Agreement is not an agreement between the Port and EAGLE, it was never intended to convey to EAGLE that the Port would determine how EAGLE performs the specifics of its operations, how EAGLE attends to an airline's aircraft, or how EAGLE manages and controls its employees or maintains its equipment. (CP 563)

**H. THE PORT LIMITS ITS CONTROL OVER THE AREAS WHERE LICENSEES PERFORM THEIR SERVICES FOR AIR CARRIERS TO THE MAINTENANCE OF THE PREMISES ONLY.**

In most instances, work done by EAGLE and other ground service vendors for the air carriers with which they have service contracts takes place at a terminal gate. (CP 126) These terminal gates either are leased by an air carrier from the Port or the air carrier pays a per turn charge to the Port for a time period which encompasses the time when the air carrier's aircraft is being loaded and unloaded with passengers, baggage, and/or cargo. (CP 126) During such time periods, the Port is responsible for repairing problems arising from its own property, like fixing a tripping hazard or replacing a

light. (CP 126) Once an aircraft is parked at a specific gate, the Port does not undertake any activities designed to control such a work area in connection with the performance of services by the air carrier's vendors. (CP 126-127) Likewise, the Port does not undertake any activities in such a work area designed to control the manner in which such services are performed by a licensee, such as EAGLE. (CP 127)

**I. PORT PERSONNEL DO NOT DIRECT EAGLE'S EMPLOYEES' WORK.**

Port personnel were not involved in or in any way supervising, managing, or directing Mr. Afoa while he operated the tug/pushback or when he lost control of it. Port personnel were not involved in or in any way supervising, managing, or directing the work that was being done by any other EAGLE employee at the time of Mr. Afoa's accident. (CP 127)

**J. THE PORT DOES NOT TRAIN EAGLE EMPLOYEES ON VEHICLE OPERATION.**

The Port did not have anything to do with training Mr. Afoa to operate this particular tug/pushback other than administering the FAA required training for persons operating motor vehicles near aircraft. Any particularized training with respect to operating the tug/pushback involved in the accident was the responsibility of EAGLE. The Port does not retain

any right to control nor does it actually control the manner in which EAGLE's employees were trained or how they perform their work. (CP 127)

#### IV. ARGUMENT

##### A. THE PORT DID NOT OWE MR. AFOA ANY DUTY UNDER WISHA.

###### 1. The Duties Prescribed By WISHA Apply Only to Employers, Employees, and Work Places as Defined Therein.

RCW 49.17.060 provides as follows:

Each employer:

(1) Shall furnish to each of his employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his employees: . . . ; and

(2) Shall comply with the rules, regulations, and orders promulgated under this chapter.

This statute creates a twofold duty. *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 457, 788 P.2d 545 (1990); *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 153, 750 P.2d 1257, 756 P.2d 142 (1988); *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 671, 709 P.2d 774 (1985). The first subsection prescribes that employers have a general duty to protect only the employer's own employees from recognized hazards which are not covered by specific safety regulations. *Id.* In the Afoa case, subsection one of RCW 49.17.060

is not implicated as the Port was not the employer of Mr. Afoa. If it were implicated, then the Port would be immune from suit under RCW 51.24.010.

The second subsection of RCW 49.17.060 prescribes a specific duty to comply with WISHA regulations. *Id.* Under subsection two, this duty extends to an employers own employees, and also extends to employees of independent contractors, when a party asserts that the employer did not follow particular WISHA regulations. *Stute*, 114 Wn.2d at 458; *Adkins*, 110 Wn.2d at 153; *Goucher*, 104 Wn.2d at 672. Where such an allegation is asserted, all employees working on the premises are members of the protected class. *Stute*, 114 Wn.2d at 458; *Adkins*, 110 Wn.2d at 153; *Goucher*, 104 Wn.2d at 673.

In this case, Mr. Afoa contends that his injuries resulted from the Port violating or allowing the violation of specific regulations applicable to powered industrial trucks (“PITs”), including the tug/pushback that he was operating at the time of his accident. (Br. of App. at 23-24.) This contention implicates subsection two of RCW 49.17.060.

The determinative issue, however, as to whether the Port owed Mr. Afoa a duty under RCW 49.17.060(2) is whether the Port was an “employer” as defined in RCW 49.17.020(4) under the facts of the Afoa case. As

discussed herein, the Port was not an “employer” and Mr. Afoa was not an “employee” relative to the Port with respect to Mr. Afoa’s work at STIA. In addition, because the Port was not an “employer”, the area where Mr. Afoa was injured was not a “work place” as defined in RCW 49.17.020(8). For these reasons, the Port did not owe Mr. Afoa a duty under RCW 49.17.060(2).

**2. The Port is Not an “Employer” as Defined by WISHA Under the Facts of the Afoa Case.**

RCW 49.17.020(4) provides as follows:

the term ‘employer’ means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees or who contracts with one or more persons, the essence of which is the personal labor of such person or persons and includes the state, counties, cities, and all municipal corporations, public corporations, political subdivisions of the state, and charitable organizations: PROVIDED, That any person, partnership, or business entity not having employees, and who is covered by the industrial insurance act shall be considered both an employer and an employee.

(Emphasis supplied.)

As set forth in the Statement of Facts, the Port did not hire Mr. Afoa as an employee nor did it hire either Mr. Afoa or EAGLE as an independent contractor to perform labor on the Port’s behalf. Likewise, none of the air carriers with which EAGLE has contracted to provide ground support was an

independent contractor of the Port hired by the Port to perform labor on the Port's behalf. Instead, these entities were licensees of the Port who were authorized by their respective license agreements to conduct air and ground support operations. These license agreements are not contracts with the Port the essence of which is the personal labor of such person or persons. As such, the Port was not an "employer" of Mr. Afoa, EAGLE or the air carriers within the meaning of RCW 49.17.060 and did not owe Mr. Afoa any specific duty thereunder to comply with or enforce any allegedly applicable WISHA regulations.

**3. Under the Facts of the Afoa Case, Mr. Afoa is Not an "Employee" Relative to the Port as Defined by WISHA.**

Mr. Afoa, relative to the Port, also does not fall within either of the meanings of the term "employee" as defined in RCW 49.17.020(5). RCW 49.17.020(5) provides as follows:

the term "employee" means an employee of an employer who is employed in the business of his employer whether by way of manual labor or otherwise and every person in this state who is engaged in the employment of or who is working under an independent contract the essence of which is his personal labor for an employer under this chapter whether by way of manual labor or otherwise.

(Emphasis supplied.)

It is clear from this definition that in order to be an “employee” to whom a duty is owed by the Port under WISHA, Mr. Afoa had to have been in the employment of the Port or had to have been working under an independent contract with the Port. At the time of his accident, Mr. Afoa was not in the employment of the Port and neither Mr. Afoa, EAGLE, nor the air carriers were working under an independent contract with the Port the essence of which was their personal labor for the Port. As such, Mr. Afoa, EAGLE, and the air carriers were not “employees” of the Port relative to the air and ground services they conducted at STIA.

**4. The Location Where Mr. Afoa Was Injured Was Not a “Work Place” as Defined by WISHA Under the Facts of the Afoa Case.**

The location where Mr. Afoa was injured does not meet the definition of a “work place” relative to the Port under the facts of this case. RCW 49.17.020(8) provides as follows:

the term “work place” means any plant, yard, premises, room, or other place where an employee or employees are employed for the performance of labor or service over which the employer has the right of access or control, and includes, but is not limited to, all work places covered by industrial insurance under Title 51 RCW, as now or hereafter amended.

(Emphasis supplied.)

Here, there is no question that pursuant to the license agreements the Port had with EAGLE and the air carriers, the Port either explicitly or implicitly retained the right of access to and control over its own land. But, the Port's right of access to or control over its own land, in and of itself, did not make the Port an "employer" of EAGLE or the air carriers. Nor did it make the place at STIA where Mr. Afoa was injured a "work place" under WISHA.

Before the place where Mr. Afoa was injured can be deemed a "work place" under WISHA, RCW 49.17.020(8) requires that the Port must have been "the employer" of Afoa, EAGLE, or an air carrier. Because the Port was not "the employer" thereof, the place where Afoa was injured was not a "work place" of the Port as defined in RCW 49.17.020(8).

**5. The Port Did Not Owe a Nondelegable Duty to Mr. Afoa as the Port Was Not A General Contractor for or Owner/Developer of a Construction Project or Other Like Jobsite Located Where Mr. Afoa's Accident and Injury Occurred.**

Mr. Afoa's attorneys contend that the Port owed a nondelegable duty to Mr. Afoa just like the nondelegable duty owed by general contractors and owner/developers to workers at a construction project jobsite. (App. Br. at 20-22.) Again, such argument completely ignores the facts of the Afoa case.

At the time of his accident, Mr. Afoa was driving a tug/pushback across the tarmac from one passenger gate to another for the purpose of providing ground support services to Hawaiian Airlines. Mr. Afoa lost control of the tug/pushback and struck a lift which was parked next to a support for a jetway extending from gate S-16. This location is clearly not a construction project jobsite over which the Port, either as a general contractor or owner/developer, was exercising supervisory authority.

This location also was never a place where the Port was exercising supervisory authority over how EAGLE and Hawaiian Airlines performed their work as a ground support vendor or an air carrier. The indisputable facts in this case are that the Port did not undertake, retain or exercise any authority over Mr. Afoa, EAGLE, or the air carriers as to how they performed or completed their work for each other. The indisputable facts also are that the only “control” exercised by the Port relative to EAGLE and the air carriers was the requirement that they comply with the terms of their respective license agreements and with the Port’s Rules & Regulations or be subject to the enforcement thereof by the Port.

In making the nondelegable duty argument, Mr. Afoa’s attorneys ignore established precedent in this State. This precedent holds that it is the

nature and extent of the supervisory authority of the general contractor or owner/developer over the construction site and the control over the manner in which its independent contractor performs or completes its work that gives rise to the duty owed to workers under WISHA. *See e.g., Kamla v. Space Needle Corp.*, 147, Wn.2d 114, 119-125, 52 P.3d 472 (2002). The mere fact that a jobsite owner retains the right to exclusive control and management of its own land is not the basis for the duty owed under WISHA. *Id.*

Furthermore, the nondelegable duty argument presupposes that the jobsite or land owner actually hired an independent contractor to perform work on its land on its behalf. This supposition does not exist in the Afoa case. As set forth in note 1, *supra.*, in each of the cases cited by Mr. Afoa's attorneys in support of their WISHA duty argument there exists an independent contractor hired by the general contractor or owner/developer to perform work on behalf of thereof. Mr. Afoa's attorneys have not cited one single case which provides either factual or legal support for their nondelegable WISHA duty argument under the actual facts of the Afoa case.

**6. In Granting the Licenses to EAGLE and the Air Carriers, The Port Did Not Retain Control Over the Manner in Which They Performed Their Work.**

In Part III. C of their brief, Mr. Afoa's attorneys set forth what they contend are "facts pertaining to the Port's control of the jobsite." (App. Br. at 9-12.) None of the evidence identified therein proves or infers the necessary elements which must exist in order to give rise to a duty under WISHA. That is, there are no facts in the Afoa case which can prove that Mr. Afoa, EAGLE, or the air carriers are independent contractors for the Port over whom the Port retained supervisory control which amounted to the right to control the manner by which Mr. Afoa, EAGLE and the air carriers performed or completed their work.

In *Kamla v. The Space Needle Corporation*, 147 Wn. 2d 114, 52 P.3d 472 (2002), the Court specifically provided answers to two questions which are completely contrary to the claim that the Port owed Mr. Afoa a duty under WISHA.<sup>2</sup> First, the Court held that a jobsite owner is not per se liable under the statutory requirements of RCW 49.17.060. *Id.* at 123. The Court specifically noted that there is nothing in chapter 49.17 RCW which specifically imposes a duty upon jobsite owners to comply with WISHA.

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<sup>2</sup>In discussing the Court's holdings in the *Kamla* case, the Port does not admit or imply in any way that Mr. Afoa, EAGLE, or the air carriers are independent contractors of the Port or that the place where Mr. Afoa was injured is a jobsite or work place as defined in RCW 49.17.020(8). The Port's discussion of the *Kamla* case is for the purpose of pointing out that even if the entire AOA, or for that matter the entirety of STIA, could somehow be considered a jobsite relative to the Afoa accident, the facts of the Afoa case still do not give rise to a duty owed to Mr. Afoa under WISHA or under the retained control doctrine.

Second, the Court also held that the mere status of being an owner of land where a jobsite exists does not “play a role sufficiently analogous to general contractors to justify imposing upon them the same nondelegable duty to ensure WISHA compliance when there is no general contractor.” *Id.*, at 123-124. As the Court noted, landowners run the gamut from the astute to the non-astute regarding WISHA compliance. Because that is the case, the status of landowner of a jobsite, in and of itself, is not sufficient to impose thereon the nondelegable duty to ensure WISHA compliance. *Id.*, at 124.

The Court’s holding with respect to the Space Needle Corporation is directly contrary to the argument by Mr. Afoa’s attorneys that “[s]o long as the job site owner is a sophisticated entity, such as the Port, which is expected to have the knowledge and experience to maintain a safe workplace, it has a duty to do so.” (App. Br. at 26.) Obviously, the Space Needle Corporation is a sophisticated entity, and regardless of whether it should or should not have been expected to have the experience and knowledge to maintain a safe work place, its status as a mere jobsite owner was not sufficient to impose on it the duty to ensure WISHA compliant work conditions.

The critical issue, the *Kamla* Court noted, is whether a landowner of a jobsite retains control over the manner in which the independent contractor

performs or completes its work. *Id.*, at 119-122, 125. If it does not, then the landowner does not have a duty to comply with WISHA rules, regulations, and orders. *Id.*, at 125.

In the Afoa case, there are no facts whatsoever from which a jury could believe that Mr. Afoa, EAGLE, or the air carriers were independent contractors for the Port and that the Port retained the right to tell them how to perform or complete their jobs. The Port has never entered into a contractual employment agreement with either EAGLE or the air carriers pursuant to which they agreed to perform work for the Port. The Port has never undertaken the responsibility of telling EAGLE or the air carriers how to do their jobs as air carriers or as a ground support vendor. The Port also has never hired EAGLE or the air carriers to construct or develop any portion of STIA such that it can be said that the Port was the owner/developer of a jobsite.

What the Port has done, however, is tell EAGLE and the air carriers in no uncertain terms that it retains exclusive control and management of the AOA which it owns and that while on Port property, EAGLE and the air carriers must comply with their respective license agreements and with the Rules & Regulations promulgated by the Port. No where in any case cited by

the Appellant's attorneys do these type of facts give rise to a duty owed to a worker under RCW 49.17.060.

The attorneys for Mr. Afoa have not produced any evidence that the Port retained control of how EAGLE or the air carriers performed or completed their work as air carriers and ground support service providers. They also have not produced any evidence that EAGLE and the air carriers are independent contractors that were hired by the Port to perform work on behalf of the Port. The reason that they have not produced such evidence, is that it does not exist. Prior to their filing of the Afoa lawsuit, Mr. Afoa's attorneys knew that no such facts existed, and yet filed the lawsuit anyway. This is a clear violation of CR 11.

Instead, Mr. Afoa's attorneys argue that a fence around STIA, the administration of mandatory FAA testing for those operating motor vehicles around aircraft, examples of enforcement of the Port's Rules & Regulations, intense regulation, the amount of money involved, and the "sheer size, scope, and complexity of airport operations" are facts which they claim is evidence of the type of "control" which gives rise to a duty under WISHA. (App. Br. at 30-32.)

Such argument is a purposeful misstatement of the type of evidence which must exist in order to prove that a landowner owes someone a duty under WISHA. Clearly, none of the evidence cited by Mr. Afoa's attorneys could prove that EAGLE and the air carriers are independent contractors for the Port and could prove that the Port agreed to undertake the responsibility of supervising how EAGLE or the air carriers perform or complete their ground support and air carrier jobs.

**7. The Evidence in the Afoa Case Fails to Establish the Elements of an Acting In Concert Theory of Liability.**

The Appellant's attorneys conclude their discussion of WISHA by asserting an acting in concert theory. (App. Br. at 33-34.) Such argument is another example of the complete lack of merit of the claims asserted by the Appellant's attorneys in this case.

As a preliminary matter, in order to successfully assert the existence of an acting in concert theory of liability, the Appellant's attorneys must show that the Port had a duty to Mr. Afoa to enforce the WISHA regulations. As explained herein, this showing clearly has not been made.

In addition, no where do Mr. Afoa's attorneys actually identify what facts in the record give rise to an inference that the Port was "consciously" acting in concert with the air carriers and/or EAGLE in an unlawful manner.

They allude to the existence of the “contract” between the Port and the airlines and the level of involvement and control exercised by the Port but never actually identify what it is that the Port did which evidences a conscious intent to act in an unlawful manner, let alone do so with EAGLE or the air carriers.

Further, contrary to the attorneys’ claims, no where in the record has the Port admitted that there is a factual question as to whether Mr. Afoa’s injuries were caused by WISHA violations. As clearly set forth in the Statement of Facts, the Port is not sure what caused Mr. Afoa to lose control of his vehicle. The Port’s only contention is that the sole cause of the accident was the act, whatever that might be, of some person or entity other than the Port.

**B. THE PORT DID NOT OWE MR. AFOA ANY DUTY UNDER THE RETAINED CONTROL DOCTRINE.**

**1. Mr. Afoa, EAGLE, and the Air Carriers Were Not Independent Contractors of the Port and The Port Did Not Undertake a Duty to Direct the Manner in Which They Performed Their Work.**

The argument by Mr. Afoa’s attorneys that the Port owed Mr. Afoa a common law duty to provide him a safe work place under the retained work doctrine also is frivolous and fails for a number of reasons. First, Mr. Afoa,

EAGLE, and the Air Carriers were not independent contractors for the Port. This in and of itself ends the inquiry.

Second, the retained control doctrine is an exception to the general rule that an employer of an independent contractor is not liable for the injuries caused thereby. *Kamla*, 147 Wn.2d at 119. This exception arises only where the employer of the independent contractor has retained the right to control the manner in which the independent contractor performs its work. *Kamla*, 147 Wn.2d at 121. As set forth herein, there is no evidence that the Port in its license agreements with EAGLE and the air carriers undertook a right to control the manner in which they performed or completed their work.

**C. MR. AFOA WAS A LICENSEE, NOT A BUSINESS INVITEE.**

In their brief, Mr. Afoa's attorneys claim that Mr. Afoa was a business visitor. (App. Br. at 36.) In support of this claim, they quote the Restatement (Second) of Torts § 332 (1965), which defines an invitee is either a public invitee or a business visitor. (App. Br. at 37.) At the time of his injury, Mr. Afoa was neither.

Under subsection two of § 332, a public invitee is defined as a person “who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.” *Id.*; emphasis

supplied. Here, Mr. Afoa was never “invited” by the Port to remain on the land as a member of the public. Mr. Afoa was the employee of a licensee, EAGLE, that had requested permission from the Port to do work for one or more air carriers, that also were licensees of the Port. There is no evidence that the Port “invited” EAGLE to perform work for an air carrier. In addition, neither Mr. Afoa nor EAGLE were members of the traveling public who were at the site for the purpose of traveling by airplane.

Mr. Afoa also was not a business visitor as defined in subsection three of § 332. Neither Mr. Afoa nor EAGLE were ever “invited” by the Port to come into the AOA to perform ground support for an air carrier. Just the opposite is the case. As set forth in the Statement of Facts, and as set forth in the Ground Service Operator Licensing Application & Agreement, it was EAGLE that was the “Company requesting Ground Service License”. (CP 202)

Under the facts of this case, it is patently frivolous to claim that Mr. Afoa was a business invitee. Subsection three of § 332 requires two things. First, the person must be “invited”. The indisputable evidence in this case is that the Port did not “invite” either Mr. Afoa or EAGLE to enter or remain

in the AOA to conduct ground support operations. That in and of itself prevents Mr. Afoa from being a business visitor.

But, in addition, the second reason that Mr. Afoa is not a business visitor is the he was not on the land “for a purpose directly or indirectly connected with business dealings with the possessor of the land.” Here, neither Mr. Afoa nor EAGLE were in the AOA for the purpose of engaging in business dealings with the Port. EAGLE and Mr. Afoa were in the AOA only because they had business dealings with Hawaiian Airlines which involved ground support for its aircraft. If EAGLE had not had such an agreement with Hawaiian Airlines or another air carrier, then neither EAGLE nor Mr. Afoa would have been in the AOA at all.

Because Mr. Afoa was not a business visitor, he was not owed a duty by the Port to exercise ordinary care for his benefit. Since Mr. Afoa was not owed such a duty, there cannot be a question of fact as to whether such a duty was breached.

**D. MR. AFOA WAS A LICENSEE AND THERE IS NO EVIDENCE THAT THE DUTY OWED TO MR. AFOA AS A LICENSEE WAS BREACHED BY THE PORT.**

Mr. Afoa was a licensee because he was "a person who [was] privileged to enter or remain on land only by virtue of the [Port's] consent."

*Restatement (Second) of Torts* § 330 (1965); *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986). The duty owed to a licensee is set forth in the *Restatement (Second) of Torts* § 342 (1965), as adopted by *Memel v. Reimer*, 85 Wn.2d 685, 689, 538 P.2d 517 (1975). This duty provides as follows:

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved.

*Memel v. Reimer*, 85 Wn.2d at 689; *Younce v. Ferguson*, 106 Wn.2d at 667-668; emphasis supplied.

In this case, Mr. Afoa has never formally pleaded that a condition of the land owned by the Port was a proximate cause of his injury. However, in Part IV. d. of his appellant brief, Mr. Afoa may be claiming that the Port allowed the tarmac to be cluttered with broken equipment, including the loader that fell on him, and that this condition of the land was the proximate cause of his injury. (App. Br. at 38.) Assuming for purposes of argument

only that this condition of the land presented an unreasonable risk of danger to Mr. Afoa and that in fact Mr. Afoa is making such an allegation, such alleged facts still do not create a question of fact as to whether the Port violated any duty owed to Mr. Afoa as a licensee.

As the *Restatement* clearly provides, it is not sufficient to merely assert that the allegedly cluttered condition of the land involved an unreasonable risk of harm to Mr. Afoa. It also must be alleged that the Port should have expected that Mr. Afoa would not have discovered or realized the danger posed by such condition, and also that Mr. Afoa did not know or have reason to know of the alleged cluttered condition of the land and the alleged risk it imposed. Mr. Afoa has never made such an allegation.

Regardless of the extent to which the tarmac allegedly was cluttered, that the allegedly broken K-loader was parked next to a support for the jetway for Gate S-16 is open and obvious, as evidenced by the photos in this case. It also is necessarily the case that Mr. Afoa would have realized that if the tug/pushback he was operating collided with the parked K-loader, then that would pose a risk to him of suffering bodily injury, which is what occurred. For these reasons, there are no facts which could support the only duty owed to Mr. Afoa by the Port under the facts of this case.

**E. THE EXCEPTIONS TO THE PUBLIC DUTY DOCTRINE DO NOT APPLY IN THE AFOA CASE.**

The public duty doctrine was advanced in the Port's Motion for Summary Judgment because there never existed any facts which would support Mr. Afoa's claim under WISHA. In addition, the Plaintiff did not allege and there are no facts to support a claim that a condition of the land was a proximate cause of Mr. Afoa's injuries. In response to the Port's assertion of the Public Duty Doctrine, Mr. Afoa asserts that his claim falls within the legislative intent, failure to enforce, and special relationship exceptions to the public duty doctrine. These arguments also are without merit. As set forth herein, the Port does not owe a duty to Mr. Afoa under WISHA directly, did not owe a duty to Mr. Afoa under any WISHA regulations, and did not have a duty to Mr. Afoa to ensure that there was compliance with pertinent WISHA regulations for the benefit of Mr. Afoa by either EAGLE or the air carriers.

Likewise, the claim that the Port owed Mr. Afoa a duty based upon a special relationship it had with Mr. Afoa is without merit. A special relationship exists between a government agency and a particular person if (1) the person is in direct privity or contact with an agency official that sets the person apart from the general public, (2) the person receives an express

assurance from the agency official, and (3) the person justifiably relies on the assurance. *Beal v. The City of Seattle*, 134 Wn.2d 769, 954 P.2d 237 (1998).

In this case, there is no evidence that a Port official had direct privity or contact with Mr. Afoa so as to set him apart from all other licensees within the AOA. There is no evidence of any type of express assurance given to Mr. Afoa by a Port official about anything, let alone an express assurance that the Port would enforce WISHA regulations for his benefit. There also is no evidence of any reliance by Mr. Afoa on any express assurance that the Port would enforce WISHA regulations for his benefit, since no such assurance was ever given to him by the Port.

**F. THE PORT MET ITS BURDEN OF SHOWING THAT IT IS ENTITLED TO SUMMARY JUDGMENT.**

Mr. Afoa's attorneys contend that the Port did not meet its burden of showing that it is entitled to summary judgment because it failed to set forth facts as would be admissible in evidence. This argument also is without merit.

With respect to Mr. Redifer's declaration, the Port never has argued that the basis for its summary judgment motion was the content thereof. This declaration obviously contains hearsay information, conclusions, and assumptions about the accident. It was submitted merely to provide the trial

court with background information about what was known and being reported about the accident shortly after the accident occurred.

With respect to Mr. Coates' declaration, it complies in every respect with the requirements of CR 56 (e). It was made based upon personal knowledge and shows affirmatively that Mr. Coates is competent to testify to the matters stated therein. Contrary to the argument of Mr. Afoa's attorneys, it does not contain conclusory statements.

As stated in *Grimwood v. University of Puget Sound*, 110 Wn.2d 355, 359, 753 P.2d 817 (1988), "[a] fact is an event, an occurrence, or something that exists in reality. *Webster's Third New International Dictionary* 813 (1976). It is what took place, an act, an incident, a reality as distinguished from supposition or opinion."

In Mr. Coates' declaration he makes the following statement: "The Port did not and does not employ, manage, or supervise EAGLE or any of its employees, including Brandon Afoa, either directly or indirectly." Although it is a compound sentence, there is no opinion or supposition contained therein. These are statements of what existed in reality. For example, if the sentence is broken down, it states that the Port did not employ Mr. Afoa or

EAGLE. It states that the Port did not manage EAGLE or Mr. Afoa. It also states that the Port did not supervise EAGLE or Mr. Afoa.

This sentence could have expressed the same reality by using words that define employ, manage, and supervise. For example, Mr. Coates' declaration could have said that the Port did not "hire or engage the services of" Mr. Afoa or EAGLE, which is the definition of "employ". Or, it could have said that the Port did not conduct the business of or be in charge of Mr. Afoa or EAGLE, which is a definition of "manage". Or, it could have included the statement of fact that the Port did not oversee or direct the performance of either Mr. Afoa or EAGLE, which is a definition of "supervise". Whether the words "employ", "manage", or "supervise" are used, or the definitions of such words are used, they still express the reality as to what the Port did not do with respect to Mr. Afoa and EAGLE.

In *Grimwood*, the Court described the appropriate content of an affidavit as follows: "defendant's affidavit sets forth facts leading to plaintiff's termination. The memoranda attached to the affidavits set forth specific events, occurrences, things that were claimed to exist in reality. They stated that plaintiff did this or did not do that." *Grimwood v. University of Puget Sound*, 110 Wn.2d at 360. (Emphasis supplied.) Contrary to the argument

of counsel, this is exactly the type of statements of fact that is expressed by Mr. Coates in his declaration. That is, Mr. Coates stated that the Port did not employ, manage or supervise Mr. Afoa or EAGLE. Such statements of fact are completely different than the conclusory statements which have been disapproved in Washington case law. *See e.g., Grimwood v. University of Puget Sound*, 110 Wn.2d at 359 (that was "petty," this was a "pretext," that was "an exaggeration," or a fact set forth was "much ado about nothing"); *Washington Osteopathic Medical Assoc. v. King County Medical Service Corp.*, 78 Wn.2d 577, 582, 478 P.2d 228 (1970) ("corner the entire practice of medicine and surgery"); and *American Linen Supply Co. v. Nursing Home Building Corp.*, 15 Wn. App. 757, 768, 551 P.2d 1038 (1976) ("we have always disputed the reasonableness of the bill").

In addition to properly setting forth statements of fact and reality, Mr. Coates' declaration, immediately preceding the quoted statement, makes another statement of reality: "EAGLE does not do work for the Port of Seattle as an independent contractor or in any other capacity." (CP 124) Mr. Coates' declaration also sets forth an additional statement of reality, i.e., the Port does not retain any right to control nor does it actually control the manner in which EAGLE's employees perform their work. (CP 127) These statements of fact

and reality go to the very essence of and completely negate Mr. Afoa's claim that the Port owed him a duty under WISHA and the common law. No where in any supporting papers submitted by counsel for Appellant, including the declarations of Mr. Afoa and Mr. Gaoa, are these statements of fact and reality refuted.<sup>3</sup>

Counsel for Mr. Afoa also object to the Declaration of Isabel R. Safora. (App. Br. at 49-50.) In her declaration, Ms. Safora explains the meaning of the language "exclusive control and management" which is

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<sup>3</sup> All but one of the examples of "exclusive control" set forth in the Afoa and Gaoa declarations describe the Port enforcing its rights as the owner and operator of an international airport in accordance with License Agreement, applicable law, and the Rules & Regulations to which EAGLE and its employees agreed to abide pursuant to EAGLE's License Agreement with the Port. These examples involve enforcement of the Rules & Regulations concerning security issues, the movement of vehicles and aircraft around the tarmac, fueling practices, loading practices, use of Port property for storage space, and nonexistent or improperly functioning vehicle lights. (CP 288-289, 346-356)

The other example of "exclusive control" set forth in Mr. Gaoa's declaration is exactly the type of exclusive control described in the Declaration of Isabel R. Safora, about which counsel for Mr. Afoa object. In this example, a China Airlines aircraft was moved from Gate S so that a United Airlines aircraft could disembark its passengers. (CP 345)

These descriptions of the Port exercising its rights as a landowner are not examples of Port conduct which demonstrate that the Port actually retained the right to control the manner in which EAGLE's employees performed or completed their work for the airlines with which they had service agreements. In addition, no where in either of the Afoa or Gaoa declarations, or for that matter any where else, is there any evidence that EAGLE, Mr. Afoa, or the air carriers were independent contractors of the Port. In the absence of such a fact, the nature and extent of the Port's "exclusive control", as delineated in its Rules & Regulations and license agreements, does not establish, in and of itself, that the Port owed a duty to Mr. Afoa under either WISHA or the common law doctrine of retained control of the performance of the work of an independent contractor.

contained in the standard license agreement the Port has with certain air carriers.

Ms. Safora explained that the phrase was used in the context of a license agreement between an owner-operator of an international airport that is highly regulated by the Federal Aviation Administration and certain air carriers that desired to obtain the nonexclusive use of the AOA in common with others. There is no evidence that the phrase was used in the air carrier license agreement so as to convey the intent of the Port and the airlines that the Port intended to undertake a duty to control how the air carriers performed their work of transporting passengers and cargo from one location to another. Clearly, the air carriers are not independent contractors of the Port, and the phrase cannot possibly have any meaning in the context of whether the Port undertook a duty towards Mr. Afoa to enforce WISHA regulations or under the retained control doctrine.

In addition, the phrase is not contained in the License Agreement the Port has with EAGLE and as such, has no contractual meaning relative to EAGLE. Also, because EAGLE is not an independent contractor of the Port, it cannot have any meaning in the context of whether the Port intended to control how EAGLE performed its work as a ground support vendor.

Likewise, counsel's citation to *Berg v. Hudesman*, 115 Wn. 2d, 657, 801 P. 2d 222 (1990) and *Bloome v. Haverly*, 154 Wn. App. 129; 225 P.3d 330 (2010) is equally erroneous. EAGLE is not a party to the air carrier license agreement. This case is not a breach of contract action between the Port and an air carrier involving the construction or interpretation of the air carrier license agreement. Neither EAGLE nor Mr. Afoa are third party beneficiaries of the air carrier license agreement as there is no evidence that it was ever intended to convey any benefit to them of any kind. Consequently, the rules of contract interpretation simply do not apply to the air carrier license agreement in the context of the Afoa case. For all of foregoing reasons, the meaning of the phrase simply is not relevant to the duty allegations made in the Afoa case.

Notwithstanding, because Mr. Afoa's counsel continually have distorted the meaning of the phrase, the Port believed it was necessary for the trial court to have an understanding of the proper meaning of the phrase, as opposed to the incorrect meaning advanced by Mr. Afoa's attorneys. Ms. Safora's declaration was submitted for the principal purpose of correcting the misinterpretation and out of context use of the phrase by Mr. Afoa's attorneys.

**G. THE TRIAL COURT ERRED IN FAILING TO AWARD CR 11 SANCTIONS IN FAVOR OF THE PORT.**

CR 11(a) requires in pertinent part that an attorney who signs a pleading must have knowledge, information, and belief, formed after an inquiry reasonable under the circumstances that (1) it is well grounded in fact and (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law. The factual allegations and legal argument by counsel for Mr. Afoa in its pleadings filed in the trial court did not meet either of these requirements.

In the Complaint and in Plaintiff's Response to Defendant Port of Seattle's Motion for Summary Judgment and Motion for CR 11 Sanctions, as well as in Plaintiff's Motion for Reconsideration of Decision Granting Port of Seattle's Motion for Summary Judgment, Mr. Afoa's counsel alleged the existence of non-existent facts. Counsel further alleged the existence of legal duties owed by the Port to Mr. Afoa where the essential facts necessary to support such duties under Washington statutes and case law do not exist. As set forth herein, and as urged at the trial court, there are no facts supporting Mr. Afoa's claim that the Port owed a duty to Mr. Afoa under WISHA and the retained control doctrine, as a business visitor, and under exceptions to

the public duty doctrine. Because there are no such facts, the Port sought the imposition of CR 11 sanctions in connection with its Motion for Summary Judgment. The trial court denied the Port's Motion for CR 11 Sanctions. (CP 598-599) The trial court did not set forth any reason for its denial of the Port's CR 11 motion. (CP 598-599) .

A trial court's decision denying a motion for CR 11 sanctions is reviewed pursuant to the abuse of discretion standard. *Washington State Phys. Ins. Ex. & Assoc. v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). An abuse of discretion occurs when the trial court's order is manifestly unreasonable or based upon untenable grounds. *Id.*, at 339.

In this instance, the trial court's denial of CR 11 sanctions was manifestly unreasonable. As demonstrated in the trial court and herein, there simply is no factual support for any of Mr. Afoa's claims against the Port. As such, Mr. Afoa's claims are not well-grounded in fact, which violates CR 11(a)(1).

Likewise, RCW 49.17.020(4) and (5) and the entirety of Washington case law pertinent to the issue of the duty owed under WISHA and under the retained control doctrine require the existence of an employer-employee or independent contract employment relationship. It is indisputable that the Port

does not have any such employment relationship with either Mr. Afoa, EAGLE, or the air carriers so as to form the basis for any such claim against it by Mr. Afoa. Under these circumstances, it cannot be that Mr. Afoa's claims are warranted by existing law or were made in connection with a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law.

The same is true with respect to the claim that Mr. Afoa was a business visitor. Mr. Afoa was never invited onto Port property by the Port, as is manifestly clear by the terms of the License Agreement. Mr. Afoa also was not injured in connection with any business dealings he had with the Port. At the time of his accident, Mr. Afoa was in the AOA only because he was employed by EAGLE, a licensee, that had business dealings with Hawaiian Airlines involving ground support for its aircraft.

Under these circumstances, it was manifestly unreasonable for the trial court to deny the Port's motion for CR 11 sanctions. The trial court abused its discretion in denying the Port's motion in this regard, and its decision should be reversed.

**H. THE PORT IS ENTITLED TO AN AWARD OF FEES AND COSTS INCURRED IN DEFENDING AGAINST THE FRIVOLOUS APPEAL BROUGHT BY MR. AFOA'S ATTORNEYS.**

Pursuant to CR 11 and RAP 18.9, the Port should be awarded its fees and costs incurred in defending Mr. Afoa's appeal. For the reasons set forth in Part IV. G., supra., the signing of the Brief of Appellant by counsel for Mr. Afoa violated CR 11. In addition, because Mr. Afoa's appeal is not well grounded in fact and is not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, it is necessarily frivolous. For these reasons, the Port should be awarded its attorney's fees and costs in defending against Mr. Afoa's appeal.

#### **V. CONCLUSION**

The Port requests that this Court affirm the trial court's November 20, 2009 Order granting of the Port's Motion for Summary Judgment and reverse the trial court's November 20, 2009 Order denying the Port's Motion for CR 11 sanctions. The Port requests that this Court affirm the trial court's November 30, 2009 Order denying Mr. Afoa's Motion for Reconsideration of Decision Granting Port of Seattle's Motion for Summary Judgment. The

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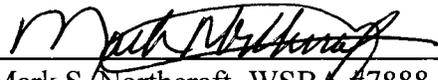
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Port also requests an award of reasonable attorney's fees and costs incurred in defending against Mr. Afoa's frivolous appeal.

RESPECTFULLY SUBMITTED, this 21<sup>st</sup> day of April, 2010.

NORTHCRAFT, BIGBY & BIGGS, P.C.

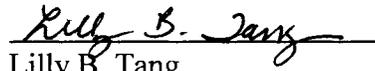
By   
Mark S. Northcraft, WSB# #7888  
Attorney for Respondent/Cross-Appellant

**CERTIFICATE OF SERVICE**

I, Lilly B. Tang, hereby certify under penalty of perjury under the laws of the state of Washington, that on April 21, 2010, I filed with the Court, the original and one copy of the Brief of Respondent/Cross-Appellant, and served one true and correct copy of same via Federal Express, upon:

Raymond E. S. Bishop  
Derek K. Moore  
Bishop Law Offices, P.S.  
19743 - 1<sup>st</sup> Avenue South  
Seattle, WA 98148-2401

SIGNED in Seattle, Washington, on April 21, 2010.

  
Lilly B. Tang