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Supreme Court No. 85784-9

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

BRANDON APELA AFOA,

Respondents

v.

PORT OF SEATTLE,

Petitioner.

**BRIEF OF AMICI CURIAE
ASSOCIATION OF WASHINGTON BUSINESS,
WASHINGTON RETAIL ASSOCIATION, WASHINGTON
PUBLIC PORTS ASSOCIATION, AND THE CITY OF KENT
SUPPORTING PETITIONER PORT OF SEATTLE**

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I. INTRODUCTION

This amici curiae brief is filed by a diverse coalition of public and private organizations who are or who represent commercial, industrial, and municipal premises owners who routinely structure legal relationships with vendors and other outside entities according to licenses allowing limited commercial use of their premises. This amici coalition urges reversal of the Court of Appeals' published opinion reversing the trial court's order on summary judgment. *Afoa v. Port of Seattle*, 160 Wn. App. 234, 247 P.3d 482 (2001).

The Respondent, Brandon Afoa, was seriously injured when he was operating a powered industrial vehicle on the airplane ramp at Seattle-Tacoma International Airport, which is owned and operated by the Port of Seattle. *Afoa*, 160 Wn. App. at 237. The Respondent worked for Evergreen Aviation Ground Logistics Enterprises, Inc. (EAGLE). EAGLE provided aircraft ground handling services at the airport, including aircraft movement and loading and unloading aircraft cargo and baggage under a license agreement with the Port. *Id.* EAGLE does not do work for the Port as an independent contractor or in any other capacity. Clerk's Papers ("CP") at 124. Afoa claims the brakes and steering wheel on the vehicle failed while he was operating it, causing him to collide with

a broken piece of equipment that had been left on the tarmac. *Id.* The Port of Seattle did not employ, manage, or supervise EAGLE or any of EAGLE's employees, including Brandon Afoa. CP at 124-125. EAGLE was hired by air carriers at Sea-Tac. CP at 124-125. To work for the air carriers, EAGLE was required to sign a licensing agreement with the Port that featured such routine requirements as one that EAGLE must comply with the Port's Rules & Regulations and all applicable federal, state and local laws and regulations. CP at 207.

The Court of Appeals erred in holding that the Port as mere landowner and licensor owed specific common law and other statutory duties to Mr. Afoa. This amici coalition represents members directly impacted by the Court of Appeals decision and urges the Court to reverse it, reinstating the trial court's order on summary judgment.

II. IDENTITY AND INTEREST OF AMICI CURIAE

A. THE ASSOCIATION OF WASHINGTON BUSINESS

The Association of Washington Business ("AWB") is Washington State's Chamber of Commerce and principal representative of the state's business community. AWB is the state's oldest and largest general business membership federation, representing the interests of approximately 7,800 Washington companies who in turn employ over

650,000 employees, approximately one-quarter of the state's workforce. AWB members are located in all areas of Washington, represent a broad array of industries, and range from sole proprietors and very small employers to the large, recognizable, Washington-based corporations who do business across the country and around the world. As commercial and industrial premises owners and including companies who routinely grant licensees the opportunity to come onto the premises to conduct business, as well as owners who routinely contract or subcontract with others for services, a number of AWB members have an interest in distinguishing the rules that govern rights and obligations for licensees and for independent contractors.

B. THE WASHINGTON RETAIL ASSOCIATION

The Washington State Retail Association ("WRA") is the institutional representative of the state's retail industry, representing 2,800 member storefronts. It has adopted as its mission statement to represent the legislative, regulatory and political interests of the industry in the Washington and to secure cooperation with and among other organizations in the furtherance of those objectives. WRA members include large commercial retail property owners who enter into license or franchise agreements with outside entities or vendors without anticipation of thereby

entering into employment or general contractor relationships. From time to time the association files amicus curiae briefs in matters of importance of its membership.

C. THE WASHINGTON PUBLIC PORTS ASSOCIATION

Founded by the Legislature in 1961, the Washington Public Ports Association (“WPPA”) promotes the interests of the state’s citizen-created port districts in the promotion of trade and economic development and the operation of marinas, docks, airports, railroads, industrial sites, and recreational facilities across the state. WPPA focuses on governmental relations, education, and advocacy for the port community and from time to time participates as an amicus curiae in matters affecting the interests and mission of the state’s ports.

D. THE CITY OF KENT

The City of Kent is the sixth largest city in the State of Washington with a population of approximately 115,000 and a geographic area of 34 square miles. Kent’s economy boast’s the country’s fourth largest manufacturing and distribution center and is home to over 4,500 businesses and approximately 78,000 jobs contributing to a \$8 billion gross business income in the city. As an extensive property owner with numerous license and franchise agreements with vendors and entities, the

city is directly interested in the court's interpretation and application of tort liability for land-owning licensors.

III. ISSUES OF CONCERN TO AMICI CURIAE

A. Whether a landowner, acting as a licensor, can be liable to the employees of a licensee as if the landowner were a general contractor and the licensee an independent subcontractor; and

B. Whether, under *Stute*, a landowner who is a licensor rather than general contractor, owes a nondelegable statutory duty to enforce specific safety regulations for the benefit of the licensee's employees.

IV. ARGUMENT

A. The Court of Appeals' Decision Creates Unprecedented Liability for Commercial, Industrial, and Municipal Licensors.

In applying the retained control test to a license agreement, as opposed to an employment relationship, the Court of Appeals' decision has numerous negative impacts on the abilities of municipal and commercial landowners to regulate their licensees. The Court of Appeals' decision rested on the idea that it is the nature, not the form, of the relationship between the Port which controls whether the Port had a duty. *Afoa*, 160 Wn. App. at 241. Fair enough; but where the Court of Appeals erred was its failure to appreciate the distinct nature of the licensor-licensee relationship.

As the Port has consistently maintained, a license is predominately a function of real estate law. The license granted by the Port to EAGLE allowed the company to come onto the Port's property and ply its trade in service of the airline companies who also do business at the Port, and who themselves hire and do business with EAGLE. No one disputes that other entities besides EAGLE hold the same license and perform similar ground support work for airlines on the property and the Port has no role in selecting or preferring vendors but merely licenses those vendors who obtain the requisite certificate from an airline and comply with the requirements of obtaining a license and then comply with the limitations on the use of the land contained in the license, lest it be revoked. As a landowner, the Port stands essentially in the same position as the Space Needle in *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 52 P.3d 472 (2002), discussed further *infra* at Section IV.B.

Unfortunately, the Court of Appeals conflated the various limitations contained in EAGLE's license, finding these routine regulations tantamount to retained control by the Port over the work of EAGLE's employees: "... genuine issues of material fact exist regarding whether the Port so involved itself in the performance of EAGLE's work

as to undertake responsibility for the safety of EAGLE's employees.”

Afoa, 160 Wn. App. at 244.

But there is a critical distinction between a licensor restricting a licensee's permitted use of property and a principal retaining control over the means and manner in which a contractor performs the contracted work. If this were the latter kind of case, one would expect to find in the agreement between the Port and Eagle typical indicia of an independent contract. Yet there is no express or implied description of a scope of work EAGLE would be performing for the Port set forth in the license, despite their being limits on the type of work EAGLE could perform on the Port's property. There is no provision for the payment of money for services to EAGLE in the license for any such work. There is no retained control over the means and manner of performing work because there is no work being performed for the Port under the license agreement. The Port is expressly not in the same position as the general contractor in *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978) and its progeny, or *Stute v. P.B.M.C.*, 114 Wn.2d 454, 788 P.2d 545 (1990) and its progeny.

Thus far from being “immaterial” as the Court of Appeals misunderstood it, 160 Wn. App. at 241, and far from being “magical

words formalism” as Respondent attempts to ridicule it, Answer to Petition for Review at 8, the difference between licensors and general contractors is a difference of categorical legal relationship. This is no mere metaphysical nicety: By its very nature the licensor does not retain control over the means and manner of work because performance of work for the licensor is not the essence of the agreement – the mere use of the licensor’s land is. The Court of Appeals has made a categorical mistake, and the Court should reverse to reaffirm the distinct nature of the property license.

B. Washington Courts Have Never Held that the Retained Control Exemption Applies to Any Contractual Relationship.

The Court of Appeals further ignored the distinction between a license agreement and an employment relationship when it stated “[t]he issue is whether the Port has a contractual relationship with EAGLE by which it retained control over the manner in which Eagle provided ground services such as loading and unloading aircraft cargo and baggage and aircraft movement.” *Afoa*, 160 Wn. App. at 241. No other Washington court has ever applied the retained control test to generic contractual relationships as such. Rather, the cases have been limited to the independent contractor context, where labor or services are being procured from an independent firm. Before *Afoa*, the cases have not extended to the

licensor-licensee context. Extending the retained control test to licenses to use property risks creating employment relationships where no such relationships were ever intended by the parties.

In this regard, *Kamla* is instructive. In *Kamla*, the Court rejected the idea that the Space Needle retained control of an independent contractor's employee who was injured in an elevator shaft. *Kamla*, 147 Wn.2d 114, 52 P.3d 472 (2002). The Court in *Kamla* accepted the Restatement's definition of independent contractor. *Kamla*, 147 Wn.2d at 119. An "independent contractor is a person *who contracts with another to do something for him* but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." RESTATEMENT (SECOND) OF AGENCY § 2(3) (1958) (emphasis added). Notably absent from the relationship between EAGLE and the Port is a contract that EAGLE will do something for the Port, beyond paying a licensing fee for the right to come onto and use the property, subject to the terms and conditions of the agreement. Under the licensing agreement, EAGLE is allowed to undertake activities on the Port's property, but there is no requirement or even contemplation that EAGLE actually do work for the Port. There is no work over which the Port retained control. That's because EAGLE is

simply not an independent contractor of the Port. Under *Kamla*, that fact alone should preclude liability on the part of the Port merely as a landowner.

The Court in *Kamla* stated that the “retained control” test is an “exception to the general rule of nonliability for the injuries of independent contractors.” *Kamla*, 147 Wn.2d at 119. Inherent in the Court’s analysis is that the injured person actually be an independent contractor or an employee of an independent contractor for the retained control test to be applicable. As just noted, the courts of Washington have never stated that retained control absent an independent contractor relationship is enough to create premises liability.

Further, the Court in *Kamla* explicitly rejected expanding enforcement of WISHA regulations, per se, to jobsite owners. *Kamla*, 147 Wn.2d at 123. The Court stated: “If a jobsite owner does not retain control over the manner in which an independent contractor completes its work, the jobsite owner does not have a duty under WISHA to ‘comply with the rules, regulations, and orders promulgated under [chapter 49.17 RCW].’” Again, inherent in this analysis is that for liability to attach, the employee must be an employee of an independent contractor.

All of the cases cited by the Court of Appeals for the proposition that jobsite owners or general contractors should be liable for worksite injuries to an independent contractor involve situations where the jobsite owner or general contractor has actually hired the independent contractor to perform a task. *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978); *Weinert v. Bronco Nat'l Co.*, 58 Wn. App. 692, 795 P.2d 1167 (1990); *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 788 P.2d 545 (1990). Notably, none of these cases involve a license agreement such as that present in this case. And again, the Port did not hire EAGLE to do anything.

C. The Court of Appeals' Decision Threatens to Undermine Routine Legal Relationships and Discourages Public Safety Provisions in License Agreements.

License agreements are routine for commercial, industrial, and municipal landowners. Amicus City of Kent is a good example. Like many other cities, Kent frequently enters into license agreements allowing independent parties to use city property. When entering into these license agreements, the City regularly imposes certain conditions in order to benefit the public good.

For example, the City may enter into a license agreement allowing an independent party to use a park for a concert, sporting event, or other

activity. In such an instance, the City would routinely use the license agreement to impose routine rules or restrictions, such as occupancy limits, set times of use, temporary fencing requirements, or other safety requirements. These safety requirements are meant to protect public safety and the general public good. The City also, of course, requires that these vendors follow all city ordinances and safety laws. The existence of such license boilerplate does not mean, however, that the City is in any way involved with, for example, how a concert vendor would operate its stage, or how a sport team would play its game.

Similarly, the City from time to time allows for town fairs on public property. The license agreement allowing for fair vendors to set up on city property may contain certain restrictions on alcohol use, requirements for fencing, and miscellaneous safety restrictions. The City's role in these fairs is not unlike the Port's role at the airport. Such fairs involve numerous distinct vendors operating in a limited space on city property, much like the various vendors operating at the airport.

The City is not involved in training employees of its vendors and licensees nor does it have the expertise or resources required to ensure that employees of such vendors comply with all safety regulations for their industry. Under the "retained control" logic of the Court of Appeals'

ruling, despite the fact that the City has no expertise or even ability to supervise the work conducted by the employees of the vendors, the City may be directly liable for injuries to the vendors' employees simply because the City has imposed some general restrictions meant to protect public safety and ensure compliance with applicable laws and codes.

The Court of Appeals ruling actually discourages municipalities from providing minimal safety requirements for the benefit of vendors who seek license to use public property or for the benefit of the public. Here, for instance, had the Port simply given EAGLE a license to use its property without any restrictions, perhaps under the logic of the Court of Appeals' ruling, the Port would not face any liability. However, by providing minimal safety requirements that benefit not only the various vendors at the Port but also the general public, the Port faces severe unanticipated liability.

Commercial landowners face similar constraints trying to structure relationships with vendors under the Court of Appeals' decision.

Commercial landowners frequently license privately owned property for the use of vendors. In many cases, the landowners may impose minimal restrictions, such as operating hours, security requirements, occupancy limits, parking and other restrictions. However, again, these commercial

landowners do not actually supervise the work done by the vendors or dictate the means and manner of complying with the basic terms of the license. As a policy matter, unlike the vendors themselves, the mere landowner as such is not best situated to absorb the legal duty to ensure a safe working environment for the vendors' employees.

V. CONCLUSION

In response to the amici memorandum supporting the petition for review, respondent trivialized the impact of the Court of Appeals' decision on landowners like amicus City of Kent, where an example was given of the City's allowing, by means of licensing agreements, third party contractors to come onto city rights of way and perform utility work for the licensee's benefit: "If other municipal corporations structure their licenses with sewer repair companies, or others, so that they retain pervasive control over the means and manner of work, like the Port did here, then the result should be the same [i.e. treating the municipal corporations as the equivalent of employers]." Respondent's Answer to Amici Curiae Memorandum at 4.

Putting aside the tendentious characterization of basic safety regulation and "follow the law" boilerplate in these license agreements as "pervasive control," this is precisely amici's concern. A landowner acting

as a licensor, with no intention of entering into an employment contract, of procuring any good or service or labor, or of even having actions taken for its own benefit, may be held liable as an employer under the Court of Appeals' decision simply because it included restrictions and conditions on the use of its property in the license agreement. That is an over-reach, and should be corrected by reversing the Court of Appeals' decision. Respectfully submitted this 17th day of January, 2012.

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