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**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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**BRANDON APELA AFOA, an individual,**

**Respondent/Cross-Appellant,**

**vs.**

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

**Appellant/Cross-Respondent.**

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

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**BRIEF OF APPELLANT/CROSS-RESPONDENT**

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**TABLE OF CONTENTS**

	<b>Page</b>
<b>I. NATURE OF THE CASE.....</b>	<b>1</b>
<b>II. ASSIGNMENTS OF ERROR .....</b>	<b>1</b>
<b>III. ISSUES PRESENTED.....</b>	<b>2</b>
<b>IV. STATEMENT OF THE CASE.....</b>	<b>3</b>
<b>A. STATEMENT OF RELEVANT FACTS .....</b>	<b>3</b>
<b>1. Overview of the Facts .....</b>	<b>3</b>
<b>2. Factual Statement of How STIA Operates .....</b>	<b>4</b>
<b>B. STATEMENT OF PROCEDURE.....</b>	<b>7</b>
<b>V. SUMMARY OF ARGUMENT.....</b>	<b>8</b>
<b>VI. ARGUMENT.....</b>	<b>9</b>
<b>A. QUESTION NO. 1 WAS CONTRARY TO LAW AND         THE INSTRUCTIONS.....</b>	<b>11</b>
<b>B. THERE WAS NO SUBSTANTIAL EVIDENCE OF THE         REQUIRED CONTROL .....</b>	<b>19</b>
<b>1. There Is No Substantial Evidence the Port             Retained the Right To Control the             Manner in Which EAGLE Maintained Its             Equipment .....</b>	<b>20</b>
<b>2. There Is No Substantial Evidence the Port             Retained the Right To Control the             Manner in Which EAGLE Performed Its             Work.....</b>	<b>24</b>
<b>C. FEDERAL LAW PREEMPTS PLAINTIFF’S CLAIMS.....</b>	<b>30</b>

1.	<b>The Federal Government Extensively Regulates STIA.....</b>	<b>31</b>
	a. <b>The Federal Aviation Act .....</b>	<b>32</b>
	b. <b>The Transportation Security Administration .....</b>	<b>35</b>
2.	<b>Plaintiff's Claims Are Impliedly Preempted.....</b>	<b>35</b>
	a. <b>Plaintiff's Claims Are Conflict Preempted.....</b>	<b>36</b>
	b. <b>Plaintiff's Claims Are Field Preempted.....</b>	<b>44</b>
3.	<b>Plaintiff's Claims Are Expressly Preempted.....</b>	<b>48</b>
<b>VII.</b>	<b>CONCLUSION .....</b>	<b>50</b>
<b>APPENDIX A</b>		
	<b>Exhibit 305, Photograph of Pushback Vehicle</b>	
<b>APPENDIX B</b>		
	<b>Supremacy Clause, U.S. CONST. art. VI, cl. 2</b>	

## TABLE OF AUTHORITIES

### Washington Cases

	<b>Page</b>
<i>Afoa v. Port of Seattle</i> , 176 Wn.2d 460, 296 P.3d 800 (2013).....	6, 7, 9, 10, 11, 16, 18, 19, 25
<i>Bozung v. Condo. Builders, Inc.</i> , 42 Wn. App. 442, 446, 711 P.2d 1090 (1985)	
<i>Bulaich v. AT&amp;T Info. Sys.</i> , 113 Wn.2d 254, 778 P.2d 1031 (1989).....	12
<i>Cano-Garcia v. King County</i> , 168 Wn. App. 223, 277 P.3d 34 (2012).....	13
<i>Capers v. Bon Marche</i> , 91 Wn. App. 138, 955 P.2d 822 (1998).....	17
<i>Cowsert v. Crowley Maritime Corp.</i> , 101 Wn.2d 402, 680 P.2d 46 (1984).....	19
<i>Epperly v. City of Seattle</i> , 65 Wn.2d 777, 399 P.2d 591 (1965).....	18
<i>Fergen v. Sestero</i> , 182 Wn.2d 794, 346 P.3d 708 (2015).....	12
<i>Filo Foods, LLC v. City of SeaTac</i> , 183 Wn.2d 770, 357 P.3d 1040 (2015).....	48
<i>Folsom v. Burger King</i> , 135 Wn.2d 658, 958 P.2d 301 (1998).....	19
<i>Guijosa v. Wal-Mart Stores, Inc.</i> , 144 Wn.2d 907, 32 P.3d 250 (2001).....	19
<i>Hall v. Corp. of Catholic Archbishop</i> , 80 Wn.2d 797, 498 P.2d 844 (1972).....	17
<i>Hennig v. Crosby Group</i> , 116 Wn.2d 131, 802 P.2d 790 (1991) .....	18, 20
<i>Horwath v. Wash. Water Power Co.</i> , 68 Wn.2d 835, 416 P.2d 92, 420 P.2d 216 (1966).....	17, 20
<i>Kamla v. Space Needle</i> , 147 Wn.2d 114, 52 P.3d 472 (2002).....	11, 18, 19

<i>Kelley v. Howard S. Wright Constr. Co.</i> , 90 Wn.2d 323, 582 P.2d 500 (1978).....	9, 13, 15
<i>Micro Enhancement Int'l, Inc. v. Coopers &amp; Lybrand, L.L.P.</i> , 110 Wn. App. 412, 40 P.3d 1206 (2002).....	17
<i>Millican v. N.A. Degerstrom, Inc.</i> , 177 Wn. App. 881, 313 P.3d 1215 (2013).....	9
<i>Mina v. Boise Cascade Corp.</i> , 104 Wn.2d 696, 710 P.2d 184 (1985).....	18
<i>Phillips v. Kaiser Aluminum &amp; Chem. Corp.</i> , 74 Wn. App. 741, 875 P.2d 1228 (1994).....	10
<i>Schatz v. Heimbigner</i> , 82 Wash. 589, 144 P. 901 (1914) .....	17
<i>Shingledecker v. Roofmaster Prods. Co.</i> , 93 Wn. App. 867, 971 P.2d 523 (1999).....	13
<i>State v. McKenzie</i> , 56 Wn.2d 897, 355 P.2d 834 (1960).....	20
<i>Stute v. P.B.M.C., Inc.</i> , 114 Wn.2d 454, 788 P.2d 545 (1990) .....	13
<i>Tauscher v. Puget Sound Power &amp; Light Co.</i> , 96 Wn.2d 274, 635 P.2d 426 (1981).....	10
<i>Veit, ex rel. Nelson v. Burlington N. Santa Fe Corp.</i> , 171 Wn.2d 88, 249 P.3d 607 (2011).....	30
<i>Viking Automatic Sprinkler Co. v. Pac. Indem. Co.</i> , 19 Wn.2d 294, 142 P.2d 394 (1943).....	12
<i>Williams v. Hofer</i> , 30 Wn.2d 253, 191 P.2d 306 (1948).....	15
<b>Other Jurisdictions</b>	
<i>Abdullah v. Am. Airlines, Inc.</i> , 181 F.3d 363 (3 <sup>d</sup> Cir. 1999).....	32
<i>Air Transp. Ass'n of Am., Inc. v. Cuomo</i> , 520 F.3d 218 (2 <sup>d</sup> Cir. 2008) .....	32
<i>Anderson v. PPCT Mgmt. Sys., Inc.</i> , 145 P.3d 503 (Alaska 2006).....	13

<i>Appiah v. Hall</i> , 183 Md. App. 606, 962 A.2d 1046 (2008), aff'd, 416 Md. 533, 7 A.3d 536 (2010).....	14
<i>Atkinson v. Gates, McDonald &amp; Co.</i> , 838 F.2d 808 (5 <sup>th</sup> Cir. 1988) .....	36
<i>Beil v. Telesis Constr., Inc.</i> , 608 Pa. 273, 11 A.3d 456 (2011).....	25
<i>Bieneman v. City of Chicago</i> , 864 F.2d 463 (7 <sup>th</sup> Cir. 1988).....	37
<i>Cain v. Joe Contarino, Inc.</i> , 10 N.E.3d 929 (Ill. App. 2014) .....	13, 14
<i>Campbell v. Hussey</i> , 368 U.S. 297, 82 S. Ct. 327, 7 L. Ed. 2d 299 (1961).....	44
<i>Castellanos v. Tommy John, LLC</i> , 2014 Ut. App. 48, 321 P.3d 218 (2014).....	13
<i>Cicccone v. US Airways, Inc.</i> , 144 F. Supp. 2d 30 (D. Mass. 2001) .....	14
<i>Cipollone v. Liggett Group, Inc.</i> , 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992).....	30
<i>Crosby v. Nat'l Foreign Trade Council</i> , 530 U.S. 363, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000).....	31
<i>English v. Gen. Elec. Co.</i> , 496 U. S. 72, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990).....	31, 36, 44, 48
<i>Funk v. Gen. Motors Corp.</i> , 392 Mich. 91, 220 N.W.2d 641 (1974),.....	
<i>Gaytan v. Wal-Mart</i> , 289 Neb. 49, 853 N.W.2d 181 (2014) .....	14
<i>Geier v. Am. Honda Motor Co.</i> , 529 U.S. 861, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000).....	31, 36, 43
<i>Hodges v. Delta Airlines, Inc.</i> , 44 F.3d 334 (5 <sup>th</sup> Cir. 1995).....	46
<i>Hoechst-Celanese Corp. v. Mendez</i> , 967 S.W.2d 354 (Tex. 1998).....	14
<i>Hoffnagle v. McDonald's Corp.</i> , 522 N.W.2d 808 (Iowa 1994) .....	19

<i>Hooker v. Dep't of Transp.</i> , 27 Cal. 4 <sup>th</sup> 198, 38 P.3d 1081 115 Cal. Rptr. 2d 853 (2002).....	14
<i>In re Lyondell Chem. Co.</i> , 503 B.R. 348 (Bankr. S.D.N.Y. 2014) .....	37
<i>In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.</i> , 725 F.3d 65 (2d Cir. 2013).....	36, 37
<i>La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n</i> , 476 U.S. 355, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986).....	30, 31
<i>Lee v. M &amp; H Enters., Inc.</i> , 237 Ariz. 172, 347 P.3d 1153 (2015).....	13, 14
<i>Lyn-Lea Travel Corp. v. Am. Airlines, Inc.</i> , 283 F.3d 282 (5 <sup>th</sup> Cir. 2002).....	49
<i>Martin ex rel. Heckman v. Midwest Express Holdings, Inc.</i> , 555 F.3d 806 (9 <sup>th</sup> Cir. 2009) .....	46, 48
<i>Miller v. Great Lakes Steel Corp.</i> , 112 Mich. App. 122, 315 N.W.2d 558 (1982).....	25
<i>Montalvo v. Spirit Airlines</i> , 508 F.3d 464 (9 <sup>th</sup> Cir. 2007).....	32, 44, 45
<i>Morales v. Trans World Airlines, Inc.</i> , 504 U.S. 374, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992).....	49
<i>Napier v. Atl. Coast Line R.R. Co.</i> , 272 U.S. 605, 47 S. Ct. 207, 71 L. Ed. 432 (1926).....	46, 47
<i>O'Carroll v. Am. Airlines, Inc.</i> , 863 F.2d 11 (5 <sup>th</sup> Cir. 1989) .....	49
<i>Ormsby v. Capital Welding, Inc.</i> , 471 Mich. 45, 684 N.W.2d 320 (2004).....	15
<i>PLIVA, Inc. v. Mensing</i> , ___ U.S. ___, 131 S. Ct. 2567, 180 L. Ed. 2d 580 (2011);.....	36
<i>Ray v Atl. Richfield Co.</i> , 435 U.S. 151, 98 S. Ct. 988, 55 L. Ed. 2d 179 (1978).....	46
<i>Rowe v. N.H. Motor Transport Ass'n</i> , 552 U.S. 364, 128 S. Ct. 989, 169 L. Ed. 2d 933 (2008).....	44, 49

<i>Schneidewind v. ANR Pipeline Co.</i> , 485 U. S. 293, 108 Ct. 1145, 99 L. Ed. 2d 316 (1988).....	44
<i>US Airways, Inc. v. O'Donnell</i> , 627 F.3d 1318 (10 <sup>th</sup> Cir. 2010) .....	32
<i>Ventress v. Japan Airlines</i> , 747 F.3d 716 (9 <sup>th</sup> Cir. 2014) .....	31

**Constitutions**

U.S. CONST. art. VI, cl. 2 .....	30
----------------------------------	----

**Statutes**

49 USC § 106(f)(2)(iii) .....	33
49 USC §§ 114 (a)-(b) .....	35
49 USC §§ 114(d)-(e) .....	5
49 USC §§ 114(f)(11)-(12) .....	35
49 USC §§ 40101- <i>et seq.</i> Federal Aviation Act.....	31, 32, 33, 34
49 USC pt. A.....	3, 33, 39
49 USC § 40120(c) .....	31
49 USC § 41112.....	46
49 USC § 41713(b) [1305(a)(1)] .....	48, 51
49 USC § 44701(a)(5).....	46
49 USC § 44701(b)(2) .....	46
USC § 44706.....	32
49 USC § 44706(a) .....	3, 33, 39, 46, 48
49 USC § 44706(b).....	33, 46
49 USC § 44709(a) .....	33
49 USC § 44709(b).....	33

49 USC §§ 44901(a)-(b) .....	5
49 USC §§ 44903(g)(2)(B)-(C) .....	35
49 USC § 44903(h) .....	35
49 USC § 47101(a)(1).....	32, 33
49 USC § 47101(b)(2) .....	33
RCW ch. 49.17	
Washington Industrial Safety and Health Act	
("WISHA") .....	7, 10, 11, 16, 22, 25, 49

**Rules and Regulations**

14 CFR subpts. C-D.....	33
14 CFR pt. 121 .....	4
14 CFR pt. 139.....	5, 32, 34, 39
14 CFR pt. 139 subpt. D .....	33, 34, 38
14 CFR § 139.7 .....	33, 34, 39
14 CFR § 139.101 .....	33
14 CFR §§ 139. 103(a)-(b).....	33
14 CFR § 139.107(c).....	5, 33
14 CFR § 139.201(a).....	33, 41, 45
14 CFR § 139.201(a)(2).....	33
14 CFR § 139.201(d) .....	34, 40
14 CFR § 139.203(b) .....	33
14 CFR §§ 139.301-.313.....	34
14 CFR § 139.305(a)(3).....	42

14 CFR §§ 139.317-.343.....	34
14 CFR § 139.327.....	38, 45, 47
14 CFR § 139.329.....	38, 40, 42, 45, 47
14 CFR §§ 139.329(a)-(b).....	40
14 CFR § 139.329(e).....	41
14 CFR pt. 205.....	46
49 CFR pt. 1542.....	5
49 CFR § 1542.101(a).....	5, 35
49 CFR § 1542.103.....	5, 33
49 CFR § 1542.201(a)-(b)-.207.....	40
49 CFR § 1542.213(b).....	41

**Other Authorities**

67 FR 8341.....	35
67 FR 8358-59.....	40
67 FR 37325.....	41
RESTATEMENT (SECOND) OF TORTS § 409 (1965).....	9
RESTATEMENT (SECOND) OF TORTS § 414 (1965).....	9, 10, 11, 15
H. R. Rep. No. 2360, reprinted in 1958 USCCAN 3741.....	32
S. Rep. No. 1811, 85 <sup>th</sup> Cong., 2d Sess. 5 (1958).....	32
www.dictionary.com/browse/airside.....	4

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## **I. NATURE OF THE CASE**

Plaintiff, an employee of ground services operator, Evergreen Aviation Ground Logistics Enterprise (EAGLE), was seriously injured at Seattle-Tacoma International Airport when he lost control of EAGLE's pushback vehicle because EAGLE had failed to maintain it. Plaintiff claimed the airport owner, the Port, was liable because it had allegedly retained the right to control the manner and instrumentalities of his work. The trial court allowed the jury to find the Port liable without its finding the Port retained any right to control the manner in which plaintiff's employer maintained the very instrumentality of the injury, the pushback.

## **II. ASSIGNMENTS OF ERROR**

The trial court erred in—

- A. Entering Judgment on Jury Verdict (CP 4881-86);
- B. Phrasing special verdict Question No. 1 to allow the jury to find the Port liable without finding it retained the right to control the manner in which plaintiff's employer maintained its equipment (CP 4839);
- C. Denying judgment as a matter of law for the Port although there was no substantial evidence it retained the right to control the manner in which plaintiff's employer maintained its equipment (RP 2308; CP 5159-60);

D. Denying a new trial on control because the jury found liability without having to find the Port retained the right to control the manner in which plaintiff's employer maintained its equipment (CP 5157-58);

E. Even if Question No. 1 was properly phrased, denying judgment as a matter of law because there is no substantial evidence to support the jury's answer to that question (RP 2308; CP 5157-60);

F. Denying the Port judgment as a matter of law because federal law preempts plaintiff's claims (CP 5151-52);

G. Denying the Port's partial summary judgment motion on preemption (CP 8923-26);

H. Granting in part plaintiff's cross-motion for partial summary judgment regarding preemption (CP 8923-26).

### **III. ISSUES PRESENTED**

A. Was special verdict Question No. 1's phrasing reversible error, where contrary to law and the instructions, it allowed the jury to find the Port liable without having to find it had retained the right to control the manner in which EAGLE maintained its pushback? (AE A-D)

B. Was there substantial evidence of the Port's alleged retention of the right to control the manner in which EAGLE maintained its pushback? (AE A-D)

C. If not, is the Port entitled to a new trial on the control issue because special verdict Question No. 1 should have been phrased to require the jury to find the Port had retained the right to control the manner in which EAGLE not only performed its work, but also maintained its pushback? (AE A, D)

D. Even if special verdict Question No. 1's phrasing was correct, did substantial evidence support the jury's answer to it? (AE A, E)

E. Does federal law preempt plaintiff's claims or at least require exclusion of evidence of the Port's conduct required by federal agencies or otherwise by federal law? (Assignments of Error A, F-H)

#### **IV. STATEMENT OF THE CASE**

##### **A. STATEMENT OF RELEVANT FACTS.**

###### **1. Overview of the Facts.**

Appellant/defendant Port of Seattle, through its elected Board of Commissioners, owns and operates Seattle-Tacoma International Airport (STIA), a Federal Aviation Administration (FAA)-certificated airport. Federal certification shows that STIA "properly and adequately is equipped and able to operate safely" under 49 USC pt. A. 49 USC § 44706(a). (RP 2755, 2962-64)

Because air carriers operating at STIA need ground services, the air carriers, not the Port, retain ground service operators (GSOs). (Ex. 322-25; RP 2967-68, 2977)

Respondent/plaintiff Brandon Afoa was employed by a GSO, Evergreen Aviation Ground Logistics Enterprise (EAGLE). In December 2007 he was driving a large pushback (Ex. 305, copy in Appendix A hereto) on the STIA airside, *i.e.*, “the part of an airport used by aircraft for loading and unloading and takeoffs and landings.” <http://www.dictionary.com/browse/airside>. Plaintiff was taking the vehicle to another gate. EAGLE owned the vehicle. Its failure to properly keep the hydraulic fluid at proper levels caused brake and steering failure. Plaintiff lost control and crashed, suffering serious injury. (RP 130-31, 135, 137, 207, 284-87, 310-11, 376-77, 2001; Ex. 549 EAGLE-BIC 137)

## **2. Factual Statement of How STIA Operates.**

An understanding of how STIA operates is required for this appeal.

The US air transportation system is a collective of governing bodies and stakeholders: (1) the FAA, (2) the Transportation Safety Administration (TSA), (3) the airport owner (*e.g.*, the Port), (4) air carriers certificated under 14 CFR pt. 121, (5) GSOs hired by air carriers, and (6) retail/food concessions leasing space at the airport. (RP 2964-70; Ex. 693).

The FAA, not the Port, is responsible for controlling air navigation into and out of STIA, including aircraft on runways and taxiways. (RP 2924, 2966, 3019) TSA has taken over the FAA's authority for airport security and is responsible for, *inter alia*, screening passengers. 49 USC §§ 114(d)-(e); 44901(a)-(b). In addition, both federal agencies have issued regulations with which airports like STIA must comply in order to operate. 14 CFR § 139.107(c); 49 CFR §§ 1542.101(a), .103.

The Port's role at STIA is to build and operate transportation facilities—the terminal, runways, taxiways, and related infrastructure necessary for air carriers to operate there. The Port does not own or operate air carriers, provide them with ground support services, or own or maintain aircraft or GSO ground support equipment. Rather, its responsibilities, often FAA or TSA-mandated, generally relate to the facilities it has constructed and maintains. (RP 1080, 1083, 1085-86, 1101, 2965, 2977-78, 2998, 3016) *See* 14 CFR pt. 139; 49 CFR pt. 1542.

The Port itself has a relatively small number of employees at STIA—about 800. By comparison, over 200 other employers employing 16-18,000 workers do business at STIA. (RP 2390, 2957, 3089)

The air carriers provide and operate aircraft. Approximately 34 carriers have each signed a Signatory Lease Operating Agreement (SLOA) with the Port, enabling them to do business at STIA long-term. Depending

on the SLOA, an air carrier has either preferential use of certain gates whenever unoccupied or common use of certain gates, requiring a carrier to be assigned to a gate each time it needs one. The air carriers also have some power over the Port's STIA purse strings, as they are entitled to review the STIA annual expense budget and collectively veto capital budget items over \$2.5 million. (RP 872-75, 885-86, 1087-88, 1135, 1156, 2311-12, 2344, 2353-54, 2967, 3003-04, 3019; Exs. 675-78)

Although this Court has stated, on a limited summary judgment record, that “[t]he Port has structured its contracts with workers like EAGLE and Afoa such that those workers are not technically Port employees,” *Afoa v. Port of Seattle*, 176 Wn.2d 460, 478, 296 P.3d 800 (2013), the evidence at trial showed that an air carrier needs ground support, so it is *the air carriers*, not the Port, that have the right to, and do, contract with their own GSOs. (RP 3005; Exs. 322-25) Once a carrier confirms it has such a contract, the GSO may enter into a licensing agreement with the Port to permit it to operate at STIA. Ground services vary, depending on the air carrier, but can include such things as baggage and cargo handling, marshalling (*i.e.*, guiding aircraft into and out of a parking spot), towing or pushing aircraft, deicing, and aircraft cleaning. More than 5,000 pieces of rolling ground support equipment support air

carriers at STIA. (RP 1161-62, 1179-82, 2627-29, 2901-02, 2925, 2950; Exs. 311, 322-25,549, EAGLE-BK 124-36)

Air carriers require GSOs to carry out their flight operation services “in accordance with the Carrier’s instructions.” Air carrier safety representatives typically are present when a flight is being worked to ensure the GSO is following air carrier standards. In addition, pilots have a large amount of control. (RP 388, 2874; Ex. 322, Evergreen 197; Ex. 323, PORT 119742; Ex. 324, PORT 119742; Ex. 325, Evergreen 225)

**B. STATEMENT OF PROCEDURE.**

Plaintiff sued the Port for negligence arising out of the condition of the pushback and STIA premises and alleged WISHA violations. Plaintiff claimed the Port could be liable because it had allegedly retained sufficient control over the manner in which EAGLE performed its work and maintained the pushback. The claims were dismissed on the basis the retained control doctrine did not apply to a licensor like the Port. (CP 1-10, 173-89, 488-89) Based on the limited summary judgment record, this Court held that the applicability of the doctrine to the Port depended on fact issues about such control. *Afoa*, 176 Wn.2d at 472, 474, 478, 482.

A jury found that no condition at STIA had involved an unreasonable risk of harm, but assessed the Port with 25% fault for non-premises-related negligence. The remaining fault was charged to plaintiff

and the four air carriers for which EAGLE provided ground services. Plaintiff's total damages were found to be \$40 million. (CP 4840-42)

Pursuant to the jury's fault allocation, a \$10 million judgment against the Port was entered. Port motions for judgment as a matter of law and new trial limited to the control issue were denied. (CP 4881-82, 5151-52, 5157-60)

#### V. SUMMARY OF ARGUMENT

Any liability the Port might have depends on whether it retained the requisite control. Under the law and the instructions, plaintiff was required to prove the Port retained the right to control the manner in which EAGLE not only performed its work, *but also* the manner in which EAGLE maintained its equipment. Special verdict Question No. 1 erroneously allowed the jury to find the Port liable without finding it had retained the right to control the manner in which EAGLE maintained its equipment. Because there was no substantial evidence of the required control, the Port is entitled to reversal and judgment as a matter of law. At the very least, a new trial on the control issue should be granted.

Should this Court rule the required control was shown, the result would still be the same. Virtually all evidence used to show the Port's alleged control was conduct required by federal law. Plaintiff's claims are

thus preempted or, at least evidence of such required conduct should have been excluded as to the control issue.

## VI. ARGUMENT

The jury found no unreasonable risk of harm in any condition at STIA. (CP 4840, Question 4) Thus, this appeal involves only plaintiff's negligence claims based on the pushback's condition. The Port's liability depends on whether it retained the right to control the manner and instrumentalities of EAGLE's work and the scope of any such control. *Afoa*, 174 Wn.2d at 472, 478; *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 331, 582 P.2d 500 (1978).

Plaintiff's employer, EAGLE, was an independent contractor of the air carriers for which it worked, and a licensee of the Port. (Exs. 311, 657-78) As a general rule, an independent contractor's employer is not liable, directly or vicariously, with respect to the independent contractor's work. RESTATEMENT (SECOND) OF TORTS § 409 (1965); *see Millican v. N.A. Degerstrom, Inc.*, 177 Wn. App. 881, 890, 313 P.3d 1215 (2013). Likewise, a licensor like the Port would generally not be liable, directly or vicariously, with respect to the work of a licensee like EAGLE that was an independent contractor of entities such as the air carriers.

*Kelley*, 90 Wn.2d at 330, however, adopted an exception to the rule, RESTATEMENT (SECOND) OF TORTS § 414's retained control doctrine:

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.

(Emphases added.) This liability is direct, not vicarious, because—

When a right to control is retained, it must be exercised with reasonable care....This duty ... exists only “within the scope” of the principal/employer’s retained control.

*Phillips v. Kaiser Aluminum & Chem. Corp.*, 74 Wn. App. 741, 750-51, 875 P.2d 1228 (1994).

Although typically applied to general contractors, section 414 can also apply to landowners that employ independent contractors. *See Tauscher v. Puget Sound Power & Light Co.*, 96 Wn.2d 274, 280-81, 635 P.2d 426 (1981); *Phillips*, 74 Wn. App. at 743, 750. Even though it was the air carriers, not the Port, that employed EAGLE and other GSOs to provide ground services, *Afoa* expanded the retained control doctrine to potentially apply to the Port. 176 Wn.2d at 475. (RP 2967-68; Exs.323-25)

Section 414 governs not only the common law negligence claim, but the WISHA claim as well, since, unlike a general contractor, a landowner’s specific duty to comply with WISHA for the benefit of others’ employees similarly exists only if it “retain[s] control over the manner and instrumentalities of work done at the jobsite.” *Afoa*, 176

Wn.2d at 472-73. Moreover, the special verdict did not differentiate between the common law and WISHA negligence claims. (CP 4839-42)

To be liable for failing to properly exercise its control over an independent contractor, a landowner must retain *more* than a general right to stop work, order work resumed, inspect its progress, receive reports, make suggestions or recommendations, or prescribe alterations and deviations. *Kamla v. Space Needle*, 147 Wn.2d 114, 121, 52 P.3d 472 (2002) (quoting section 414, comment *c*). It is not enough to retain the right to demand contract compliance. *Id.* 120-21. Instead, the landowner must “retain control over the manner and instrumentalities of work being done on the jobsite.” *Afoa*, 176 Wn.2d at 472, 478.

As will next be discussed, plaintiff had to prove not only that the Port retained the right to control the manner in which EAGLE performed its work, but also that the Port retained the right to control the manner in which EAGLE maintained its equipment. He failed to prove either.

**A. QUESTION NO. 1 WAS CONTRARY TO LAW AND THE INSTRUCTIONS.**

Plaintiff’s injury was caused by EAGLE’s failure to properly maintain the pushback he was driving: plaintiff’s expert testified if EAGLE had properly maintained the vehicle, the accident would never

have happened. (RP 310-11) Contrary to law, however, special verdict

Question No. 1 asked the jury (CP 4839) (emphases added):

Did the defendant retain a right to control the manner in which the plaintiff's employer, Evergreen Aviation Ground Logistics Enterprise, Inc. (EAGLE), performed its work **or** maintained its equipment used to provide ground support work for the non-party air carriers (China Airlines, LTD, Hawaiian Airlines, Inc., EVA Airways Corporation, and British Airways, PLC)?

Phrased in the disjunctive over the Port's objection (RP 2427-28, 2447-49, 2463-64, 3106-07, 3162), the question allowed the jury to find the Port liable without finding a prerequisite to such liability: that it retained the right to control how EAGLE maintained the pushback, the very instrumentality that caused the accident. Because Question No. 1 misstated the law and contradicted the jury instructions, the trial court erred in giving it as phrased. *See Bulaich v. AT&T Info. Sys.*, 113 Wn.2d 254, 260, 778 P.2d 1031 (1989); *Viking Automatic Sprinkler Co. v. Pac. Indem. Co.*, 19 Wn.2d 294, 298, 142 P.2d 394 (1943). Review is de novo. *Fergen v. Sestero*, 182 Wn.2d 794, 803, 346 P.3d 708 (2015).

"[T]he employer is liable for injuries to the employees of the independent contractor **caused by the employer's failure to exercise that control** with reasonable care." *Bozung v. Condo. Builders, Inc.*, 42 Wn. App. 442, 446, 711 P.2d 1090 (1985) (Div. II) (emphases added); *see Phillips*, 74 Wn. App. at 750-51. Thus, under the retained control doctrine,

the injury must be “caused by [the] failure to exercise [the] control with reasonable care.” *Cain v. Joe Contarino, Inc.*, 10 N.E.3d 929, 954 (Ill. App. 2014).

Washington courts have long recognized this rule. For example, *Kelley* paraphrased section 414 to mean that if an employer retains control over some part of the independent contractor’s work, the employer “then has a duty, ***within the scope of that control***” to provide a safe workplace. 90 Wn.2d at 330 (emphases added). *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 461, 788 P.2d 545 (1990), said that “a general contractor has a duty, ***within the scope of its control over the work***, to provide a safe place to work for all employees” (emphases added). *Accord Cano-Garcia v. King County*, 168 Wn. App. 223, 246, 277 P.3d 34 (2012) (employer retaining control over part of independent contractor’s work has duty “within the scope of that control”); *Shingledecker v. Roofmaster Prods. Co.*, 93 Wn. App. 867, 873, 971 P.2d 523 (1999) (duty to third-party employees exists only “within the scope” of employer’s retained control).

Many courts elsewhere follow some variation of this rule. In Alaska and Utah, the control retained must be related to the cause of the injury. *Anderson v. PPCT Mgmt. Sys., Inc.*, 145 P.3d 503, 510 (Alaska 2006); *Castellanos v. Tommy John, LLC*, 2014 Ut. App. 48, 321 P.3d 218, 224 (2014). In Arizona the scope of any duty of the landowner “is

determined by the amount of control” it retains over the contractor’s work. *Lee v. M & H Enters., Inc.*, 237 Ariz. 172, 347 P.3d 1153, 1159 (2015). California courts require the exercise of retained control to affirmatively contribute to the injury. *Hooker v. Dep’t of Transp.*, 27 Cal. 4<sup>th</sup> 198, 38 P.3d 1081, 1083, 115 Cal. Rptr. 2d 853 (2002). Illinois courts hold the injury must be caused by failure to exercise control with reasonable care. *Cain*, 10 N.E.3d at 954. In Maryland, “[t]he key element of control, or right to control, ‘must exist in respect to the very thing from which the injury arose.’” *Appiah v. Hall*, 183 Md. App. 606, 962 A.2d 1046, 1055 (2008), *aff’d*, 416 Md. 533, 7 A.3d 536 (2010). In Massachusetts an independent contractor’s employer cannot be liable to the independent contractor’s employee injured by defective equipment unless the employer owned, supplied, or actually controlled the particular offending instrumentality. *Ciccone v. US Airways, Inc.*, 144 F. Supp. 2d 30, 33-34 (D. Mass. 2001). The Nebraska Supreme Court has ruled “the control must directly relate to the work that caused the injury.” *Gaytan v. Wal-Mart*, 289 Neb. 49, 853 N.W.2d 181, 193-94 (2014). Texas courts require a nexus between an employer’s retained supervisory control and the condition or activity causing injury. *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354, 356-57 (Tex. 1998).

Michigan law is particularly significant because *Kelley* followed *Funk v. Gen. Motors Corp.*, 392 Mich. 91, 220 N.W.2d 641 (1974), in adopting section 414. 90 Wn.2d at 332. In Michigan a plaintiff must show a property owner “failed to take reasonable steps *within its supervisory and coordinating authority*.” *Ormsby v. Capital Welding, Inc.*, 471 Mich. 45, 684 N.W.2d 320, 325-26 (2004) (emphases added).

This approach makes sense. Since the landowner’s duty depends on its retaining the right to control, it makes no sense to impose liability as to something over which it did not retain the right to control. Rather, a landowner’s negligence depends on its “failure to exercise [its] control with reasonable care.” RESTATEMENT § 414.

Plaintiff’s injury was caused by EAGLE’s failure to properly maintain the pushback he was driving. (RP 310-11) Question No. 1’s disjunctive phrasing allowed the jury to find the Port liable without finding it had retained the requisite right to control the manner in which EAGLE maintained the very instrumentality of work that caused the accident. *See Williams v. Hofer*, 30 Wn.2d 253, 259-60, 191 P.2d 306 (1948) (vehicles can be instrumentalities of work).

Moreover, Question No. 1 was contrary to the jury instructions. The instructions were phrased in the conjunctive, thereby recognizing that at least in this case, merely retaining the right to control the manner in

which work is done is insufficient. Instruction Nos. 23 and 26 told the jury that a landowner like the Port had a duty to maintain a safe workplace and ensure compliance with applicable safety regulations for nonemployees only if it retained “the right to control the manner *and instrumentalities* by which the work is performed by that worker.” (CP 4807, 4810) (emphases added) Instruction No. 28 told the jury the authority to inspect work, order it stopped and started, or require contract compliance did not alone constitute retaining the right to control “the manner *and instrumentalities*” by which a worker not the landowner’s employee performed work. (CP 4812) (emphases added); *see Afoa*, 176 Wn.2d at 473, 478-79 (jobsite owners with control over “manner and instrumentalities of work” must comply with WISHA). Instruction No. 13 told the jury plaintiff was claiming the Port “retained the right to control the manner in which [EAGLE] performed its work *and* maintained the equipment used by EAGLE ....” (CP 4795, ¶ 1) (emphases added)

In short, consistent with the law, the instructions were clear that to find the requisite control to hold the Port liable, the jury had to find the Port had the right to control the manner in which EAGLE performed its work *and* maintained the instrumentalities—*i.e.*, equipment—of its work. Question No. 1 was inconsistent with, and contradictory to, the instructions.

A special verdict form may not contain language inconsistent with, or contradictory to, correct instructions. *Capers v. Bon Marche*, 91 Wn. App. 138, 144, 955 P.2d 822 (1998). Because no one excepted to the instructions' conjunctive phrasing, that phrasing is the law of the case. *Horwath v. Wash. Water Power Co.*, 68 Wn.2d 835, 844-45, 416 P.2d 92, 420 P.2d 216 (1966); *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, L.L.P.*, 110 Wn. App. 412, 429, 40 P.3d 1206 (2002); see *Schatz v. Heimbigner*, 82 Wash. 589, 590, 144 P. 901 (1914). Thus, not only did the law require that Question No. 1 be phrased in the conjunctive, so did the instructions.

“Where instructions are inconsistent or contradictory on a given material point, their use is prejudicial, for the reason that it is impossible to know what effect they may have [had] on the verdict.” *Hall v. Corp. of Catholic Archbishop*, 80 Wn.2d 797, 804, 498 P.2d 844 (1972). As Question No. 1 was contradictory to the instructions on the material point of control over instrumentalities of work, it is impossible to know what effect this inconsistency had on the verdict. The Port was prejudiced.

As will next be discussed, there was no evidence the Port retained the right to control the manner in which EAGLE maintained its equipment. Hence, the Port is entitled to reversal and judgment in its favor. At the very least, if this Court rules a jury should decide, the new

trial should be limited to the distinct control issue. *See Mina v. Boise Cascade Corp.*, 104 Wn.2d 696, 707, 710 P.2d 184 (1985).

**B. THERE WAS NO SUBSTANTIAL EVIDENCE OF THE REQUIRED CONTROL.**

The retained control doctrine was the foundation of plaintiff's claims because a landowner like the Port cannot be liable for injuries to an independent contractor's employee absent the required control. The doctrine seeks to place the burden of controlling safety on the entity in the best position to do so. *Afoa*, 176 Wn.2d at 482.

The authority to inspect work, order it stopped and started, or require contract compliance does not alone constitute retention of the right to control. *Kamla*, 147 Wn.2d at 120-21; *Hennig v. Crosby Group*, 116 Wn.2d 131, 134, 802 P.2d 790 (1991). As this Court has explained:

It is one thing to retain a right to oversee compliance with contract provisions and a different matter to so involve oneself in the *performance* of the work as to undertake responsibility for the safety of the independent contractor's employees. "The retention of the right to inspect and supervise to ensure the proper completion of the contract does not vitiate the independent contractor relationship."

*Hennig* 116 Wn.2d at 134 (quoting *Epperly v. City of Seattle*, 65 Wn.2d 777, 785, 399 P.2d 591 (1965)) (emphasis by *Hennig*); accord *Kamla*, 147 Wn.2d at 120-21.

Moreover, the required control does not include the right to control timing or the order of work. *Kamla*, 147 Wn.2d at 121. Rather, "the proper

inquiry becomes whether there is a retention of the right to direct *the manner* in which the work is performed” as well as the instrumentalities of that work. *Id.* (emphasis added); *Afoa*, 176 Wn.2d at 472, 478.

For example, a franchisor’s mere authority to require a franchisee to adhere to the franchise system by complying with the franchisor’s standards is insufficient retention of control to impose liability on the franchisor for a franchisee employee’s injury. Rather, analogizing to the employer/independent contractor relationship, this Court has held that a franchisor’s liability requires that the franchisor have retained the ability to make decisions about the daily operations of the franchised business. *Folsom v. Burger King*, 135 Wn.2d 658, 670-73, 958 P.2d 301 (1998) (citing with approval *Hoffnagle v. McDonald’s Corp.*, 522 N.W.2d 808 (Iowa 1994)). The crucial factor is whether the jobsite owner lacks the right to control the details of the independent contractor’s work. *Cowsert v. Crowley Maritime Corp.*, 101 Wn.2d 402, 410, 680 P.2d 46 (1984).

Question No. 1 allowed the jury to decide the control issue. But a verdict can be sustained only if there is substantial evidence— evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premise—to support it. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001).

Significantly, the issue here is control, not negligence. Therefore, what is relevant is *not* what the Port *should have done*, but what the Port *in fact did*, *i.e.*, whether it in fact retained the required control. There was no substantial evidence that the Port in fact retained the required control.

**1. There Is No Substantial Evidence the Port Retained the Right To Control the Manner in Which EAGLE Maintained Its Equipment.**

Question No. 1 did *not* ask the jury whether the Port retained the right to control *whether* EAGLE maintained its equipment. Rather, it asked the jury to determine if the Port had retained the right to control *the manner* in which EAGLE maintained its equipment. No one objected to this part of the instruction, so it is the law of the case. *Horwath*, 68 Wn.2d at 844-45; *State v. McKenzie*, 56 Wn.2d 897, 903, 355 P.2d 834 (1960).

Hence, plaintiff had to produce evidence the Port had the right to control *how* EAGLE retained its equipment. The evidence showed:

1. The pushback plaintiff was driving (like the rest of its GSVs) was owned by EAGLE (RP 171, 198, 346, 1691-92);
2. The Port-EAGLE licensing agreement provided (Ex. 311, PORT 12) (emphases added):

***All equipment brought by Licensee onto the Premises pursuant to this License shall remain the sole responsibility of Licensee.*** The Licensee certifies that equipment brought onto the Premises will be maintained in safe and operational condition. As solely determined by the

Port, equipment appearing to be unsafe or operational is subject to towing, impoundment and storage charges....

***The Port accepts no liability for Licensee's equipment.***  
When not in use, Licensee's equipment shall remain in Licensee's assigned parking/storage area or in a carrier's leased area, if so authorized....

....

***Licensee shall be solely responsible for the maintenance of its equipment*** while on the Premises for the duration of the License. The Port shall be responsible for maintenance of the Premises for the duration of this License.

3. Although the Port gave federally-required training to GSO employees on airport security and driving safely around aircraft, it did not train them on how to operate their vehicles or do their jobs. The GSOs and air carriers were supposed to provide such training. (RP 693-717, 1188, 1198-1201, 1398, 1703, 2382, 2388-90, 2585-86, 2629-36, 2645-51; Ex. 188; Ex. 322, EVERGREEN 200; Ex. 325, EVERGREEN 326; Exs. 549, 691)

4. GSOs were responsible for doing actual maintenance and repairs on their vehicles. Indeed, EAGLE's lead maintenance supervisor at STIA testified the Port "had no jurisdiction over [EAGLE]'s equipment." (RP 776, 849-50, 1150, 1341-42, 1402, 1723, 2331; Ex. 311, PORT 12)

5. Plaintiff's own experts testified an airport operator's only concern vis-à-vis GSV maintenance was ***whether*** GSOs maintained them. They did not testify that the Port had any role in controlling ***how*** GSOs maintained their GSVs. (RP 1644, 1888)

6. The Port was not equipped with the personnel or expertise to maintain GSVs, so did not retain the right to control their maintenance. Indeed, the Port department responsible for WISHA compliance and health and safety had a three-member staff whose job was to ensure the *Port* and its employees, not other employers and their employees, were in compliance. Other employers were responsible for their own WISHA and health and safety compliance. (RP 849-50, 1077-79, 1086-87, 1093, 1096-97, 1105, 1109, 3079; Exs. 311, 549, EAGLE-BK 16)

7. Although Port personnel would inform EAGLE personnel if they happened to see readily observable defects in ground vehicles (*e.g.*, visible fuel leaks, burned-out headlights), would red tag or otherwise stop vehicles involved in accidents or obviously hazardous vehicles<sup>1</sup>, and later ask for confirmation of repair, (*e.g.*, RP 593, 614, 630, 635, 642, 915, 2937, 3063, 3071, 3075, 3080), there was no evidence they had anything to do with *how* EAGLE did the repairs. EAGLE's lead maintenance supervisor at STIA testified that although the Port required vehicles on the ramp to be in good working order, it did not tell EAGLE how to do that. (RP 1690) EAGLE's STIA station manager at the time confirmed this (RP 2685):

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<sup>1</sup>The Port did not undertake to discover less visible problems such as the low hydraulic fluid level that resulted in plaintiff's accident. (RP 246, 313, 3063)

Q. Mr. Redifer, did the Port of Seattle have any right to tell EAGLE how to maintain its equipment?

...  
A. There was a standard that we had to meet, but they didn't give us specifics.

Q. ... And was the standard it had to be in safe operating condition?

A. Yes.

Q. Did the Port ever tell you how to maintain your equipment?

A. No.

8. The FAA official who had approved the Port's federally required airport certification manual testified the manual showed no indication the Port intended to retain control of how GSOs maintained their equipment and the Port did not in fact retain that right. (RP 2761-62)

9. Port personnel testified the Port retained no control over GSO equipment maintenance or how it was done. (RP 776, 849-50, 1086, 1150, 1339-42, 1402, 1938-39, 2338-39, 2902, 2976, 2978)

Under EAGLE's licensing agreement, the Port did retain the right to subject equipment "appearing to be unsafe or unoperational" to towing, impoundment, and storage charges. (Ex. 311, PORT 12, ¶ 11.A) By its terms, this provision did not give the Port the right to control *the manner* in which EAGLE *maintained* its equipment.

There was no evidence to the contrary. Consequently, if this Court agrees Question No. 1 should have been phrased in the conjunctive, there

was no substantial evidence supporting a “yes” answer to that question and the Port is entitled to judgment as a matter of law.

**2. There Is No Substantial Evidence the Port Retained the Right To Control the Manner in Which EAGLE Performed Its Work.**

Even if Question No. 1’s disjunctive phrasing were correct, the result would be the same because there is no substantial evidence the Port retained the right to control *the manner* in which EAGLE performed its work that would be legally sufficient under the retained control doctrine.

EAGLE’s work for the air carriers included handling the aircraft at the gate, marshalling, and baggage and cargo handling, among other things. (RP 2627-28) As will be discussed, there was no evidence the Port retained control over *the manner* in which EAGLE performed those services. The Port’s aviation operations director explained (RP 2999):

[W]e’re under no obligation to [retain the right to control or direct the method, means, or manner, by which a [GSO] performs or completes its work for an air carrier.] And, frankly, we don’t have the qualifications and the expertise to do so. It’s not our core business, and we would prefer that those people that are responsible have the control of ... those activities.

As explained *supra*, mere inspection and supervision to ensure contract compliance does not prove the requisite control. But to show control, plaintiff relied heavily on the Port’s ensuring EAGLE complied with its licensing agreement. For example, that agreement required

EAGLE to comply with Port rules and regulations, including federally-authorized safety rules governing traffic, parking, driving vehicles in poor condition, and improper equipment storage. (Ex. 311, PORT 12, ¶ 9) Plaintiff submitted evidence of the Port citing EAGLE employees for violating these regulations. (*E.g.*, RP 176-78, 1120-45; Ex. 43)

But “not every licensor or jobsite owner takes on a common law duty to maintain a safe workplace anytime it requires on-site workers to comply with safety rules and regulations.” *Afoa*, 176 Wn.2d at 481; *see Beil v. Telesis Constr., Inc.*, 608 Pa. 273, 11 A.3d 456, 468-69 (2011) (owner’s enforcement of its own safety requirements insufficient to show control); *Miller v. Great Lakes Steel Corp.*, 112 Mich. App. 122, 315 N.W.2d 558, 560 (1982) (contractual right to terminate violators of owner’s rules and regulations insufficient to show control). Where, as here, the landowner did not undertake to control all worker safety and was not in the best position to do so, it has no duty. *Afoa*, 176 Wn.2d at 481.

For example, the Port did not undertake to control traffic on runways and taxiways. That was solely the FAA’s responsibility. (RP 2924, 2966) The Port also did not undertake to ensure that employers at STIA complied with WISHA. The Port’s three-person health and safety department was responsible for ensuring the Port and its 800 employees complied with WISHA, *not* to oversee WISHA compliance vis-a-vis the

remaining 200 employers and their 16-18,000 workers at STIA. That was each employer's responsibility. (RP 1076-77, 1093-95, 1101, 1105, 1109, 2390, 2957; Ex. 549, EAGLE-BK 16)

Nor did the Port undertake to train other employers' workers how to do their jobs, given that employers knew best the tasks their employees were to perform. For example, the Port offered no training on how to drive the 100,000 lb. pushbacks. In fact, the Port's training manager had no idea what a ramp worker's duties were; her staff did not have the expertise to give detailed GSV safety training. (RP 275, 1398, 2388-90, 2608-09) Port rules and regulations did not address these subjects. (Ex. 482)

Rather, those tasks were the GSOs' responsibility. For instance, EAGLE not only had an employee responsible for training, it had a 435-page ground handling training manual. The manual provided for a driver's certification training process and included instructions and safety tips on every aspect of EAGLE's ground handling operations, ranging from how to operate pushbacks and other equipment to aircraft lavatory servicing. (Ex. 549; Ex. 550, EAGLE-BK 438-41; RP 2647)

The evidence was undisputed that it is the air carriers, not the Port, that had the right to, and did, hire their own GSOs. (RP 3005; Exs. 322-25) Although each carrier required its GSO to do different combinations of tasks. (RP 2802; *compare* Ex. 322, Evergreen 195 *with* Ex.323,

Evergreen 254, Ex. 324, Evergreen 338, Ex. 325, Evergreen 349), the four carriers that retained EAGLE all required it to “carry out all . . . flight operations services in accordance with the Carrier’s instructions.” (Ex. 322, Evergreen 225; Ex. 323, PORT 119742; Ex. 324, PORT 119742; Ex. 325, Evergreen 225) These carriers also reserved the right to “inspect the services furnished” by EAGLE, provide a supervisor to supervise EAGLE’s services, and required that “[i]n the provision of the services as a whole, due regard shall be paid to safety, security, local and international regulations, applicable IATA and/or ICAO and/or other governing rules, regulations and procedures and the aforementioned request(s) of the Carrier ....” (Ex. 322, Evergreen 225-26; Ex. 323, PORT 119742-43; Ex. 324, PORT 119742-43; Ex. 325, Evergreen 225-26)

British Airways (BA) mandated that training be “achieved to the agreed specification” and that “complete training records [be] kept and made available to the Carrier.” BA also required EAGLE to implement “performance management and monitoring on behalf of the Carrier” and retained the right to, and did, audit EAGLE’s performance of its work including whether it had followed various safety procedures. (Ex. 322, Evergreen 200, 201, 226; Ex. 556; RP 3071)

The EVA-EAGLE contract’s safety section said EVA representatives would conduct “random ramp security [*sic*] checks” that

could be based on the EVA ramp safety walk-around checklist and that “[n]o ground safety irregularity” was allowed. (Ex. 324, Evergreen 345)

Hawaiian Air’s trainer taught “Ramp Handling 101” including ramp safety to plaintiff and other EAGLE employees. Although at the time of plaintiff’s accident, the Hawaiian/EAGLE contract had expired and the parties were trying to negotiate a new one, the expired contract had required Hawaiian to provide training on how to push back aircraft and to train EAGLE trainers “on behalf of the carrier.” (Ex. 325, Evergreen 375; Ex. 339; RP 1158-60, 1188, 1197-1201)

Further, air carriers all had safety managers, and an air carrier safety representative was typically present when GSOs worked a flight. Air carriers did GSO performance audits, which could include safety performance. Air carriers also directed EAGLE how and where to load baggage and cargo into planes—crucial to aircraft safety. (Ex. 583; RP 954, 1182-85, 2629, 2873-74, 2879, 2939, 2941, 2947-48)

The SLOAs between the Port and some carriers did grant carriers the right to use common use premises such as gates subject to the Port’s “exclusive control and management.” (Exs. 675-78, ¶ 2.3.4) As common use gates are used by different carriers, the Port must be able to control when an aircraft enters or departs from such a gate. (RP 2919-20)

In any event, such language was not included in the Port-EAGLE licensing agreement. (Ex. 311) Under Question No. 1, what matters is whether the Port retained the right to control the manner in which EAGLE, not the air carriers, performed its work. (CP 4839)

A Port rule did say the Port “is empowered to issue such other instructions [vis-à-vis motor vehicles] as may be deemed necessary for the safety and well-being of Airport users or otherwise in the best interests of the Port.” (Ex. 482, PORT 51) But EAGLE agreed to follow the Port rules and regulations. (Ex. 311, PORT 12, ¶ 9) Mere compliance with contractual provisions is insufficient to establish the required control. *Hennig*, 116 Wn.2d at 134. Moreover, the Port-EAGLE licensing agreement provided that EAGLE’s equipment “shall remain the sole responsibility of [EAGLE].” (Ex. 311, PORT 12)

As a practical matter, the Port had no reason to control the manner in which EAGLE or any other GSO performed its work. It lacked the staff and expertise and was simply not in the business of providing ground services for air carriers. (RP 2902, 2975-76, 2999, 3007-08, 3068)

**C. FEDERAL LAW PREEMPTS PLAINTIFF'S CLAIMS.<sup>2</sup>**

Even if this Court decides the Port retained the required control, reversal is still required. Virtually all evidence used to try to show the requisite control involved conduct required by the federal government. Yet plaintiff obtained partial summary judgment, and the Port was denied partial summary judgment and judgment as a matter of law, on preemption. (CP 5151-52, 8923-26) These rulings were erroneous. At the very least, evidence and argument of the Port's compliance with federal law to show control should have been excluded. Review is de novo. *Veit, ex rel. Nelson v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 99, 249 P.3d 607 (2011).

Under the Supremacy Clause, U.S. CONST. art. VI, cl. 2 (set forth in Appendix B), Congress and federal agencies acting within their statutory authority may preempt state tort law. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992); *La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n*, 476 U.S. 355, 368-69, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986). Preemption may be express or implied.

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<sup>2</sup> Statutes and regulations cited are those in effect when the accident occurred.

Although the Federal Aviation Act has a savings clause, 49 USC § 40120(c), such clauses do not bar preemption. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000). Hence, the Act can impliedly preempt state law in an appropriate case. *See, e.g., Ventress v. Japan Airlines*, 747 F.3d 716 (9<sup>th</sup> Cir. 2014).

Implied federal preemption occurs in at least two circumstances. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000). Conflict preemption occurs where state law conflicts with federal law. *English v. Gen. Elec. Co.*, 496 U. S. 72, 78, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990). Field preemption occurs when state law regulates conduct in a field Congress intended the federal government to occupy exclusively. *Id.* Preemption may result not only from congressional action, but from federal agency action within its congressionally delegated authority. *La. Pub. Serv.*, 476 U.S. at 369.

This brief will next summarize how the federal government regulates the Port's STIA operations and then explain why either or both conflict and field preemption exists here.

**1. The Federal Government Extensively Regulates STIA.**

The FAA and TSA extensively regulate STIA: the airport could not operate without complying with their regulations. Indeed, it is difficult to imagine how the Port could comply with FAA/TSA regulations, the

Port's federally-required air operating certificate (AOC), or its federally-required airport certification manual (ACM), without retaining some of what plaintiff would erroneously call "control" over aspects of airport operations.

**a. The Federal Aviation Act.**

The Federal Aviation Act centralizes aviation safety regulation to the exclusion of state regulation. Congress intended the federal government to bear "virtually complete responsibility for the promotion and supervision of [the aviation] industry in the public interest," including safety regulation. *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1326 (10<sup>th</sup> Cir. 2010); *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 368-69 (3<sup>d</sup> Cir. 1999) (quoting S. Rep. No. 1811, 85<sup>th</sup> Cong., 2d Sess. 5 (1958)); see H. R. Rep. No. 2360, reprinted in 1958 USCCAN 3741. Thus, the FAA "occupies the entire field of aviation safety" with authority to address "virtually all areas of air safety." *Montalvo v. Spirit Airlines*, 508 F.3d 464, 473-76 (9<sup>th</sup> Cir. 2007); *O'Donnell*, 627 F.3d at 1327 (quoting *Air Transp. Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 224 (2<sup>d</sup> Cir. 2008)).

Accordingly, the FAA regulates not only aircraft, but airports. *E.g.*, 49 USC § 44706; 14 CFR pt. 139 (hereinafter pt. 139); FAA Advisory Circular No. 150/5210-20 (Jun. 21, 2002) (hereinafter AC No. 150/5210-20) (Ex. 182). "It is the policy of the United States . . . that the safe

operation of *the airport ... system* is the highest aviation priority.” 49 USC § 47101(a)(1) (emphases added). To implement that policy, the FAA prescribes—via official publications like regulations, rules, orders, and circulars—minimum airport safety standards. 49 USC §§ 106(f)(2)(iii), 44701(b)(2).

Thus, airports like STIA cannot even operate without obtaining and complying with an FAA AOC, signifying that the airport operator “properly and adequately is equipped and able to operate safely” as contemplated by 49 USC pt. A. 49 USC § 44706(a); 14 CFR § 139.107(c). To obtain and keep its AOC, the airport operator must adopt and comply with an FAA-approved ACM and, “in a manner authorized by” the FAA, comply with 14 CFR subpts. C-D. 49 USC §§ 44706(a)-(b), 44709(a)-(b); 14 CFR §§ 139.7, .101, 103(a)-(b), .201(a). The FAA inspects STIA annually to ensure its continuing compliance. (RP 2984-85)

The ACM must include the 29 items listed in 14 CFR § 139.203(b), ranging from describing airport operational responsibility to any other item the FAA finds necessary to ensure air transportation safety. 14 CFR § 139.203(b). The ACM must also include the 22 sections set forth in pt. 139’s subpt. D – and describe operating procedures, facilities and equipment, responsibility assignments, and other information needed to comply with section 139.203(b). 14 CFR § 139.201(a)(2).

To comply with most subpt. D regulations, airport operators must act “in a manner authorized by the [FAA]” or equivalent. *See* 14 CFR §§ 139.301-313, .317-343. Accordingly, FAA advisory circulars set forth FAA-authorized methods and procedures for subpt. D compliance. 14 CFR §§ 139.7, .201(d).

For example, AC No. 150/5210-20 provides (Ex. 182, p. 1, ¶ 3.a):

Airport operators should establish procedures and policies concerning vehicle access and vehicle operation on the airside of the airport. These procedures and policies should address such matters as access, vehicle operator requirements, vehicle requirements, operations, and enforcement and should be incorporated into tenant leases and agreements.

Hence, to comply with pt. 139, the Port established vehicle rules and regulations. (Ex. 482, § 4)

Although the FAA does not approve such rules and regulations per se, Matt Cavanaugh, the FAA official who approved the Port’s ACM, explained the FAA required the Port to show it had rules and regulations that it would enforce to operate STIA safely. (RP 2779-80).

The Port’s rules and regulations include driver qualifications, parking, vehicle operation, and vehicle condition provisions. For example, one rule provides (Ex. 482, at PORT 54):

No person shall operate any motor vehicle or motorized equipment in the Air Operations Area of the Airport unless

such motor vehicle or motorized equipment is in reasonably safe condition for such operation.

Mr. Cavanaugh testified about this rule (RP 2781):

Q. And, again, this is another rule and regulation that the Port represented to the FAA that would be enforced to keep SeaTac safe; is that correct?

A. Yes.

**b. The Transportation Security Administration.**

After the 2001 World Trade Center attack, Congress created TSA to, *inter alia*, oversee airport security measures; require background checks for those accessing secure areas; develop security and airport access training programs; and improve airport perimeter access security. 49 USC §§ 114 (a)-(b), (f)(11)-(12), 44903(g)(2)(B)-(C), (h); 67 FR 8341. As a result, no one may operate an airport like STIA without adopting and implementing a security program with at least 21 different elements, including establishing secured areas and security identification display areas (SIDAs). 49 CFR §§ 1542.101(a), .103.

**2. Plaintiff's Claims Are Impliedly Preempted.**

Because plaintiff relied so heavily on federally required activity to prove control, and because federal regulation of the Port at STIA is so pervasive, plaintiff's claims are impliedly preempted.

a. **Plaintiff's Claims Are Conflict Preempted.**

Conflict preemption occurs where it is impossible to comply with both state and federal requirements, or where state law is an obstacle to the accomplishment and execution of Congress's full purposes and objectives. *English*, 496 U.S. at 79. Although "impossibility" traditionally requires proving a party cannot independently do under federal law what state law requires, this is not required when state law merely creates an obstacle to congressional objectives and purpose. *PLIVA, Inc. v. Mensing*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2567, 2577, 180 L. Ed. 2d 580 (2011); *Atkinson v. Gates, McDonald & Co.*, 838 F.2d 808, 812 (5<sup>th</sup> Cir. 1988). Courts need not strain to reconcile federal law with seemingly conflicting state law. *PLIVA*, 131 S. Ct. at 2580.

*Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000), is illustrative. There, the Court declared:

Why, in any event, would Congress not have wanted ordinary pre-emption principles to apply where an actual conflict with a federal objective is at stake? Some such principle is needed. In its absence, state law could impose legal duties that would conflict directly with federal regulatory mandates, say, by premising liability upon the presence of the very ... requirements that federal law requires ....

*Id.* at 871. Hence, "impossibility" exists when "***state law penalizes what federal law requires.***" *Id.* at 873 (emphasis added). Under this expansive variation of impossibility preemption, *In re Methyl Tertiary Butyl Ether*

*Prods. Liab. Litig.*, 725 F.3d 65, 97 (2d Cir. 2013); *In re Lyondell Chem. Co.*, 503 B.R. 348, 363 (Bankr. S.D.N.Y. 2014), a state may not use common law to question federal decisions or extract money from those who abide by those decisions. *Bieneman v. City of Chicago*, 864 F.2d 463, 472-73 (7<sup>th</sup> Cir. 1988). That is exactly what is happening here.

Specifically, any liability the Port may have under state law is premised on its alleged control over work and instrumentalities at STIA. But to show this control, plaintiff presented evidence of the Port's compliance with federal law. For example—

1. *Plaintiff's claim*: One of plaintiff's experts read to the jury this section from an FAA advisory circular on self-inspection programs:

***“Self-inspection is a primary responsibility of the airport owner, operator, or a duly authorized representative. It is customary to assign the job of assuring overall airport ground safety to the airport manager or operations supervisor. Primary attention should be given to such operational items as ... ground vehicles .... Inspection of areas that have been assigned to individual air carriers, fixed base operators, or other tenants can be made the responsibility of the user.”*** [“]However, ***at Part 139 airports, the FAA will hold the certificate holder ultimately responsible for operating the airport safely.***”

(RP 1583) (quoting Ex. 183, ¶ 6.a) (emphases added). In addition, plaintiff argued that Port personnel noted defects in GSVs they happened to see

and that vehicles could be “red tagged”<sup>3</sup> or otherwise cited if deemed to present possible fire or other safety hazards or if they had been in an accident. Plaintiff also pointed out a Port rule requiring that motor vehicles and motorized equipment be in a reasonably safe condition. (Ex. 482, PORT 54) (RP 579, 614-15, 1126-27, 3071, 3080)

*Federal Requirements:* 14 CFR § 139.327 required the Port to conduct, “[i]n a manner authorized by the [FAA],” airport inspections at least daily to assure compliance with pt. 139, subpt D. An FAA-approved way to meet this requirement included general observation of ground vehicles when inspection personnel were on the air operations area. 14 CFR §139.327. (Ex. 183, pp. 1, 11) Further, to comply with 14 CFR § 139.329, airports were FAA-authorized to prohibit vehicles not “in sound mechanical condition” from the airside. AC No. 150/5210-20 (Ex. 182, App. B, § 1.7.2.5.b)

2. *Plaintiff's claim:* Plaintiff questioned Mr. Cavanaugh, who, as an FAA official, had approved the Port ACM (RP 2764-65):

Q. (by Mr. Moore)... Isn't it true that these advisory circulars typically state that ... Part 139, the airport, the FAA will hold the certificate holder ultimately responsible for operating the airport safely?

A. Yes.

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<sup>3</sup> Red-tagging meant the vehicle could not be operated on the airside until the defective condition(s) were fixed. (RP 227-28, 584)

Q. And let's bring up 182, also an exhibit.... The number is AC No. 150-5210-20.

....  
Q. And again, here, it says the overall responsibility for the operation of vehicles on airport rests with the airport operator; is that correct?

A. Yes.

Q. So the Port of Seattle it is ultimately responsible for the operation of vehicles on the airport?

A. Right....

*Federal Requirements:* The advisory circulars set forth FAA-approved "[m]ethods and procedures for compliance" with pt. 139. *Id.* § 139.7. Also, as an AOC signifies the airport operator is "properly and adequately ... equipped and able to operate safely" under 49 USC pt. A, 49 USC § 44706(a), Mr. Cavanaugh testified (RP 2763) (emphases added):

Q. Do you know who, under these advisory circulars, the FAA places the ultimate responsibility for operating SeaTac airport safely?

A. Well, that wouldn't be under the advisory circulars, but *under the operating certificate*. The responsibility is the airport owner, Port of Seattle.

3. *Plaintiff's Claim:* The Port had a badge system to identify personnel with access to certain airport areas and to ensure that only those employees gained access to those areas. (RP 476-77, 546-47, 1229-30)

*Federal Requirements:* TSA and the FAA required airport operators to (1) prevent entry into, and detect unauthorized individuals and

GSVs in, secure areas, and (2) limit, and provide for safe and orderly, access to movement and safety areas (*e.g.*, runways and taxiways). 67 FR 8358-59; 14 CFR §§ 139.329(a)-(b); 49 CFR § 1542.201(a)-(b)-.207. The FAA said that to help meet these requirements, an airport could set up “a tiered identification badging system that permits easy recognition of a vehicle operator’s permitted driving area privileges.” AC No. 150/5210-20 (Ex. 182, p. 5, ¶ 13.a.)

4. *Plaintiff’s Claim:* The Port had motor vehicle rules and regulations and could cite GSV drivers who violated them. (RP 417, 459-60, 545-46; Ex. 97)

*Federal Requirements:* Section 139.329 of 14 CFR required the Port, “[i]n a manner authorized by the [FAA]”, to establish and implement procedures for GSV safe and orderly access to, and operation in, movement and safety areas, including identifying the consequences of an employee’s, tenant’s, or contractor’s noncompliance. Thus, the FAA approved airport operators to promulgate rules and regulations for safe and orderly vehicle operation on the airside to comply with section 139.329. These rules and regulations could include such things as speed limits, where vehicles could park, right-of-way rules, and driver and vehicle requirements, which the Port rules and regulations contained. 14 CFR § 139.201(d); AC No. 150/5210-20 (Ex. 182, ¶¶ 5, 9-10; Ex. 482, § 4)

Moreover, 14 CFR § 139.201(a) required the Port to comply with its FAA-approved ACM, which set forth specified sanctions for “[f]ailure to comply with the Airport Rules and Regulations” regarding ground vehicle procedures. (Ex. 495, PORT 4039; RP 2759-67)

5. *Plaintiff's Claim:* The Port provided some training and retraining to GSO employees. (RP 140-41, 178, 335)

*Federal Requirements:* 14 CFR § 139.329(e) required the Port, “[i]n a manner authorized by the [FAA],” to ensure each employee or tenant was trained on procedures for GSV safe and orderly access to, and operation in, movement and safety areas. To comply with this regulation, airport operators could “provid[e] training regarding vehicle operations [on the airside] to ensure aircraft and personnel safety” as well as recurrent and/or remedial instruction, since drivers at airports face conditions not normally encountered on the highway and thus need “an appropriate level of knowledge of airport rules and regulations.” AC No. 150/5210-20 (Ex. 182, ¶¶ 5, 6, 8 & Apps. A, B; Ex. 208; RP 1237-44, 2759, 2772-74, 2777-78) In addition, TSA prohibited the Port from authorizing any unescorted person to access a secured area or SIDA without successful training in accord with FAA-approved curriculum. 67 FR 37325, 49 CFR § 1542.213(b).

6. *Plaintiff's Claim:* The Port asked EAGLE and another GSO to clean up a ramp, including removing their inoperable or unnecessary equipment from areas they had not leased. (Ex. 53; RP 1031-33)

*Federal Requirements:* 14 CFR § 139.305(a)(3) requires paved surfaces such as ramp areas to be free of foreign objects. FAA-approved ways of complying with 14 CFR § 139.329 include “keep[ing] vehicular ... activity on the airside ... to a minimum” and limiting vehicles on the airside “to those necessary.” AC 150/5210-20, ¶ 7 (Ex. 182) Further, Port rule 4.12, authorized as a method to comply with pt. 139, precludes parking any motor vehicle or equipment in the Air Operations Area except at such points prescribed by the Port. (Ex. 182, ¶¶ 3, 10.h; Ex. 482, PORT 454)

7. *Plaintiff's Claim:* The Port-GSO agreements required GSOs to comply with Port rules and regulations. (Ex. 311, ¶ 9; Ex. 482)

*Federal Requirements:* An FAA-approved way to comply with pt. 139 was to “incorporate[] into tenant leases and agreements” airport operator’s procedures and policies on airside vehicle access and operation and enforcement procedures. AC No. 150/5210-20 (Ex. 182, ¶¶ 3.a., 13)

These examples demonstrate that in claiming the Port retained the control required by state law, plaintiff is claiming the Port should be

penalized for doing what federal law requires. This is impermissible. *See Geier*, 529 U.S. at 873. Plaintiff's claims are impliedly conflict preempted.

Plaintiff's claims are conflict preempted for another reason as well. *Geier* again presents a helpful comparison. Plaintiff there argued that defendant auto manufacturer had negligently designed its car without an airbag. Federal standards then required auto manufacturers to equip some, but not all, vehicles with passive restraints, with the percentage of vehicles to be so equipped to rise over time. Plaintiff's vehicle had manual shoulder/lap belts, but no airbags or other passive restraint devices.

The Court ruled that federal law preempted plaintiff's claim. The claim that defendant manufacturer had a duty to install an airbag was an obstacle to the federal regulatory scheme's call for a variety and mix of devices and gradual passive restraint phase-in. 529 U.S. at 881.

Here plaintiff claimed the Port had a duty to have a more comprehensive ground vehicle inspection program, as a few airports have. The FAA does not require such a program. (RP 312-13, 1503, 1582, 1882-83, 1927-31, 2770, 2787, 2999-3000, 3060, 3087) Rather, recognizing that every airport is different, the FAA has given each the flexibility to decide what vehicle requirements to adopt. AC No. 150/5210-20 (Ex. 182, p. 3, ¶ 9) By claiming the Port had not a choice, but a duty, to have such a program, plaintiff would deprive the Port of that flexibility and erect an

obstacle to accomplishment and execution of Congress' full purposes and objectives. Plaintiff's claims are thus impliedly preempted. At the very least, evidence and argument of the Port's compliance with federal law to show control should have been excluded.

**b. Plaintiff's Claims Are Field Preempted.**

Congressional intent that a field be occupied exclusively by the federal government can be inferred when (a) federal regulation is so pervasive as to reasonably infer that Congress left no room for the States to supplement it, (b) a federal statute touches a field in which the federal interest is so dominant that the federal system is assumed to preclude enforcement of state law on the same subject, or (c) "the object sought to be obtained by the federal law and the character of obligations imposed by it ... reveal the same purpose." *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990); *Schneidewind v. ANR Pipeline Co.*, 485 U. S. 293, 300, 108 Ct. 1145, 99 L. Ed. 2d 316 (1988). Even if state law is consistent with, or merely supplemental to, federal law, preemption is possible. *Rowe v. N.H. Motor Transport Ass'n*, 552 U.S. 364, 371-72, 128 S. Ct. 989, 169 L. Ed. 2d 933 (2008); *Campbell v. Hussey*, 368 U.S. 297, 329-30, 82 S. Ct. 327, 7 L. Ed. 2d 299 (1961).

For example, in *Montalvo* passengers sued the airlines for failing to warn about the risk of developing deep vein thrombosis during long

flights. The Ninth Circuit Court of Appeals ruled the claims were field preempted because FAA regulations and an FAA advisory circular governed the warnings airlines must give. 508 F.3d at 472-73. The FAA had not mandated the type of warning plaintiffs advocated. Yet there was preemption because “[t]he comprehensiveness of these regulations demonstrates that the [FAA] has exercised [its] authority to regulate aviation safety to the exclusion of the states.” *Id.* at 473.

Here, as in *Montalvo*, the FAA exercised its authority to regulate airport operators’ safety duties vis-à-vis GSVs to the exclusion of the states. 14 CFR §§ 139.327, .329. Declaring “[t]he overall responsibility for the operation of vehicles on an airport rests with the airport operator,” the FAA said airport operators could comply with its regulations by, *inter alia*, (a) performing GSV inspections to determine whether GSVs were following airport procedures for orderly GSV operation, (b) establishing procedures and policies for vehicle access and operation on the airside, and (c) providing training for GSV drivers. In addition, the FAA issued the Port AOC and approved its ACM (with which federal law requires the Port to comply), in which the Port promised to enforce its vehicle rules and regulations. 14 CFR §§ 139.201(a), .329; AC No. 150/5210-20; AC 150/5200-18C (Exs. 182-83; Ex. 495, PORT 4039, 692; RP 2756, 2766)

Indeed, the federal statutory scheme here favors preemption more than in *Montalvo*. That case involved state tort claims against an *air carrier*. This case involves state tort claims against an *airport operator*. Although the FAA regulates both air carriers and airport operators, Congress required air carriers, but not airport operators, to maintain liability insurance. Since this insurance requirement would be meaningless if all state law claims were preempted, Congress must have intended air carriers to be liable for at least some state law claims. 49 USC § 41112; 14 CFR pt. 205; *Martin ex rel. Heckman v. Midwest Express Holdings, Inc.*, 555 F.3d 806, 809, 811 (9<sup>th</sup> Cir. 2009); *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334 (5<sup>th</sup> Cir. 1995). A similar intent cannot be imputed to Congress as to airport operators.

Furthermore, field preemption will occur where the substantive federal law is addressed to the same object or ends as the state law. *See Ray v Atl. Richfield Co.*, 435 U.S. 151, 164-65, 98 S. Ct. 988, 55 L. Ed. 2d 179 (1978). Here, the legal theory underlying plaintiff's claims applies to the same object—airports—and has the same aim as pertinent federal law—safety. *See* 49 USC §§ 44701(a)(5), (b)(2), 44706 (a)-(b).

*Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605, 47 S. Ct. 207, 71 L. Ed. 432 (1926), is illustrative. The issue was whether the federal Locomotive Boiler Inspection Act occupied the field of regulating

locomotive equipment. State law required locomotives to have an automatic firebox door and cab curtain. While the Interstate Commerce Commission had, under the federal act, required locomotives to be equipped with various devices, neither Congress nor the ICC had required automatic firebox doors or cab curtains.

A unanimous Supreme Court held federal law preempted state law:

The federal and the state statutes are directed to the same subject – the equipment of locomotives. They operate upon the same object. ... *It is also urged that, even if the Commission has power to prescribe an automatic firebox door and a cab curtain, it has not done so, and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power.*

272 U.S. at 612-13 (emphasis added).

Here the FAA exercised its power to regulate operation and maintenance of ground vehicles that had access to, or operated in, certain areas at airports like STIA. *See* 14 CFR §§ 139.327, .329. Even absent these regulations and their related advisory circulars (Exs. 182-83), the FAA *could have* regulated vehicles like the pushback. Plaintiff would have this Court create state law that would do the same. But plaintiff's claims are preempted under *Napier*. At the very least, any evidence or

argument to show control of conduct that the federal government requires or could require should have been excluded.

Federal law does not preempt every claim arising from civil aviation. *See, e. g., Martin*, 555 F.3d at 809, 811. But where, as here, (1) defendant is an airport, not an air carrier required by federal law to carry liability insurance; (2) the FAA, consistent with its statutory authority, has stated, “The overall responsibility for the operation of vehicles on an airport rests with the airport operator,” AC No. 150/5210-20 (Ex. 182), and (3) Congress has declared airports like STIA must be “properly and adequately ... equipped and able to operate safely” within 49 USC § 44706(a), preemption applies.

### **3. Plaintiff’s Claims Are Expressly Preempted.**

Preemption is express when Congress explicitly defines the extent to which federal law preempts state law. *English*, 496 U.S. at 78. Section 41713(b) of 49 USC (hereinafter section 1305(a)(1)), set forth the following preemption clause:

[A] State [or] political subdivision of a State ... may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

This clause has been construed broadly. *See Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 805, 357 P.3d 1040 (2015). For example,

“other provision” includes state common law. *O’Carroll v. Am. Airlines, Inc.*, 863 F.2d 11, 13 (5<sup>th</sup> Cir. 1989). “Relating to” means having a connection with or reference to. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 375, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992).

Further, laws that affect prices, routes, or service only *indirectly* can be preempted if state law has a significant impact related to federal deregulatory and preemption objectives. *See Rowe*, 552 U.S. at 370-71; *Filo*, 183 Wn.2d at 805. Whether state law is consistent with federal regulation is immaterial. *Rowe*, 552 U.S. at 370. Statutory preemption is not limited to claims against air carriers, so long as the claims relate to an air carrier’s prices, routes, or services. *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 287 n.8 (5<sup>th</sup> Cir. 2002).

Thus, under section 1305(a)(1), ***state law significantly affecting, directly or indirectly, any air carrier’s price, route, or service is preempted.*** That is the case here.

Plaintiff claimed the Port should have established a more comprehensive ground vehicle inspection program, as a few airports had, including overseeing GSVs’ WISHA compliance. Such a program would have required the Port to periodically inspect more than 5,000 diesel, gas, and electric ground vehicles of different types, although it did not then have the expertise and personnel to do so. (RP 850-51, 3001-05, 3060,

3087) But by contract, the air carriers were entitled to review the Port's annual expense budget and had collective veto power on capital budget items over \$2.5 million. Setting up and running a ground vehicle inspection program would not only have required air carrier approval, but the cost of such a program would have ultimately been passed on to them. The program would thus have significantly impacted the carriers' prices or services. (RP 850-51, 1087-89, 3003-04) Consequently, plaintiff's claims are expressly preempted.

## VII. CONCLUSION

The Port is entitled to reversal and entry of judgment as a matter of law for one or more of the following reasons:

1. It cannot be liable under the law and the instructions unless it retained the right to control the manner in which EAGLE maintained its equipment, but there was no substantial evidence of such right.
2. Even if this Court disagrees with #1, there is no substantial evidence that the Port retained the right to control the manner of either EAGLE's performance of its work *or* its maintenance of its equipment.
3. Even if this Court disagrees with #1-#2 by finding the Port had the requisite control, federal law preempts plaintiff's claims. To hold otherwise would impermissibly penalize the Port for doing what federal law requires, destroy the flexibility the FAA sought to give individual

airports in regulating vehicles, invade the federal prerogative, and violate 49 USC § 41713(b).

Alternatively, the Port is entitled to reversal and a new trial limited to the control issue for one or both of the following reasons:

1. It cannot be liable unless the jury finds it retained the right to control the manner in which EAGLE maintained its equipment;
2. Evidence and argument about the Port's compliance with federal law as to whether it retained the required control must be excluded.

Dated this 20<sup>th</sup> day of March 2016.

**REED McCLURE**

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APPENDIX A

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**Article. VI.**

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

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**APPENDIX B**