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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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BRANDON APELA AFOA,  
Respondent & Cross-Appellant,

v.

PORT OF SEATTLE,  
Appellant.

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**BRANDON APELA AFOA'S  
REPLY BRIEF IN SUPPORT OF CROSS-APPEAL**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. REPLY ARGUMENT IN SUPPORT OF CROSS-APPEAL	1
A. The Port’s Nondelegable Duty to Maintain a Safe Workplace Means the Port Cannot Shift Liability to the Airlines	1
1. The Port is Subject to a Nondelegable Duty	1
2. This Court’s Nondelegable Duty Doctrine Has Not Been Abrogated by RCW 4.22.070(1)	4
a. Express Statutory Vicarious Liability for Persons Acting as Agents and Servants Preserves Nondelegable Duty	4
b. There is No Conflict Between Nondelegability and RCW 4.22.070, or <i>Gilbert H. Moen</i> , but there Is a Conflict Between Port Delegation of Fault and OSHA/WISHA	8
c. The Port and Airlines Acted in Concert to Violate WISHA	11
3. Plaintiff Properly Raised the Nondelegability / Tort Reform Issues Below	13
B. It was an Abuse of Discretion to Add Airline Empty Chairs in Violation of the Express Language of CR 12(i)	18
C. The Port is Bound by Res Judicata and Collateral Estoppel	22
1. The Port was in Privity with the Airlines	22
2. Applying Collateral Estoppel is Not Unjust	27
III. CONCLUSION	28

## TABLE OF AUTHORITIES

### I. CASE LAW

<i>Afoa v. Port of Seattle</i> , 176 Wn.2d 460, 296 P.3d 800 (2013)	2, 3, 4, 6 7, 9, 11, 12-13, 14
<i>Burnett v. State Dept. of Corrections</i> , 187 Wn. App. 159, 349 P.3d 42 (Div. 3 2015)	20
<i>Clausen v. Icicle Seafoods, Inc.</i> , 174 Wn.2d 70, 272 P.3d 827 (2012)	20
<i>DeNike v. Mowery</i> , 69 Wn.2d 357, 418 P.2d 1010 (1966)	20
<i>DeWater v. State</i> , 130 Wn.2d 128, 921 P.2d 1059 (1996)	7
<i>Ellis v. City of Seattle</i> , 142 Wn.2d 450, 13 P.3d 1065 (2000)	17
<i>Farmer v. Farmer</i> , 172 Wn.2d 616, 259 P.3d 256 (2011)	20
<i>Gilbert H. Moen Company v. Island Steel Erectors, Inc.</i> , 128 Wn.2d 745, 912 P.2d 472 (1996)	5, 9-11, 13, 14
<i>Kamla v. Space Needle Corp.</i> , 147 Wn.2d 114, 52 P.3d 472 (2002)	2-3, 4, 5, 6, 7, 9
<i>Kelley v. Howard S. Wright Const. Co.</i> , 90 Wn.2d 323, 582 P.2d 500 (1978)	4, 11, 13
<i>Kinney v. Space Needle Corp.</i> , 121 Wn. App. 242, 85 P.3d 918 (Div. 1 2014)	3
<i>Kottler v. State</i> , 136 Wn.2d 437, 963 P.2d 834 (1998)	13
<i>Loveridge v. Fred Meyer, Inc.</i> , 125 Wn.2d 759, 887 P.2d 898 (1995)	22

<i>Millican v. N.A. Degerstrom, Inc.</i> , 177 Wn. App. 881, 313 P.3d 1215 (Div. 3 2013), <i>rev. den.</i> , 179 Wn.2d 1026 (2014)	5, 10, 14
<i>Myers v. Little Church by the Side of the Road</i> , 37 Wn.2d 897, 227 P.2d 165 (1951)	6
<i>Neil v. NWCC Investments V, LLC</i> , 155 Wn. App. 119, 229 P.3d 837 (Div. 1), <i>rev. den.</i> , 169 Wn.2d 1018 (2010)	5
<i>Norfolk Redev. &amp; Housing Auth. v. Chesapeake &amp; Potomac Tel. Co.</i> , 464 U.S. 30 (1983)	5
<i>Osborn v. Public Hosp. Dist.1</i> , 80 Wn.2d 201, 492 P.2d 1025 (1972)	17
<i>Potter v. Wash. State Patrol</i> , 165 Wn.2d 67, 196 P.3d 691 (2008)	5
<i>Rains v. State</i> , 100 Wn.2d 660, 674 P.2d 165 (1983)	27
<i>State ex. rel. Peninsula Neighborhood Ass'n v. Washington State Dept. of Transp.</i> , 142 Wn.2d 328, 12 P.3d 134 (2000)	8
<i>State of Montana v. United States</i> , 440 U.S. 147 (1979)	27
<i>State v. Morse</i> , 45 Wn. App. 197, 723 P.2d 1209 (Div. 1 1986)	19
<i>State v. Vasquez</i> , 148 Wn.2d 303, 59 P.3d 648 (2002)	27, 28
<i>Stute v. PBMC</i> , 114 Wn.2d 454, 788 P.2d 545 (1990)	4, 5, 6, 11, 13, 14
<i>Taylor v. Sturgell</i> , 553 U.S. 880, 885 (2008)	26
<i>Thompson v. State Dept. of Licensing</i> , 138 Wn.2d 783, 982 P.2d 601 (1999)	27, 28
<i>Tuggle v. Anderson</i> , 43 Wn.2d 721, 263 P.2d 822 (1953)	7

*Yong Tao v. Heng Bin Li*, 140 Wn. App. 825, 166 P.3d 1263  
(Div. 3 2007), *rev. den.*, 163 Wn.2d 1045 (2008) 12

*Watts v. Swiss Bank*, 27 N.Y.2d 270, 265 N.E.2d 739 (1970) 23

## **II. STATUTES, REGULATIONS AND COURT RULES**

RCW 4.22.030 15

RCW 4.22.070 1, 4-5, 6,  
7, 8, 10,  
13, 14, 15  
17,18, 19

RCW 4.24.115 10

RCW 49.17.010 9, 12

RCW 49.17.020 6, 14

RCW 49.17.060(2) 6, 13, 14

29 U.S.C. § 667(c)(2) 9

29 C.F.R. §1926 8

CR 12(i) 1, 18-19,  
21, 28

CR 50 15

RAP 12.2 28

RPC 1.7 24

## **III. OTHER AUTHORITIES**

Restatement (Second) Agency §2 7

Restatement (Third) Agency §1.01 (2006) 4, 7

Restatement (Third) Agency §2.04 (2006)	7
Restatement (Second) Judgments §139	22, 23, 24-25
Gregory C. Sisk, <i>Interpretation of the Statutory Modification of Joint &amp; Several Liability</i> , 16 U. Puget Sound L.Rev. 1 (1992)	7, 21
2A Tegland, Washington Practice – RAP 2.5 (7 <sup>th</sup> ed. 2016)	16-17
Philip A. Trautman, <i>Claim and Issue Preclusion in Civil Litigation in Washington</i> , 60 Wash.L.Rev. 805 (1985)	22-23

## I. INTRODUCTION

1. The Legislature's decision to carve out vicarious liability for persons "acting as an agent or servant" demonstrates that RCW 4.22.070(1) was not intended to abrogate the venerable rule that the employer or jobsite owner who retains control over safety has a nondelegable duty to provide a safe workplace to all workers at the jobsite.

2. Under CR 12(i), it was the Port's, not the Plaintiff's, duty to timely name the airlines, and the Port's breach of this duty prejudiced Mr. Afoa by preventing him from having all fault adjudicated in a single lawsuit.

3. Privity for claim and issue preclusion is established by Port control over the airlines' Federal defense, and it is not unjust to bind the Port to the Federal judgment that it fought so hard to obtain.

## II. REPLY ARGUMENT IN SUPPORT OF CROSS-APPEAL

### A. The Port's Nondelegable Duty to Maintain a Safe Workplace Means the Port Cannot Shift Liability to the Airlines

#### 1. The Port is Subject to a Nondelegable Duty

The Port starts its argument on a false premise: "Plaintiff argues public policy forbids allocating fault in this case."<sup>1</sup> There is much more than public policy behind Mr. Afoa's argument. Based on the twenty-six Washington cases cited in notes 125-126, which extend back to 1896, plus

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<sup>1</sup> Reply Brief of Appellant/Cross-Respondent ("RBA") at 38.

the Restatement and respected legal treatises, plus the WISHA specific duty statute and corresponding OSHA regulation, plus the WISHA and OSHA provisions requiring Washington worker safety to equal or exceed OSHA standards, Mr. Afoa demonstrates that the Port has a *nondelegable* duty to maintain a safe workplace at Seatac.

Although conceded below,<sup>2</sup> the Port now argues that it does not have a nondelegable duty to maintain a safe workplace at Seatac. This reversal of position is based on taking language out of context from *Kamla*,<sup>3</sup> and totally ignoring this Court's holding in *Afoa I*.<sup>4</sup> Because the jury found the Port to be in control of EAGLE's work, CP 4883, and because this Court in *Afoa I* found that "the Port is closely analogous to a general contractor," *Afoa I*, 176 Wn.2d at 474, under *Kamla* the Port has duties equivalent to a general contractor – including a nondelegable duty to maintain a safe workplace for all workers on the Ramp. The fact that the Port has styled its contracts as "licenses" rather than in some other manner is a mere matter of form, irrelevant to the imposition of legal duty:

[A]s *Kelley* makes abundantly clear, the safety of workers does not depend on the formalities of contract language. Instead, our doctrine seeks to place the safety burden on the entity in the best position to ensure a safe working environment.<sup>5</sup>

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<sup>2</sup> CP 4379; RP 2437/6-10, 2437-38/25-1.

<sup>3</sup> *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 52 P.3d 472 (2002).

<sup>4</sup> *Afoa v. Port of Seattle*, 176 Wn.2d 460, 296 P.3d 800 (2013).

<sup>5</sup> *Afoa I*, 176 Wn.2d at 479.

The Port relies on taking *Kamla* out of context, RBA at 39, failing to mention that *Kamla* held that jobsite owners *could have* duties equivalent to general contractors:

Jobsite owners can run the gamut from an owner/developer with the same degree of knowledge about WISHA compliant work conditions as that of a general contractor to a public corporation without any knowledge about WISHA regulations ....

*Kamla*, 147 Wn.2d at 124. Division One read *Kamla* to mean that sophisticated jobsite owners who exercise pervasive control over safety aspects of the work have “the same nondelegable duty of care to ensure WISHA compliant work conditions” as general contractors.<sup>6</sup> This Court agreed in *Afoa I*, 176 Wn.2d at 472 (“[A]lthough general contractors and similar employers *always* have a duty to comply with WISHA regulations ..., jobsite owners have a duty to comply with WISHA only if they retain control over the manner in which contractors complete their work”).

The jury’s finding of Port control over EAGLE’s work at Seatac forecloses the Port’s belated claim that it is not subject to a nondelegable duty to maintain a safe workplace. The Port, which is both a highly sophisticated jobsite owner, and a statutory employer under WISHA, *id.* at 473, is at the “same degree of knowledge” and expertise side of the

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<sup>6</sup> *Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 248-49, 85 P.3d 918 (Div. 1 2014).

continuum – as this Court already found in *Afoa I*, *id.* at 474 (“the Port is closely analogous to a general contractor”).

**2. This Court’s Nondelegable Duty Doctrine Has Not Been Abrogated by RCW 4.22.070(1)**

a. Express Statutory Vicarious Liability for Persons Acting as Agents and Servants Preserves Nondelegable Duty

The Port misses the point by stressing that the Legislature *can* abrogate the common law, while failing to demonstrate that it *did* abrogate the longstanding nondelegable duty doctrine. The employer’s nondelegable duty to maintain a safe workplace is based on control, and because the same ‘right to control’ test that imposes liability under *Kelley*, *Stute*, *Kamla* and *Afoa I*, also establishes ‘agent’ and ‘servant’ vicarious liability, the nondelegability of the duty to furnish a safe workplace is totally consistent RCW 4.22.070(1)(a)’s preservation of joint and several liability for persons “acting as the agent or servant of a party.” *Id.* This statutory language demonstrates that the Legislature did not intend to abrogate the century-old nondelegability doctrine, and makes clear that nothing in §.070 is inconsistent with its continued existence.<sup>7</sup>

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<sup>7</sup> The words “acting as” in §.070(1)(a) are significant. The Legislature could have imposed joint and several liability only when “a person was an agent or servant of the party,” but instead it chose to extend the exception to persons “acting as” agents or servants. *Id.* That encompasses contractors at a multiemployer job site who are acting as agents or servants of the controlling party *for purposes of ensuring the safety of all workers*. One need not be an agent for all purposes at all times to be “acting as an agent” for purposes of enforcing safety. Restatement (Third) Agency §1.01, cmt. b (“Aspects of an overall relationship may constitute agency and entail its legal consequences while other aspects do not.”).

Whether RCW 4.22.070(1) demonstrates intent to abrogate common-law and WISHA doctrines of the nondelegable duty to maintain a safe workplace is a purely legal question of statutory construction, not dependent on factual findings.<sup>8</sup> “It is a well-established principle of statutory construction that the common law ... ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.”<sup>9</sup> Because the statutory language expressly provides for continued vicarious liability for persons “acting as the agent or servant of the party,” RCW 4.22.070(1)(a), abrogation is not clear and explicit.

The Port’s principal argument against the deep Washington case law establishing the rule of nondelegability is that it preceded enactment of RCW 4.22.070. RBA at 43. That’s not even accurate as to *Kamla*, 147 Wn.2d at 122, *Stute*, 114 Wn.2d at 463-64, *Gilbert H. Moen Co. v. Pacific Steel Erectors, Inc.*, 128 Wn.2d 745, 758, 912 P.2d 472 (1996), and their progeny,<sup>10</sup> which show that the nondelegability rule survived Tort Reform.

Existing case law strongly suggests that the “acting as ... agent or servant” exception in RCW 4.22.070(1)(a) encompasses the nondelegable

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<sup>8</sup> *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 78, 196 P.3d 691 (2008).

<sup>9</sup> *Id.* at 77 (quoting *Norfolk Redev. & Housing Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35-36 (1983) (internal quotations omitted)).

<sup>10</sup> *Neil v. NWCC Investments V, LLC*, 155 Wn. App. 119, 121-22, 229 P.3d 837 (Div. 1), *rev. den.*, 169 Wn.2d 1018 (2010); *Millican v. N.A. Degerstrom, Inc.*, 177 Wn. App. 881, 313 P.3d 1215 (Div. 3 2013), *rev. den.*, 179 Wn.2d 1026 (2014).

duty case law. First, *Afoa I* held that the Port “easily falls within” the WISHA definition of “employer,” and that Mr. Afoa “easily falls within the definition of an ‘employee,’” *Afoa I*, 176 Wn.2d at 473 (*citing*, RCW 49.17.020(4), (5)), which is of course another word for “servant.” The entire purpose of the WISHA specific duty under RCW 49.17.060(2) is to ensure that the party best able to protect workers against hazards will have the duty to provide a safe workplace.<sup>11</sup> This is simply the old master-servant nondelegable duty in a modern context.

Second, this Court in *Afoa I* explained that the present-day common-law control doctrine is an outgrowth of master-servant law:

Historically, our common law workplace safety doctrine has its roots in the master-servant relationship. At common law, a “master” has a duty to its “servants” to maintain a reasonably safe place to work. *Myers v. Little Church by the Side of the Road*, 37 Wn.2d 897, 901-02, 227 P.2d 165 (1951) ....

Over time, we have expanded the doctrine beyond the narrow confines of the master-servant relationship.

*Afoa I*, 176 Wn.2d at 475. Thus, under *Afoa I*, the word “servant” in RCW 4.22.070(1)(a) encompasses the control liability workplace safety doctrine.

Third, *Afoa I* held that “a jobsite owner who exercises pervasive control over a work site should keep that work site safe for all workers, ... *just as a master is required to provide a safe workplace for its servants at*

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<sup>11</sup> *Afoa I*, 176 Wn.2d at 479, 481; *Kamla*, 147 W.2d at 124; *Stute*, 114 Wn.2d at 463.

*common law.*” *Afoa I*, 176 Wn.2d at 481 (emphasis added). “[E]mployees are ‘agent[s] employed by [an employer] to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the [employer].’” *Kamla*, 147 Wn.2d at 119.<sup>12</sup> The hallmark of agency is that “the agent shall act . . . subject to the principal’s control.” Restatement (Third) Agency §1.01 (2006).<sup>13</sup> Inasmuch as control is established by the jury verdict, and a common-law master-servant relationship is a species of agency relationship, the Legislature’s carve out of vicarious liability for persons “*acting as an agent or servant*” demonstrates that RCW 4.22.070 was not intended to abrogate

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<sup>12</sup> *Quoting*, Restatement (Second) Agency §2(2) (bracketed material added by Court); *accord*, Gregory C. Sisk, *Interpretation of the Statutory Modification of Joint & Several Liability*, 16 U. Puget Sound L.Rev. 1, 109-10 (1992) (“Sisk”).

<sup>13</sup> The Port argues that agency also requires assent by the principal that the agent shall act on its behalf, and that this is missing here. There are two responses to this. First, the key to the statutory exception is *vicarious liability*. RCW 4.22.070(1)(a) (“A party shall be responsible for the fault of another person . . .”); *accord*, *Sisk*, 16 U. Puget Sound L.Rev. at 109 (“RCW 4.22.070(1)(a) imposes a regime of vicarious tort liability . . .”). Common law vicarious liability is *solely dependent on control*. *E.g.*, *DeWater v. State*, 130 Wn.2d 128, 137, 921 P.2d 1059 (1996); *Tuggle v. Anderson*, 43 Wn.2d 721, 723, 263 P.2d 822 (1953); Restatement (Third) Agency §2.04, comment b. Assent is not material to vicarious liability. Second, however, in this case, the Port *did assent* to the airlines acting on its behalf with respect to safety of the workplace. “A principal’s manifestation of assent to an agency relationship may be informal, implicit, and nonspecific.” Restatement (Third) Agency §1.01, comment d. The Port has manifested this assent. The Port’s own Director of Aviation testified that that they rely on airlines and ground service providers (GSPs) to achieve their “preeminent goal” of safety at Seatac. RP 2978-79/4-24. The Port contracted with both the airlines and EAGLE, requiring them to comply with all its safety rules and with all regulations, including WISHA, and to act subject to Port direction and control. Ex. 311 ¶¶9, 11(A); Exs. 675-678, ¶¶2.1, 2.3.4, 4.7, 13.1, 13.2; Ex. 482 §3¶1, §4. Subject to Port “exclusive control,” the airlines entered into their own agreements with EAGLE. Exs. 322-325. Under this top-down chain of agreements, the Port assented and the Airlines agreed to enforce Port and WISHA safety rules against EAGLE at Seatac.

the venerable common-law and statutory WISHA rule that the employer or jobsite owner who retains control over safety has a nondelegable duty to provide a safe workplace to all workers at the jobsite.

b. There is No Conflict Between Nondelegability and RCW 4.22.070, or *Gilbert H. Moen*, but there Is a Conflict Between Port Delegation of Fault and OSHA/WISHA

The above analysis eviscerates the balance of the Port's arguments. Because RCW 4.22.070 on its face was not intended to abrogate the employer's or controlling party's nondelegable duty to provide a safe workplace, there is no need to harmonize any potential "conflict" between WISHA and Tort Reform, or to determine which is the more specific enactment. The only conflict arises from the Port's arguments.<sup>14</sup> *WISHA and Tort Reform would be brought into conflict by abrogating the nondelegability doctrine*, because OSHA mandates that the general contractor may not "be relieved of overall responsibility for compliance of this part for *all work to be performed under the contract*," and that the contractor "assumes all obligations prescribed as employer obligations under the standards contained in this part, *whether or not [it] subcontracts any part of the work*," 29 CFR §1926.16(a), (b) (emphasis added), and both

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<sup>14</sup> As the Port itself argues, RBA at 43, statutes should be read together whenever possible to achieve a "harmonious total statutory scheme ... which maintains the integrity of the respective statutes." *State ex. rel. Peninsula Neighborhood Ass'n v. Washington State Dept. of Transp.*, 142 Wn.2d 328, 342, 12 P.3d 134 (2000).

Washington and Federal statutes require that Washington worker safety standards equal or exceed OSHA standards. *Afoa I*, 176 Wn.2d at 470, 472 (citing, 29 USC §667(c)(2) & RCW 49.17.010). The only way to harmonize them is to recognize that the true intent of the Legislature when it excluded “agent” and “servant” vicarious liability from the general rule of several liability was to preserve in all contexts the master’s nondelegable duty to maintain a safe workplace for all workers on the site.<sup>15</sup>

The Port’s claim that Plaintiff has overlooked the significance of *Gilbert H. Moen* is not accurate. *See*, BR at 47 n.134. *Moen* only concerns recovery among tortfeasor controlling parties; it does not address the direct obligation of a controlling party to the injured employee. The *Moen* decision is entirely consistent with, and supportive of, the rule that there is a sharp difference between liability *as between the various parties in control, on the one hand, and the injured employee, on the other hand*. As Mr. Afoa stated in his opening brief:

Nondelegability protects the injured employee, not other contractors. Depending on the terms of its agreements, the Port may be able to recover against other contractors based on contractual indemnity. *Gilbert H. Moen*, 128 Wn.2d at 759-60. This is fully

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<sup>15</sup> The Port once again relies on the kind of formalism rejected in *Afoa I* by arguing that the Federal OSHA requirements are limited to actions of “prime contractors” and therefore not applicable to itself. RBA at 44. As detailed in section II(A)(1), *supra*, under *Kamla* and *Afoa I*, as well as the jury’s verdict here, the established fact of Port control over the manner of work makes it liable equally as though it was a prime contractor, without regard to the formalities of its designation.

consistent with protecting the primacy of the nondelegable duty to the worker....

BR at 51 n.141. This is the view of the Court of Appeals in *Millican*:

Indemnification provisions enable the general contractor, if liable to the employee, to recover its defense costs and judgment liability from the culpable subcontractor. They do not enable the general contractor to disavow its primary responsibility for WISHA compliance. *See Moen*, 128 Wn.2d at 753, 912 P.2d 472 ....

*Millican*, 177 Wn. App. at 894.

*Moen's* holding that the indemnification provisions of RCW 4.24.115(2) survive enactment of RCW 4.22.070(1) only makes sense if *contractors and their subcontractors are not severally liable*, because “[i]f a general contractor and a subcontractor are severally liable to an injured employee, there would be no need for an indemnification agreement at all on any project.” *Moen*, 128 Wn.2d at 760. Thus, *Moen* directly holds that nondelegability survives tort reform: “while *Moen* as the general contractor *may not delegate away its general duty to ensure safety on the jobsite*, Island [the subcontractor] is not thereby relieved of its concurrent workplace safety duty.” *Moen*, 128 Wn.2d at 758 (emphasis added). Perhaps the Port can later rely on *Moen* to recover against the Airlines under the indemnification provisions of the SLOAs.<sup>16</sup> But right now, in the

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<sup>16</sup> Or perhaps, because they are both insured by AIG, they will choose not to do so.

context of its dispute with Mr. Afoa, the Port “may not delegate away its general duty to ensure safety on the jobsite.” *Id.*

c. The Port and Airlines Acted in Concert to Violate WISHA

This case involves a sophisticated business enterprise that retained the full right to control the airline contractors, Exs. 675-678, §2.1, that nonetheless intentionally refused to comply with its WISHA specific duty. Its refusal was in the teeth of 1990 and 1978 holdings of this Court which made it clear that, under the common law and WISHA’s specific duty, the Port owed a duty to ensure a safe workplace to *all workers at the job site.*<sup>17</sup>

According to Michael Ehl, Port Director of Aviation Operations since 2003, the highest ranking Port official to testify,<sup>18</sup> the Port and all its stakeholders, including the airlines and ground service providers, “act in concert regarding safety at the Port.”<sup>19</sup> Ehl testified that the Port *intentionally* does not retain control over the manner in which ground service providers provide services for airlines, or maintain their equipment, claiming “we’re under no obligation to do so,”<sup>20</sup> the first part of which is factually false under the GSOLA, Ex. 311 ¶¶9, 11(A), and the second part of which is legally false under *Stute* and *Afoa I*. Mark Coates, Port Senior

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<sup>17</sup> *Stute*, 114 Wn.2d at 463-64 [1990]; *Kelley*, 90 Wn.2d at 332-33 [1978].

<sup>18</sup> RP 2955-56/15-21.

<sup>19</sup> RP 3020/10-25.

<sup>20</sup> RP 2999/2-20.

Manager for Airfield Operations, confirmed the Port's willful disregard of its specific duty under WISHA, by testifying that it is not the Port's responsibility to inspect ground service vehicles or their maintenance records to ensure safety, but that "[i]t's the responsibility of their employer, which is the airline." RP 3071-72/9-1. This evidences a tacit agreement between the Port and airlines to violate the WISHA specific duty.<sup>21</sup> With senior management stonewalling their obligations to all workers at Seatac, it is no wonder that the evidence shows that the Seatac Health and Safety Lead whose job is "to make sure that the Port of Seattle complies with workplace safety rules under WISHA,"<sup>22</sup> testified that he only made sure that *direct employees* of the Port were complying with WISHA.<sup>23</sup>

In enacting WISHA, the legislature created an industrial safety and health program which "shall equal or exceed the standards prescribed by [OSHA]," "in order to assure ... safe and healthful working conditions for every man and woman working in the state of Washington ...." RCW 49.17.010 (emphasis added). The WISHA specific duty was enacted to ensure that the party best able to control safety at a multiemployer jobsite will carry out that duty *as to all workers on the job site. Afoa I*, 176 Wn.2d

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<sup>21</sup> See, *Yong Tao v. Heng Bin Li*, 140 Wn. App. 825, 832, 166 P.3d 1263 (Div. 3 2007), *rev. den.*, 163 Wn.2d 1045 (2008).

<sup>22</sup> RP 1077/9-10.

<sup>23</sup> RP 1086/3-6, 1096-97/23-2, 1101/5-10, 1105/8-21. The Port went to far as to attempt to transform its illegal conduct into a virtue in its opening brief. BA at 22, 25-26.

at 473. It is antisocial behavior with potentially greater consequences than the Port's example of drag racing, when a large public corporation places itself above the law, acting as if clear legal mandates do not apply to it. Acting in concert with the airlines, the Port has intentionally avoided its WISHA specific duty and common-law duty to maintain a safe workplace for all workers at Seatac. This triggers the "acting in concert" exception of RCW 4.22.070(1)(a).<sup>24</sup>

### **3. Plaintiff Properly Raised the Nondelegability / Tort Reform Issues Below**

The Port argues that the issue of the nondelegability of its duty in relation to RCW 4.22.070(1) was not properly raised below. RBA at 47. The Port is seriously mistaken. On April 15, 2009, while moving to strike the Port's nonspecific "empty chair" affirmative defenses, Mr. Afoa cited RCW 4.22.070, and quoted *Moen*: "an entity in Moen's position [controlling contractor] could not use the empty-chair defense ...." CP 5192 (*quoting, Moen*, 128 Wn.2d at 759 n.7). Mr. Afoa first told the trial court that the Port could not shift responsibility "to its contractors" because

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<sup>24</sup> This does *not* call upon this Court to expand the *Kottler v. State*, 136 Wn.2d 437, 963 P.2d 834 (1998) test for acting in concert. Nor will it permit the exception to swallow the rule, as suggested by the Port. Acting in concert to intentionally violate a clear legal rule – here, the rules of *Kelley* and *Stute* / RCW 49.17.060(2) – will not be present in the average tort case. But here, sadly, such a combination is admitted by Port testimony.

its duty is “nondelegable” on April 28, 2009. CP 5200-01. Mr. Afoa cited the WISHA specific duty statute and the *Stute* decision in support. *Id.*<sup>25</sup>

On January 2, 2015, Mr. Afoa filed a Motion for Partial Summary Judgment re: Port’s Nondelegable Duty. CP 3389. The first issue stated was: “As a matter of law, is the WISHA statutory ‘specific duty’ under RCW 49.17.060(2) *nondelegable, and therefore not subject to apportionment between entities under RCW 4.22.070(1)?*” CP 3394 (emphasis added). This squarely raised the issue of nondelegability in relation to Tort Reform. Relying on *Moen* and *Millican*, heading #2 was titled: “The Nondelegable Duty under WISHA’s RCW 49.17.060(2) Cannot Be Apportioned Under the Tort Claims Act.” CP 3397 (*sic.*, should say “Tort Reform Act”). The argument tied nondelegability back to the master-servant relationship: “For example, the safety of employees is the responsibility of the employer even though a third party was hired to monitor compliance with safety standards.” CP 3397.<sup>26</sup> In quoting *Millican*, Mr. Afoa argued that the Port as “employer” has a nondelegable

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<sup>25</sup> On November 9, 2009, Mr. Afoa expanded this to argue that: (1) the nondelegable duty of a general contractor under *Stute* to protect all workers on its premises from WISHA violations applies to job site owners who retain control; (2) the Port is an “employer” as defined in RCW 49.17.020, so it has a duty to protect all workers on its premises from WISHA violations; and (3) the Port cannot delegate this nondelegable duty. CP 199-206.

<sup>26</sup> Likewise, in summary judgment briefing dated October 6, 2014, Mr. Afoa quoted to the trial court this Court’s statement in *Afoa I*, that a jobsite owner who exercises pervasive control has a duty to provide all employees a safe workplace, “*just as a master is required to provide a safe workplace for its servants at common law.*” CP 2560 (quoting, *Afoa I*, 176 Wn.2d at 481) (emphasis added).

duty which can only be shifted to its contractors in a later indemnification proceeding, but not in the direct determination of the Port's liability to him. CP 3397-98.<sup>27</sup> Mr. Afoa further argued under the Tort Reform Act that this situation was covered by RCW 4.22.030, which he quoted to the Court.<sup>28</sup>

In his CR 50 Motion for Directed Verdict re: Nondelegable Duties, filed March 24, 2015, Mr. Afoa again argued that there is both a statutory and common law nondelegable duty that "falls squarely on the Port, and cannot be shifted to another." CP 8936-38. He quoted the relevant language from RCW 4.22.070(1)(a), and argued that the Port's duty was joint and several because of evidence of acting in concert. CP 8939. And in his CR 50 Motion for Directed Verdict re: Retained Control, of the same date, Mr. Afoa again quoted law equating the control doctrine with the power of a "principal / employer" to interfere with work. CP 8929. As noted by the Port, the issues of nondelegability, acting in concert and control/employer/agency were raised yet again in a post-verdict motion for judgment notwithstanding the verdict. CP 8998-99, 9004-05. The trial court was clearly apprised that Mr. Afoa's position involved the legal

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<sup>27</sup> See also, CP 392 (Plaintiff's Reply in Support dated 1/26/2015).

<sup>28</sup> "Except as otherwise provided in RCW 4.22.070, if more than one person is liable to a claimant *on an indivisible claim* for the same injury, death or harm, *the liability of such persons shall be joint and several.*" CP 3399 (*quoting*, RCW 4.22.030 (emphasis in original brief)).

effect of both acting in concert and the Port's "principal/employer" pervasive control on the Port's ability to shift its liability to the airlines.

The Port's assertion that Plaintiff never proposed any instructions on the Port's nondelegable duty as principal or master/employer is not accurate. RBA at 49. In Plaintiff's Proposed Jury Instructions of October 6, 2014, Mr. Afoa explained the legal relationship between principal-agent and the control doctrine duty, in proposed instruction #23.<sup>29</sup> In proposed instruction #25, Mr. Afoa asked the court to direct the jury that the Port is an employer for purposes of WISHA, and that a controlling employer owed a safe workplace duty to Plaintiff.<sup>30</sup> Mr. Afoa again stressed the nondelegability of this duty, in proposed instruction #36.<sup>31</sup>

"As long as the basic argument has been made at the trial court level, the appellate courts will be willing to consider newly-discovered authorities – statutes, court rules, case law, and treatises – for the first time

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<sup>29</sup> "The relevant inquiry is whether *the principal, the defendant Port of Seattle*, retains control over the work site, not whether there was a direct employment relationship between the parties." CP 3094 (emphasis added).

<sup>30</sup> "There is a statutory duty under WISHA to comply with all WISHA safety and health regulations that applies *to an employer who retains control* over the manner and instrumentalities of work being done at a work place. *The defendant is an 'employer' for purposes of WISHA. This duty runs to all workers at the work place, including the plaintiff.*" CP 3096 (emphasis added).

<sup>31</sup> "The defendant Port of Seattle is not relieved of its duties to protect plaintiff from injury from violations of WISHA regulations or workplace safety by delegating ... that duty to another person or entity so long as the defendant retained control ...." CP 3107. Plaintiff's counsel specifically objected to the trial court's failure to give these proposed instructions. RP 3252-53.

on appeal.” 2A Tegland, Washington Practice – RAP 2.5 §3 (7<sup>th</sup> ed., August 2016). The fact that a party could have framed the question more clearly, or cited one or more additional authorities or statutes in support, does not constitute grounds for imposing the severe sanction of waiver.<sup>32</sup>

Had Mr. Afoa never cited RCW 4.22.070(1) at all – although of course he did – but merely asserted his rights under the nondelegability doctrine, that alone would have properly preserved the issue. At that point, it would have been up to the Port to raise RCW 4.22.070(1) defensively. Then, even if the Port had failed to do so, this Court would still need to consider the relationship between the nondelegable duty doctrine and the Tort Reform Act, simply because “any court is entitled to consult the law in its review of an issue, whether or not a party has cited that law.” *Ellis v. City of Seattle*, 142 Wn.2d 450, 459 n.3, 13 P.3d 1065 (2000).<sup>33</sup>

Mr. Afoa clearly raised the issue of nondelegability of the Port’s duty to provide a safe workplace. He went further and cited and quoted various provisions of the Tort Reform Act, including RCW 4.22.070(1), and argued that they did not overcome the doctrine of nondelegability. He

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<sup>32</sup> *Bennett v. Hardy*, 113 Wn.2d 912, 917-18, 784 P.2d 1258 (1990); *State v. Fagalde*, 85 Wn.2d 730, 732, 539 P.2d 86 (1975).

<sup>33</sup> *Accord, e.g., Osborn v. Public Hosp. Dist. 1*, 80 Wn.2d 201, 206, 492 P.2d 1025 (1972) (in fall from hospital bed case, Court considers for first time on appeal statute and regulations pertaining to hospital licensing, because “[t]he issue of the hospital’s duty for the safety of its patients was squarely before the trial court and the statutes of this state in regard thereto are therefore pertinent to our consideration.”).

went further still, to argue that the Port, as a controlling party and a statutory employer, was both a principal and a master. He went even further still, to argue the acting in concert doctrine. This is not even a close question: Mr. Afoa sufficiently preserved the issue of whether nondelegability survives Tort Reform.

**B. It was an Abuse of Discretion to Add Airline Empty Chairs in Violation of the Express Language of CR 12(i)**

The Port does not contest that it knew the identity of the potentially liable airlines, which is the only trigger for its duty of specific disclosure under CR 12(i). Instead, contrary to the language of the Rule, the Port would shift the focus from its own failure to comply, to the Plaintiff's so-called "inexcusable neglect".<sup>34</sup> The Port does not confront the actual language of CR 12(i), which places the burden of naming nonparties claimed to be at fault *squarely on the Port, not the Plaintiff*:

**Nonparty at Fault.** Whenever a defendant . . . intends to claim for purposes of RCW 4.22.070(1) that a nonparty is at fault, such claim is an affirmative defense which shall be affirmatively pleaded by the party making the claim. *The identity of any nonparty claimed to be at fault, if known to the party making the claim, shall also be affirmatively pleaded.*

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<sup>34</sup> "Inexcusable neglect" was not an epithet hurled at Plaintiff's counsel by Judge Coughenour. Rather, it was the legal standard for deciding whether amendment to add the Port in Federal Court after expiration of the statute of limitations would "relate back" to the original complaint. CP 5384. In light of the then-pending appeal, it would not have been proper to add the airlines to the lawsuit on appeal, so Plaintiff sued them separately.

CR 12(i) (emphasis added). It was the Port that made the RCW 4.22.070(1) claim, *and the Port that violated this rule*, resulting in the severe prejudice of loss to Mr. Afoa of 74.8% of the jury's award.

The only "inexcusable neglect" that is of legal significance here was the Port's inexcusable neglect in failing to name the airlines as empty chair defendants from the outset. The Port should not be allowed to profit from a brazen violation of the express terms of CR 12(i), which prejudiced Mr. Afoa by depriving him of the opportunity to recover any fault attributed to "empty chairs" in a single forum. By failing to enforce the plain language of CR 12(i) in the face of this manifest prejudice, the trial court abused its discretion.<sup>35</sup>

The Port is mistaken that "Plaintiff could not have been unfairly surprised or otherwise prejudiced" by the Port's September 2014 Motion to Amend to add the airlines as empty chair defendants. RBA at 56. When Mr. Afoa first moved to strike the Port's defense that named, "for purposes of RCW 4.22.070(1)," EAGLE "and/or presently unknown persons," CP 15, 5189-93, the Port misled Plaintiff in its response by claiming that the "reason for asserting the subject affirmative defenses was to put Mr. Afoa and his counsel on notice that the Port will pursue a sole proximate cause

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<sup>35</sup> *State v. Morse*, 45 Wn. App. 197, 199, 723 P.2d 1209 (Div. 1 1986) (discretionary ruling in violation of statutory language is an abuse of discretion).

defense.” CP 5198 (emphasis in original). That was the *only* reason stated, and the Port made no mention of any intent to assert an empty chair defense against the airlines. *Id.* at 5194-98. From 2013-2014, Port counsel vigorously represented the airlines in Federal court, arguing that they were not at fault because they were not in control of safety at the time and place of Mr. Afoa’s injuries, and supporting these arguments with the testimony of Port witnesses.<sup>36</sup> The Plaintiff was not merely “unfairly surprised” by the Port’s sudden about-face – *he and the courts were deceived.*<sup>37</sup>

Nor is it relevant that Mr. Afoa had a chance to seek discovery from the airlines in the Federal action, because the prejudice is not lack of time to prepare a *defense*, but inability to assert an *offense*. This prejudice was already irremediable as of the date of the September 2014 Motion to Amend. By delaying the naming of airlines as “empty chair” defendants until it was too late for Plaintiff to claim against them, the Port denied Plaintiff his fundamental right to be made whole by the tort system.<sup>38</sup> By

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<sup>36</sup> CP 2561, 7979-80, 8791-92; BR at 59-60, 67-68.

<sup>37</sup> Citing *Burnett v. State Dept. of Corrections*, 187 Wn. App. 159, 349 P.3d 42 (Div. 3 2015), the Port asserts that Mr. Afoa lacks standing to raise Port counsel’s ethical conflict. *Burnett* simply holds that a party not represented by the attorney with a putative conflict of interest lacks standing to *seek disqualification* of counsel. *Id.* at 170. Mr. Afoa never sought disqualification of Port counsel. *Burnett* states that only a party who is potentially harmed may have standing. *Id.* Mr. Afoa has standing to raise the specific harms he suffered from the putative conflict, and the unified Port/Airline defense strategy of manipulating the dual forums to shift liability to airlines already found not to be at fault.

<sup>38</sup> *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 78, 272 P.3d 827 (2012); *Farmer v. Farmer*, 172 Wn.2d 616, 626, 259 P.3d 256 (2011); *DeNike v. Mowery*, 69 Wn.2d 357, 358, 418 P.2d 1010 (1966).

creating several liability, the Legislature did not intend to deprive injured plaintiffs of their recovery, but instead “embraced the ‘primal concept that ... the extent of fault should govern the extent of liability ...’” *Sisk*, 16 U. Puget Sound L.Rev. at 170. The Port’s gamesmanship in violating CR 12(i), misrepresentating its intentions, and arguing both sides of the same question of airline fault, frustrates this primal intent by preventing recovery in a single action according to the jury’s determination of fault.

Not one of the authorities cited by the Port for a liberal amendment standard addresses application of CR 12(i), and therefore all of its authorities are distinguishable. CR 12(i) is a special rule of pleading designed to protect the integrity of the tort process in the face of the empty chair defense. Without the remedy that it is per se prejudicial to name a known empty chair when it is too late for Plaintiff to assert his or her own claim, the rule of CR 12(i) will fail of its intended purpose.

The Port’s only answer to Mr. Afoa’s argument is that Mr. Afoa “should have sued the carriers when he had the chance.” RBA at 58. But CR 12(i) places the burden on *the Port* to assert *the Port’s defense* by specifically naming known airline empty chair defendants. CR 12(i). Due to noncompliance with CR 12(i), and severe prejudice to Mr. Afoa’s right to recover all his damages, it was an abuse of discretion to permit the jury to apportion fault to the airlines.

### **C. The Port is Bound by Res Judicata and Collateral Estoppel**

The Port concedes all elements of res judicata / collateral estoppel except: (1) privity; and (2) the injustice element of collateral estoppel. The cumulative effect of the Port's control over, active participation and financial interest in the airlines' Federal Court defense establishes privity under Washington law and Restatement (Second) Judgments §139. The lack of injustice in binding the Port is demonstrated by the full and fair opportunity the Port had to litigate airline liability in Federal Court, plus the Port's Federal advocacy *against airline liability*, which resulted in a Federal judgment that is inconsistent with the State judgment. The trial court erred by not binding the Port to the Federal Court summary judgment.

#### **1. The Port was in Privity with the Airlines**

“ ‘A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party.’”<sup>39</sup> Privity is not confined to successive ownership interests in the same right or property, as suggested by the Port. That is simply the most restrictive sense of privity, which is a flexible doctrine covering “persons whose interests are represented by a party, ... those in actual control of the

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<sup>39</sup> *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 764 n.17, 887 P.2d 898 (1995) (quoting, Restatement (Second) Judgments §139 (1982)).

litigation, ... persons who participate in litigation though they are not in actual control, ... [and sometimes] testifying as a witness ....”<sup>40</sup>

The record shows the following evidence of Port substantial participation in control over the airlines’ Federal defense:

1. Port counsel took over representation of the airlines, and vigorously argued “no control / no liability”;
2. Port/ Airline counsel admitted a unified defense strategy, CP 6141<sup>41</sup>;
3. Port “speaking agents” in their official capacity provided much of the crucial summary judgment testimony on behalf of airlines;
4. Port/ Airline counsel rejected an offer to drop all claims against the airlines;
5. The Port and airlines share a common financial interest based on indemnification by AIG; and
6. The airlines are under a contract (SLOA) stating that their use of Seatac is subject to the Port’s “exclusive control”.

The Port’s argument against privity picks one fact at a time, and then asserts that it does not demonstrate privity. That is a flawed approach. “[N]o single fact is determinative but *all the circumstances must be considered* from which one may infer whether or not there was participation amounting to a sharing in control of the litigation.”<sup>42</sup>

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<sup>40</sup> Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash.L.Rev. 805, 819-20 (1985).

<sup>41</sup> “This issue involves five defendants, who are represented by a single law firm, in the State and Federal action.” CP 6141.

<sup>42</sup> Restatement (Second) Judgments §139, Reporter’s Notes to comment c (*quoting, Watts v. Swiss Bank*, 27 N.Y.2d 270, 277, 265 N.E.2d 739, 743-44 (1970) (emphasis added)).

The Port argues that there was no “fundamental unity of interest” between the Port and airlines, because the airlines successfully argued against liability in Federal Court, whereas the Port argued for liability in State Court. According to the Restatement: “The fact of his assumption of control of the litigation *is itself indicative that his interest is substantially equivalent to that of the party on whose behalf he appears.*”<sup>43</sup> The Port’s argument conflicts with the fact that Port counsel obtained common representation of the airlines through signed conflict waivers, since fundamentally inconsistent litigation positions are non-consentable. RPC 1.7(b)(1), (b)(3), & comments 6, 14, 23, 24. The fundamental unity of interest, of course, was the overall litigation strategy of using the dual forums to pass Port liability to the airlines from whom Mr. Afoa could no longer recover – all in service to the Port / Airlines single insurer, AIG.<sup>44</sup>

The Port argues that Mr. Afoa is speculating that it controlled the airlines’ defense. Again, the Restatement is to the contrary:

To have control of litigation requires that a person have effective choice as to the legal theories and proofs to be advanced in behalf of the party to the action. . . . *It is sufficient that the choices were in the hands of counsel responsible to the controlling person . . . .*

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<sup>43</sup> Restatement (Second) Judgments §139, comment a (emphasis added).

<sup>44</sup> The Port’s argument is also inconsistent with actual Port litigation actions. For example, the Port joined the airlines in seeking to quash Mr. Afoa’s state subpoena for the very IATA agreements that the Port later relied upon to show airline control, claiming (prior to the Federal judgment) that they were “irrelevant to the pending litigation.” CP 5872.

*Id.*, comment c (emphasis added). It is not speculation that the Port rejected a stipulation under which “Plaintiff’s claims against [all named airline] defendants ... in federal cause number 2:11-CV-00028-JCC shall be dismissed with prejudice ...,” conditioned only on the Port’s agreement not to assert “empty chair” defenses against them. CP 6185. If the Port was not in control of the airlines’ federal defense, the airlines would have *jumped to accept* a stipulation to dismiss all claims against them.<sup>45</sup>

The Port also effectively controlled the airlines as to opposition to joinder of the Port. Since the primary liability issue was “control,” and the airlines operated under SLOAs stating they were subject to the Port’s “exclusive control,” the airlines had a strong interest in consenting to joinder of the Port, despite destruction of Federal diversity – yet they opposed it. While the airlines might prefer Federal Court, there is no evidence that they could not get a fair trial in State Court. If not for Port

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<sup>45</sup> The Port asserts two flimsy arguments to show that the airlines had legitimate grounds to reject this stipulation: (1) the airlines had no right to waive the Port’s defense; and (2) it was a state court stipulation, and the airlines were not parties in state court. RBA at 63. The first is immaterial: it was still in the airlines’ interest to agree to a dismissal stipulation, and to hope that the Port would agree to it. The second is misleading for two reasons: (1) the stipulation is set for signature by counsel who had already appeared on behalf of both the Port and the Airlines; and (2) the stipulation on its face was “contingent upon the attached CR 41 Order of Dismissal ... being signed by Judge Coughenour and entered into federal court ....” CP 6185. In addition, the Port is not correct that this stipulation would have deprived it of the right to argue that it did not have control; all it did was deprive it of the ability to argue *contrary to the arguments it was then making in Federal Court* that the airlines were at fault. CP 6185.

control over their defense, the airlines should have preferred a trial in which they could assert that the Port controlled safety at Seatac.

The Port tilts at windmills by suggesting that Mr. Afoa is arguing “virtual representation,” though the phrase does not appear anywhere in Afoa’s Brief.<sup>46</sup> The basis of Mr. Afoa’s argument is *privity*, and we have cited Washington cases which consider witness testimony as one factor demonstrating the long-established element of “privity.” BR 68 & nn.182, 183. Witness testimony is especially strong evidence of privity here because these were not Port employees acting on their own, but instead were *Port speaking agents* proffered by *joint counsel for the Port and Airlines*. CP 6911. Again, while witness testimony alone might not have been enough to establish privity, viewed in combination with joint representation and all the other factors, it is enough.

The Port has had more than its “day in court” – it had the many days in Federal Court in which it argued and testified that the airlines were *not* in control and *not* at fault, plus its entire series of second bites at the apple in which it argued and testified that the airlines *were* in control and

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<sup>46</sup> The U.S. Supreme Court ruled that virtual representation standing alone is not sufficient to bind a stranger to prior litigation, in a totally distinguishable case in which “there is no evidence that Taylor controlled, financed, participated in, or even had notice of Herrick’s earlier suit.” *Taylor v. Sturgell*, 553 U.S. 880, 885 (2008). *Taylor* recognizes the continued validity of the rule that “a nonparty is bound by a judgment if she assumed control over the litigation in which that judgment was rendered.” *Id.* at 895.

were at fault. It is the fundamental purpose of res judicata and collateral estoppel to “preclude parties from contesting matters that they have had a full and fair opportunity to litigate” because it “protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.”<sup>47</sup>

## 2. Applying Collateral Estoppel is not Unjust<sup>48</sup>

The Port argues that it would be unjust to apply collateral estoppel to it because “the Port was not a party to the federal case nor in privity with them.” RBA at 66. All that has been said above regarding Port privity refutes the Port’s injustice argument. *It is the epitome of justice to hold the Port to the outcome in Federal Court that it fought so hard to procure.*<sup>49</sup>

The injustice element is fundamentally rooted in procedural unfairness.<sup>50</sup> As discussed above, the Port had a full and fair opportunity to litigate all issues pertaining to airline liability in Federal Court, and

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<sup>47</sup> *State of Montana v. United States*, 440 U.S. 147, 153-54 (1979) (emphasis added).

<sup>48</sup> Injustice is an element of collateral estoppel, not res judicata. *See, e.g., Rains v. State*, 100 Wn.2d 660, 663-64, 674 P.2d 165 (1983).

<sup>49</sup> The Port’s one specific example of alleged procedural injustice does not concern its own participation, but Mr. Afoa’s alleged “failure simply to cite any WISHA regulations that might apply . . .” RBA at 66. If true this would still fall far short of “injustice,” *but it is patently false*. *See*, CP 5432, ¶¶10.4, 10.5; 5433-34 ¶¶11.4, 11.5; 5435, ¶¶12.4, 12.5; 5436, ¶¶13.4, 13.5. Indeed, Mr. Afoa’s WISHA claim against Hawaiian and China survived the first round of airline dismissal motions. CP 5395-96.

<sup>50</sup> *State v. Vasquez*, 148 Wn.2d 303, 308, 59 P.3d 648 (2002); *Thompson v. State Dept. of Licensing*, 138 Wn.2d 783, 795-96, 982 P.2d 601 (1999).

successfully obtained a Federal judgment finding no airline liability. Collateral estoppel's injustice element also considers the strong public policy against inconsistent adjudications and in favor of judicial economy.<sup>51</sup> The Port's and AIG's attempt at gaming the system by profiting from inconsistent Federal and State judgments is strong evidence that application of res judicata and collateral estoppel is not unjust.

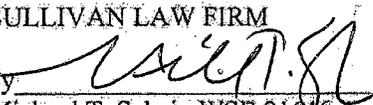
### III. CONCLUSION

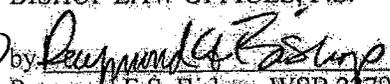
Mr. Afoa respectfully requests that the judgment be reversed and remanded with instructions to enter judgment in favor of Mr. Afoa against the Port for the full amount of the \$40 Million verdict, less Plaintiff's 0.2% fault, plus interest and costs.<sup>52</sup>

Dated at Seattle, WA, this 30<sup>th</sup> day of August, 2016.

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by   
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Attorneys for Respondent/Cross-Appellant Brandon Afoa

<sup>51</sup> *Thompson*, 138 Wn.2d at 795; see, *Vasquez*, 148 Wn.2d at 309.

<sup>52</sup> The Port says this Court should disregard the testimony of the jury foreman cited in Afoa's Brief of Respondent, because of the rule against "impeaching the verdict." The Port is mistaken because neither citation is offered for this purpose. The first is to show one element of prejudice in allowing amendment to add the collusive airlines: deception of the jury in assessing witness bias. BR at 63; CP 9016 ¶6. The second goes to the appellate remedy, namely, judgment in favor of Plaintiff as a matter of law, as opposed to remand for retrial of fault allocations. BR at 70. Regardless, neither citation is necessary. The primary prejudice under CR 12(i) inheres on the face of the verdict, in the fault allocation. CP 4917. Appellate remedy lies in this Court's discretion, based on "the merits of the case and the interest of justice ...." RAP 12.2.

Aug 30, 2016, 12:45 pm

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SUPREME COURT OF THE STATE OF WASHINGTON

BRANDON APELA AFOA, an individual,

Respondent, Cross-Appellant,

vs.

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

Appellant.

No. 91995-0

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I, Jennifer Marroquin, legal assistant at Sullivan Law Firm, hereby certify that on the date set forth below I caused the within AFOA'S REPLY BRIEF IN SUPPORT OF CROSS APPEAL and AFOA'S VERIFIED MOTION TO PERMIT FILING OF OVERLENGTH REPLY BRIEF OF CROSS-APPELLANT to be filed with the Clerk of the Washington Supreme Court by email PDF, and caused a copy of the same to be served via electronic mail to appellate counsel for Appellant, at the following addresses:

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DATED at Seattle, King County, Washington, this 30<sup>th</sup> day of August, 2016.

  
Jennifer Marroquin

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Searching for information about a case? Case search options can be found here:

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**From:** Jennifer Moran [mailto:j.moran@sullivanlawfirm.org]  
**Sent:** Tuesday, August 30, 2016 12:39 PM  
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**Cc:** Michael Schein <M.Schein@sullivanlawfirm.org>  
**Subject:** Case No. 91995-0, Afoa v. Port of Seattle

Attached for filing please find the following:

1. Afoa's Reply Brief In Support of Cross Appeal
2. Afoa's Verified Motion To Permit Filing of Overlength Reply Brief of Cross-Appellant
3. Certificate of Service

Regards,

**Jennifer P. Moran**

PARALEGAL



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