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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BRANDON APELA AFOA,

Petitioner/Respondent,

vs.

PORT OF SEATTLE,

Defendant/Petitioner.

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STATE OF WASHINGTON
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BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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ORIGINAL

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of the Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of plaintiffs under the civil justice system, including an interest in the proper application of the so-called “retained control exception,” most recently discussed by this Court in Kamla v. Space Needle Corp., 147 Wn.2d 114, 52 P.3d 472 (2002).

II. INTRODUCTION AND STATEMENT OF THE CASE

This appeal requires the Court to decide whether Brandon Afoa (Afoa) has common law and statute-based tort claims against the Port of Seattle (Port) under what has been described as the “retained control exception,” and the related question whether Afoa has a premises liability tort claim against the Port based on his status as a business invitee. The underlying facts are drawn from the Court of Appeals opinion and the briefing of the parties. See Afoa v. Port of Seattle, 160 Wn.App. 234, 247 P.3d 482, *review granted*, 171 Wn.2d 1031 (2011); Afoa Br. at 6-14 & Appendix; Port Br. at 5-17; Port Pet. for Rev. at 2-3; Afoa Ans. to Pet. for Rev. at 1-4; Afoa Supp. Br. at 1-3; Port Supp. Br. at 1-3.

For purposes of this brief, the following facts are relevant: The Port owns and operates Seattle-Tacoma International Airport (airport) and employs a relatively large workforce on the premises. See Afoa Br. at 8; Airports Council International-North America Am. Br. at 3-4. Under a standard written agreement entitled “Port of Seattle Signatory Lease and Operating Agreement 2006-2012,” the Port licenses various airlines to provide public transportation and cargo services at the airport, covering use of both the airport facilities and the airfield. Under this agreement, airlines are apparently permitted to contract with others to provide for aircraft ground handling services such as movement of aircraft and handling of cargo and baggage. Upon an airline’s certification that it has engaged such a service provider, the Port enters into a “licensing agreement” with that provider.¹

As pertains to this case, Hawaiian Airlines entered into a standard lease and operating agreement with the Port. Hawaiian Airlines contracted with Evergreen Aviation Ground Logistics Enterprises, Inc. (EAGLE) to provide aircraft ground handling services. The Port, upon receiving certification of the contract between the airline and EAGLE, entered into a separate licensing agreement with EAGLE, allowing it to perform the agreed-upon services on the Port’s airfield. While working as an employee of EAGLE, Afoa sustained severe injuries during the course of operating a

¹ The Port describes both of these agreements as “license agreements.” Port Br. at 2; see also Afoa Br. at 9 n.12, Appendix Exhibit H (internal pp. 1-2) & Exhibits I-1 & I-2 (internal p. 7) (providing “[t]he Port grants Airline a nonexclusive license to use the Airfield Area, in common with others, subject at all times to the exclusive control and management of the Port”).

“tug/pushback vehicle” on the airfield. Port Br. at 6. Port employees, including its Ramp Patrol, frequented the airfield work area where Afoa was injured. See Afoa Br. at 10-11 and Appendix.

Afoa brought this action against the Port alleging it negligently breached common law and statutory duties owed to him by failing to provide a safe work place. More particularly, Afoa urged that as landowner/licensor the Port retained sufficient control over the airfield so as to be liable for negligence under the common law and for violations of the Washington Industrial Safety and Health Act of 1973, Ch. 49.17 RCW (WISHA). See generally Kamla v. Space Needle Corp., 147 Wn.2d 114, 52 P.3d 472 (2002) (discussing the nature of each type of claim). Afoa separately contended that the Port was liable in negligence based on premises liability law and Afoa’s status as a business invitee.

The Port sought summary judgment of dismissal on all three theories of liability. Afoa presented evidence on summary judgment that the Port had both retained control over ground handling services on the airfield in its licensing agreements with the airline and EAGLE, and had in practice exercised control over provision of these services. The Port presented evidence and argument that (a) the rights it exercised under the licensing agreements did not implicate the retained control exception because Afoa was only functioning as an employee of a licensee, and not as an employee of an independent contractor hired by the Port; (b) with regard to negligence liability based upon WISHA violations, the Port was

not an “employer” under WISHA because Afoa was not performing work for the Port; and (c) the Port had no duty to Afoa under premises liability law because he was a mere licensee at the time of injury. The superior court granted summary judgment of dismissal on all theories of liability, and Afoa appealed.

The Court of Appeals, Division I, reversed, finding the Port owed a duty of care under each of the three theories of liability, and that there are genuine issues of material fact as to whether the Port breached its duty under one or more of these theories. Regarding the retained control theory, the court found that there is a sufficient basis for common law and statutory liability because the licensing agreements and other evidence demonstrate a genuine issue of material fact whether “the Port so involved itself in the performance of EAGLE’s work as to undertake responsibility for the safety of EAGLE’s employees.” Afoa, 160 Wn.App. at 244. The court rejected the Port’s argument that it is not liable under the retained control exception because it has not engaged EAGLE as an independent contractor to perform work on its behalf. See id. at 244, 247. Further, in finding a triable issue based upon WISHA violations, the court rejected the Port’s argument that in order to be liable it must be an employer of Hawaiian Airlines, EAGLE or Afoa himself. See id. at 247; Port Br. at 19-20. Regarding the premises liability claim, the Court of Appeals

determined that Afoa qualifies as a business invitee and is entitled to proceed on this theory of recovery. See Afoa at 248-49.²

This Court granted the Port's petition for review challenging each of the Court of Appeals' determinations.³

III. ISSUES PRESENTED

The following issues are addressed in this brief:

- 1) Does the retained control exception, as most recently set forth in Kamla v. Space Needle Corp., 147 Wn.2d 114, 52 P.3d 472 (2002), apply to a landowner/licensor, for purposes of common law and statutory liability?
- 2) Is the Port an "employer" for purposes of applying the retained control exception based upon violations of the Washington Industrial Safety and Health Act of 1973, Ch. 49.17 RCW?

See Port Pet. for Rev. at 1; Port Supp. Br. at 1.⁴

IV. SUMMARY OF ARGUMENT

Re: Retained Control Claims

A landowner's liability for negligence based upon retained control, whether grounded in the common law or WISHA violations, should not be confined to instances where it directly engages an independent contractor to perform work on its premises. Thus, a landowner who grants another a "license" to perform work on its premises may be liable for negligence if,

² The Court of Appeals also summarily rejected the Port's contention that Afoa's claims are barred by the public duty doctrine. See Afoa, 160 Wn.App. at 249; Port Br. at 36-37.

³ A joint amicus curiae memorandum in support of review was filed by Association of Washington Business, Washington Retail Association, Washington Public Ports Association, City of Kent, and Airports Council International-North America (AWB et al. ACM).

⁴ The Port also challenges on review reversal of dismissal of the premises liability claim, an issue not addressed in this brief. While the Port raised the public duty doctrine in the Court of Appeals, it does not invoke the doctrine in its submissions to this Court. See Port Pet. for Rev. at 1.

in conjunction with the license, it retains a right of control over the work performed by the licensee and its employees comparable to the supervision exercised by a general contractor in the more conventional construction setting. This retention of the right of control may be established by the terms of the licensing agreement and by evidence of how the agreement is implemented in actual practice. If the evidence regarding retained control is disputed, the issue is for the jury at trial.

Re: "Employer" Requirement Under WISHA-based Retained Control Claim

Under RCW 49.17.020, a landowner/licensor who otherwise retains control over the work place is liable for negligence in failing to enforce relevant WISHA safety regulations if its own employees have access to the relevant work place. It is not necessary that the injured person be an employee of an independent contractor hired directly by the landowner/licensor.

V. ARGUMENT

A) Overview Of Negligence Liability Based Upon The Retained Control Principle, Under Both The Common Law And WISHA.

The law regarding tort liability based upon a principal's retained control of work performance by another is well-settled in Washington, both as to common law and statute-based negligence claims.

Re: Common Law Liability

It is often said that the general rule at common law is that one who engages an independent contractor is not liable in negligence for injuries to employees of the independent contractor based upon failure to exercise control over their work. See Kelley v. Howard S. Wright Constr., 90 Wn.2d 323, 330, 582 P.2d 500 (1978); Restatement (Second) of Torts, §409 (1965).⁵ However, this Court long ago recognized an “exception” to this rule in construction cases when a general contractor retains control over the work of an independent contractor resulting in injury to that contractor’s employee. See Kelley, 90 Wn.2d at 330 (citing, *inter alia*, Restatement (Second) of Torts, §414 (1965)).⁶

This is referred to as the “retained control exception.” Afoa, 160 Wn.App. at 240; Kamla, 147 Wn.2d at 119. Yet, even at the time Restatement §409 was adopted in 1965 it was understood that this exception is one of many impacting the “general rule” of non-liability, so much so that the rule “can now be said to be ‘general’ only in the sense that it is applied where no good reason is found for departing from it.” Restatement §409 cmt. *b*. Almost fifty years have passed and the notion that liability for retained control is a mere “exception” to the general rule

⁵ Section 409 and official comments are reproduced in the Appendix to this brief.

⁶ Section 414 and official comments are reproduced in the Appendix to this brief.

persists. It is more accurate to refer to this basis for tort liability as the retained control principle, as opposed to an exception.⁷

As developed by this Court, the test for retained control is whether the *right* to exercise control over the relevant work place has been reserved by the principal, whether or not such control is actually exercised. See Kelley at 330-31; Kamla at 119-22. The hallmark of retained control is the principal's involvement in supervising performance of the work so as to take responsibility for the safety of the independent contractor's employees. See Kamla at 120-21.⁸ A general contractor operating in a traditional construction context is deemed to have retained control, usually based on its contract with the owner. See Kelley at 331.

While the retained control principle originated in the general contractor-independent contractor setting, in a series of Washington cases it has been extended to landowners hiring independent contractors. See Kennedy, 62 Wn.App. at 842, 855-58 (involving lessee of property hiring independent contractor; finding genuine issues of material fact on whether lessee retained sufficient control to subject it to common law liability for death of contractor's employee); Phillips v. Kaiser Aluminum, 74 Wn.App. 741, 749-53, 875 P.2d 1228 (concluding triable issue on whether industrial landowner retained control over work of independent

⁷ As a consequence, the retained control principle should not be viewed narrowly as often occurs with exceptions to a general rule. See Port Supp. Br. at 4 (making this argument).

⁸ Although the right to exercise control suffices, the same result may follow when the principal affirmatively assumes actual control, under the particular facts and circumstances. See Kennedy v. Sea-Land Service, 62 Wn.App. 839, 858, 816 P.2d 75 (1999); Kamla at 121-22.

contractor), *review denied*, 125 Wn.2d 1010 (1994); Kamla at 118-23 (recognizing business landowner may be liable for injury to independent contractor's employee if retained control over work, but concluding insufficient evidence of right to control under circumstances; discussing with approval Court of Appeals cases applying retained control principle beyond traditional general contractor context).⁹

To date, no Washington appellate court has had occasion to consider applying the retained control principle when a landowner's relationship with the entity performing work on its premises does not involve an independent contractor, such as the situation here, where EAGLE is a licensee of the Port.

Re: Statute-Based Liability

The retained control principle also applies as a basis for holding general contractors liable in negligence for injuries sustained by employees of independent contractors as a result of violation of specific safety requirements under WISHA. See Stute v. P.B.M.C., Inc., 114 Wn.2d 454, 460-64, 788 P.2d 545 (1998) (concluding general contractors have innate supervisory authority, rendering them per se responsible for work place safety).¹⁰ This retained control liability is distinct from any

⁹ The extension of the retained control principle beyond the general contractor context is consistent with Restatement §414 cmt. *b*, which provides: "[t]he rule stated in this Section is usually, *though not exclusively*, applicable when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman superintends the entire job." (Emphasis added)

¹⁰ The predicate for this non-delegable statutory liability is RCW 49.17.060(2), imposing a duty on employers to comply with WISHA rules, regulations and orders that runs to *all* employees in the work place. The current version of RCW 49.17.060 is reproduced in the Appendix to this brief.

tort liability that may stem from situations when a general contractor creates a dangerous condition in violation of WISHA, resulting in injury to another. See id. at 461. In the construction setting, where the defendant is not a general contractor, recovery may nonetheless be had upon proof of retained control, although in this instance the existence of such control is not presumed. See id. at 460-64.

Statutory liability for retained control also requires that the defendant against whom liability is sought qualify as an “employer” under WISHA. See RCW 49.17.020(4) (defining “employer”).¹¹ This requirement is readily met in the construction context because the definition of employer includes one that hires an independent contractor. See id.

As with common law liability based upon retained control, tort liability for violation of WISHA safety standards has also been extended to those landowners who have retained the right to exercise control over the work of independent contractors performing services on their behalf, so long as these landowners also meet the definition of “employer” under WISHA. See Kamla, 147 Wn.2d at 122-25 (considering statutory liability rule in landowner context but finding insufficient evidence of retained control); Kinney v. Space Needle Corp., 121 Wn.App. 242, 246-49, 85

¹¹ The current version of RCW 49.17.020 is reproduced in the Appendix.

P.3d 918 (2004) (same, except finding genuine issues of material fact regarding landowner's retained control).¹²

As with the common law retained control claim, to date no Washington appellate court has determined whether the retained control principle applies to a WISHA-based negligence claim when the landowner's relationship with the entity performing work on its premises is not that of landowner-independent contractor.

B) A Landowner May Be Liable In Negligence Under The Common Law And For WISHA Violations When It Retains The Right To Exercise Control Over Work Place Safety, Regardless Of The Ostensible Nature Of The Contractual Relationship Involved.

The Court of Appeals is correct that a landowner's liability in tort for retained control over the work place should not be confined to situations where it has hired an independent contractor. See Afoa, 160 Wn.App. at 241. Under the retained control principle, if an ostensible relationship such as landowner/licensor-licensee also involves a right to control performance of the work by the landowner/licensor, then this should be determinative. If genuine issues of material fact exist whether the landowner/licensor retained sufficient control in the work place, the issue is for the jury at trial. See Kinney, 121 Wn.App. at 247 (reversing

¹² There is language in Kamla, 147 Wn.2d at 124, discussing "knowledge or expertise about WISHA complaint work conditions" in connection with tort liability based on WISHA. This language seems to be swept up in the retained control rationale for imposing liability based on WISHA, rather than a separate element of proof. Knowledge is not a distinct requirement in the Court's statement of its holding, nor in the post-Kamla case law. See Kamla at 125; Kinney, 121 Wn.App. at 248-49; Neil v. NWCC Invs., V. LLC, 155 Wn. App. 119, 126-27, 229 P.3d 837, *review denied*, 169 Wn.2d 1018 (2010).

summary judgment for landowner based on fact questions regarding retained control).

The Port argues that the Court of Appeals analysis is incorrect because an “employer-independent contractor relationship” must first be shown to exist, before the question of retained control arises. See Port Supp. Br. at 4-5. According to the Port, only then does this “narrow exception” apply. Id. at 4. As previously discussed in §A, supra, the retained control principle is not truly an exception, but rather a free-standing rule of tort liability, and should be treated as such. More importantly, there is no principled reason to confine the rule to the employer-independent contractor context when, in other seemingly more remote legal contexts, the principal nonetheless preserves the right to control the manner of performance of services in the relevant work place. As Afoa and amicus curiae Washington State Department of Labor & Industries (DLI) argue, it is the substance of the relationship, not the formal name given to it, that should prevail. See Afoa Supp. Br. at 1-2, 7-8; DLI Am. Br. at 8-13.

Notwithstanding argument to the contrary, the question here is not whether the retained control principle applies generally to all licensors. See Port Br. at 2 (stating Port’s licensing agreements “simply grant to the licensees the non-exclusive use [of the airfield]”); AWB et al. ACM at 8 (urging that “licensors have a fundamentally different relationship to licensees than general contractors do with independent contractors”).

Instead, the question here is whether *in these circumstances* the landowner/licensor Port *also* retained a right to control how EAGLE performed its ground handling services on the airfield.

The Port insists that the circumstances here do not qualify for retained control because it did not “assent” to EAGLE providing ground handling services on the airfield, urging a level of formality based upon the traditional principal-independent contractor model. Port Supp. Br. at 6. The Port’s argument undermines the through line in this Court’s case law that tort liability follows the right of control. Afoa argues that the Port retained the right to control EAGLE’s work through interlocking licensing agreements, which allowed Hawaiian Airlines to subcontract its ground services with assurance that the Port would honor the subcontract. See Afoa Reply Br. at 3. Afoa further argues that the airline licensing agreement preserves the Port’s exclusive management and control, and that this right of control is reflected in the day-to-day practices of the Port because of its involvement in supervising EAGLE. If the record and reasonable inferences therefrom support these assertions, then Afoa has established sufficient “assent” on the Port’s part for EAGLE to work on its behalf, and under its supervision.

Afoa’s theory of liability appears to be based on interactions that go far beyond a bare license. The Port seems to argue that it did nothing more than set the terms of the license and monitor compliance. See Port Pet. for Rev. at 10-13; Port Supp. Br. at 8; see also AWB et al. ACM at 9-

10. If Afoa's view of the record is correct, to disallow operation of the retained control principle under these circumstances would exalt form over substance, a notion out of keeping with the tenets of modern tort law. Cf. Davis v. Baugh Indus. Contractors, 159 Wn.2d 413, 150 P.3d 545 (2007) (abandoning "completion and acceptance doctrine" because grounded in outmoded notions of privity and inconsistent with modern tort liability principles).

Ultimately, the fact-intensive inquiry regarding retained control is for the Court to resolve on de novo review of this summary judgment record. The parties' briefing reflects profoundly different views of the facts and inferences therefrom. Afoa is entitled to all reasonable inferences present in the record on this issue. See Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). If there is a triable issue of fact regarding retained control, it applies equally to both Afoa's common law and statute-based claims. See Kamla, 147 Wn.2d at 122, 125.

However, with respect to the negligence claim based upon WISHA violations, an additional requirement must be met. The principal must qualify as an "employer" in order for WISHA to apply and render it subject to liability for violation of safety regulations. This requirement is discussed in §C, infra.¹³

¹³ The Court of Appeals properly concluded that the public duty doctrine does not apply in these circumstances. See Afoa, 160 Wn.App. at 249. Both private and public parties are subject to tort liability for retained control under the common law and WISHA. The fact that the Port is a public entity does not alter its duty. See RCW 4.96.010 (providing local government entities shall be liable to the same extent as a private person or corporation).

C) For Purposes Of Imposing Statute-Based Tort Liability On A Landowner/Licensors Under The Retained Control Principle, WISHA Only Requires That The Landowner/Licensors Own Employees Have Access To The Relevant Work Place.

In addition to challenging whether it may be liable for negligence under the retained control principle based on WISHA violations, the Port also contends it is not liable because it is not an “employer” under RCW 49.17.020(4). See Port Supp. Br. at 2-3, 11-17. More particularly, the Port argues that in order for it to be liable it must be an employer of “one or more of the involved entities, and not just an employer of other persons in general[.]” Id. at 11. The Court of Appeals properly rejected this argument. See Afoa, 160 Wn.App. at 247; see also DLI Am. Br. at 5.

The relevant statutory definitions of “employer” and “employee” under RCW 49.17.020(4) & (5) are not phrased in terms of an employment relationship between a particular employer and employee. As defined by WISHA, an employer (specifically including government entities) is one who engages in business or similar activities, and who employs one or more persons. See RCW 49.17.020(4). An employee is one who is employed in the business of his or her employer, regardless of who that employer might be. See RCW 49.17.020(5).

The only nexus between employer and employee required to trigger application of WISHA is that the employer in question has “the right of access or control” to the work place where employees are performing labor or services. See RCW 49.17.030 (indicating WISHA

applies “to employment performed in any work place within the state”); RCW 49.17.020(8) (defining “work place” in terms of “the right of access or control”).¹⁴ As long as the employer has access to, if not control of, the relevant work place, it does not matter whether the employee in question has a direct relationship with that employer. See Stute, 114 Wn.2d at 462 & n.2 (indicating general and subcontractor both satisfied WISHA definition of “employer” of injured plaintiff-employee).

This interpretation of “employer” is not only in keeping with the language of WISHA, but it also furthers the public policy underlying this statutory scheme and its goal of maximizing employee safety in the work place. See RCW 49.17.010¹⁵; see also Stute at 462-64 (emphasizing public policy basis for tort recovery for WISHA violations). In this case, the briefing before the Court suggests that employees of Hawaiian Airlines, EAGLE and the Port all had a right of access to the same work place, the airfield. See Afoa Br. at 10-11 & Appendix; Afoa Reply Br. at 3. That is all that should be required.

¹⁴ As previously indicated, the current version of RCW 49.17.020 is reproduced in the Appendix. The current version of RCW 49.17.030 is also reproduced in the Appendix.

¹⁵ The current version of RCW 49.17.010 is reproduced in the Appendix.

VI. CONCLUSION

The Court should adopt the analysis advanced in this brief as to each of the issues addressed, and resolve this appeal accordingly.

DATED this 17th day of January, 2012.

George M. Ahrend
for BRYAN F. HARNETIAUX,
with authority

George M. Ahrend
GEORGE M. AHREND

On behalf of WSAJ Foundation

Appendix

RCW 49.17.010. Purpose

The legislature finds that personal injuries and illnesses arising out of conditions of employment impose a substantial burden upon employers and employees in terms of lost production, wage loss, medical expenses, and payment of benefits under the industrial insurance act. Therefore, in the public interest for the welfare of the people of the state of Washington and in order to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington, the legislature in the exercise of its police power, and in keeping with the mandates of Article II, section 35 of the state Constitution, declares its purpose by the provisions of this chapter to create, maintain, continue, and enhance the industrial safety and health program of the state, which program shall equal or exceed the standards prescribed by the Occupational Safety and Health Act of 1970 (Public Law 91-596, 84 Stat. 1590).

[1973 c 80 § 1.]

RCW 49.17.020. Definitions

For the purposes of this chapter:

(1) The term "agriculture" means farming and includes, but is not limited to:

(a) The cultivation and tillage of the soil;

(b) Dairying;

(c) The production, cultivation, growing, and harvesting of any agricultural or horticultural commodity;

(d) The raising of livestock, bees, fur-bearing animals, or poultry; and

(e) Any practices performed by a farmer or on a farm, incident to or in connection with such farming operations, including but not limited to preparation for market and delivery to:

(i) Storage;

(ii) Market; or

(iii) Carriers for transportation to market.

The term "agriculture" does not mean a farmer's processing for sale or handling for sale a commodity or product grown or produced by a person other than the farmer or the farmer's employees.

(2) The term "director" means the director of the department of labor and industries, or his or her designated representative.

(3) The term "department" means the department of labor and industries.

(4) 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.

(5) The term "employee" means an employee of an employer who is employed in the business of his or her 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 or her personal labor for an employer under this chapter whether by way of manual labor or otherwise.

(6) The term "person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.

(7) The term "safety and health standard" means a standard which requires the adoption or use of one or more practices, means, methods, operations, or processes reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

(8) 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.

(9) The term "working day" means a calendar day, except Saturdays, Sundays, and all legal holidays as set forth in RCW 1.16.050, as now or hereafter amended, and for the purposes of the computation of time within which an act is to be done under the provisions of this chapter, shall be computed by excluding the first working day and including the last working day.

[2010 c 8 § 12005, eff. June 10, 2010; 1997 c 362 § 2; 1973 c 80 § 2.]

RCW 49.17.030. Application of chapter--Fees and charges

This chapter shall apply with respect to employment performed in any work place within the state. The department of labor and industries shall provide by rule for a schedule of fees and charges to be paid by each employer subject to this chapter who is not subject to or obtaining coverage under the industrial insurance laws and who is not a self-insurer. The fees and charges collected shall be for the purpose of defraying such employer's pro rata share of the expenses of enforcing and administering this chapter.

RCW 49.17.060. Employer--General safety standard--Compliance

Each employer:

(1) Shall furnish to each of his or her employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his or her employees: PROVIDED, That no citation or order assessing a penalty shall be issued to any employer solely under the authority of this subsection except where no applicable rule or regulation has been adopted by the department covering the unsafe or unhealthful condition of employment at the work place; and

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

[2010 c 8 § 12007, eff. June 10, 2010; 1973 c 80 § 6.]

Restatement (Second) of Torts § 409 (1965). General Principle

Except as stated in §§ 410-429, the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.

Comment:

a. The words "independent contractor" are used throughout this Topic as describing any person who does work for another under conditions which are not sufficient to make him a servant of the other. It is immaterial whether the work is done gratuitously or is done for pay, or, indeed, if the latter, whether it is done under a specific contract or under a general contract of employment. As stated in the Restatement of Agency, Second, § 2, Comment *b*, an agent may be either an independent contractor or a servant while engaged in work necessary to the exercise of his functions as agent.

b. The general rule stated in this Section, as to the non-liability of an employer for physical harm caused to another by the act or omission of an independent contractor, was the original common law rule. The explanation for it most commonly given is that, since the employer has no power of control over the manner in which the work is to be done by the contractor, it is to be regarded as the contractor's own enterprise, and he, rather than the employer, is the proper party to be charged with the responsibility of preventing the risk, and bearing and distributing it.

The first departure from the old common law rule was in *Bower v. Peate*, 1 Q.B.D. 321 (1876), in which an employer was held liable when the foundation of the plaintiff's building was undermined by the contractor's excavation. Since that decision, the law has progressed by the recognition of a large number of "exceptions" to the "general rule." These exceptions are stated in §§ 410-429. They are so numerous, and they have so far eroded the "general rule," that it can now be said to be "general" only in the sense that it is applied where no good reason is found for departing from it. As was said in *Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co.*, 201 Minn. 500, 277 N.W. 226 (1937), "Indeed it would be proper to say that the rule is now primarily important as a preamble to the catalog of its exceptions."

The exceptions have developed, and have tended to be stated, very largely as particular detailed rules for particular situations, which are difficult to list completely, and few courts have attempted to state any broad principles governing them, or any very satisfactory summaries. In general, the exceptions may be said to fall into three very broad categories:

1. Negligence of the employer in selecting, instructing, or supervising the contractor.
2. Non-delegable duties of the employer, arising out of some relation toward the public or the particular plaintiff.
3. Work which is specially, peculiarly, or "inherently" dangerous.

Restatement (Second) of Torts § 414 (1965). Negligence In Exercising Control Retained By Employer

One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Comment:

a. If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein, under the rules of that part of the law of Agency which deals with the relation of master and servant. The employer may, however, retain a control less than that which is necessary to subject him to liability as master. He may retain only the power to direct the order in which the work shall be done, or to forbid its being done in a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in this Section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others.

b. The rule stated in this Section is usually, though not exclusively, applicable when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman superintends the entire job. In such a situation, the principal contractor is subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, if he knows or by the exercise of reasonable care should know that the subcontractors' work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself. So too, he is subject to liability if he knows or should know that the subcontractors have carelessly done their work in such a way as to create a dangerous condition, and fails to exercise reasonable care either to remedy it himself or by the exercise of his control cause the subcontractor to do so.

c. In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is

controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

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-----Original Message-----

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Subject: Afoa v. Port of Seattle (S.C. #85784-9) - Proposed Amicus Curiae Brief

Dear Mr. Carpenter:

A proposed amicus curiae brief in the above-referenced case, submitted on behalf of the Washington State Association for Justice Foundation, is attached to this email. A letter application for amicus curiae status was previously emailed to the Court on January 13, 2012. Counsel for the parties are being served simultaneously by copy of this email, by prior agreement among counsel.

Respectfully submitted,

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