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No. 94525-0

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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BRANDON APELA AFOA,

Respondent,

v.

PORT OF SEATTLE,

Petitioner.

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**RESPONDENT BRANDON AFOA'S  
COMBINED RESPONSE TO AMICUS BRIEFS**

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## I. RESPONSE TO ASSOCIATED GENERAL CONTRACTORS

Special interest group Associated General Contractors of Washington (AGCW) opens the substantive portion of its Amicus Brief as follows: “The issue addressed in this amicus brief is whether a general contractor or landowner can be held vicariously liable for another employer’s breach of *this other employer’s* duty to comply with the WISHA regulations that caused injury to the worker.” *AGCW Amicus Brief* at 4 (emphasis added). This misstates the holding of the Court of Appeals in the case on review, which held that “*the Port* had a nondelegable duty to ensure a safe workplace, including safe equipment, and is vicariously liable for any breach of *that duty*.” *Afoa v. Port of Seattle*, 198 Wn. App. 206, 212, 393 P.3d 802 (Div. 1 2017) (“Afoa II”) (emphasis added).<sup>1</sup> *Afoa II* thus held that the Port is vicariously liable for airline breach of *the Port’s* duty to ensure a safe workplace, not someone else’s duty. AGCW’s arguments about whether the Port could be liable for airline breach of *the airlines’* duties to ensure a safe workplace miss the point, misstate the case before this court, and are irrelevant to this appeal.

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<sup>1</sup> *Accord, id.* at 234; *Gilbert H. Moen Co. v. Pacific Steel Erectors, Inc.*, 128 Wn.2d 745, 758, 912 P.2d 472 (1996) (“Moen as the general contractor may not delegate away *its* general duty to ensure safety on the jobsite ...”).

**A. The “Sole Proximate Cause” Defense was Presented to and Rejected by the Jury, and Has No Relevance to this Appeal**

AGCW’s first issue is, “Under RCW 4.22.070, does a general contractor or landowner have a right to present evidence of an immune employer’s fault to negate an essential element of the Plaintiff’s case – proximate cause?” *AGCW Brief* at 3. This issue and the discussion of the “sole proximate cause” defense which follows is purely academic, because the Port requested an instruction on sole proximate cause, and the trial court instructed the jury on it, but the jury rejected it.<sup>2</sup> AGCW’s first issue is therefore not material to this appeal.

AGCW’s first issue also fails on its merits. As this Court’s decision in *Edgar v. City of Tacoma* makes clear, “[n]othing in *Sofie*, *Geschwind* or *Lamborn* recognizes a right to have the jury decide an issue of fact which is not legally relevant.” *Edgar*, 129 Wn.2d 621, 631, 919 P.2d 1236 (1996).<sup>3</sup> The fact that other subcontractors, general contractors, or employers operating at Seatac might owe concurrent safe workplace duties is not legally relevant to *the Port’s* nondelegable safe workplace duty owed to Mr. Afoa. All that is relevant is what has already been proven and found

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<sup>2</sup> CP 4621-22, 4658 (Def’t. Proposed Instructions); CP 4793-94, 4796-97 (Court’s Instructions to Jury); CP 4884 (Verdict).

<sup>3</sup> *Citing, Geschwind v. Flanagan*, 121 Wn.2d 833, 854 P.2d 1061 (1993); *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989); *Lamborn v. Phillips Pac. Chem. Co.*, 89 Wn.2d 701, 575 P.2d 215 (1978).

by the jury: that *the Port* retained the right to control the work performed by Mr. Afoa's employer, EAGLE. CP 4839.

The sole proximate cause defense is derived from *Lamborn*, a case that focused solely on the landowner's duty to employees of the independent contractor to exercise reasonable care itself, not on the landowner's possible liability to such employees based on its control over the independent contractor. *Lamborn*, 89 Wn.2d at 707-08. Recall that there are potentially two kinds of liability at the multiemployer workplace – the employer/landowner's liability for *its own negligence*, and the employer/landowner's *vicarious nondelegable liability* that arises from control over the work. *Millican v. N.A. Degerstrom, Inc.*, 177 Wn. App. 881, 890, 313 P.3d 1215 (Div. 3 2013), *rev. den.*, 179 Wn.2d 1026 (2014); W. Prosser, *Handbook of the Law of Torts*, 469-70 (4<sup>th</sup> ed. 1971) (*quoted in, Amicus Brief of Washington State Association for Justice Foundation (WSAJF)* at 7). The sole proximate cause defense necessarily applies only to the former kind of claim, because it destroys an essential element of plaintiff's case: proximate cause. But in cases involving control liability, where the control itself creates a nondelegable duty, proximate cause is not destroyed by any amount of fault – even up to 100% – attributed to an independent contractor. If it were, venerable precedents like *Guy v. Northwest Bible College*, 64 Wn.2d 116, 118-19, 390 P.2d 708 (1964),

*Myers v. Little Church by the Side of the Road*, 37 Wn.2d 897, 904, 227 P.2d 165 (1951), and *Acres v. Frederick & Nelson*, 79 Wash. 402, 404, 409-10, 140 P. 370 (1914), would be wrongly decided. They are not, because “a ‘non-delegable duty’ requires the person upon whom it is imposed to answer for it that care is exercised by anyone, even though he be an independent contractor, to whom the performance of the duty is entrusted.” *Millican*, 177 Wn. App. at 896-97 (quoting, Restatement (Second) ch.15, Topic 2, Introductory Note).

Mr. Afoa has consistently recognized that other entities, including the airlines, *could* have *concurrent nondelegable* duties to ensure safety at the Seatac workplace.<sup>4</sup> It does not follow, however, that the existence of these other parties’ duties would operate to limit the scope of *the Port’s nondelegable duty* to ensure safety for all workers on the ramp at Seatac, which is based on *the Port’s pervasive control* over the manner and instrumentalities of work. Mr. Afoa’s argument is not that the airlines could not have been liable for proven control over the manner of work within specific areas of the airport; it is that the Port, as the entity best able to control safety at the whole of Seatac, cannot shift any part of its

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<sup>4</sup> *Afoa Supp. Brief* at 16 n.43; *Brief of Respondent/Cross-Appellant Afoa* at 47 n.134 (citing, *Weinert v. Bronco Nat’l Co.*, 58 Wn. App. 692, 696, 795 P.2d 1167 (Div. 1 1990) and *George Sollitt Corp. v. Howard Chapman Plumbing & Heating, Inc.*, 67 Wn. App. 468, 836 P.2d 851 (Div. 2, 1992)).

nondelegable duty to the airlines. That is the essential meaning of “nondelegable”:

“The label ‘nondelegable duty’ does not mean that an actor is not permitted to delegate the activity to an independent contractor. Rather, the term signals that the actor will be vicariously liable for the contractor’s tortious conduct in the course of carrying out the activity.”

*Millican*, 177 Wn. App. at 896 (*quoting*, Restatement (Third) Torts §57, cmt. b (2012)).

AGCW’s mistake is to argue that the existence of concurrent nondelegable safe workplace duties necessarily limit the scope of each controlling entities’ duty to the injured worker. That mistake flows from its statement of the fundamental issue: that the question is the general contractor / landowner’s liability for other contractor’s breach of *their* duty. But that’s not the issue at all. The issue is the scope of the Port’s liability for breach of *its own safe workplace duty* that arises because it retained the right to control the work. That duty is nondelegable, and therefore the liability for its breach is not limited by the fact that the Port entrusted other contractors to carry it out, in whole or in part.

**B. AGCW’s Second Argument Misses the Mark Entirely**

AGCW’s second issue heading states: “Under RCW 4.22.070(1), a General Contractor or Landowner Has the Right to Prove That Non-Immune Subcontractors, Who Concurrently Owe the Injured Worker a

Duty to Comply with WISHA Safety Regulations, Are at Fault for the Injury ....” *AGCW Brief* at 7. What the control party has the right to prove about subcontractor fault simply is not material to this appeal because it fails to rebut the primary rationale of Division One’s opinion in *Afoa II*, which is that even though subcontractor (airline) fault was proven, *the Port is vicariously liable for that subcontractor fault under its nondelegable workplace safety duty. Afoa II*, 198 Wn. App. at 231-34; *accord, e.g., Guy*, 64 Wn.2d at 118-19; *Myers v. Little Church*, 37 Wn.2d at 904; *Acre v. Frederick & Nelson*, 79 Wash. at 404, 409-10; *Millican*, 177 Wn. App. at 892-93, 896-97.

AGCW is somewhat disingenuous when it argues that the Legislature’s wording in RCW 4.22.070(1) “every entity ... except entities immune from liability to the claimant under Title 51 RCW” dictates the scope of this section of the Tort Reform Act. *AGCW Brief* at 7-8. AGCW fails to look at the entirety of the language used, and excludes from mention the following language that was also chosen by the Legislature: “(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party ... when a person was acting as an agent or servant of the party.” RCW 4.22.070(1)(a). This is the legislative language that directly supports the holding of Division One, and the

language which allows the common law of vicarious liability for breach of the nondelegable duty to provide a safe workplace to survive tort reform.

**C. Division One Did Not Create Per Se or Overbroad Liability, *Millican* is On Point, and Whether RCW 4.22.070(1) was Intended to Abrogate the Common-Law is a Question of Law for the Court**

**1. There is no “Per Se” Liability Here, and the Exception the Legislature Wrote into Tort Reform is Limited by the Control Doctrine**

Based on the heading of its third and final argument, AGCW argues that where a jury has found breach of concurrent duties to the injured worker by both the landowner (Port) and non-immune nonparties (airlines), “Neither a General Contractor Nor a Landowner can be held Per Se Vicariously Liable Under RCW 4.22.070(1) for the Fault of Such Non-Immune Defendants.” *AGCW Brief* at 8 (emphasis in original). This is another significant misstatement of the case. Nobody is claiming “per se” liability here. If the Port as landowner was “per se” liable for breach of a duty to maintain a safe workplace at Seatac, then *Afoa I* would not have resulted in a remand to try the issue of control over the manner of work. Instead, consistent with *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 123-25, 52 P.2d 472 (2002), this Court in *Afoa I* recognized that before the Port would be charged with a nondelegable workplace safety duty, it had to be proven to the jury’s satisfaction that the Port controlled the manner

of Mr. Afoa's work on the Seatac ramp. *Afoa v. Port of Seattle* (Afoa I), 176 Wn.2d 460, 472, 474, 296 P.3d 800 (2013). That was proven, and it is the basis of the Port's liability.

AGCW suggests by its erroneous use of the term "per se liability" that this court would create an unduly broad liability by affirming Division One. Nothing could be further from the truth. Just like liability under WISHA specific duty and the common-law control doctrine itself, the scope of the exception under RCW 4.22.070(1)(a) is limited by the need to prove retention of the right to control the manner of work. That limitation on the nondelegable safe workplace duty has been a part of Washington law since at least the 1978 decision in *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 330-31, 582 P.2d 500 (1978), which itself was based on earlier decisions and the Restatement.

We do not ask the Court to write an exception into the Tort Reform Act, but instead *to give effect to the language chosen by the Legislature when it drafted the Act*, and when it chose to create its own exception by stating that: "[a] party shall be responsible for the fault of another person or for payment of the proportionate share of another party ... when a person was acting as an agent or servant of the party." RCW 4.22.070(1)(a).

The alternative to giving RCW 4.22.070(1)(a) the effect dictated by the common law is abrogation of 120 years of common-law jurisprudence

protecting the safety of workers at the multiemployer jobsite. If the employer's nondelegable liability for workplace safety can be parsed out between multiple entities, it will become a pea in the shell game of hiding liability behind entities from which the injured worker cannot recover, as the Port wants to do in this case.

Holding general contractors and landowners completely responsible for safety at the workplaces they control also furthers Washington's policy favoring third party actions (actions against parties other than the direct employer for workplace injury), and facilitates the procedure by which the Department of Labor and Industries is authorized to bring such an action in the name of the injured worker to recover benefits paid from the Industrial Insurance Fund if the worker does not bring suit for themselves. *Evans v. Thompson*, 124 Wn.2d 435, 437, 879 P.2d 938 (1994); RCW 51.24.030-.060. If full recovery is denied to an injured worker, the State would end up subsidizing the unrecovered portion of the damages caused by tortfeasors. Also, if the nondelegable duty to provide a safe workplace is fragmented as AGCW and the Port claim it should be, then DLI will have the same burden and expense of suing everyone in sight that would be cast on the injured worker. This will end up costing the State millions of dollars in added litigation fees and lost recovery of benefits paid.

## 2. *Millican* is not Distinguishable

AGCW's argument "C" is merely a repackaging of the failed argument that concurrent workplace safety duties are incompatible with holding a control party such as the Port to a nondelegable vicarious duty to provide a safe workplace. Because the essence of the nondelegable duty over workplace safety is that the control party cannot escape liability for the actions of those entrusted with discharging *the control party's* duty, *Millican*, 177 Wn. App. at 896-97, the fact that others may have a similar nondelegable duty does not change the fact that the Port can delegate part of the work involved in maintaining a safe workplace on the ramp at Seatac, *but not its liability for failing to do so*.<sup>5</sup>

AGCW attempts to distinguish the *Millican* decision as a case in which the general contractor attempted to blame the direct employer based on contractual assumption of safety duties, and attempted to delegate to others its Specific Duty to comply with WISHA. *AGCW Brief* at 11-13. AGCW is apparently not familiar with the record in this case, since the Port did both of these things here. The Port introduced its lease agreement with EAGLE and repeatedly emphasized EAGLE's delegated safety

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<sup>5</sup> *Guy*, 64 Wn.2d at 118-19; *Myers v. Little Church*, 37 Wn.2d at 904; *Acras v. Frederick & Nelson*, 79 Wash. at 404, 409-10; *Millican*, 177 Wn. App. at 892-93, 896-97; *see cases cited in Afoa Supp. Brief* at 4-5, fns. 10, 12.

duties. Port Ex. 311. Thus, the Port began its closing argument by saying the case is “very simple” because, “[i]f EAGLE had properly maintained its equipment, Mr. Afoa’s accident would not have happened.” RP 3504/9-14. It stressed that EAGLE promised in its licensing agreement with the Port that it would maintain its own equipment. RP 3513/14-16. In addition, the record in this case shows that even after *Afoa I*, the Port delegated the duty to enforce WISHA as to non-Port-employees to the hundreds of other employers working at Seatac, and that it has tried to make a virtue of defiance of its RCW 49.17.060(2) specific duty, both in testimony, RP 1086/3-6, 3071/11-13, and even in its Brief before the Court. *Port’s Brief of Appellant/Cross-Respondent* at 22, 25-26. All this is thoroughly detailed in the Amicus Brief of the Washington State Labor Council at 3-4. There is *nothing* distinguishable between this case and *Millican*, and when *Millican* quoted the Restatement (Second) of Torts for the general meaning of “nondelegable duty” as including vicarious liability for the actions of subcontractors, it was stating law that is directly applicable to this case.

### **3. Statutory Interpretation is a Question of Law for the Court, not the Jury**

AGCW argues, as does the Port, that the Tort Reform Act abrogates 120 years of common law, including common-law interpretation of the WISHA Specific Duty Clause, RCW 49.17.060(2). AGCW’s added

emphasis is its assertion that the legal issue of whether the Tort Reform Act abrogates the common-law should somehow have depended on a finding of fact by the jury. *AGCW Brief* at 10. AGCW is mistaken.

Statutory interpretation is a question of law for the court. *E.g.*, *Shanghai Commercial Bank Ltd. v. Kung Da Chang*, 189 Wn.2d 474, 479, 404 P.3d 62 (2017); *Philippides v. Bernard*, 151 Wn.2d 376, 383, 88 P.3d 939 (2004). The Legislature is presumed to be aware of the existing common law which, by statute, is the rule of decision in this State, RCW 4.04.010, and it will not be deemed abrogated absent clear evidence that the Legislature intended to do so. *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 77, 196 P. 3d 691 (2008). The nondelegable safe workplace duty based on control of the work is firmly entrenched in roughly 120 years of jurisprudence, and recognized in numerous decisions as both a manifestation of or coextensive with the doctrines of master-servant and principal-agent. *Afoa I*, 176 Wn.2d at 475; *Brief of Respondent Afoa* at 53-54; *Supp. Brief of Afoa* at 13-14. The party best able to control safety at the multiemployer job site treats the controlled entity “as an agent” for purposes of carrying out duties related to safety. The issue here is whether RCW 4.22.070(1), which contains the express language creating vicarious liability for acts of a person who was “acting as an agent or servant of the party,” *clearly demonstrate the Legislature’s intent to abrogate this*

longstanding common law. That is not a jury question; it is instead a *legal* issue for determination by *the Court as a matter of law*.

If, as a matter of law, RCW 4.22.070(1) does not abrogate the control party's nondelegable safe workplace duty, there is *no further factual finding required* to establish the Port's full liability in this case.

The record before this Court already demonstrates that the controlled entities at Seatac acted "as an agent or servant" of the Port for purposes of ensuring safety, so a remand for fact-finding on this issue would be a wasteful and pyrrhic exercise. Under leases ("SLOAs") signed by each of the four nonparty airlines, §2.1 grants a nonexclusive right to use the airfield area "**subject at all times to the exclusive control and management by the Port.**" Ex. 675 at Port 277 (China); Ex. 676 at Port 3465 (British), Ex. 677 at Port 3648 (Eva); Ex. 678 at Port 190 (Hawaiian), RP 1510/8-19. Roland Kaopuiki, Hawaiian Airlines Station Manager at Seatac, testified that his understanding of the §2.1 "exclusive control and management" language in the SLOA was that the Port was "the entity that enforced all rules and regulations ... at the airfield," and that no other entity at Seatac had power stronger than that of the Port. RP 1172-73/13-2. The Port's Director of Tenant Leases testified that Gate S-15, near where the injury occurred, is "a Port-controlled, common use gate." RP 873/18-21 & 885/6-7, *see also*, RP 2355-56/21-4 (Port Attorney Safora agrees); Ex. 675

at Port 284, ¶4.7 (SLOA states that “The Port shall retain exclusive control of the use of all Common Use Gates”). Senior Manager for Port Operations, Nicholas Harrison, testified that it was his understanding that the Port has “exclusive control and management over the airfield area.” RP 1005/7-11. And as quoted by Division One:

John Nance, a Sea-Tac-based airline pilot, aviation expert, and former Port spokesman, testified that “[s]omeone has to be responsible for the overall operation or you have a community that is in chaos,” and that “it is to *the super authoritative source, which in this case is the Port of Seattle, that responsibility really does lie.*” Nance testified that under the Port’s airline and ground services contracts, and its rules, enforced by ramp patrol, Port police, and Port fire department, the Port controls the work on the ramp areas: “[T]hey control the means of work. They control the instrumentalities of work. They control the people who work there, and they control workplace safety. That’s the Port on the ramp areas.”

*Afoa II*, 198 Wn. App. at 225 (emphasis added by Court of Appeals). No remand is necessary.<sup>6</sup>

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<sup>6</sup> At this point in the litigation, the Port and AIG are only cynically playing for time, hoping Mr. Afoa cannot survive, or his attorneys cannot further fund this nightmare litigation. Remand for a factual finding on agency would do nothing other than frustrate the justice due to Mr. Afoa. Mr. Afoa was paralyzed Christmas Night 2007 at age 25. His life was shortened twenty years by the injuries he suffered, and as of trial in early 2015 he was expected to live about 30 more years. RP 1860-1862. He is now 35. Assuming he would have had (as of the date of the accident) about 50-55 years of life left, then roughly one-third of his remaining life expectancy has already been consumed by this litigation aimed at obtaining just compensation for his devastating injuries. Never was it truer that justice further delayed would be justice denied.

## II. RESPONSE TO WASHINGTON STATE LABOR COUNCIL

Mr. Afoa agrees with Amicus Washington State Labor Council (WSLC) that the effect of RCW 4.22.070(1)(a) is that the vicarious liability of the master was carved out as an exception to the new “usual” rule of several liability created by Tort Reform, and that therefore it is an example of residual joint and several liability under RCW 4.22.030. *Brief of Amicus WSLC* at 6. This is entirely consistent with the view of the Restatement:

A person whose liability is imputed based on the tortious acts of another is liable for the entire share of comparative responsibility assigned to the other, regardless of whether joint and several liability or several liability is the governing rule for independent tortfeasors who cause an indivisible injury.

Restatement (Third) Torts – *Apportionment of Liability* §13. Because it is the law of the case that the Port and Mr. Afoa stand as statutory employer-employee for purposes of WISHA, *Afoa I*, 176 Wn.2d at 473, and as “control of manner of work” master for purposes of the common-law control doctrine, this means that the Port is jointly and severally liable to Mr. Afoa.

It is significant, as reported by WSLC, that the Department of Labor and Industries has found that ground service employees at Seatac have four times the likelihood of injury as other workers in their risk class. *Brief of Amicus WSLC* at 2. The Tompa study cited by WSLC, showing that only a direct penalty on the party responsible for safety results in

increased safety at the workplace, *id.* at 7-8, means that if the Port or other future control parties are permitted to delegate their nondelegable duty to ensure a safe workplace, then the multiemployer workplaces around the state will all become more dangerous. This is a prescription for disaster for the ground service employees at Seatac, who desperately need improvement, not diminishment, of safety. The Legislature has already taken appropriate steps to prevent this, by enactment of the WISHA Specific Duty, RCW 49.17.060(2). If this Court were to accept the Port's arguments aimed at watering down this duty, it would undermine the very worker safety protective legislation that is mandated by the Washington Constitution. Wash. Const. Art. II §35.

Amicus WSLC does an excellent job illustrating the wasteful consequences of adopting the Port's position. *Brief of Amicus WSLC* at 10-11. The injured worker would either be forced to sue "everyone" – here, over 30 airlines and 200 other contractors – or risk failing to recover full and just compensation as found by the jury.

Finally, Mr. Afoa agrees with WSLC that, just as "the common law workplace safety doctrine has its roots in the master-servant relationship," *Afoa I*, 176 Wn.2d at 475, the Port's attempt to shelter liability for failing to provide a safe workplace is a modern version of the discredited fellow servant rule, and just as pernicious. *Brief of Amicus WSLC* at 11-12.

### III. RESPONSE TO WSAJF

Mr. Afoa is in complete accord with the WSAJF's framing of the analysis for determining the legal issue of whether RCW 4.22.070(1) has abrogated the common-law nondelegable duty to provide a safe workplace, and/or the statutory nondelegable specific duty under WISHA. *Amicus Brief of WSAJF* at 11-15. Specifically, the words "acting as an agent or servant" as used in RCW 4.22.070(1)(a) encompass the traditional actions of employers as well as the level of control necessarily proven to show landowner control over workplace safety, and show that the Legislature did not intend to abrogate the longstanding common law safe workplace doctrine by enactment of Tort Reform. Importantly, "*acting as an agent or servant*" is broader than the ultimate legal status of agency or employer, and is broad enough language to signal the Legislature's intent to encompass the extended modern scope of control party liability for providing a safe workplace. *Amicus Brief of WSAJF* at 14-15.

WSAJF argues the issue of the Port's violation of CR 12(i) by its late amendment to name the airlines as nonparties at fault, slightly differently than Mr. Afoa argued it. Mr. Afoa has stressed the Port's violation of the express language of CR 12(i), which states that, "[t]he identity of any nonparty claimed to be at fault, if known to the party making the claim, *shall* also be affirmatively pleaded." In response to the argument

that there was no prejudice because Mr. Afoa had previously sued the airlines and could be ready to confront them again, Mr. Afoa argued that the prejudice flows from the Port's gamesmanship preventing Mr. Afoa from his chance to have all liability determined in a single proceeding, thus depriving him of full compensation for his injuries.

WSAJF frames the issue primarily in terms of "waiver", *Amicus Brief of WSAJF* at 17-20, stressing the importance of the doctrine under the caselaw in controlling against "trial by ambush." *Id.* at 18 (*quoting, Lybbert v. Grant County*, 141 Wn.2d 29, 39-40, 1 P.3d 1124 (2000)). Mr. Afoa agrees that this would be a sound alternative way to analyze this issue, to find that the trial court abused its discretion by allowing amendment to add the late defenses of nonparty airline fault.

### **CONCLUSION**

The Port and Amicus AGCW argue that 120 years of Washington worker-safety jurisprudence was abrogated by a statute that expressly preserves vicarious joint and several liability for controlled contractors acting as the agents or servants of the party best able to protect worker safety at a multiemployer jobsite. The Port and Amicus AGCW ask this Court to bless a shell game by which the Port, for whom the real party in interest is insurer AIG under EAGLE's coverage, would pretend to pass three-quarters of its safe workplace liability to airlines that acted under its

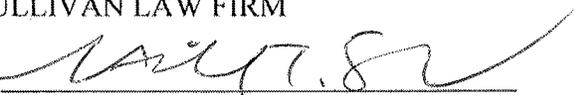
“exclusive control and management,” Exs. 675-678, who are also indemnified by AIG under the same policy, and against whom (to the surprise and disgust of the jurors) Mr. Afoa cannot collect one dime. This was made possible by a scheme in which Port counsel first represented the airlines, claiming they were pure as the driven snow, and successfully (with the aid of Port witnesses) obtained their federal court absolution; and then turned around and sued them (his own former clients!) when it was too late for Mr. Afoa to join them, arguing they were reprehensible scoundrels, thus obtaining the 18.7% x 4 allocation of fault against the airlines which stands in this record.

Mr. Afoa respectfully asks this Court to hold as a matter of law that the Tort Reform Act did not abrogate 120 years of worker protection law, and to refuse to reward the Port for its gamesmanship and for hiding its empty chair defense in violation of the express language of CR 12(i). Mr. Afoa respectfully requests that this Court affirm the Court of Appeals, Division One, and award him *as a matter of law* the full verdict that the jury intended to grant him as fair compensation for his devastating injuries.

Respectfully submitted this 2<sup>nd</sup> day of January, 2018.

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