NO. 94525-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON
(Formerly Court of Appeals No. 75951-5-I)

BRANDON APELA AFOA, an individual,

Respondent,

vs.

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

Petitioner.

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

PETITION FOR REVIEW

Address:

4655 Executive Drive, Suite 700
San Diego, CA 92121
(619) 236-1414

819 Virginia Street, Suite C2
Seattle, WA 98101-4433
(206) 623-0229

1215 Fourth Avenue, Suite 1700
Seattle, WA 98161-1087
(206) 292-4900

DENTONS US LLP
By Charles A. Bird
Mark A. Dombroff
Pro Hac Vice Admission Pending
Attorneys for Petitioner

NORTHCRAFT, BIGBY & BIGGS, P.C.
By Mark S. Northcraft WSBA #7888
Attorneys for Petitioner

REED McCLURE

By Pamela A. Okano
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Page

Other Jurisdictions

Constitutions

Statutes

Rules and Regulations

I. IDENTITY OF PETITIONER

The Petitioner is the Port of Seattle ("the Port"), defendant at trial and owner of Seattle Tacoma International Airport ("Sea-Tac").

II. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks review of the published March 20, 2017, decision of Division I of the Court of Appeals, No. 75951-I. *See* Appendix.

III. ISSUES PRESENTED FOR REVIEW

A. Plaintiff was injured because of his employer's improper maintenance of a tug he drove on the airport tarmac. Does federal law preempt holding an airport owner liable, whether directly or vicariously, to an independent contractor's employee for injury caused by the contractor's negligent vehicle maintenance and the negligence of the air carriers that employed the independent contractor in allowing the negligent maintenance?

B. The first question on the special verdict form asked: "Did the defendant retain a right to control the manner in which the plaintiff's employer . . . performed its work or maintained its equipment. . .?" The use of "or" conflicted with the uncontested instructions given to the jury and allowed the jury to find the Port liable even if the Port did

not control the employer's tug maintenance. Did the verdict form create a confusing inconsistency in the jury instructions and misstate Washington law and should the interrogatory have been submitted when it was not supported by substantial evidence?

C. When an employee of an independent contractor is injured at a workplace where multiple parties dealing with the contractor owe duties of workplace safety to the employee, does allocation of fault under RCW 4.22.070 apply?

IV. STATEMENT OF THE CASE

Plaintiff Brandon Afoa was employed by Evergreen Aviation Ground Logistics Enterprises, Inc. (EAGLE), an airline contractor providing ground handling services such as aircraft towing, deicing, and baggage handling. (RP 982:11-22, 1178:9-1186:25, 2627:19-2629:17; Exs. 322, 324, 325, 650, 651, 653, 694.) As an airline contractor, EAGLE held a license from the Port permitting it to perform services for the airlines at Sea-Tac. The Port did not employ EAGLE for any reason.

Afoa was seriously injured when the brakes and steering failed on a tug he was driving, causing him to crash. The tug was at all times owned, operated and maintained by EAGLE. The brake and steering malfunction was solely attributable to EAGLE's failure to maintain a

proper level of hydraulic fluid in the vehicle. (RP 130-31, 135, 137, 198:8-10, 207:1-22, 284-87, 310:2-25-11:1-4, 376-77, 2001, Ex. 392.)

A. PROCEDURAL HISTORY.

The trial court granted summary judgment in favor of the Port. (CP 488-89) In *Afoa v. Port of Seattle*, 176 Wn.2d 460, 296 P.3d 800 (2013) ("*Afoa-I*"), this Court reversed, finding there was a triable issue of fact whether the Port had failed to maintain a safe workplace at the airport and whether the Port retained sufficient control over the "manner and instrumentalities of work being done on the jobsite" to impose liability under the Washington Industrial Safety and Health Act of 1973 (WISHA) and common law. *Id.* at 464, 472, 475, 478.

At trial, in accordance with this Court's ruling in *Afoa-I*, the jury was correctly instructed that to conclude that the Port exercised the requisite control, it must find the Port retained the "right to control the manner ***and*** instrumentalities" of the work. (CP 4807, 4810) (emphasis added). Afoa did not object to these instructions. (RP 3224-26:14, 3228-29) Special verdict form Question No. 1, however, permitted the jury to impose liability if the Port retained a right to control the manner in which EAGLE "performed its work ***or*** maintained its equipment. . . ." (CP 4839) App. B at 2 (emphasis added).

The jury returned a verdict for plaintiff. While the jury found that there was no condition at Sea-Tac that involved an unreasonable risk of harm, the jury allocated 25 percent of the fault to the Port based on Afoa's retained control claims. The remaining fault was allocated between Afoa (.2 percent) and the four non-party airlines (74.8 percent) that had contracted with EAGLE for ground handling services. Total damages were found to be $40 million. Pursuant to the jury's fault allocation, a net $10 million judgment against the Port was entered. The Port's motions for judgment as a matter of law and new trial were denied. (CP 4839-42, 5151-52, 5157-58, 5159-60)

The Port appealed, arguing that the inconsistent verdict form required a new trial, that there was no substantial evidence of a retention of the right to control, and that Afoa's arguments regarding the Port's control of operations at Sea-Tac were preempted by federal law. Afoa cross-appealed the allocation of fault to the non-party airlines. (CP 9210-11)

The Court of Appeals affirmed in part and reversed in part. *Afoa v. Port of Seattle,* ___ Wn. App. ___, ___ P.3d ___ (2017) (2017 WL 1049671) It held that, while the verdict form was "not a model," it was consistent with the law. With little analysis, the panel rejected the Port's federal preemption defense. On Afoa's cross-appeal, the court reversed the

allocation order, holding that the Port owed Afoa a nondelegable duty that made it vicariously liable for the fault of the non-party air carriers. The court remanded for entry of judgment against the Port in the amount of $39,920,000.

B. RELEVANT FACTS.

Sea-Tac Airport is a Class I Certificated Airport pervasively regulated by the Federal Aviation Administration ("FAA") under 14 CFR Part 139 and by the Transportation Security Administration ("TSA") under 49 CFR Part 1542. Constituents of a Class I airport include air carriers/airlines certified by the FAA under 14 CFR Part 121, ground support providers that contract with the airlines (like EAGLE in this matter), and providers of retail goods and services to travelers. (RP 2964:24-2965:2, 2965:24-25; Exs. 686, 693)

More than 40 airlines served travelers from Sea-Tac. (RP 3019:6-16) Under FAA authority, the Port provides these airlines and their contractors with facilities including runways, taxiways, gate areas, and a terminal. (*See* FAA Order 5280.5D; Exs. 675-678.) More than 5000 pieces of ground support equipment are needed to support the airlines. (RP 2925:12-18, 3003:19) During the year of the accident, there were 350,000 aircraft operations at Sea-Tac, resulting in the transport of approximately

31 million passengers and 320,000 metric tons of cargo into and out of the airport. (RP 2972:2-12)

The way Sea-Tac operates—the way the federal regulations require it to operate—is limited to the issuance of license agreements, leases, and lease-operating agreements, as authorized by the FAA, and to providing facilities such as runways, taxiways, gate areas, and a terminal, where airlines and contractors are authorized by the FAA to conduct their own certificated air transportation businesses. (RP 872:12-878:5, 1396:2-6, 2322:14-18, 2336: 6-14, 2886-87, 2923:1-2925:7, 2965:20-24, 2977:2-2978:3, 2988:14-2989:15, 2997:20-2998:17, 3014:13-3015:11; Exs. 529, 675-678, 686, 692) Every entity doing business at Sea-Tac, including airlines and ground handlers, controls its own operations, including equipment maintenance; and each takes responsibility for its own employees' safety. (RP 2965:12-2968:21, 3015:25-3016:12, 3019:20-3020:9, 3021:22-3022:6; Exs. 182, 311, 495, 675-678)

Moreover, each entity must exercise control over the safety of its operations, including WISHA compliance. (RP 2979:13-24; 3015:25-3016:12; 3019:20-3020:9; 3021:22-3022:6, 1105:8-21, 1151:10-22, 1339:24-25:1340:1-11, 1341:19-1342:1, 1345:3-7, 878:19-879:6, 2941:1-11) The Port lacks the expertise to control the work of the employees of the 200 independent constituents at the airport, and it has never intended

or attempted to exercise such control.[1] Those businesses deploy 16-18,000 workers at the airport. (RP 2390:20-22.) The Port, with only approximately 800 of its own employees at the airport (RP 2957:19-21), does not contract to control the operations of licensees or lessees.[2]

In *Afoa-I*, this Court distilled the relevant inquiry as an attempt to place "the safety burden on the entity in the best position to ensure a safe working environment." 176 Wn.2d at 479. However, the record is clear that, consistent with the FAA's regulatory system and the realities of modern airport operations, that entity is not, and cannot be, the Port.

V. ARGUMENT: WHY REVIEW SHOULD BE GRANTED

The serious errors committed by the panel require this Court's attention. The Panel's decision not only conflicts with the decisions of this Court and the Court of Appeals, RAP 13.4(b)(1)-(2), it massively expands the liability of a property owner such as the Port. This expansion conflicts with the FAA/TSA regulatory system, which has as its sole purpose ensuring that the airport can operate safely and efficiently. RAP 13.4(b)(3)-(4).

---

[1] RP 849:4-17, 2999:2-24, 2324:6-18, 2326:17-24, 2328:21-2329:8, 2331:7-14, 2331:20-25, 2332:2-12, 2333:6-13, 2335:18-2336:5, 2336:17-2337:14, 2338:14-22, 2338:23-2340:2, 2373:17-22, 3079:19-3080:1.

[2] RP 2322:8-2323:17, 2323:18-2325:1, 2325:12-2326:11, 2328:21-2329:8, 2329:18-2330:6, 2331:7-14, 2331:20-25, 2332:1-12, 2333:6-13, 2335:18-2336:5, 2336:15-2337-14, 2371:9-12, 2373:13-22, 2762:7-21, 3006:14-3007, 3008:1-7.

A. FEDERAL LAW PREEMPTS STATE LAW IN THIS CASE.

Under the Supremacy Clause, Article VI, clause 2 of the U.S. Constitution, Congress has authority to preempt state laws. While Congress may exercise its preemption power expressly, it may also do so through implied conflict preemption. *See Oneok, Inc. v. Learjet, Inc.*, ___ U.S. ___, 135 S. Ct. 1591, 1595, 191 L. Ed. 2d 511 (2015). This occurs when a state law conflicts with federal law such that compliance with both is impossible, *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 131 S. Ct. 2567, 2577, 180 L. Ed. 2d 580 (2011), or when a challenged state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of a federal law," *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 330, 131 S. Ct. 1131, 179 L. Ed. 2d 75 (2011) (internal quotation marks omitted).

The FAA is tasked with ensuring the safety and efficiency of the country's air transportation system. *See* 49 U.S.C. §§ 106, 40101. To further that goal,

> [t]he FAA created the National Airspace System (NAS) to protect persons and property on the ground, and to establish a safe and efficient airspace environment for civil, commercial, and military aviation. The NAS is made up of a network of air navigation facilities, [Air Traffic Control] facilities, airports, technology, and appropriate rules and regulations that are needed to operate the system.

See FAA National Airspace System Overview, Appendix A at A-1.

To balance the duties and responsibilities of all of the entities needed to support the NAS including pilots, air traffic controllers, airlines, cargo operators, and maintenance and repair operations, the FAA and TSA have promulgated detailed regulations governing each entity. See, e.g. 14 CFR Parts 43, 61, 121, 135. In the case of an airport, those regulations are found in 14 CFR Part 139 and 49 CFR Part 1541.

Federal regulations exclusively govern Class I airports' certification and operation. 14 CFR § 139.1. For Sea-Tac to exist and receive critical federal funding, it must operate pursuant to FAA and TSA regulations. 14 CFR §§ 139.1, .7, .101; 49 CFR § 1542.101. Thus, the Port was required to and did prepare an Airport Certification Manual ("Manual") (Exs. 495-509) and gain FAA approval thereof. 14 CFR Part 139, subpart C; 14 CFR §§ 139.103(a)-(b), 107, 201(a)(1)-(2).

Under 14 CFR § 139.329, the Port was also required to adopt policies and procedures for vehicle access, operations, and enforcement in order to ensure "safe and orderly access to, and operation in, movement areas and safety areas."[3] Pursuant to 14 CFR § 139.203, its Manual had to describe how the Port intended to comply with section 139.329, which had

[3] Because the regulation applies beyond "operation in safety and movement areas" and extends to "access to" those areas, it must cover vehicles that have to cross those areas, thus extending its coverage to areas such as the ramp. For example, EAGLE expected its tugs to be used on taxiways, which are part of the movement area. (14. CFR § 139.5; Ex. 549 at EAGLE-BK 000258)

to be "[i]n a manner authorized by" the FAA. 14 CFR § 139.7. FAA Advisory Circulars ("AC") set forth authorized means of compliance. 14 CFR § 139.7.

The FAA AC applicable to vehicle safety is No. 150/5210-20. (Ex. 182.) That AC provides that an airport may comply with federal regulations by establishing "procedures and policies concerning vehicle access and vehicle operation on the airside of the airport." Plaintiff's accident occurred on the airside.

Hence, the Port had to adopt rules and regulations ("Rules") (Ex. 482), accepted by the FAA, to comply with FAA regulatory requirements and to implement its Manual. 14 CFR § 139.101(a)-(b); Ex. 482 at PORT 50-58; 14 CFR §§ 139.7, .329; AC 150/5210-20 (Ex. 182 § 3.a & App. B at 8 of 22.) The Rules deal with speed limits, dedicated vehicle lanes, rights of way, areas where vehicles may park, places where vehicles may be serviced, reporting accidents, and cleanliness; they require all vehicles to be operated in reasonably safe condition.

The Port's Part 139-compliant Rules permit it to take enforcement actions, but only for alleged violations of the Rules. (Ex. 482 at PORT 74-87.) For example, under 14 CFR §§ 139.327, .329, the Port, like a city police officer enforcing a municipal motor vehicle code, can stop operation of a visibly unsafe vehicle. (*See* Exs. 182, App. B, § 1.7.2.5.b;

183, pp. 1, 11.) The Port does not, however, have the authority to control maintenance of vehicles or extend its oversight beyond visibly unsafe vehicles.[4] Moreover, while the Port may issue citations for Rules violations, and make requests to comply, the Port is not in a position to control its lessees' and licensees' means of compliance. *See, e.g.,* 14 CFR §§ 139.7, .329, AC 150/5210-20, Ex. 495 (Manual at PORT 4038-4039), 49 CFR §§ 1542.101,.201(b)(1)-(6), .211; Exs. 188, 515. As a result, by imposing a state law duty on the Port that is beyond the limits of the Port's authority over airside operations under FAA and TSA regulations, the panel's decision conflicts with federal law.

In addition, this massive expansion in the role that the Port must play in air operations destroys the primary federal goal of ensuring the safe, efficient, and uniform operation of the National Airspace System. It is important to keep in mind what the Port does *not* do. The Port does not operate aircraft. It does not transport passengers. It does not maintain or fuel aircraft. It does not provide ground handling or aircraft maintenance equipment. It does not own or maintain vehicles, like the tug, which are necessary to move aircraft. (See RP 2322:14-18, 2977:18-2978:3) If the critical federal purpose of facilitating air travel is to be met, state law cannot be read to impose these obligations on the Port or similar airport

[4] The tug at issue was not visibly unsafe. (RP 313: 2-24)

owners.

If the Port has a nondelegable duty to ensure that every one of the thousands of ground vehicles owned and operated by service providers hired by the airlines has the appropriate level of hydraulic fluid, then state law converts the Port into a ground handler and the air carrier that retained it. That duty would compel the Port to be intimately involved in maintaining every one of the 5000 pieces of ground handling equipment used at Sea-Tac. Carried to its logical conclusion, it would require the same level of involvement by the Port in every piece of equipment needed to fuel aircraft, cater aircraft, and move bags. Similarly, even though the Port is not a 14 CFR Part 121 air carrier, and has no right to direct how an airline attempts to comply with its FAA-mandated duties[5], it would have an obligation to be involved in those operations.

The panel's opinion, by imposing a state-law duty of vehicle maintenance on the Port, puts the Port at the center of an inconsistent patchwork of regulations and duties that are in conflict with the comprehensive federal regulatory system established by Congress and the FAA and the obligations imposed on federally funded airports by federal law. By imposing these obligations on airports in only one state, this

[5] The jury was not asked to decide whether the Port controlled the air carriers, let alone their work and equipment maintenance. (CP 4780-4834, 4839-42)

ruling creates the exact type of patchwork of conflicting state law requirements that is preempted by federal law. *Montalvo v. Spirit Airlines*, 508 F.3d 464, 473 (9th Cir. 2007).[6] For Sea-Tac Airport to operate as part of the NAS, the Port cannot be involved in the day-to-day business of how an airline and its subcontractors perform their own regulated services.[7]

If Washington burdens its certificated airports with unique liabilities and the resulting expenses, it destabilizes the foundations on which the National Airspace System is built, redefines an airport's role in the system, and thrusts it into areas for which it lacks the necessary expertise. Only a uniform federal regulatory system can ensure the harmony of duties and obligations necessary to keep the aviation system operating safely and efficiently.

The panel's preemption decision creates an issue of substantial public interest this Court should decide and raises a significant question of law under the Supremacy Clause of the United States Constitution. RAP 13.4(b)(3)-(4).

---

[6] In addition, the panel's decision, which premises its retained control determination on existence and enforcement of the Port's Rules, has imposed "liability upon the presence of the very . . . requirements that federal law requires", which is specifically prohibited by *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 871, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000).

[7] Every entity doing business at Sea-Tac Airport sees to its own safety compliance, including WISHA compliance; the Port relies upon these independent actors to comply. (RP 2979:13-24; 3015:25-3016:12; 3019:20-3020:9; 3021:22-3022:6; RP 1105:8-21; RP 1151:10-22; RP 1339:1340:11; RP 1341:19-1342:1; RP 1345:3-7; RP 878:19-879:6; RP 1670:4-14; RP 2941:1-11)

B. THE PANEL'S RULING UPHOLDING THE USE OF A VERDICT FORM THAT CONFLICTED WITH THE JURY INSTRUCTIONS, IGNORED THE LAW OF THE CASE, PREVENTED THE PORT FROM ARGUING ITS THEORY OF THE CASE, WAS UNSUPPORTED BY SUBSTANTIAL EVIDENCE, MISSTATED THE LAW, AND PREJUDICED THE PORT.

A special verdict form may not use language inconsistent with or contradictory to the jury instructions. *Capers v. Bon Marche*, 91 Wn. App. 138, 144, 955 P.2d 822 (1998). This is particularly true where, as here, the instructions became the law of the case because there were no pertinent objections. *Peters v. Dulien Steel Prod.*, 39 Wn.2d 889, 892, 239 P.2d 1055 (1952). When instructions are inconsistent, irreconcilable, or contradictory, prejudice is presumed. *Hall v. Corp. of Catholic Archbishop*, 80 Wn.2d 797, 804, 498 P.2d 844 (1972). The panel's decision on special verdict form Question No. 1 conflicts with these decisions.

The jury was correctly instructed—twice—that the Port was liable only if it retained the "right to control the manner ***and*** instrumentalities" of the work. (CP 4807, 4810) (emphasis added); *see Afoa-I* ,163 Wn.2d at 472. These instructions became law of the case since plaintiff did not make pertinent exceptions to them. *State v. France,* 180 Wn.2d 809, 814, 816, 329 P.3d 864 (2014). In contrast, special verdict form Question No. 1 (CP 4839) permitted the jury to find the Port had the requisite control

based solely on whether the Port retained control over the manner in which EAGLE performed its work ***or*** maintained its equipment.

Phrasing Question No. 1 in the disjunctive improperly slashed Afoa's burden of proof and ignored the law of the case. The instructions required the jury to find the Port retained the right to control ***both*** EAGLE's work ***and*** instrumentalities. But because of Question No. 1's disjunctive phrasing, the jury's affirmative answer could have been based on a finding the Port retained control only of the manner in which EAGLE performed its work, without finding the Port had retained the right to control what actually caused Afoa's injury, i.e. the negligent maintenance of EAGLE's tug. *See Viking Automatic Sprinkler Co. v. Pacific Indem. Co.*, 19 Wn.2d 294, 298-99, 142 P.2d 394 (1943).

In addition, Question No. 1's disjunctive phrasing deprived the Port of arguing its theory to the jury. The Port's theory was that there had to be requisite control over two criteria: performance of work in general ***and*** maintenance of equipment. (RP 3246:23-25, 3247:1-6.) The Port was correct under the instructions, but Question No. 1 permitted the jury to find the requisite control based on only one of these two criteria. The panel's conclusion that the Port could argue its theory, App. B at 10-11, is illogical and unfair.

Because Question No. 1 was inconsistent, irreconcilable, and contradictory with the instructions, prejudice is presumed. *Hall*, 80 Wn.2d at 804. The panel's decision ignored *Hall* in holding that the Port had to show actual prejudice.

In addition, causation is a basic element in a negligence claim. *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 127-28, 875 P.2d 621(1994). Indeed, under Washington law, before a landowner is responsible for injury to an independent contractor's employee doing work on its land, the landowner must have retained the right to control the activity giving rise to the worker's injury.[8] Here, there was no substantial evidence that the Port retained such a right.[9]

Allowing the verdict to stand based on a special verdict form question that permitted the jury to find the Port liable without finding the

---

[8] *Afoa-I*, 176 Wn.2d at 481; *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 119, 124-125, 127, 52 P.3d 472 (2002); *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 461, 788 P.2d 545 (1990); *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 330, 582 P.2d 500 (1978); *Epperly v. Seattle*, 65 Wn.2d 777, 785, 399 P.2d 591 (1965); *Millican v. N.A. Degerstrom, Inc.*, 177 Wn. App. 881, 892, 313 P.3d 1215 (2013); *Cano-Garcia v. King County*, 168 Wn. App. 223, 232-34, 246-247, 277 P.3d 34 (2012); and *Shingledecker v. Roofmaster Products Co.*, 93 Wn. App. 867, 873, 971 P.2d 523, *rev. denied*, 138 Wn.2d 1018 (1999).

[9] No retention of right to control performance of work: RP 1397:25-1398:25; RP 2762:7-21; RP 2902:20-23; RP 2975:16-20; RP 2976:5-13; RP 2999:2-14; RP 3006:14-3007:11; RP 3008:1-7; RP 3068:3-4; no retention of right to control maintenance of EAGLE equipment: RP 316:16-18; RP 776:5-8; RP 849-851:6; RP 1150:8-11; RP 1151:10-22; RP 1402:10-14; RP 1690:4-19; RP 1888:12-16; RP 1937:3-1939:3; RP 1957:23-1958:1; RP 2762:7-21; RP 2685:1-17; RP 2941:1-11; RP 2902:6-12; RP 2947:19-2948:5; RP 2948:16-17; RP 2975:24-2976:4; RP 2976:14-22:2999:15-24; RP 3006:14-3007:11; RP 3008:8-14; RP 3071:14-3072:1.

Port retained control over the manner in which EAGLE performed its equipment maintenance, particularly where there was no substantial evidence in support of that proposition, –results in an unwarranted expansion of tort liability. Thus, the panel's holding conflicts with the cases cited in this section and raises an issue of substantial public interest this Court should decide.

C. RCW 4.22.070 Requires That Fault Be Allocated to the Other Entities That Owed a Duty of Workplace Safety.

In enacting the Tort Reform Act of 1986, the Legislature aimed to prevent the outcome that occurred in this case, *i.e,* imposing unallocated liability for the fault of others on a public agency contrary to RCW 4.22.070. The Act's purpose was to protect the public from higher taxes and loss of essential services by reducing each municipality's share of damages to that entity's share of fault. Laws of 1986, ch. 305, § 100. The panel's decision turns that purpose on its head. The error of the court below satisfies RAP 13.4(b)(1) and (4), because the opinion conflicts with this Court's holding in *Clark v. Pacificorp*, 118 Wn.2d 167, 822 P.2d 162 (1991), and presents an issue of substantial public interest that this Court should decide.

Clark involved consolidated cases; in one of the cases, a subcontractor's employee's widow sued the general contractor for

wrongful death. 118 Wn.2d at 172-73. Although the Legislature later *superseded* Clark's holding that fault must be allocated to the victim's employer, *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.,* 128 Wn.2d 745, 761, 912 P.2d 472 (1996), *Clark*'s remaining reading of RCW 4.22.070 remains valid:

> The language of RCW 4.22.070(1) is clear and unambiguous: "the trier of fact *shall* determine the percentage of the total fault which is attributable to *every* entity which caused the claimant's damages". "Shall" is presumed to be mandatory. ...We hold that RCW 51.24.060(1)(f) and RCW 4.22.070 require a trier of fact to determine the percentage of total fault attributable to every entity which caused plaintiff's damages.

Clark, 118 Wn.2d at 181 (emphasis in original).

In short, unless specifically exempted by RCW 4.22.070, fault must be allocated to every entity that causes a plaintiff's damages, including general contractors such as the one in *Clark.* In Washington, general contractors have long had a nondelegable duty under WISHA. *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn .2d 323, 582 P.2d 500 (1978). Hence, the trier of fact must be able to allocate fault to an entity that owes a nondelegable duty, such as the Port, as found by the panel.

The Legislature could have eliminated allocation for parties held vicariously liable. For example, New Mexico abolished joint and several liability when comparative fault applies, but retained joint and several

liability of vicariously liable defendants to the extent of the fault of the person for whose acts the defendant is vicariously liable. N.M. STAT. § 41-3A-1 A & C(2).

The Legislature did not do that. Instead, it chose to exempt from fault allocation only two types of vicarious liability: "the proportionate share of another party 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). If liability under the nondelegable duty theory is vicarious, parties liable under that theory are entitled to allocation with nonparties. *See State v. LG Electronics, Inc.*, 186 Wn.2d 1, 9, 375 P.3d 636 (2016) (where a statute specifies things it operates on, there is an inference that the Legislature intended all omissions). "[I]t is the Legislature's prerogative to change or define tort law" and thus it could determine whether fault should be allocated. *Geschwind v. Flanagan*, 121 Wn.2d 833, 841, 854 P.2d 1061 (1993). The Legislature has done so.

In addition, the Court of Appeals' creation of vicarious liability contrary to the express language of RCW 4.22.070 is based upon a case interpreting the Washington Products Liability Act, Chapter 7.72 RCW, in which the Legislature expressly provided that one entity would have 100 percent of the fault of another. Such analysis does not apply here, where there is no such statute that expressly calls for vicarious liability.

VI. CONCLUSION

The opinion of the Court of Appeals contradicts both established opinions of the Supreme Court and Court of Appeals, and the defined role of the Port within the framework of the FAA's National Airspace System. The opinion unreasonably expands Washington retained control law without justification, and nullifies the fair application of the principle of allocation as declared by the Legislature. This new role, defined without consideration of the FAA's designed safety systems, makes the Port directly responsible for others' operations in which it has no expertise, and puts it in direct conflict with how the FAA designed and defines the role..

This Court should grant review and reverse the panel's decision and remand for entry of judgment for the Port dismissing plaintiff's claims.

DATED this 18th day of April, 2017.

REED McCLURE

By _____
Pamela A. Okano WSBA #7718
Attorneys for Petitioner

NORTHCRAFT, BIGBY & BRIGGS, P.C.

By _____ per 4/18/17 authority
Mark S. Northcraft WSBA #7888
Attorneys for Petitioner

DENTONS US LLP

By Mark. A. Dombroff
Charles A. Bird
Attorneys for Petitioner,
Pro Hac Vice Admission Pending

APPENDIX A

NATIONAL AIRSPACE SYSTEM OVERVIEW

This appendix contains additional information to supplement the discussion of the National Airspace System, including aircraft separation, air traffic control facilities, and navigation, contained in Section 1.2.1.

NATIONAL AIRSPACE SYSTEM OVERVIEW

The airspace structure is a complex environment that requires the use of highly technical air traffic control (ATC) procedures. Many of the terms and descriptions used in the Environmental Impact Statement (EIS) require the reader to have a fundamental knowledge of aviation procedures. This appendix provides a brief overview of the ATC system used by the Federal Aviation Administration (FAA) to manage the nation's airspace.

The Federal Aviation Act of 1958 established the FAA and made it responsible for the control and use of navigable airspace within the United States. The FAA created the National Airspace System (NAS) to protect persons and property on the ground, and to establish a safe and efficient airspace environment for civil, commercial, and military aviation. The NAS is made up of a network of air navigation facilities, ATC facilities, airports, technology, and appropriate rules and regulations that are needed to operate the system. In addition, this appendix details the various components of the NAS, and then describes how these components interact to facilitate safe and efficient air travel.

A.1 FLIGHT RULES AND WEATHER CONDITIONS

Weather is a significant factor in aircraft operations. Weather conditions determine the flight rules under which aircraft can operate, and can also affect aircraft separation (physical distance between aircraft). Aircraft are separated from each other to ensure safety of flight. The required separation varies depending on aircraft type, weather, and flight rules. Aircraft separation requirements can increase during poor weather conditions, as it is more difficult for a pilot to see other aircraft. Increased aircraft separation can reduce airport capacity, as less aircraft can use an airport during a given time interval. Reduced aircraft separation can increase airport capacity, as more aircraft can use an airport during a given time interval.

Aircraft operate under two distinct categories of operational flight rules: visual flight rules (VFR) and instrument flight rules (IFR). These flight rules are linked to the two categories of weather conditions: visual meteorological conditions (VMC) and instrument meteorological conditions (IMC). VMC exist during generally fair to good weather, and IMC exist during times of rain, low clouds, or reduced visibility. IMC generally exist whenever visibility falls below 3 statute miles (SM) or the ceiling drops below 1,000 feet above ground level (AGL). The ceiling is the distance from the ground to the bottom of a cloud layer that covers more than 50% of the sky.

During VMC, aircraft may operate under VFR, and the pilot is primarily responsible for seeing other aircraft and maintaining safe separation. Aircraft operating under VFR typically navigate by orientation to geographic and other visual references.

During IMC, aircraft operate under IFR. ATC exercises positive control (i.e., separation of all air traffic within designated airspace) over all aircraft in controlled airspace, and is primarily responsible for aircraft separation. Aircraft operating under IFR must meet minimum equipment requirements. Pilots must also be specially certified and meet proficiency requirements. IFR aircraft fly assigned routes and altitudes, and use a combination of radio navigation aids (NAVAIDs) and vectors from ATC to navigate.

Aircraft may elect to operate IFR in VMC; however, the pilot, and not ATC, is primarily responsible for seeing and avoiding other aircraft.

The majority of commercial air traffic (including all air carrier traffic), regardless of weather, operate under IFR as required by Federal Aviation Regulations. In an effort to increase airport capacity, ATC can allow IFR aircraft to maintain visual separation when weather permits.

A.2 TYPES OF AIRSPACE

In the early days of aviation, aircraft only flew during VMC, which allows a pilot to maintain orientation (up/down, turning, etc.) by reference to the horizon and visual ground references. Flight through clouds (i.e., IMC) was not possible, as the aircraft instruments of the time did not provide orientation information, and thus a pilot could easily loose orientation and control of the aircraft. In a visual-only airspace environment, it was possible to see other aircraft and avoid a collision – and thus maintain aircraft separation.

Flight through clouds became possible with the use of gyroscopic flight instruments. Because it is not possible to see other aircraft in the clouds, ATC was established to coordinate aircraft positions and maintain separation between aircraft. Today, maintaining separation between IFR and VFR air traffic is still a fundamental mission of ATC. The evolution of the NAS, and existing ATC procedures, can be directly tied to this requirement.

A.2.1 AIRSPACE CLASSIFICATIONS

The FAA has designated six classes of airspace, in accordance with International Civil Aviation Organization (ICAO) airspace classifications. **Figure A-1** and **Table A.1** identifies the airspace classifications and terminology. Airspace is broadly classified as either controlled or uncontrolled. Airspace designated as Class A, B, C, D, or E is controlled airspace. Class F airspace is not used in the United States. Class G airspace is uncontrolled airspace.

Controlled airspace means that IFR services are available to aircraft that elect to file IFR flight plans; it does not mean that all flights within the airspace are controlled by ATC. IFR services include ground-to-air radio communications, navigation aids, and air traffic (i.e., separation) services. Aircraft can operate under IFR in uncontrolled airspace; however, the aircraft cannot file an IFR flight plan and IFR services are not necessarily available. Controlled airspace is intended to ensure separation of IFR traffic from other aircraft, both IFR and VFR.

The airspace classifications discussed in this section are designed primarily to manage VFR traffic in controlled airspace. The controlled airspace classifications do not affect IFR operations, as IFR traffic is cleared through controlled airspace automatically by ATC. VFR aircraft may operate in Class E controlled airspace without control by ATC, so long as weather conditions permit visual separation of aircraft (during IMC, VFR traffic is prohibited and thereby ensures separation between VFR and IFR traffic). Also, air traffic service is provided to VFR aircraft in Class E airspace only when ATC workload permits. VFR aircraft operating in class B, C, and D airspace must be in contact with ATC; this gives ATC the authority to manage VFR

aircraft in the proximity of busy airports. Essentially, the controlled airspace system protects IFR aircraft from VFR aircraft during IMC and in close proximity to busy airports.

Note that the boundaries of airspace class areas do not necessarily correlate with the boundaries and sectors of ATC facilities.

Table A.1

Airspace Classifications

Airspace Class	Description
A	Class A encompasses the en route, high-altitude environment used by aircraft to transit from one area of the country to another. All aircraft in Class A must operate under IFR. Class A airspace exists within the United States from 18,000 feet MSL to and including 60,000 feet MSL.
B	All aircraft, both IFR and VFR, in Class B airspace are subject to positive control from ATC. Class B airspace exists at 29 high-density airports in the United States as a means of managing air traffic activity around the airport. It is designed to regulate the flow of air traffic above, around, and below the arrival and departure routes used by air carrier aircraft at major airports. Class B airspace generally includes all airspace from an airport's established elevation up to 12,000 feet MSL, and, at varying altitudes, out to a distance of about 30 nautical miles from the center of the airport. Aircraft operating in Class B airspace must have specific radio and navigation equipment, including an altitude encoding transponder, and must obtain ATC clearance.
C	Class C airspace is defined around airports with airport traffic control towers and radar approach control. It normally has two concentric circular areas with a diameter of 10 and 20 nautical miles. Variations in the shape are often made to accommodate other airports or terrain. The top of Class C airspace is normally set at 4,000 feet AGL. The FAA had established Class C airspace at 120 airports around the country. Aircraft operating in Class C airspace must have specific radio and navigation equipment, including an altitude encoding transponder, and must obtain ATC clearance. VFR aircraft are only separated from IFR aircraft in Class C airspace (i.e., ATC does not separate VFR aircraft from other VFR aircraft, as this is the respective pilot's responsibility).
D	Class D airspace is under the jurisdiction of a local Air Traffic Control Tower (ATCT). The purpose of an ATCT is to sequence arriving and departing aircraft and direct aircraft on the ground; the purpose of Class D airspace is to provide airspace within which the ATCT can manage aircraft in and around the immediate vicinity of an airport. Aircraft operating within this area are required to maintain radio communication with the ATCT. No separation services are provided to VFR aircraft. The configuration of each Class D airspace area is unique. Class D airspace is normally a circular area with a radius of five miles around the primary airport. This controlled airspace extends upward from the surface to about 2,500 feet AGL. When instrument approaches are used at an airport, the airspace is normally designed to encompass these procedures.
E	Class E airspace is a general category of controlled that is intended to provide air traffic service and adequate separation for IFR aircraft from other aircraft. Although Class E is controlled airspace, VFR aircraft are not required to maintain contact with ATC, but are only permitted to operate in VMC. In the eastern United States, Class E airspace generally exists from 700/1200 feet AGL to the bottom of Class A airspace at 18,000 feet MSL. It generally fills in the gaps between Class B, C, and D airspace at altitudes below 18,000 feet MSL. Federal Airways, including Victor Airways, below 18,000 feet MSL are classified as Class E airspace.
F	Not Applicable within United States
G	Airspace not designated as Class A, B, C, D, or E is considered uncontrolled, Class G, airspace. ATC does not have the authority or responsibility to manage of air traffic within this airspace. In the Eastern U.S., Class G airspace lies between the surface and 700/1200 feet AGL.

Source: Airman's Information Manual

A.2.2 SPECIAL USE AIRSPACE

Large segments of controlled and uncontrolled airspace have been designated as special use airspace. Operations within special use airspace are considered hazardous to civil aircraft operating in the area. Consequently, civil aircraft operations may be limited or even prohibited, depending on the area. Special use airspace is divided into prohibited, restricted, warning, military operations, and alert areas as described in **Table A.2.**

Table A.2

Special Use Airspace

Type	Description
Prohibited	Areas where, for reasons of national security, the flight of an aircraft is not permitted are designated as prohibited areas. Prohibited areas are depicted on aeronautical charts. For example, a prohibited area (P-56) exists over the White House and U.S. Capitol.
Restricted	In certain areas, the flight of aircraft, while not wholly prohibited is subject to restrictions. These designated often have invisible hazards to aircraft, such as artillery firing, aerial gunnery, or guided missiles. Aircraft operations in these areas are prohibited during times when it is "active."
Warning	A warning area contains many of the same hazards as a restricted area, but because it occurs outside of U.S. airspace, aircraft operations cannot be legally restricted within the area. Warning areas are typically established over international waters along the coastline of the United States.
Alert	Alert areas are shown on aeronautical charts to provide information of unusual types of aerial activities such as parachute jumping areas or high concentrations of student pilot training.
Military Operations Area	Military operations areas (MOA) are blocks of airspace in which military training and other military maneuvers are conducted. MOA's have specified floors and ceilings for containing military activities. VFR aircraft are not restricted from flying through MOAs while they are in operation, but are encouraged to remain outside of the area.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

BRANDON APELA AFOA, Respondent/Cross Appellant, v. PORT OF SEATTLE, a local governmental entity in the state of Washington, Appellant/Cross Respondent.	No. 75951-5-I PUBLISHED OPINION FILED: March 20, 2017

VERELLEN, C.J. — Brandon Afoa was severely injured working for Evergreen Aviation Ground Logistics Enterprises, Inc. (EAGLE), providing ground services at Seattle-Tacoma International Airport (Sea-Tac Airport), which is owned and operated by the Port of Seattle (Port). Afoa sued the Port, alleging it failed to maintain safe premises and violated common law and statutory duties to maintain a safe workplace. The trial court dismissed Afoa's claims on summary judgment, but this court reversed, and our Supreme Court affirmed the reversal of summary judgment.[1] On remand, a jury rendered a verdict in favor of Afoa and determined his damages totaled $40 million. The jury allocated 25 percent fault to the Port and 18.7 percent fault to each of the four nonparty airlines that used EAGLE's ground services. The trial court entered a

[1] Afoa v. Port of Seattle, 176 Wn.2d 460, 482, 296 P.3d 800 (2013) (Afoa I).

judgment against the Port for $10 million.

The Port appeals, focusing on the disjunctive phrasing of special verdict form question 1, which asked the jury whether the Port retained a right to control the manner in which EAGLE "performed its work or maintained its equipment used to provide ground work support . . .?"[2] Because both the common law theory of retained control and the Washington Industrial Safety and Health Act of 1973 (WISHA)[3] "specific duty" standard depend on control over the "manner of work" done on a work site, which necessarily encompasses control over the maintenance of instrumentalities used in performing that work, the special verdict did not misstate the law. While the special verdict should have used terms consistent with the other instructions, no relief is warranted because the Port was able to adequately argue its theory. The Port's other claims also fail.

Afoa cross appeals, arguing that the jury should have been precluded from allocating fault to the four airlines because the Port had a nondelegable duty to maintain a safe workplace. 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.

Therefore, we affirm the jury verdict as to the liability of the Port and remand for entry of an amended judgment.

---

[2] Clerk's Papers (CP) at 4839.

[3] Ch. 49.17 RCW.

FACTS

A. Afoa I

Brandon Afoa was severely injured in 2007 as a result of a collision while he was driving a "pushback" vehicle on the airplane ramp at Sea-Tac Airport. Afoa worked for EAGLE, which contracts with airlines to provide ground services such as moving aircraft in the ramp area. The Port owns and operates the airport. It does not employ EAGLE or contract for its services, but EAGLE must obtain a license from the Port before it can work on the premises. As Afoa drove the pushback toward gate S-16, he lost control of the vehicle and crashed into a large piece of loading equipment that fell on him, leaving him paralyzed.

Afoa sued the Port in February 2009, alleging it "failed to maintain safe premises and violated common law and statutory duties to maintain a safe workplace."[4] The Port moved for summary judgment, arguing none of Afoa's claims were viable because neither Afoa nor EAGLE was the Port's employee. The trial court granted the Port's motion, dismissing Afoa's claims. This court reversed, holding that Afoa's claims hinged on genuine issues of material fact and that summary judgment was inappropriate.[5] The Supreme Court granted review and affirmed this court's reversal of summary judgment, remanding the case to the trial court.[6]

---

[4] Afoa I, 176 Wn.2d at 465.

[5] Afoa v. Port of Seattle, 160 Wn. App. 234, 237, 244, 247 P.3d 482 (2011).

[6] Afoa I, 176 Wn.2d at 482.

B. Afoa v. China Airlines, Hawaiian Airlines, British Airways, and Eva Air

Afoa's prior appeal against the Port lasted over three years. In December 2010, during the pendency of the appeal, Afoa filed a "precautionary"[7] lawsuit against four airlines that used EAGLE's ground services. Ultimately, that lawsuit was removed to federal court, stayed pending Afoa I, and then dismissed after the federal court denied Afoa's motion to add the Port. The federal court concluded that Afoa failed to show the airlines were at fault and granted the airlines summary judgment in February and June 2014.

C. Afoa v. Port of Seattle

The Afoa I mandate issued February 27, 2013. On September 19, 2014, the Port moved to amend its affirmative defenses to identify the four airlines as potential nonparties at fault for purposes of RCW 4.22.070(1). Afoa opposed allocating fault to the airlines, arguing the Port's failure to amend earlier "made it impossible for Mr. Afoa to bring claims against the Airlines in the same action."[8] But the trial court found this was "the consequence of Afoa's litigation choices (including the decision to sue the Port and the Airlines separately)."[9] The court permitted the Port to amend its answer.

At trial, Afoa presented evidence of the Port's control over Sea-Tac's airfield, where any activity is "subject at all times to the exclusive control and management by

---

[7] Resp't's Br. at 59.

[8] CP at 8062.

[9] CP at 3176.

the Port."[10] Sea-Tac's airfield is divided into two parts, the "movement" and "nonmovement" areas.[11] While the Port and Federal Aviation Administration (FAA) share control over the movement area where planes take off, land, and taxi, the Port retains nearly total control over the nonmovement area, which includes the "ramp" where Afoa's injury occurred.[12] These two areas are divided by the "vehicle control line."[13] Different rules and different badges for access apply in the two different areas. The FAA airport tower controls movement in the movement area. The ramp tower, on the other hand, controls all movement on the ramp and is staffed by contractors hired by the Port. Afoa was licensed by the Port to drive exclusively in the ramp area.

Afoa also presented evidence of the Port's control over the manner in which EAGLE performed ground service work through its "Ground Service Operator Licensing Agreement" (Licensing Agreement) with EAGLE, as well as its control over EAGLE's conduct:

- The Licensing Agreement required EAGLE to comply with all Port rules.[14]
- Under EAGLE's Licensing Agreement with the Port, "*[a]s solely determined by the Port, equipment* appearing to be unsafe or unoperational is subject to towing, impoundment and storage charges."[15]

---

[10] Port Exhibit 675 at 277 (China Airlines); Port Exhibit 676 at 3465 (British Airways, PLC); Port Exhibit 677 at 3648 (Eva Airways Corporation); Port Exhibit 678 at 190 (Hawaiian Airlines, Inc.); Report of Proceedings (RP) (Mar. 3, 2015) at 1510.

[11] RP (Feb. 24, 2015) at 695-97; CP at 6500-01.

[12] RP (Feb. 24, 2015) at 695-97; CP at 6500-01.

[13] RP (Feb. 24, 2015) at 706.

[14] Port Ex. 311 ¶9.

[15] Port Ex. 311 ¶11(A) (emphasis added).

- 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 [a]irport users or otherwise in the best interests of the Port."[16]

- A Port rule states that *"[n]o person shall operate any . . . motorized equipment in the Air Operations Area*[17] *unless such . . . motorized equipment is in a reasonably safe condition for such operation."*[18] The Port had the authority to "red-tag" or impound any motorized equipment not in compliance so that it would have to be removed and/or repaired before it could be used again.

- EAGLE ramp supervisor Toiva Gaoa gave several examples of how the Port controlled the manner in which he conducted his work. *According* to Gaoa, the Port controls the S gates, near where Afoa's accident happened: "[T]hat's where they enplane all . . . the international flights, so they make a lot of money off of these flights. So . . . it's always a . . . juggling act of moving one aircraft to . . . a gate to accommodate . . . another aircraft. . . . [I]t was like a circus. And the ringmaster was the -- the Port of Seattle, and they make sure that everything was -- was run the way they wanted it. Put this plane here. Take that plane over there. And that's my experience with the . . . S gates is that they control it.[19]

A jury found that the Port controlled the manner of EAGLE's work at Sea-Tac and determined damages totaled $40 million. The jury allocated 25 percent fault to the Port and 18.7 percent fault to each of the nonparty airlines that used EAGLE's ground services.[20] Pursuant to the jury's fault allocation, the trial court entered judgment against the Port for $10 million.

The Port appeals, and Afoa cross appeals.

---

[16] Port Ex. 482 at 51 ¶8.

[17] The "Air Operations Area" (AOA) "is essentially all areas inside the airport perimeter fence where aircraft would operate. Simply, these are all areas with restricted access and located outside the airport terminal buildings." RP (Feb. 24, 2015) at 695.

[18] Port Ex. 482 at 54 ¶15 (emphasis added).

[19] RP (Feb. 23, 2015) at 449.

[20] The jury also assigned 0.20 percent fault to Afoa.

ANALYSIS

I. Special Verdict Form Question 1

The Port challenges the trial court's disjunctive phrasing of special verdict form question 1, which asked whether the Port retained "a right to control the manner in which the plaintiff's employer, [EAGLE], performed its work or maintained its equipment used to provide ground support work for the non-party air carriers . . .?"[21] The Port argues this verdict form is based on an incorrect statement of the law[22] and allowed the jury to find the Port liable without finding it had retained the requisite right to control the manner in which EAGLE maintained the pushback.

We review a trial court's decision regarding a special verdict form under the same standard we apply to decisions regarding jury instructions.[23] Whether a jury instruction reflects an accurate statement of law is reviewed de novo.[24] Jury instructions are reviewed in their entirety and are sufficient if they permit each party to argue their theory of the case, are not misleading, and when read as a whole properly inform the jury of the applicable law.[25]

---

[21] CP at 4839 (emphasis added).

[22] Contrary to Afoa's argument that the Port invited error in Question 1's use of the disjunctive "or," the Port proposed an entirely different instruction: "Did the [Port] retain a right to direct the manner in which the plaintiff's employer, [EAGLE], *performed or completed the maintenance of the equipment* used by EAGLE to provide ground support work . . . ?" CP at 4673 (emphasis added).

[23] Canfield v. Clark, 196 Wn. App. 191, 199, 385 P.3d 156 (2016); Capers v. Bon Marche, 91 Wn. App. 138, 142, 955 P.2d 822 (1998)).

[24] Joyce v. Dep't of Corr., 155 Wn.2d 306, 323, 119 P.3d 825 (2005).

[25] Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996); Caldwell v. Washington State Dep't of Transp., 123 Wn. App. 693, 697, 96 P.3d 407 (2004) (quoting Capers, 91 Wn. App. at 142).

a. No Misstatement of the Law

The Port argues that special verdict form question one had to be phrased in the conjunctive. The Port's premise is that control over "manner of work" is a separate and discrete category from control over "maintaining instrumentalities."[26] But the Port misperceives both the common law theory of retained control and the WISHA specific duty standard.

In Kelley v. Howard S. Wright Construction Co., our Supreme Court held that where a principal "retains control *over some part of the work*" completed by a worker at its site, the principal has a duty to maintain safe common workplaces for all workers on the site.[27] The Supreme Court based its holding on the *Restatement (Second) of Torts* § 414 (1965) :

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.[28]

A decade later, in Stute v. P.B.M.C. Inc., our Supreme Court held that WISHA, in particular RCW 49.17.060(2), "imposes a specific duty" for employers "to comply with WISHA regulations."[29] This "specific duty does not create per se liability for anyone deemed an 'employer.'"[30] Rather, jobsite owners have a specific duty to comply with WISHA regulations "only if they retain control *over the manner in which contractors*

---

[26] Resp't's Br. at 10-11.

[27] 90 Wn.2d 323, 330-31, 582 P.2d 500 (1978).

[28] (Emphasis added.)

[29] 114 Wn.2d 454, 457, 788 P.2d 545 (1990).

[30] Afoa I, 176 Wn.2d at 472.

complete their work."[31] In Afoa I, our Supreme Court held, based on Kelley and Stute, that a jobsite owner is only liable for a worker's injuries if it retains but fails to exercise control over the "work done" on a work site.[32]

Both the common law theory of retained control based on the *Restatement* and the WISHA specific duty standard depend on control over the manner of work.[33] Control over the manner of work necessarily encompasses control over the maintenance of instrumentalities used in performing that work. "Manner of work" and "maintaining instrumentalities" are not mutually exclusive categories. Stated another way, a jobsite owner's control over maintaining instrumentalities is merely part of its control over the manner of work being performed on the jobsite.

Although special verdict form question 1 is not a model, it is consistent with the underlying retained control theory of the *Restatement* and the WISHA specific duty standard. The special verdict does not misstate the law.

---

[31] Id. (emphasis added).

[32] Id. at 470 ("Jobsite owners such as the Port have a statutory duty to prevent WISHA violations if they retain control over work done on a jobsite").

[33] See Afoa I, 176 Wn.2d at 477 ("the existence of a safe workplace duty depends on retained control over work"); Kamla v. Space Needle Corp., 147 Wn.2d 114, 121, 52 P.3d 472 (2002) ("When we distill the principles evident in our case law, the proper inquiry [is] whether there is a retention of the right to direct the manner in which the work is performed, not simply whether there is an actual exercise of control over the manner in which the work is performed."); RESTATEMENT (SECOND) OF TORTS § 414 cmt. c ("There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.'"); Stute v. P.B.M.C., Inc., 114 Wn.2d 454, 464, 788 P.2d 545 (1990) (imposing primary responsibility for compliance with WISHA regulations on the general contractor because its "innate supervisory authority constitutes sufficient control over the workplace").

b. Permitted the Port to Argue Its Theory of the Case

The Port's theory was that control over the manner of work did not trigger common law or WISHA liability, rather, only operational-level control over the actual maintenance of the pushback could trigger such liability.[34] The record from closing argument makes clear that the Port extensively argued this theory.

The Port began closing argument by stating the case was "very simple" because the "only evidence you need . . . for deciding the liability issue is this: If EAGLE had properly maintained its equipment, Mr. Afoa's accident would not have happened."[35] Although the Supreme Court in Afoa I made clear that contractual formalities do not trump Washington courts' "well-established principles of workplace safety,"[36] the Port stressed that EAGLE promised in its licensing agreement with the Port that it would maintain its own equipment: "Had that happened, had EAGLE done its job, had it complied with its contract and its promises, this accident would never have happened."[37]

The Port argued there was not "one single document in this case" that showed the Port retained the right to control how the airlines or ground support providers "do

---

[34] The Port refers to this as its "turning the wrench" theory. See RP (Mar. 12, 2015) at 2286-87 ("The plaintiffs must prove that . . . the Port of Seattle, retained the right to control, direct the means and methods that affected the condition or activity that actually caused the injury. . . . There's no evidence whatsoever that we told them how to turn wrenches, what oil to use, when to . . . view the maintenance inspections."); CP at 1898-99, 4577, 4971.

[35] RP (Mar. 25, 2015) at 3504.

[36] Afoa I, 176 Wn.2d at 478.

[37] RP (Mar. 25, 2015) at 3507, 3514.

their work or maintain their equipment," including under the Port rules.[38] It continued, "The Port does not get involved in ground support performance and how they complete their work or how they maintain their equipment."[39] The Port claimed it was concerned "that the equipment be maintained, . . . but [not] how they maintain it," and that the "exclusive control" provision in each airline's lease agreement "doesn't mean we intend to tell the air carriers how to do their work or maintain their equipment or, likewise, with the ground service equipment."[40]

The Port further argued the airlines had control:

> We've heard evidence that the air carriers did, in fact, tell EAGLE how to do its job. . . . They told them how to load [equipment] . . . [and] how to move it. They even told them how to clean their ashtrays. That's control. That's the retention of the right to control, and that's what the air carriers did.[41]

It continued: "[I]f somebody was going to see a problem, it would have been the air carriers. And if they saw, they had a duty to fix it. They had a duty to tell EAGLE to fix that equipment. That's the . . . control they retained."[42] The Port argued to the jury that they must answer "no" to special verdict form question 1 because "the Port did not retain the right to control how the ground support people . . . maintained their equipment, how the air carriers maintained their equipment, how they did their job."[43]

---

[38] Id. at 3512, 3509-10, 3513, 3517, 3520.

[39] Id. at 3513.

[40] Id. at 3514-16.

[41] Id. at 3518.

[42] Id. at 3530-31.

[43] Id. at 3520-21, 3509.

The Port clearly presented its theory of the case to the jury in closing, emphasizing its lack of control over the precise method of maintaining the pushback. Because special verdict form question 1 was not inconsistent with the Port's theory and did not preclude or contradict that theory, we conclude the special verdict adequately allowed the Port to argue its theory.

Further, the Port offers no alternative argument that the instruction, if misleading, caused actual prejudice.[44] It instead relies on the presumptive prejudice for an instruction that incorrectly states the law. Although special verdict form question 1 did not dovetail with other instructions given to the jury,[45] question 1 did not in and of itself misstate the law. While a special verdict form question should use terms consistent with the other instructions, the Port does not establish, or even argue, the special

---

[44] See Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 860, 281 P.3d 289 (2012) ("Prejudice is presumed if the instruction contains a clear misstatement of law; prejudice must be demonstrated if the instruction is merely misleading.").

[45] Instruction 23 stated, "A land owner . . . has a duty to maintain a safe work place at a job site . . . if the landowner retains the right to control the manner *and* instrumentalities by which the work is performed." CP at 4807 (emphasis added).

Instruction 26 stated, "A land owner . . . has a duty to ensure compliance with applicable safety regulations . . . only if the land owner retains the right to control the manner *and* instrumentalities by which the work is performed." CP at 4810 (emphasis added).

Instruction 28 stated, "Authority to inspect work, order it stopped and started, or require contract compliance do not alone constitute retention of the right to control the manner *and* instrumentalities by which a worker . . . ." CP at 4812 (emphasis added).

Instruction 13 included "retained the right to control the manner in which [EAGLE] performed its work and maintained the equipment" and "retained control of the manner in which EAGLE employees performed their work *and* maintained their equipment." CP at 4795 (emphasis added).

Neither party excepted to Instructions 23, 26, or 28. Afoa excepted to instruction 13, but he did not complain about its conjunctive phrasing. RP (Mar. 24, 2015) at 3213-16.

verdict form caused actual prejudice. Accordingly, we conclude the instructions including special verdict question 1 were sufficient.

II. Substantial Evidence of Required Control

The Port asserts that because a failure to maintain EAGLE's ground service equipment was the only theory advanced at trial, Afoa was required to produce evidence of the Port's authority to control how maintenance was conducted, not merely whether maintenance was performed. It contends that evidence of its specific control over the manner of making repairs to defective equipment is required for liability. The Port relies on case law that the authority to inspect work, order it stopped, or enforce compliance with a contract is an inadequate retention of the right to control.[46] But the retained control standard requires consideration of the entire context of control.[47]

Our Supreme Court's analysis in Afoa I is instructive. There, the court rejected the Port's argument that the retained control doctrine did not apply to it because it was merely a licensor.[48] Noting that the Port made "this argument notwithstanding the fact that, if everything Afoa alleges is true, . . . the Port appears to exercise nearly plenary control over Sea-Tac and the manner in which work is performed on the premises[,]" the court determined, "when an entity . . . *retains control over the manner in which work is*

---

[46] See Kamla, 147 Wn.2d at 120-21; Hennig v. Crosby Group, 116 Wn.2d 131, 134, 802 P.2d 790 (1991).

[47] See Phillips v. Kaiser Aluminum & Chem. Corp., 74 Wn. App. 741, 750, 875 P.2d 1228 (1994) ("Whether a right to control has been retained depends on the parties' contract, the parties' conduct, and other relevant factors. One such factor is a principal/employer's interference in the work of the independent contractor; however, a *right* to control can exist even in the absence of that factor.").

[48] Afoa I, 176 Wn.2d at 478-82.

done on a work site, that entity has a duty to keep common work areas safe."[49] "Calling the relationship a license does not change reality. 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."[50]

In arriving at this holding, the Supreme Court recognized that not every licensor or jobsite owner takes on a common law duty to maintain a safe workplace anytime it requires on-site workers to comply with safety rules and regulations: "*But where a licensor undertakes to control worker safety in a large, complex work site like Sea-Tac Airport and is in the best position to control safety, there is a duty to maintain safe common work areas within the scope of retained control.*[51] The court noted,

> [T]his holding also recognizes what is fair: that a jobsite owner *who exercises pervasive control over a work site should keep that work site safe for all workers*, just as a general contractor is required to keep a construction site safe under Kelley, and just as a master is required to provide a safe workplace for its servants at common law.[52]

The court's analysis in Afoa I is consistent with comment c to the *Restatement (Second) of Torts* § 414:

> [T]he employer must *have retained at least some degree of control over the manner in which the work is done.* It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. *There must be such a retention of a right of*

---

[49] Id. at 478 (emphasis added).

[50] Id. at 478-79.

[51] Id. at 481 (emphasis added).

[52] Id.

> *supervision that the contractor is not entirely free to do the work in his own way.*[53]

The holding in Afoa I is also consistent with the federal "multi-employer workplace doctrine." Under that doctrine, "an employer who controls or creates a workplace safety hazard may be liable under [federal law] even if the injured employees work only for a different employer."[54] And as this court has recognized, "the deciding factor in those [multi-employer] cases was not how much the employer participated in the planning or the execution of that plan, *but how much supervisory control it had.*"[55]

In Afoa I, the court described the evidence alleged by Afoa giving rise to questions of fact requiring trial:

> Afoa alleges that the Port retains control over the Airfield Area and that any activity there is "subject at all times to the exclusive control and management by the Port." At oral argument, the Port's attorney conceded that the purpose of the Port's rules and regulations is to control the tarmac. Afoa also alleges the Port retains control through its license agreement with EAGLE, requiring EAGLE to abide by all Port rules and regulations and allowing the Port to inspect EAGLE's work. Finally, Afoa alleges the Port retains control over EAGLE by conduct. He specifically claims that the Port continuously controls the actions of EAGLE and its employees and that they are subject at all times to the Port's pervasive and overriding supervision and control.
>
> Viewing this evidence in the light most favorable to Afoa, a reasonable jury could conclude that the Port had sufficiently pervasive control over EAGLE and Afoa to create a duty to maintain a safe workplace.[56]

---

[53] (Emphasis added.)

[54] Afoa I, 176 Wn.2d at 472 (citing Martinez Melgoza & Assocs. v. Dep't of Labor & Indus., 125 Wn. App. 843, 848-49, 106 P.3d 776 (2005)).

[55] Martinez, 125 Wn. App. at 853 (emphasis added).

[56] Afoa I, 176 Wn.2d at 482 (emphasis added) (internal citation omitted).

At trial, Afoa provided evidence of all the examples of control approved in Afoa I, as well as evidence that

- EAGLE's Licensing Agreement controls parking of ground service equipment not in use (such as the cargo loader 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."[57]

- In 2006, a pushback experienced brake failure and crashed into a fence. The Port ramp patrol cited the driver for reckless driving, escorted him off the airfield, and conditioned his airfield driving privileges on repeating a Port training course. The 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.*"[58]

- In August 2008, another pushback experienced brake failure, and the Port requested that "[b]y 1600 on the 6 of August please provide me with written confirmation that a complete equipment safety review has been complete. . . . *Any equipment found non-functional in anyway [sic] will be removed from service until the equipment is properly repaired.*"[59]

- John Nance, a Sea-Tac-based airline pilot, aviation expert, and former Port spokesman, testified that "[s]omeone has to be responsible for the overall operation or you have a community that is in chaos," and that "it is to *the super authoritative source, which in this case is the Port of Seattle, that responsibility really does lie.*"[60] Nance testified that under the Port's airline and ground services contracts, and its rules, enforced by ramp patrol, Port police, and Port fire department, the Port controls the work on the ramp areas: "[T]hey control the means of work. They control the instrumentalities of work. They control the people who work there, and they control workplace safety. That's the Port on the ramp areas."[61]

---

[57] Port Ex. 311 ¶11(B) (emphasis added). The Port further controls parking through its rules. See Port Ex. 482 at 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").

[58] Port Ex. 208 at 2 (emphasis added).

[59] Port Ex. 72 (emphasis added).

[60] RP (Mar. 3, 2015) at 1502-03 (emphasis added).

[61] Id. at 1544.

"Substantial evidence exists if a rational, fair-minded person would be convinced by it."[62] Though the trier of fact is free to believe or disbelieve any evidence presented at trial, "[a]ppellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact."[63]

Consistent with the holding in Afoa I, viewing the evidence in the light most favorable to Afoa, the Port had extensive authority over the work of moving aircraft equipment on the ramp, including the suitability and safety of equipment. The Port's level of supervision was beyond the general right referred to in comment c of the *Restatement*. In particular, the Port had the authority to red tag or impound any defective motorized equipment, require the equipment be fixed, and prohibit use of that equipment until adequately repaired. Such evidence that the Port had absolute control over the use of that instrumentality in the performance of EAGLE's work in turn is evidence of the Port's control over EAGLE's manner of work in using that instrumentality. The Port did not merely have a right to inspect and enforce compliance with a contract.

Therefore, we conclude substantial evidence supports the jury's finding that the Port retained a right to control the manner of EAGLE's work, including how EAGLE maintained its equipment.

---

[62] In re Estate of Palmer, 145 Wn. App. 249, 265-66, 187 P.3d 758 (2008).

[63] Quinn v. Cherry Lane Auto Plaza, Inc., 153 Wn. App. 710, 717, 225 P.3d 266 (2009).

III. Federal Preemption

The Port argues that "[e]ven if this Court decides the Port retained the required control, reversal is still required" because federal law preempts Afoa's claims.[64] We disagree.

Congressional intent is the touchstone of preemption.[65] We must assume "Congress does not intend to supplant state law."[66] "State laws are not superseded by federal law unless that is the clear and manifest purpose of Congress."[67] "The presumption against preemption is 'even stronger with state regulation regarding matters of health and safety,' in which states have traditionally exercised their sovereignty."[68] The burden of proof is on the party claiming preemption.[69]

The Port first asserts the Airline Deregulation Act expressly preempts Afoa's claims. The Airline Deregulation Act preempts any statutes or regulations "related to a *price, route, or service of an air carrier.*"[70] Because the Act does not apply to ground crew services or their manner of work, the Port's argument fails.

---

[64] Appellant's Br. at 30.

[65] Wyeth v. Levine, 555 U.S. 555, 565, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009).

[66] N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995).

[67] Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 326-27, 858 P.2d 1054 (1993).

[68] Hue v. Farmboy Spray Co., Inc., 127 Wn.2d 67, 78-79, 896 P.2d 682 (1995) (quoting id. at 327).

[69] Inlandboatmen's Union of the Pac. v. Dep't of Transp., 119 Wn.2d 697, 702, 836 P.2d 823 (1992).

[70] 49 U.S.C. § 41713(b)(1).

The Port next asserts implied conflict preemption. Conflict preemption exists "where 'compliance with both federal and state regulation is a physical impossibility,' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[71] The Port claims that by allowing Afoa to use federal standards to prove the Port's level of control for state tort law purposes, the Port was penalized for doing what federal law requires. But it is not a penalty to be held liable for failing to do what both federal and state law contemplates, that is, run a safe airport. While federal law may require that the Port maintain control over the work site, state law does not penalize that control. Instead, state law imposes certain worker safety standards. The tort action does not penalize the Port for exercising control to the extent such control is a byproduct of federal regulation; rather, it holds the Port accountable for doing it poorly. Because we find no case law supporting the Port's proposition, we conclude there is no implied conflict preemption.

Finally, the Port asserts implied field preemption. Field preemption exists where the scheme of federal regulation is "'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'"[72] The comprehensiveness of federal law in the field and "pervasiveness of the regulations" are "indication[s] of preemptive intent."[73]

---

[71] Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992) (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963) and Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)).

[72] Id. (quoting Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta, 458 U.S. 141, 153, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982))

[73] Montalvo v. Spirit Airlines, 508 F.3d 464, 470 (9th Cir. 2007).

In Estate of Becker v. Avco Corp., our Supreme Court recently held there is no field preemption of state law standards of care in airplane product liability and negligence actions involving a defective carburetor float.[74] The court noted that "the Federal Aviation Act directs the FAA to create 'minimum standards' surrounding aviation safety[,]" indicating "that federal regulations are a floor for engine design standards."[75] Even though there are extensive FAA regulations of fuel systems, the court concluded, "the regulations are not comprehensive or pervasive enough to show Congress' intent to preempt state law. The Federal Aviation Act . . . was not designed to take the place of state tort remedies, but rather to create a federal minimum."[76]

Similarly, there is no pervasive federal regulation of the use of safe equipment in performing the work of moving aircraft on the airplane ramp. At most, there are a few advisory bulletins with vague and general standards. Therefore, there is no implied field preemption.

We conclude the Port fails to meet its burden of establishing preemption.

CROSS APPEAL

I. Nondelegability

Afoa argues that the jury should not have been allowed to allocate fault to the four nonparty airlines that used EAGLE's ground services because the Port had a nondelegable duty to maintain a safe workplace. The Port counters that it did not have

---

[74] ___ Wn.2d ___, 387 P.3d 1066 (2017).

[75] Id. at 1070 (internal quotation marks omitted).

[76] Id. at 1071.

a nondelegable duty, and even if it did, RCW 4.22.070(1) still requires allocation of fault. The Port, however, appears to have conceded below that it had a nondelegable duty:

> The Court has established it was Stute that says *there's a nondelegable duty, okay, so you can't delegate*, but there's no such thing in any of these cases that says there's a per se liability going on here.
>
> . . . .
>
> And one of our principal defenses in this case is that EAGLE had the primary responsibility to, in fact, maintain its equipment under all of these regulations, and the jury then has to decide were we negligent in relying upon that once you–if you get there. If you get to that duty, was it ok for the Port to reasonably rely upon those people, EAGLE, to maintain their equipment under the facts of the case . . . ? There's no such thing as per se liability.
>
> . . . .
>
> *We just can't delegate it*, but the jury can clearly find that it was EAGLE's duty. They had the primary duty.[77]

Further, without regard to the Port's concession, ample authority recognizes the duty to maintain a safe workplace is nondelegable.[78] At common law, a general contractor had no duty to the employees of its independent subcontractor, unless the general contractor retained control over part of the work.[79] In Kelley, the Supreme Court explicitly held a general contractor had a nondelegable duty under the then-existing workplace safety statute to ensure the safety of all workers on a jobsite.[80] In Stute, the Supreme Court held a general contractor has a nondelegable duty to ensure compliance with safety regulations under WISHA for the protection of all employees at

---

[77] RP (Mar. 13, 2015) at 2437-38 (emphasis added); CP at 4379.

[78] Kelley, 90 Wn.2d at 330; Stute, 114 Wn.2d at 464; Millican v. N.A. Degerstrom, Inc., 177 Wn. App. 881, 890-94, 313 P.3d 1215 (2013).

[79] Kelley, 90 Wn.2d at 330.

[80] Id. at 332-33 (citing former RCW 49.16.030 (1919), *repealed by* Laws of 1973, ch. 80, § 28, which imposed a duty on all employers to furnish a reasonably safe place of work, with reasonable safety devices, and to comply with state safety regulations).

the work site, including the employees of a subcontractor.[81] The court concluded the general contractor assumes primary responsibility because its "innate supervisory authority constitutes per se control over the workplace."[82] The court explained that the policy rationale for placing this responsibility on a general contractor is because the "general contractor's supervisory authority places the general in the best position to ensure compliance with safety regulations."[83]

The Port argues the nondelegable duty to provide a safe workplace under WISHA applies only to general contractors, whereas the Port is a jobsite owner. We disagree.

The Port ignores that the Afoa I court determined that "the Port is closely analogous to a general contractor."[84] And in Kamla v. Space Needle Corp., the Supreme Court 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 governing a specific trade."[85] In Kinney v. Space Needle Corp., this court 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

---

[81] Stute, 114 Wn.2d at 463-64.

[82] Id. at 464.

[83] Id. at 463.

[84] Afoa I, 176 Wn.2d at 474.

[85]147 Wn.2d 114, 124, 52 P.3d 472 (2002).

compliant work conditions" as general contractors.[86] The Afoa I court agreed: [A]lthough general contractors and similar employees *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."[87] "Further, this duty extends to all workers on the jobsite that may be harmed by WISHA violations."[88]

The Port maintains that even if it had a nondelegable duty, RCW 4.22.070(1) still requires allocation of fault. But "[n]ondelegable duties involve a form of vicarious liability."[89] As Division III of this court noted in Millican v. N.A. Degerstrom, Inc., "'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.'"[90] Therefore, when it comes to breach of common law duties arising from retained control and violations of WISHA, a jobsite owner has vicarious liability for breach of duties that are nondelegable.[91]

This court has recognized that in cases involving vicarious liability, there can be no comparative fault. For example, in Johnson v. Recreational Equipment, Inc. (REI),

---

[86] 121 Wn. App. 242, 249, 85 P.3d 918 (2004).

[87] Afoa I, 176 Wn.2d at 472 (citing Kamla, 147 Wn.2d at 125).

[88] Id.

[89] 6 WASHINGTON PRACTICE; WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 12.09 cmt. at 161 (6th ed. 2012); see generally 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 4:15, at 204-06 (4th ed. 2013).

[90] 177 Wn. App. 881, 896, 313 P.3d 1215 (2013) (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 57 cmt. b (2012)).

[91] See id. at 893.

Monika Johnson brought a product liability action against the seller of a defective bicycle fork.[92] REI argued that "the statutory comparative fault system adopted by our legislature in 1986 demands that it be permitted to ask the jury to allocate fault" to the fork's manufacturer for the defect.[93] This court disagreed: "Because a seller of a branded product is vicariously liable for manufacturing defects, permitting REI—the product seller liable as the manufacturer pursuant to RCW 7.72.040(2)(e)—to seek to allocate fault to Aprebic—the actual manufacturer of the defective product—would undermine the statutory scheme of the WPLA."[94] The Johnson court noted that "construing RCW 7.72.040(2)(e) such that a product seller could seek to allocate fault to a manufacturer would render the provision itself meaningless."[95]

Similarly, 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."[96] 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

---

[92] 159 Wn. App. 939, 247 P.3d 18 (2011).

[93] Id. at 945.

[94] Id. at 948.

[95] Id. at 949.

[96] Afoa I, 176 Wn.2d at 479 (citing Kelley, 90 Wn.2d at 331).

reduce its vicarious responsibility to a tort victim based on others whose negligence also contributed to the injury.[97]

The Port relies on the Supreme Court's decision in Gilbert H. Moen Co. v. Island Steel Erectors, Inc.[98] But Moen does not support the Port's argument that the nonparty airlines must be allocated fault and the Port's share of damages reduced proportionately. Rather, Moen merely holds that where a general contractor has an obligation based on the retained control doctrine and WISHA specific duty standard, it does not follow that a subcontractor employer is thereby relieved of its duty to comply with safety regulations and provide a safe workplace.[99]

Moen involved a general contractor who had settled with the employee of a subcontractor injured in an accident at the construction work site.[100] The general contractor sought contractual indemnification from the subcontractor.[101] The Moen court held that notwithstanding RCW 4.22.070, the parties' "indemnification agreement negotiated pursuant to RCW 4.24.115" was valid and enforceable.[102] Moen does not stand for the proposition that a party who has vicarious liability for another's breach may

---

[97] The Port argues that the list of specific exceptions to RCW 4.22.070 (i.e., master-servant; acting as an agent; acting in concert; Title 51 employers per 1993 amendments) is an exclusive list of exceptions from the statutory directive that all entities "shall" be allocated fault. But as discussed, we do not read the comparative fault statute to render the established retained control doctrine and WISHA specific duty standard meaningless.

[98] 128 Wn.2d 745, 912 P.2d 472 (1996).

[99] Id. at 757-59.

[100] Id. at 748-51.

[101] Id.

[102] Id. at 747.

escape any of its vicarious liability by allocating fault to the breaching party. We note that the Port has not advanced any theory of contribution or indemnification as to the four nonparty airlines.

Therefore, we conclude the Port had a nondelegable duty to ensure a safe workplace and safe equipment and is vicariously liable for breach of that duty. Consistent with the Port's vicarious liability, it is not entitled to proportionately reduce its liability based upon an allocation of fault to the four nonparty airlines.

We affirm the jury's verdict as to the liability of the Port, reverse the portion of the judgment allocating 74.8 percent fault to the airlines, and remand for entry of an amended judgment.[103]

WE CONCUR:

Trickey, J

[103] Accordingly, we need not address the other issues Afoa raises on cross appeal.

E

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRANDON APELA AFOA, an individual, Respondent, vs. PORT OF SEATTLE, a Local Government Entity in the State of Washington, Petitioner.	NO. _____ (Court of Appeals No. 75951-5-I) AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

The undersigned, being first duly sworn on oath, deposes and says:

That she is a citizen of the United States of America; that she is over the age of 18 years, not a party to the above-entitled action, and competent to be a witness therein; that on April 18, 2017, served via U.S. mail, postage prepaid, and electronic mail a copy of Petition for Review, together with a copy of this Affidavit of Service, addressed to the parties listed below:

Raymond E. Bishop
Bishop Legal
19743 First Avenue S.
Normandy Park, WA 98148

Derek K. Moore
Bishop Legal
19743 First Avenue S.
Normandy Park, WA 98148

Mark S. Northcraft
Andrew Thomas Biggs
Northcraft, Bigby & Biggs, P.C.
819 Virginia Street, Suite C2
Seattle, WA 98101-4433

Michael T. Schein
Sullivan Law Firm
701 5th Ave Ste 4600
Seattle, WA 98104-7068

Sarah Kortokrax
Attorney General of Washington
P.O. Box 40121
Olympia, WA 98504-0121

Mark A. Dombroff
Dentons US LLP
1676 International Drive Penthouse
McLean, VA 22102-4832

Charles A. Bird
Dentons US LLP
4655 Executive Drive, Suite 700
San Diego, CA 92121

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Jessica Pitre-Williams

SIGNED AND SWORN to (or affirmed) before me on 4-18-17 by Jessica Pitre-Williams.

REBECCA LEWIS (Print Name)
Notary Public Residing at LYNNWOOD, WA
My appointment expires 4-9-2018

REBECCA CAROLINE LEWIS NOTARY PUBLIC Commission Expires 04-09-2018 STATE OF WASHINGTON