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No. 94525-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRANDON APELA AFOA,

Respondent,

v.

PORT OF SEATTLE,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT BRANDON AFOA

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I. INTRODUCTION

This is an action for personal injury against the Port of Seattle, owner and operator of Seatac Airport, based on: (1) violation of the WISHA specific duty clause, RCW 49.17.060(2); and (2) common-law duty to provide a safe workplace in a multiemployer jobsite. These are nondelegable duties that fall as a matter of law and sound public policy on the entity best able to control safety in a multiemployer jobsite – in this case, the Port.¹

This Court is familiar with this case from *Afoa I*, which held:

If a jury accepts Afoa's allegations, the Port controls the manner in which work is performed at Sea-Tac Airport, controls the instrumentalities of work, and controls workplace safety. The Port is the only entity with sufficient supervisory and coordinating authority to ensure safety in this complex multiemployer work site. If the Port does not keep Sea-Tac Airport safe for workers, it is difficult to imagine who will.²

After a month and one-half trial, the jury *did* accept Mr. Afoa's evidence, finding that the Port controlled the manner of work at Seatac, and that damages total \$40 Million.³ CP 4839-41. However, the trial court allowed the Port to name four airline "empty chair" defendants *who were known to the Port all along, but not named by the Port back when*

¹ *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 122, 52 P.3d 472 (2002); *Stute v. PBMC*, 114 Wn.2d 454, 463-64, 788 P.2d 545 (1990); *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 332-33, 582 P.2d 500 (1978).

² *Afoa v. Port of Seattle*, 176 Wn.2d 460, 478-79, 296 P.3d 800 (2013) (citations omitted) ("Afoa I").

*Mr. Afoa would have been able to join them in this action, in violation of the mandatory terms of CR 12(i). CP 3174, 8061. When the jury assigned 18.7% fault to each airline, the Port's nondelegable duty to provide a safe workplace was effectively delegated to parties who were not best able to control safety at Seatac, and against whom Mr. Afoa could not recover.*⁴ This result was inconsistent with a prior Federal Court dismissal of the exact same claims, in which the Port controlled the airlines' defense.⁵

The trial court entered judgment against the Port for \$10 Million. CP 4881. Division One held that the Port is liable for the full verdict:

We conclude the Port had a nondelegable duty to ensure a safe workplace, including safe equipment, and is vicariously liable for any breach of that duty. Consistent with the Port's vicarious liability, it is not entitled to allocate fault to the four nonparty airlines and proportionately reduce its liability.⁶

This Court granted review, primarily to decide whether the nondelegable WISHA specific duty under RCW 49.17.060(2), and nondelegable duty of a control party to provide all workers a safe workplace, were abrogated by RCW 4.22.070(1). Alternatively, this Court will consider whether CR 12(i) precludes the Port's late amendment to allocate fault to the airlines, and whether the Port should be bound to the outcome of the Federal dismissal of claims against the airlines that it fought so hard to obtain.

³ See Appendix A for evidence supporting Port control over the manner of work.

⁴ CP 3174, 4688, 4842, 8876, 8934, 9197.

⁵ CP 6858, 6909, 8423.

II. ARGUMENT

A. **The Nondelegable WISHA Specific Duty and Duty to Provide a Safe Workplace Were Not Abrogated by RCW 4.22.070(1)**

The Port's argument that RCW 4.22.070(1) permits it to shift its responsibility for worker safety at Seatac conflicts with the most basic principles of worker protection law in Washington – the nondelegable WISHA specific duty clause, RCW 49.17.060(2), and the common-law rule that the master has a nondelegable duty to provide a safe workplace.

1. **The Statutory WISHA Specific Duty is Nondelegable**

It is the law of the case that, under OSHA's multiemployer workplace doctrine, an employer who controls workplace safety cannot avoid liability for compliance with all safety regulations, even as to employees of a different employer.⁷ Because "WISHA directs our Department of Labor and Industries to promulgate regulations that equal or exceed standards promulgated under OSHA,"⁸ the WISHA specific duty to comply with all worker safety regulations "runs to *any* employee who may be harmed by the employer's violation of the safety rules."⁹ *Afoa I* holds that the Port and Mr. Afoa "easily fall within" the definitions of "employer" and "employee" for application of this duty. *Id.* at 473.

⁶ *Afoa v. Port of Seattle*, 198 Wn.App. 206, 212, 393 P.3d 802 (Div. 1 2017) (*Afoa II*).

⁷ *Afoa I*, 176 Wn.2d at 472; 29 CFR §1926.16(a), (b).

⁸ *Afoa I*, 176 Wn.2d at 470 (*citing*, RCW 49.17.010, .040); *accord*, 29 USC §667(c)(2).

⁹ *Afoa I*, 176 Wn.2d at 471, 473; *Stute*, 114 Wn.2d at 460.

As statutory employer under WISHA, and jobsite owner with control over the work of ground service contractors like Afoa's direct employer EAGLE, the Port's duty to provide a safe workplace to all workers on the ramp is "nondelegable" under *Kelley*, *Stute* and *Kamla*.¹⁰

In Washington prior to the adoption of WISHA, the court held that RCW 49.16.030 (WISHA's predecessor) created a *nondelegable duty* on general contractors to provide a safe place to work for employees of subcontractors. *Kelley*, 90 Wn. at 333, 582 P.2d 500 The policy reasons behind the court's holdings have not changed and give added force to the language of WISHA.

Stute, 114 Wn.2d at 463-64 (emphasis added). The Restatement agrees:

[W]henever a statute or an administrative regulation imposes a duty upon one doing particular work to provide safeguards or precautions for the safety of others ... *the employer cannot delegate his duty* to provide such safeguards or precautions to an independent contractor.

Restatement (Second) Torts §424 & cmt. a.¹¹

2. The Common-Law Control Party's Duty to Provide a Safe Workplace is Nondelegable

For at least 120 years, Washington common law has imposed a nondelegable duty on employers and owners to provide a safe workplace

¹⁰ *Kamla*, 147 Wn.2d 122 ("In Washington, all general contractors have a nondelegable specific duty to ensure compliance with all WISHA regulations"); *Stute*, 114 Wn.2d at 463-64; *Kelley*, 90 Wn.2d at 332-33; *accord, e.g., 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); *Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 249, 85 P.3d 918 (Div. 1 2004).

¹¹ *Accord, Millican v. N.A. Degerstrom, Inc.*, 177 Wn. App. 881, 893, 313 P.3d 1215 (Div. 3 2013), *rev. den.*, 179 Wn.2d 1026 (2014); Restatement (Third) Torts §57 cmt. b.

both to direct employees and to employees of independent contractors.¹² Even after enactment of Tort Reform, this Court has continued to hold that the party in control of the manner of work at a workplace has a “nondelegable duty” to ensure worker safety.¹³

Nondelegable duties are based on “ ‘the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another.’ ”¹⁴ Whether a control party seeks to shift responsibility for workplace injury to fellow servants (as in the old days) or to controlled contractors as argued by the Port here, the basic policy against such a shift is the same: *protection of worker safety*. *Afoa I* holds that it undermines worker safety to allow the

¹² *Guy v. Northwest Bible College*, 64 Wn.2d 116, 118, 390 P.2d 708 (1964); *Myers v. Little Church by the Side of the Road*, 37 Wn.2d 897, 904, 227 P.2d 165 (1951) (cited with approval, *Afoa I*, 176 Wn.2d at 475); *Cotton v. Morck Hotel Co.*, 32 Wn.2d 326, 336, 201 P.2d 711 (1949); *Buss v. Wachsmith*, 190 Wash. 673, 680, 70 P.2d 417 (1937); *Carlson v. P.F. Collier & Son Corp.*, 190 Wash. 301, 311, 67 P.2d 842 (1937); *Pellerin v. Washington Veneer Co.*, 163 Wash. 555, 563, 2 P.2d 658 (1931); *Haverty v. Int’l Stevedoring Co.*, 134 Wash. 235, 243-44, 235 P. 360 (1925); *Britton v. Rumbaugh*, 128 Wash. 445, 449, 222 P. 899 (1924); *Arces v. Frederick & Nelson*, 79 Wash. 402, 409-10, 140 P. 370 (1914); *Dumas v. Walville Lumber Co.*, 64 Wash. 381, 386, 116 P. 1091 (1911); *Westerlund v. Rothschild*, 53 Wash. 626, 627-28, 102 P. 765 (1909); *Tills v. Great Northern Ry. Co.*, 50 Wash. 536, 541, 97 P. 737 (1908); *Howland v. Standard Milling & Logging Co.*, 50 Wash. 34, 37, 96 P. 686 (1908); *Comrade v. Atlas Lumber & Shingle Co.*, 44 Wash. 470, 474, 87 P. 517 (1906); *Ball v. Megrath*, 43 Wash. 107, 110, 86 P. 382 (1906); *Dossett v. St. Paul & Tacoma Lumber Co.*, 40 Wash. 276, 286, 82 P. 273 (1905); *O’Brien v. Page Lumber Co.*, 39 Wash. 537, 545, 82 P. 114 (1905); *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 396, 68 P. 896 (1902); *Costa v. Pacific Coast Co.*, 26 Wash. 138, 142, 66 P. 398 (1901); *McDonough v. Great Northern Ry. Co.*, 15 Wash. 244, 258, 46 P. 334 (1896); *Marsland v. Bullitt Co.*, 3 Wn. App. 286, 292, 474 P.2d 589 (Div. 1 1970).

¹³ *Kamla*, 147 Wn.2d at 122 [2002]; *Stute*, 114 Wn.2d at 463-64 [1990].

¹⁴ *Millican*, 177 Wn. App. at 892 (quoting, W. Page Keeton, et. al., *Prosser and Keeton on the Law of Torts* at 512 (West 5th Ed. 1984)).

person best able to protect safety at the jobsite to shift liability to another party.¹⁵ That is especially true here, where this multiemployer workplace has more than 40 different airlines, and over two hundred contractors.¹⁶

A nondelegable safety duty is imposed also because workers are relatively powerless, must follow directions, and rely on those with control over the job site for their safety.¹⁷ This policy supports imposition of a vicarious nondelegable duty on the Port, because airline authority is always subject to Port “exclusive control.”¹⁸ Airline station managers testified that each airline only exercises its subordinate control over its own gate, and only during loading and unloading; that airlines could not control other airlines, and could not instruct EAGLE when traveling between the gates of one airline and another.¹⁹ The Port’s attempt to shift its nondelegable safety duty is reminiscent of the old fellow-servant rule.

3. “Nondelegable Duty” Means Vicarious Liability Owed to the Injured Party that Cannot be Shifted to Another

In the context of WISHA statutory and common-law duties, “nondelegable” means that the control party *may delegate the work but not the liability, which is a kind of vicarious liability:*

¹⁵ “*Kelley* and *Kamla* stand for the proposition that when an entity ... retains control over the manner in which work is done on a work site, that entity has a duty to keep common work areas safe because it is best able to prevent harm to workers.” *Afoa I*, 176 Wn.2d at 478; *id.* at 481; *see, Kamla*, 147 W.2d at 124; *Stute*, 114 Wn.2d at 463.

¹⁶ *Brief of Appellant Port of Seattle* at 5, 6.

¹⁷ *Haverty*, 134 Wash. at 244.

“The label ‘nondelegable duty’ does not mean that an actor is not permitted to delegate the activity to an independent contractor. Rather, the term signals that the actor will be *vicariously liable* for the contractor's tortious conduct in the course of carrying out the activity.” Restatement (Third) Torts ... §57 cmt. b (2012). Stated differently, “a ‘non-delegable duty’ requires the person upon whom it is imposed to answer for it that care is exercised by anyone, even though he be an independent contractor, to whom the performance of the duty is entrusted.” Restatement (Second) ch.15, topic 2, intro. note.²⁰

Millican quotes the Restatement to explain how nondelegable duties are a form of vicarious liability:

“The rules ... do not rest upon any personal negligence of the employer. They are rules of vicarious liability, making the employer liable for the negligence of the independent contractor, irrespective of whether the employer has himself been at fault. They arise in situations in which, for reasons of policy, the employer is not permitted to shift the responsibility for the proper conduct of the work to the contractor. The liability imposed is closely analogous to that of a master for the negligence of his servant.

“The statement commonly made in such cases is that the employer is under a duty which he is not free to delegate to the contractor. Such a ‘non-delegable duty’ requires the person upon whom it is imposed to answer for it that care is exercised by anyone, even though he be an independent contractor, to whom the performance of the duty is entrusted.”²¹

In *Myers v. Little Church*, 37 Wn.2d 897, the trial court set aside a verdict in favor of an employee because maintenance of the elevator that

¹⁸ Exs. 675-78 ¶¶2.1, 4.7.

¹⁹ RP 1008-09/14-1, 1170/8-12, 1170-71/24-11.

²⁰ *Millican*, 177 Wn. App. at 896-97 (emphasis added).

²¹ *Id.* at 890-91 (quoting, Restatement (Second) Torts, Ch. 15, Topic 2, Intro. Note).

injured the employee was entrusted to a contractor. *Id.* at 899, 903. This

Court reversed based on nondelegable duty and vicarious liability:

The master's duty to provide the servant with a reasonably safe place to work is nondelegable.... Therefore respondent cannot escape liability for the negligence of the elevator company on the theory that the latter was an independent contractor²²

Likewise, the Port's duty to maintain a safe workplace for all workers on the Seatac ramp jobsite was nondelegable, and it was error to permit the Port to avoid this duty by shifting blame to the airlines.

Many authorities from other jurisdictions agree with Washington that a party may not shift liability for a nondelegable duty.²³ And under

²² *Id.* at 904 (citations omitted). Other decisions to the same effect include *Guy v. NW Bible College*, 64 Wn.2d 116, in which this Court held that a college could not shift blame to its architects for personal injuries suffered when a ceiling screen fell on the dean of women because its duty to provide a safe work place was "nondelegable", *id.* at 118-19; and *Acras v. Frederick & Nelson*, 79 Wash. 402, in which this Court labeled the employer's effort to shift blame for an employee's injuries to the elevator repair contractor "fallacious" because "the duty of the master to use reasonable care to keep the place reasonably safe was a continuing and nondelegable one," *id.* at 409-10.

²³ *E.g.*, *Ft. Lowell-NSS Ltd. Partnership v. Kelly*, 166 Ariz. 96, 100-05, 800 P.2d 962 (1990) (owner properly denied summary judgment due to its nondelegable duty to provide safe premises to invitees); *Reid v. Berkowitz*, 315 P.3d 185, 191-92 (Col.App. 2013) (trial court did not err by refusing builder's proposed instruction that jury could apportion liability to coworkers on construction site, because builder's duty to maintain safe workplace was nondelegable); *Armiger v. Associated Outdoor Clubs, Inc.*, 48 So.3d 864, 874-76 (Fl. App. 2010) (nondelegable duty to maintain safe workplace creates direct liability that cannot be shifted to cleaning contractor; while the owner may hire independent contractors, "the owner may not contract away his or her legal responsibility for the proper performance of the nondelegable duty"); *Rizzuto v. LA Wegner Contracting Co.*, 91 N.Y.2d 343, 349-50, 693 N.E.2d 1068 (1998) (worker safety statute imposed on owner or general contractor a nondelegable duty to provide safe workplace); *Johansen v. Anderson*, 555 N.W.2d 588, 591-93 (ND 1996) (owner of granary equipment owes nondelegable duty which "cannot be intrusted to another, so as

the OSHA “minimum standard” rule of 29 U.S.C. §667(c)(2), a control party’s nondelegable duty to apply worker safety regulations to all employees at a multiemployee workplace is the law of the land.²⁴

4. Tort Reform Did Not Abrogate These Nondelegable Duties

The Port asks this Court to find that RCW 4.22.070(1) was clearly intended to abrogate the statutory WISHA specific duty clause, and 120 years of authority imposing a nondelegable duty on masters to provide a safe workplace.²⁵ This would have a devastating effect, frustrating the policy goal of protection of workers mandated by the Washington Constitution, Art. II §35. “Authority is legion that implied repeals of statutes are disfavored and courts have a duty to interpret statutes so as to give them effect.”²⁶ The issue is not whether the Legislature *could* abrogate decades of prior precedent and earlier statutory law; the issue is whether it *clearly intended* to do so. It did not.

to exonerate” the owner from liability to employee killed due to contractor’s negligent modification of equipment); Restatement (Third) Torts §57 cmt. b.

²⁴ “In no case shall the prime contractor be relieved of overall responsibility for compliance of this part for *all work to be performed under the contract.*” 29 CFR §1926.16(a) (emphasis added). “[T]he prime contractor assumes all obligations prescribed as employer obligations under the standards contained in this part, *whether or not he subcontracts any part of the work.*” *Id.* §1926.16(b) (emphasis added).

²⁵ If “[o]verruling a prior decision is a serious step, not to be undertaken lightly,” *Bishop v. Miche*, 137 Wn.2d 518, 529, 973 P.2d 465 (1999), then overruling multiple decisions stretching back nearly the entire history of our state cannot be undertaken absent clear intent by the legislature to abrogate prior law.

²⁶ *Johnson v. REI*, 159 Wn. App. 939, 950, 247 P.3d 18 (Div. 1 2011) (quoting, *Bellevue Sch. Dist. No. 405 v. Brazier Constr. Co.*, 103 Wn.2d 111, 122, 691 P.2d 178 (1984)).

Tort Reform evinces no clear legislative intent to abrogate the control party's nondelegable duty to provide a safe workplace because the control party's nondelegable duty constitutes vicarious liability, and RCW 4.22.070(1)(a) expressly exempts vicarious liability for persons "acting as an agent or servant" from the rule of several liability.²⁷

a. The Airlines' Liability is the Port's Liability

RCW 4.22.070(1) did not abolish vicarious liability. As stated by Division One in an opinion holding that a vicarious liability provision of the Product Liability Act was not impliedly repealed by RCW 4.22.070:

REI ... assumes that, by enacting RCW 4.22.070(1), our legislature eliminated vicarious liability, *which it expressly did not do*. Indeed, this specific statute itself explicitly retains principles of common law vicarious liability, in that it provides that "[a] party shall be responsible for the fault of another ... where both were acting in concert or when a person was acting as an agent or servant of the party." RCW 4.22.070(1)(a). Similarly, the WPLA provision at issue here is a statutory imposition of vicarious liability wherein the seller of a branded product is held liable for the actions of the manufacturer²⁸

And similarly, the WISHA specific duty clause at issue here is also a statutory imposition of vicarious liability which survives Tort Reform. Neither statutory nor common-law master-servant vicarious liability were impliedly repealed by Tort Reform.

²⁷ Gregory C. Sisk, *Interpretation of the Statutory Modification of Joint & Several Liability*, 16 U. Puget Sound L.Rev. 1, 109 (1992) ("RCW 4.22.070(1)(a) imposes a regime of vicarious tort liability ...") ("Sisk").

²⁸ *Johnson v. REI*, 159 Wn. App. at 950-51 (emphasis in original).

WISHA and Tort Reform are thus reconciled because *nondelegable duties create vicarious liability*,²⁹ and RCW 4.22.070(1)(a) expressly recognizes that vicarious liability is excluded from the general rule of several liability. The Port has engaged in a fruitless exercise by obtaining an adjudication of fault against nonparty airlines, *because airline fault is vicariously attributed back to the Port*.³⁰ Each airline's 18.7% share of liability is, *as a matter of law*, attributable to the Port. No matter how hard the Port tries to rid itself of its control person liability for providing a safe workplace, the fact that this liability is *nondelegable* and *vicarious* means that it sticks to the Port.³¹

b. Comparative Fault Does Not Apply Here

Division One reasoned that “in cases involving vicarious liability, there can be no comparative fault.” *Afoa II*, 198 Wn. App. at 232. The Restatement agrees:

²⁹ *Myers*, 37 Wn.2d at 904; *Afoa II*, 198 Wn. App. at 231; *Millican*, 177 Wn. App. at 883, 886-87; Restatement (Third) of Torts § 57 cmt. b; Sisk, 16 UPS L.Rev. at 109.

³⁰ The Port may have a right to seek contribution from the airlines under RCW 4.22.040, within one year after the judgment becomes final in this action. RCW 4.22.050(3); *Gilbert H. Moen Co. v. Pacific Steel Erectors, Inc.*, 128 Wn.2d 745, 758, 912 P.2d 472 (1996). This remedy is available to the Port, but not to Mr. Afoa, though as a practical matter the Port will not exercise this right because the Port and the airlines are all insured by AIG under its policy with EAGLE.

³¹ Indeed, *Tort Reform could only be brought into conflict with WISHA if it was read to abrogate the nondelegability doctrine*, because nondelegability is mandated by both WISHA and OSHA. Both WISHA and OSHA 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). OSHA mandates that the general contractor “assumes all obligations prescribed as employer obligations under the standards

A person whose liability is imputed based on the tortious acts of another is liable for the entire share of comparative responsibility assigned to the other, regardless of whether joint and several liability or several liability is the governing rule for independent tortfeasors who cause an indivisible injury.³²

According to the commentary, not only does this rule apply to cases of respondeat superior under the general law of agency, but it also specifically applies to cases in which “[n]ondelegability rules impose liability on a principal who hired an agent to perform a task.”³³

Division One correctly held:

Allowing the Port to allocate fault to the airlines would render the vicarious liability doctrines of retained control and WISHA specific duty meaningless. As the *Afoa I* court explained, the purpose of the retained control doctrine is “to place the safety burden on the entity in the best position to ensure a safe working environment.” It follows that if the purpose of that doctrine is to identify the entity best situated to ensure a safe workplace, then that entity should not be entitled to escape or reduce its vicarious responsibility to a tort victim based on others whose negligence also contributed to the injury.

Afoa II, 198 Wn. App. at 233. This Court should affirm.

c. Tort Reform’s Preservation of Vicarious Liability for Controlled Persons Is Consistent with the Common Law

Afoa I and other case law demonstrates that the “acting as ... agent or servant” exception in RCW 4.22.070(1)(a) is easily reconciled with the continued enforcement of common-law nondelegable safe

contained in this part, *whether or not [it] subcontracts any part of the work,*” 29 CFR §1926.16(a), (b) (emphasis added).

³² Restatement (Third) Torts – *Apportionment of Liability* §13.

workplace duties. *Afoa I* held that the Port and Mr. Afoa are WISHA statutory employer and employee,³⁴ which is of course another word for “servant.” *Afoa I* explains that control party liability is the old master-servant nondelegable duty in a modern context:

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*, 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.³⁵

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 common law.*” *Afoa I*, 176 Wn.2d at 481 (emphasis added). Therefore, under *Afoa I*, the word “servant” in RCW 4.22.070(1)(a) encompasses the control liability workplace safety doctrine.

Controlled contractors also are “acting as an agent” within the meaning of RCW 4.22.070(1)(a). The hallmark of both agency and the control doctrine is that “the agent shall act . . . subject to the principal’s control.”³⁶ After quoting the Restatement (Second) Agency definition of “independent contractor” (not controlled) and “employee” (“subject to

³³ *Id.* cmt. a (emphasis added).

³⁴ *Afoa I*, 176 Wn.2d at 473 (citing, RCW 49.17.020(4), (5)).

³⁵ *Afoa I*, 176 Wn.2d at 475.

the right to control”), this Court in *Kamla* reaffirmed the “right to control” test for a duty to provide a safe workplace.³⁷ “[V]icarious liability of a principal for the negligent acts of any agent or servant is dependent upon whether the principal *controls or has the right to control* the details of the physical movements of the agent while such person is conducting the authorized transaction.”³⁸ “The doctrine of respondeat superior, which is the basis of vicarious tort liability..., requires that the one charged with imputed liability have control of or the right to control the physical actions of the negligent actor.”³⁹ The Port’s control rights under its agreements with EAGLE and the airlines not only trigger its nondelegable duty to maintain a safe workplace under *Kelley*, *Stute*, *Kamla* and *Afoa I*, but also its vicarious liability as a master and principal within RCW 4.22.070(1)(a).

“The Legislature is presumed to be aware of judicial interpretation of its enactments.”⁴⁰ Thus, it is presumed to be aware of the long line of authority creating a nondelegable duty to maintain a safe workplace for employees and controlled contractors, and that this

³⁶ Restatement (Third) Agency §1.01 (2006).

³⁷ *Kamla*, 147 Wn.2d at 119 (*quoting*, Restatement (Second) Agency §2(2)); *accord*, *Sisk*, 16 U. Puget Sound L.Rev. at 109-10.

³⁸ *McClellan v. St. Regis Paper Co.*, 6 Wn. App. 727, 729-30, 496 P.2d 571 (Div. 2), *rev. den.*, 81 Wn.2d 1003 (1972); *accord*, *e.g.*, *Larner v. Torgerson Corp.*, 93 Wn.2d 801, 804-05, 613 P.2d 780 (1980).

³⁹ *McClellan*, 6 Wn. App. at 732.

nondelegable duty depends on proof of the same right to control that establishes agency and/or a master-servant relationship. *Against that legal backdrop, it chose to preserve vicarious liability for agents and servants in the Tort Reform Act.* This demonstrates that the Legislature did not intend to abrogate the controlling person's nondelegable duty to maintain a safe work place, or the long line of authority supporting it.

d. *Moen Supports Afoa's Tort Reform Argument*

The Port has relied on *Gilbert H. Moen Co.*, but such reliance is misplaced. *Moen's* holding that the indemnification provisions of RCW 4.24.115(2) survive enactment of RCW 4.22.070(1) *makes no sense if, as the Port contends, contractors and their subcontractors are severally liable.* As this Court stated in *Moen*, “[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.*”⁴¹ *Moen* recognizes joint and several liability, and that the control party may not shift its initial liability to the injured party to other contractors: “*Moen as the general contractor may not delegate away its general duty to ensure*

⁴⁰ *Friends of Snoqualmie Valley v. King Cty. Boundary Rev. Bd.*, 118 Wn.2d 488, 496, 825 P.2d 300 (1992).

⁴¹ *Moen*, 128 Wn.2d at 760 (emphasis added).

safety on the jobsite”⁴² Any attempt to bootstrap *Moen* into support for the Port founders on the express contrary language of the decision.⁴³

B. The Trial Court Committed Reversible Error by Granting the Port’s Motion to Amend in Violation of CR 12(i)

Division One did not reach two independent grounds for ruling in favor of Mr. Afoa: (1) error in allowing the empty chair defenses to be added late in the game; and (2) res judicata/collateral estoppel effect of Federal judgments dismissing these same claims against the airlines. To properly understand these issues, it is necessary that this Court review the complex procedural history of this case, which is detailed in Afoa’s Brief of Respondent at pages 58-61. *See*, Appendix B.

The obligation to name known nonparties allegedly at fault is subject to a special, enhanced pleading rule, under CR 12(i):

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.*

⁴² *Id.* at 758 (emphasis added).

⁴³ The Port may seek to muddy the waters by pointing to decisions such as *George Sollitt Corp. v. Howard Chapman Plumbing & Heating, Inc.*, 67 Wn. App. 468, 836 P.2d 851 (Div. 2, 1992), which hold that subcontractors can owe WISHA and safe workplace duties that run concurrently with the prime contractor’s duties. But *Moen* itself recognizes that *concurrent* duties are not incompatible with *nondelegable* duties. *Moen*, 128 Wn.2d at 758. Mr. Afoa’s argument is *not* that the airlines could not have been liable for proven control over the manner of work within specific areas of the airport; it is that the Port, as the entity best able to control safety at the whole of Seatac, cannot shift any part of its nondelegable duty to the airlines.

CR 12(i) (emphasis added). “Shall” when used in a rule or statute “is presumptively imperative and creates a mandatory duty unless a contrary legislative intent is shown.”⁴⁴ The Port knows and has known of the airlines served by EAGLE from the very outset of this litigation back in 2009.⁴⁵ It was thus the Port’s affirmative duty to comply with CR 12(i) by identifying the defensive claim against the airlines back in April 2009. The Port did not, and misled Plaintiff and the Court by claiming that the “reason for asserting [“unknown persons”] ... defenses was to put Mr. Afoa and his counsel on notice that the Port will pursue a sole proximate cause defense.” CP 5198 (emphasis in original); *see*, App. B at 58-59.

On the face of the special CR 12(i) rule applicable to “nonparty fault” under “RCW 4.22.070,” its purpose is to address the problem of the *stealth empty chair*, and to ensure that exactly what happened here would not happen: the defense hidden until it was too late for the plaintiff to join the nonparties in the same lawsuit. Tort Reform under RCW ch. 4.22 aims “to encourage settlement *while assuring full compensation to tort victims*.”⁴⁶ This Court should hold that the general rule of liberal amendment, which is intended to facilitate and not frustrate the assertion

⁴⁴ *Goldmark v. McKenna*, 172 Wn.2d 568, 575, 259 P.3d 1095 (2011).

⁴⁵ *See* App. B at 58.

⁴⁶ *Seattle Western Indus., Inc. v. David A. Mowat Co.*, 110 Wn.2d 1, 5, 750 P.2d 245 (1994) (emphasis added).

of all claims and defenses, does not apply here. *Strict enforcement of CR 12(i) is essential to achieving its purpose.*

Contrary to the Port's arguments, the prejudice here was not inability to prepare the case against the airlines. The prejudice was the Port's deliberate maneuvering to delay identifying the airlines as empty chairs until the statute of limitations and res judicata/collateral estoppel prevented Mr. Afoa from recovering against them. This denied Mr. Afoa his chance to have all liability determined in a single proceeding, thus depriving him of full compensation for his injuries by preventing recovery of \$30 Million of the jury's verdict. Additional prejudice was the wasted time and expense of the Federal proceeding, inconsistent Federal and State adjudications, and litigating against a conflict of interest, in which Port counsel played opposite sides of the same issue while representing and gaining confidences of the airlines and the Port.⁴⁷

The trial court committed reversible error by allowing the late empty chair defenses against the airlines.⁴⁸

⁴⁷ CP 6141, 7995-8021; RPC 1.6, 1.7, 1.8, 1.9. The confidences gained by Port counsel from the airlines may have permitted it to make a more effective case against them.

⁴⁸ The Port will likely trot out Judge Coughenour's "inexcusable neglect" finding. "Inexcusable neglect" was not an epithet hurled at Plaintiff's counsel, but the legal standard for 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. Because the duty to name the "empty chairs" falls on the Port under CR 12(i), the only "inexcusable neglect" of legal significance here was the Port's inexcusable neglect in failing to name the airlines as empty chair defendants from the outset. It should be noted that this Federal ruling is immaterial as there is no Federal equivalent to CR 12(i).

C. It was Reversible Error to Rule that the Federal Court Summary Judgments Do Not Bar the Empty Chair Defense

Res judicata prevents relitigation of the same claim where a subsequent claim involves the same (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of persons for or against whom the claim made.⁴⁹ Collateral estoppel requires proof that: (1) the issue in the prior and current action be identical; (2) the prior action ended in a final judgment on the merits; (3) the party against whom it is asserted was a party or in privity with a party to the prior action; and (4) application of the doctrine does not work an injustice.⁵⁰ In the Port's August 1, 2016 Reply Brief, it concedes all elements of res judicata / collateral estoppel except: (1) privity; and (2) the injustice element of collateral estoppel. *Port Reply* at 59.

The cumulative effect of the Port's control of the Federal defense by its counsel's appearance on behalf of the airlines in Federal Court, testimony against airline liability by Port speaking agents, and unified financial interest due to a common insurer, establishes privity under Washington law and Restatement (Second) Judgments.⁵¹ The Port so

⁴⁹ *In re Estate of Black*, 153 Wn.2d 152, 170, 102 P.3d 796 (2004).

⁵⁰ *State v. Vasquez*, 148 Wn.2d 303, 308, 59 P.3d 648 (2002).

⁵¹ *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 764, 887 P.2d 898 (1995); *Eugster v. WSBA*, 198 Wn. App. 758, 787, 397 P.3d 131 (Div. 3 2017); *Future Realty, Inc. v. KLP&E, LP*, 161 Wn.2d 214, 224, 164 P.3d 500 (2007); *Stevens Cty. v. Futurewise*, 146 Wn. App. 493, 503, 192 P.3d 1 (Div. 3 2008), *rev. den.*, 165 Wn. 2d 1038 (2009);

thoroughly controlled the airlines in Federal Court that the airlines rejected a proposed stipulation under which “Plaintiff’s [federal court] claims against [all named airline] defendants ... shall be dismissed with prejudice,” conditioned only on the Port’s agreement not to assert “empty chair” defenses against them. CP 6185.

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. *It is the epitome of justice to hold the Port to the outcome in Federal Court that it fought so hard to procure.* The trial court erred by not binding the Port to the Federal Court summary judgment.⁵²

III. CONCLUSION

Mr. Afoa’s life was devastated 10 years ago, including a loss of 20 years of life expectancy.⁵³ Justice requires a prompt ruling as a matter of law, so that he may hope to be compensated in his lifetime.

State v. Cloud, 95 Wn. App. 606, 614, 976 P.2d 649 (Div. 1, 1999); *Mutual of Enumclaw Ins. Co. v. State Farm Ins. Co.*, 37 Wn. App. 690, 693, 682 P.2d 317 (Div. 1 1984); Restatement (Second) Judgments §39 (“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.”).

⁵² For more thorough briefing on these points, see Afoa’s Reply in Support of Cross Appeal, Appendix C, pp. 22-28.

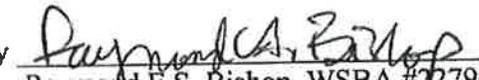
⁵³ RP 1861/2-3.

Respectfully submitted this 6th day of November, 2017.

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APPENDIX A

No. 91995-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRANDON APELA AFOA,
Respondent & Cross-Appellant,

v.

PORT OF SEATTLE,
Appellant.

**BRIEF OF RESPONDENT / CROSS APPELLANT
BRANDON APELA AFOA**

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APPENDIX A

B. Substantial Evidence Supports the Jury Finding of Control

After a month and one-half of hotly contested trial, thirty-nine witnesses called by plaintiff and fourteen called by the defense, plus

hundreds of exhibits, the jury answered “YES” to Interrogatory #1,⁵⁶ thereby establishing that the Port controlled the manner in which Mr. Afoa’s employer performed ground service work. ““An appellate court, in a law case, will not usurp the functions of a jury ... and reverse the judgment because the weight of testimony seems to be on the other side, or because, in a case of conflict of testimony, the jury believed the testimony of witnesses that it does not believe.””⁵⁷ “A decision is supported by substantial evidence if ‘the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.’”⁵⁸ “Review for support by substantial evidence is an extremely limited form of judicial review.”⁵⁹

1. Review of the Evidence

The jury’s verdict is amply supported by substantial evidence in the record demonstrating the Port’s authority to control EAGLE’s work:

➤ Under the GSOLA,⁶⁰ “[a]s solely determined by the Port, equipment appearing to be unsafe or unoperational is subject to towing, impoundment and storage charges.” Ex. 311 ¶11(A) (emphasis added).

⁵⁶ CP 4835-38, 4839, 4843-80.

⁵⁷ *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 573, 343 P.2d 183 (1959) (quoting, *Graves v. H.L. Griffith Realty Co.*, 3 Wash. 742, 29 P. 344, 345 (1892)).

⁵⁸ *King Cty. v. Wash. Boundary Rev. Bd.*, 122 Wn.2d 648, 675, 860 P.2d 1024 (1993) (quoting, *World Wide Video, Inc. v. Tukwila*, 117 Wn.2d 382, 387, 816 P.2d 18 (1991)).

⁵⁹ *Id.*

⁶⁰ GSOLA = EAGLE’s Ground Service Operator Licensing Agreement with the Port.

- The GSOLA required EAGLE to comply with all Port Rules.⁶¹ Ex. 311 ¶9. This meant that EAGLE had to follow not only the published Rules, but any “written or oral instructions” given by any Port employee.⁶² In addition to the Port Rules, the Airport Director was specifically authorized “to issue such other instructions 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 at Port 51, ¶8.⁶³
- The GSOLA controls parking of GSE not in use (such as the cargo loader that Mr. Afoa hit). “Any equipment that hinders circulation or is stored in an unsafe or disorderly fashion, *as determined solely by the Port*, is subject to towing, impoundment and storage charges.” Ex. 311 ¶11(B) (emphasis added). Parking is also controlled by the Port through its Rules.⁶⁴ The Port Ramp Operations Manager authorized EAGLE to

⁶¹ The Port mistakenly argues that this Court should not consider contractual provisions or Port Rules, even though this Court already did so in *Afoa I*, so this is law of the case. *Afoa I*, 176 Wn.2d at 474, 482. “Contractual terms that assign responsibility are relevant but not dispositive in determining whether a hirer retained control for purposes of tort liability.” Restatement (3d) Torts 56, cmt. e; *accord, e.g., Jackson v. Standard Oil Co.*, 8 Wn. App. 83, 91-93, 505 P.2d 139 (Div. 2 1972), *rev. den.*, 82 Wn.2d 1001 (1973) (control based on safety practices in manual incorporated into distributor’s contract).

⁶² Ex. 482 at Port 31, ¶1, 52 ¶2; RP 1330-31/21-24, 2782/7-21.

⁶³ Even Port Deputy General Counsel Isabel Safora had to admit that this was “broad language.” RP 2370/17-20. Confronted with this language, Ms. Safora disclaimed any testimony that the Port contracts do not “provide the Port with the authority to control the means and methods of Mr. Afoa’s work.” RP 2373/3-8.

⁶⁴ Ex. 482 at Port 54 ¶12 (“No person shall park any motor vehicle or other equipment ... in the Air Operations Area ... except ... at such points as prescribed by the [Airport Director]).

park the cargo loader where it was located when it collapsed on Mr. Afoa. RP 2127-28/7-13.

➤ The only way to operate a vehicle on the ramp portion of the air operations area (where Plaintiff's injury occurred) was with authorization from the Port.⁶⁵ Entry to this area was controlled by the Port, not TSA.⁶⁶ Permission from the FAA Airport Tower was only required to enter the movement area – not the ramp area.⁶⁷ All movement on the ramp was controlled by the Ramp Tower, staffed by contractors hired by the Port.⁶⁸ Ground service employees called the Port's Ramp Tower the "Eye of Sauron," from *Lord of the Rings*. "[T]hey had full control ... [over] pretty much everything, pretty much everybody on there. They can spot you, spot-check you from where you're driving." RP 526/3-21.

➤ A key Port Rule states: "*No person shall operate any ... motorized equipment in the Air Operations Area ... unless such ... motorized equipment is in a reasonably safe condition for such operation.*" Ex. 482 at Port 54 ¶15 (emphasis added).⁶⁹ The Port had the

⁶⁵ Exs. 113 p.5, 482 at Port 53 ¶5(b).

⁶⁶ RP 1314/7-15, 1319/18-22, 1320/4-7, 2604/22-25, 2765-66/21-13.

⁶⁷ *Id.*; RP 2753/12-21.

⁶⁸ RP 451-52/13-11, 526-27/3-7, 696-97/24-13, 956-57/17-2, 2815/8-12, 2874-75/16-17, Ex. 188.

⁶⁹ Donald Roten, an Airport Duty Manager responsible for day-to-day operation of the airport, 1406/18-24, whose duties include supervising the Port's ramp patrol and enforcing the Port's Rules, RP 649/5-18, 743/2-8, 1406-07/18-2, testified that this rule means, "If I see something in an unsafe operation, I will have them stop it, will notify their management team, and tell them to replace it." RP 1409-10/21-4.

power to “red-tag” or impound any vehicle not in compliance, including one leaking hydraulic fluid like the pushback involved in this incident, so that it would have to be removed and/or repaired before it could be used again, and this was done to the EAGLE pushback after Afoa’s injury.⁷⁰

➤ One of many examples of Port authority to control the manner of work is the “Swissport incident” of September 2006, in which a ground service employee was driving a Swissport pushback that lost its brakes and went through the airport fence. RP 1237-38/3-25; Ex. 208. The Port ramp patrol escorted the employee off the airfield, RP 1260/5-12, cited him for reckless driving, and conditioned his airfield driving privileges on repeating a Port training course.⁷¹ Patrick Clancy, Port Manager of Airport Certification, requested emphasis briefing on vehicle inspections and safety, and verification of “*the complete repair of vehicle 300’s brake system before it is put back in service on the AOA.*” Ex. 208 p.2 (emphasis added). Mr. Clancy testified that the Port has authority to require GSPs to divulge their maintenance records. RP 1388-89/23-1.

➤ In August, 2008, another Swissport vehicle had failed brakes. Flexing its muscle under the Rules, the Port’s letter of August 4 states: “By 1600 on the 6 of August please provide me with written notification

⁷⁰ RP 474-75/7-3, 583/7-14, 652-53/20-5, 1268-69/16-20, 1272-74/21-7, 2693-94/2-19; Ex. 53.

⁷¹ RP 1244/2-11, 1245/1-9; Ex. 208 p.2.

that a complete equipment safety review has been complete.... *Any equipment found non-functional in any way will be removed from service until the equipment is properly repaired.*” Ex. 72 (emphasis added).

➤ A similar letter was sent to EAGLE’s station manager, Roger Redifer, immediately after Mr. Afoa’s injury, stating, “This will advise that if Evergreen EAGLE continues to violate the rules and regulations, the Port of Seattle may proceed with termination of this agreement.” Ex. 90; RP 2717-18/22-9. Mr. Redifer sent such letters directly to the EAGLE home office. This and similar letters from the Port spurred Mr. Delford Smith, owner of EAGLE, to bring EAGLE into compliance with the Port’s safety Rules, albeit too late for Mr. Afoa. RP 2718/10-22.

➤ EAGLE’s station manager testified that the airport is managed on a day-to-day basis by the Port’s director of aviation to ensure worker safety, and that whenever any policy or procedure came into question he directed EAGLE employees to comply with the Port’s Rules, or to check with the Port if clarification was needed. RP 2691-92/3-1.

➤ Toiva Gaoa, EAGLE ramp supervisor, gave a number of specific examples of the Port controlling how he did his work. RP 456-61/23-23. According to Mr. Gaoa, the Port controls the S-gates (near where this incident happened), which were like a circus, and the Port was “the ringmaster,” with everything run just as they wanted it. RP 448-49/12-23.

- Under leases (“SLOAs”) signed by each of the four nonparty airlines, §2.1 grants a nonexclusive right to use the airfield area “subject at all times to the *exclusive control and management by the Port.*”⁷²
- John Nance, a Seatac-based airline pilot and aviation expert who was also a former Port spokesman,⁷³ testified that “[s]omeone has to be responsible for overall operation or you have a community that is in chaos,” and that “it is to *the super authoritative source, which in this case is the Port of Seattle*, that responsibility really does lie ...,” RP 1502-03/18-8 (emphasis added), and that under the SLOAs, GSOLA and Rules, enforced by Ramp Patrol, Port Police and Port Fire Department, the Port controls the work on the Seatac ramp. RP 1543-44/19-12.
- The FAA holds the airport operator – in the case of Seatac, the Port of Seattle – ultimately responsible for safety at each of the 575 certificated airports in the United States.⁷⁴ According to Benedict Castellano, former manager of the FAA Airport Safety and Certification Branch who wrote the rules on this subject, RP 1878/1-9, if the Port were not held ultimately responsible for safety at Seatac, “chaos ensues” because “[e]verybody does their own thing.” RP 1901-02/18-4.

⁷² Ex. 675 at Port 277 (China); Ex. 676 at Port 3465 (British), Ex. 677 at Port 3648 (Eva); Ex. 678 at Port 190 (Hawaiian), RP 1510/8-19.

⁷³ RP 1484-85/24-12, 1489-90/20-11, 1491/14-22.

⁷⁴ Ex. 183 ¶6(a), p.3; RP 1885-86/20-8, 1958/2-9; 2763/20-25.

This is more than sufficient evidence to persuade fair-minded, rational persons that the Port has the authority to control the manner of EAGLE's work on the ramp at Seatac.⁷⁵ *A fair-minded jury was convinced.* We have been arguing about this since 2009 as the evidence mounts ever higher. Only those with a professional obligation to remain unconvinced could possibly do so. It is time for finality: this Court should hold that the control finding is supported by substantial evidence.

⁷⁵ There is too much other miscellaneous evidence of Port control to cite it all, nor is that necessary on a "substantial evidence" review. Other evidence includes: (1) Joshua Tuani, who'd worked at Seatac for seven different ground service providers from 1999-2007, testified that the Port intervened in the manner in which he did his work "all the time," RP 1225/4-15, 1248/19-22; (2) the admission of the Port's Director of Tenant Leases that Gate S-15, near where the injury occurred, is "a Port-controlled, common use gate", RP 873/18-21 & 885/6-7, *see also*, RP 2355-56/21-4 (Port Attorney Safora agrees); Ex. 675 at Port 284, ¶4.7 (SLOA states that "The Port shall retain exclusive control of the use of all Common Use Gates"); (3) the admission of the Senior Manager for Port Operations, Nicholas Harrison, that it was his understanding that the Port has "exclusive control and management over the airfield area," RP 1005/7-11; (4) the testimony of Roland Kaopuiki, Hawaiian Airlines Station Manager at Seatac, that his understanding of the §2.1 "exclusive control and management" language in the SLOA was that the Port was "the entity that enforced all rules and regulations ... at the airfield", and that no other entity at Seatac had power stronger than that of the Port, RP 1172-73/13-2; (5) Port Manager of Access Control Patrick O'Brien's admission that if any other entity had a rule that conflicted with a Port rule at Seatac, the Port's rule would govern, RP 1326/8-12; and (6) Port Ramp Operations Manager Daniel Cowdin's admission that he had oversight and operational control over all the nonmovement areas of the airfield, including the ramp, RP 2122/14-23.

APPENDIX B

No. 91995-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRANDON APELA AFOA,
Respondent & Cross-Appellant,

v.

PORT OF SEATTLE,
Appellant.

**BRIEF OF RESPONDENT / CROSS APPELLANT
BRANDON APELA AFOA**

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APPENDIX B

1. Procedural Gamesmanship

This lawsuit was filed in February 2009, based on a December 2007 injury. CP 3-10. The Port's April 2009 answer asserted nonparty liability, but it did not name the airlines as potentially liable parties. CP 15. As detailed below, CR 12(i) requires that the identity of known nonparties "shall" be affirmatively pleaded. The Port's answer named EAGLE "and/or presently unknown persons" for purposes of CR 12(i). CP 15. Because the identity of the airlines who contract with EAGLE were at all times known to the Port, the airlines should have been named.

On April 15, 2009, Mr. Afoa moved to strike the "empty chair" affirmative defenses as insufficient. CP 5189-93. The Port's April 27th response states that "[a] prerequisite" to EAGLE's license from the Port "was proof that EAGLE had received a Certificate of Carrier Support from an air carrier holding a current operating agreement with the Port," and that "EAGLE's only use of the [airfield] shall be for the purpose of providing aircraft ground handling services" CP 5196 (emphasis in original). Thus, the Port immediately demonstrated that the airlines with whom EAGLE contracted were *known* potentially liable parties.¹⁶⁰ The Port misled Plaintiff by claiming that the "reason for asserting the subject

¹⁶⁰ The Port repeated all this in its October 2009 Motion for Summary Judgment, again demonstrating it knew of potential airline involvement. CP 178-79, 5890.

affirmative defenses was to put Mr. Afoa and his counsel on notice that the Port will pursue a **sole proximate** cause defense.” CP 5198 (emphasis in original). The Port made no mention in its briefing of any intent to assert an empty chair defense against the airlines. *Id.* at 5194-98. The trial court ruled that EAGLE is immune from suit as the Title 51 RCW employer, but otherwise denied the motion to strike. CP 5203-04.

Afoa’s complaint was erroneously dismissed in November 2009, based in part on the Port’s argument that it did not directly hire EAGLE.¹⁶¹ With the case still pending in the Court of Appeals, and the statute of limitations approaching, Plaintiff was forced to file a precautionary action against four airlines that directly hired EAGLE.¹⁶² This state lawsuit was removed to Federal Court. CP 5362. Port counsel substituted as counsel for the airlines in Federal Court, and proceeded to aggressively defend based on declarations from both Port and airline personnel, testifying that the airlines had *no responsibility* for Mr. Afoa’s injuries.¹⁶³ The airlines, under control of Port counsel, vigorously resisted Plaintiff’s repeated efforts to add the Port in Federal Court and/or get the claims against the airlines remanded so they could be joined with the present action, and even refused a proposed stipulation for dismissal that

¹⁶¹ CP 180, 488-89; *see, Afoa I.*

¹⁶² CP 5332. China Airlines, Hawaiian Airlines, British Airways, and Eva Air. *Id.*

¹⁶³ CP 2944-49, 2951-53, 6737-51, 6753-58, 6869-83, 6911.

would have freed the airlines from all liability, conditioned on admission that the Port was solely in control at Seatac. CP 5381-85, 6181-86.¹⁶⁴

The *Afoa I* mandate issued February 27, 2013. CP 5251. In July 2013, Plaintiff attempted once again to smoke out the Port's "empty chair" defenses by filing a motion to preclude allocation of fault to nonparties, CP 5460, to which the Port responded that, although it knew of the Federal Court action against the airlines, it "has not had sufficient time to generate evidence to identify potentially liable non-parties." CP 5859-60. This was tactical manipulation – the Port knew of the airlines' potential liability, but could not name them because Port counsel was representing them in Federal Court, diligently seeking summary judgment that they were *not liable*. CP 6147, 6916. The trial court was persuaded to give the Port more time to name empty chairs. CP 5935-36.

By orders entered in February and June 2014, the Federal Court granted summary judgment to the airlines, dismissing all claims against them. CP 6858, 8423. In the teeth of the Federal Court orders, to the shock of Plaintiff, on September 19, 2014, 5½ years after commencement of this action, the Port moved to amend to name as "allegedly liable nonparties" the four airlines it had defended in Federal Court as

¹⁶⁴ Professor David Boerner testified that Port counsel had a serious conflict of interest. CP 7995-8021.

blameless. CP 7595. Of course, by then it was impossible for Plaintiff to name the airlines in state court, because of res judicata, collateral estoppel, and statute of limitations. On October 27, 2014, the trial court granted that motion, CP 3174, in violation of CR 8(c) and 12(i).¹⁶⁵

¹⁶⁵ The standard of review is abuse of discretion, but a court “would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.” *Washington State Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

APPENDIX C

No. 91995-0

IN THE SUPREME COURT
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BRANDON APELA AFOA,
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**BRANDON APELA AFOA'S
REPLY BRIEF IN SUPPORT OF CROSS-APPEAL**

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APPENDIX C

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.’”³⁹ 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

³⁹ *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”⁴⁰

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 6141⁴¹;
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.”⁴²

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

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

⁴² 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.*”⁴³ 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.⁴⁴

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*

⁴³ Restatement (Second) Judgments §139, comment a (emphasis added).

⁴⁴ 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.⁴⁵

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

⁴⁵ 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.⁴⁶ 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

⁴⁶ 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.”⁴⁷

2. Applying Collateral Estoppel is not Unjust⁴⁸

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.*⁴⁹

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

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

⁴⁸ 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).

⁴⁹ 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.

⁵⁰ *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.⁵¹ 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.

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

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