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SUPREME COURT
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BRANDON APELA AFOA,

Respondent,

v.

PORT OF SEATTLE,

Petitioner.

On Appeal from the Court of Appeals,
Division I
of the State of Washington
No. 64545-5-I

**ANSWER OF PETITIONER PORT OF SEATTLE TO BRIEF OF
AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR
JUSTICE FOUNDATION**

Mark S. Northcraft, WSBA #7888
Attorney for Petitioner Port of Seattle

Northcraft, Bigby & Biggs, P.C.
Suite C-2
819 Virginia Street
Seattle, WA 98101
(206) 623-0229

ORIGINAL

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I. ARGUMENT

A. Answer to Argument Regarding Retained Control Claims

The arguments set forth by amicus curiae Washington State Association for Justice Foundation (“WSAJF”) regarding the applicability of the retained control doctrine conflate and essentially extinguish the clear classifications and rules of law upon which a landowner’s liability for negligence is based as has been determined by this Court over the decades. These distinct classifications and rules of law clearly established by this Court are: (1) the legal distinctions between trespassers, licensees, and invitees;¹ (2) the general rule that a landowner who employs an independent contractor to do work for it or on its behalf is not liable for injuries to employees of the independent contractor resulting from their work;² (3) the retained control exception to the foregoing general rule of

¹See *Kamla v. The Space Needle Corporation*, 147 Wn.2d 114, 125, 52 P.3d 472 (2002); *Iwai v. State*, 129 Wn.2d 84, 90-91, 915 P.2d 1089 (1996).

²See *Kelly v. Howard S. Wright Construction Co.*, 90 Wn.2d 323, 300, 582 P.2d 500 (1978); *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 549 P.2d 483 (1976); *Larson v. American Bridge Co.*, 40 Wash. 224, 82 P. 294 (1905); see also W. Prosser, *Handbook of the Law of Torts* 468 (4th ed. 1971); 2 Restatement (Second) of Torts § 409 (1965).

non-liability for injuries to an independent contractor's employees;³ and (4) the specific duty under RCW 49.17.060(2) to comply with the rules, regulations, and orders promulgated under Chapter 49.17 RCW where a landowner retains the right to control the performance of the work of a general or independent contractor hired to do work for or on behalf of the landowner.⁴

If the Court of Appeals' decision in *Afoa*⁵ is not reversed and the arguments in support of this decision are adopted, then instead of these clear, longstanding legal distinctions and rules of law, landowners, such as the Port, will be faced with uncertainty as to how their interaction with persons on their land, and the meaning of any "contracts" associated therewith, will be treated by the courts of this state. Such uncertainty, which now exists because of the Court of Appeals' decision in the *Afoa*

³See *Kelly v. Howard S. Wright Construction Co.*, supra.; *Fenimore v. Donald M. Drake Constr. Co.*, supra.; see also *Greenleaf v. Puget Sound Bridge & Dredging Co.*, 58 Wn.2d 647, 364 P.2d 796 (1961); 2 *Restatement (Second) of Torts* § 414 (1965).

⁴See *Kamla v. The Space Needle Corporation*, 147 Wn.2d 114, 125, 52 P.3d 472 (2002).

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

case, should not be sanctioned by this Court and the arguments of amici curiae the WSAJF in support thereof should not be adopted by this Court.

According to the WSAJF, the retained control exception should not be confined to instances where a landowner directly engages an independent contractor to perform work on its land.⁶ Instead, the WSAJF urges that the terms of a license agreement or any other type of contract with the employer of an injured worker should be assessed to determine whether some term or phrase thereof or some act of the landowner can somehow be said to amount to the retention of a right to control the performance of the work of the licensee or other contracting party.⁷ Such a scenario, however, provides no meaningful way for landowners to assess or legally avoid potential liability for personal injuries caused by persons working on their land.

As set forth in detail in the Port's Petition for Discretionary Review and Supplemental Brief, the retained control exception is an "exception" to well established law in this state. Contrary to the argument

⁶Br. of WSAJF at 5-6.

⁷Id. at 6.

of the WSAJF, it is not a “free standing rule of tort liability”.⁸ As such, this exception should continue to be applied in the workplace setting only to those situations where a landowner has actually hired an independent contractor to do work for or on its behalf and where the landowner actually has retained the right to control the performance of the work it hired the independent contractor to perform. This should be the case whether the duty of care owed by a landowner to workers on its land is imposed by the common law or by WISHA.

As the case law in this state holds, aside from the Court of Appeals’ *Afoa* decision, the retained control doctrine has never had any other application in any other landowner liability context. Such a restriction on the applicability of the retained control exception will preserve the legal distinctions with respect to a landowner’s duty to people and workers on its property, avoid the conflation of legal principles and distinctions allowed by the Court of Appeals’ *Afoa* decision, and provide continued clarity to landowners so that they will know how their legal obligations to people on their land can be met.

B. Answer to Argument Regarding Employer Requirement Under WISHA

⁸Br. of WSAJF at 12.

The Washington State Association for Justice Foundation argues that under Chapter 49.17 RCW it is not necessary that the injured person be an employee of an independent contractor hired directly by the landowner/licensor. The WSAJF argues that WISHA's specific duty under RCW 49.17.060(2) is imposed upon the Landowner/Licensor merely because either the landowner or the landowner's own employees have access to the relevant work place.⁹ These arguments are incorrect and contrary to the express language of RCW 49.17.

As explained in detail below, under Chapter 49.17 RCW, just because a landowner has a contract, such as a license or lease, with an entity that is performing work on its land does not make it the "employer" of that contractor for WISHA purposes. Under Chapter 49.17 RCW, a landowner **first** must have a **contract** with an independent contractor **the essence of which is the personal labor of the independent contractor** before the landowner can be considered the employer of the independent contractor and its employees.¹⁰ And even then, if the landowner does not retain the right to control the performance of the work of its independent

⁹Br. of WSAJF at 15.

¹⁰See definitions of "employer" and "employee" respectively at RCW 49.17.020(4) and (5).

contractor, the landowner does not have imposed upon it the specific duty owed under RCW 49.17.060(2).¹¹

In the *Afoa* case, there is no contractual relationship between the Port and EAGLE or between the Port or any of EAGLE's airline clients the essence of which is the personal labor thereof for or on behalf of the Port. To the contrary, the contracts between the Port and EAGLE and between the Port and the airlines are, respectively, as a matter of both form and substance, a license agreement (CP 202-213) and a lease operating agreement (CP 392-557). Under the facts of the *Afoa* case, because the Port did not have a contract with either EAGLE or its airline clients the essence of which is their personal labor, the Port is not an "employer" thereof under WISHA. Because the Port is not the "employer" thereof under WISHA, the retained control exception that otherwise may be applicable to landowners that do have such a contractual relationship does not apply in the *Afoa* case.

¹¹ *Kamla v. The Space Needle Corporation*, 147 Wn.2d at 125.

RCW 49.17.060 creates two separate duties.¹² The first subsection thereof prescribes that each employer has a general duty to protect only that employer's own employees from recognized hazards which are not covered by specific safety regulations.¹³

The second subsection of RCW 49.17.060 prescribes a specific duty to comply with WISHA regulations.¹⁴ This duty extends to an employer's own employees, and also extends to employees of an independent contractor, when a party asserts that the employer did not follow particular WISHA regulations.¹⁵ Where such an allegation is asserted, all employees working on the premises are members of the protected class.¹⁶

¹²*Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 457, 788 P.2d 545 (1990); *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 153, 750 P.2d 1257, 756 P.2d 142 (1988); *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 671, 709 P.2d 774 (1985).

¹³*Id.*

¹⁴*Id.*

¹⁵*Stute*, 114 Wn.2d at 458; *Adkins*, 110 Wn.2d at 153; *Goucher*, 104 Wn.2d at 672.

¹⁶*Stute*, 114 Wn.2d at 458; *Adkins*, 110 Wn.2d at 153; *Goucher*, 104 Wn.2d at 673.

RCW 49.17.060, as interpreted by this Court in *Goucher, Adkins and Stute*, clearly identifies two separate classifications of workers to whom respective duties are owed. The first is the duty owed to an employer's direct employees. Under RCW 49.17.060(1) the employer owes his or her employees a general duty to maintain a safe place of employment for their benefit and under RCW 49.17.060(2) owes a specific duty to his or her employees to comply with rules, regulations, and order promulgated under Chapter 49.17 RCW. However, with respect to the employees of an independent contractor, RCW 49.17.060 mandates that with respect to this classification of employees, the employer owes only a specific duty to comply with rules, regulations, and orders promulgated under Chapter 49.17 RCW.

RCW 49.17.060, as interpreted by this Court in *Goucher, Adkins and Stute*, expressly recognizes that a single employer can owe a duty to two different groups of employees. The first group of employees to which both the general and specific duties are owed is the employer's own direct employees. The second group of employees recognized in RCW 49.17.060 is the employees of the independent contractor hired by the employer that has his or her own direct employees. It is to this second

group of employees that the employer only owes a specific duty to comply with rules, regulations, and order promulgated under Chapter 49.17 RCW.

In order for one employer to owe duties to two different groups of employees under RCW 49.17.060, as envisioned by the legislature and as interpreted by this Court, it necessarily follows that the employer, in this case the landowner Port of Seattle, had to have entered into two different and separate types of contracts of employment. First, the employer had to have hired its own direct employees. Second, the employer then had to have hired an independent contractor to whose employees the employer only owes a specific duty under RCW 49.17.060(2).

That there are two distinct and separate groups of employees referenced in RCW 40.17.060 necessarily leads to the following conclusion. An employer of his or her own direct employees, like the Port, does not become the employer of another employer's employees unless an employer, like the Port, actually contracts with this other employer and the contract between the two employers is one the essence of which is the personal labor of the other employer. In the *Afoa* case, the Port did not ever undertake the second act of hiring an independent contractor, i.e. either EAGLE or EAGLE's airline clients, to do work for it or on its behalf so as to give rise to the Port potentially owing a specific

duty to the employees of these entities under RCW 49.17.060(2). In fact, it is undisputed that the Port did not ever hire EAGLE, Mr. Afoa, or the airlines conducting air operations at STIA to do anything for or on behalf of the Port.

That the legislature intended that a landowner/employer could only become the employer of an independent contractor's employees and thereby potentially have imposed upon it the specific duties set forth in RCW 49.17.060(2) for the benefit of the independent contractor's employees is further evidenced in the definition of "employer", as set forth in RCW 49.17.020(4). Therein, RCW 49.17.020(4) also refers to these two distinctly separate classifications of employers. In pertinent part, RCW 49.17.020(4) provides as follows:

the term 'employer' means any business entity [including municipal corporations] which . . . employs one or more employees or who contracts with one or more persons, the essence of which is the personal labor of such person . . .

(Emphasis supplied.)

This language expressly provides that an "employer", aside from the employer's own direct employees, is an "employer" of some other person only where the essence of the contract with this other person is "the personal labor of such person."

This separate classification of direct employers and employers who have a contract with an independent contractor the essence of which is the independent contractor's personal labor is continued in the definition of "employee" as defined in RCW 49.17.020(5). RCW 49.17.020(5) provides as follows:

the term "employee" means an employee of an employer who is employed in the business of his employer whether by way of manual labor or otherwise **and every person in this state who is engaged in the employment of or who is working under an independent contract the essence of which is his personal labor for an employer under this chapter** whether by way of manual labor or otherwise.

(Emphasis supplied.)

In summary, three separate statutes in WISHA each make reference to two distinctly different classifications of employees of an "employer". Under this scheme, only where an entity has entered into a contract with an independent contractor the essence of which is the personal labor of the independent contractor does the employer become an employer of someone besides the entities' direct employees. In other words, an employer who has his or her own direct employees does not become the employer of the employees of an entity with which it has a contract unless that contract is for the personal labor of the independent contractor.

In the *Afoa* case, the Port directly employs hundreds of people (not tens of thousands as incorrectly asserted by counsel for Mr. Afoa). As such, the Port is an “employer” of these direct employees. However, the Port did not **also** become the employer of EAGLE or EAGLE’s airline clients merely because the Port had a license agreement with EAGLE or because the Port’s employees had access to the AOA. In the *Afoa* case, the Port’s “contract” with EAGLE is **not** a contract the essence of which is the personal labor of EAGLE. The Port’s contract with EAGLE, contrary to the Court of Appeals’ reluctance to accept it as such, is a license. No where in its “contract”, i.e. license, with EAGLE, does the Port hire or employ EAGLE to do anything for the Port or on the Port’s behalf. The Port therefore is not an employer of EAGLE under WISHA because the Port does not have a contract with EAGLE the essence of which is the personal labor of EAGLE.

The WISHA statutory scheme, as evidenced by the way that it consistently distinguishes between direct employers and employers of independent contractors, envisions the scenario, just like the one here, where an entity, such as the Port, has two different groups of employees working on its land. The first group is the direct employees of the Port. To this group of employees, the Port owes both the general and specific

duties set forth in RCW 49.17.060(1) and (2), respectively. The other group of employees that can be working on land owned by the Port of Seattle is the employees of an entity, such as EAGLE, the airlines, or Starbucks, to mention just a few, that does not have a contract with the Port the essence of which is the personal labor of such contracting party. To this group of employees, the Port does not owe any WISHA duties. The Port does not owe this second group of employees on its land any WISHA duties because there is no agreement between the Port and the employer(s) of this other group of employees the essence of which is their personal labor for or on behalf of the Port. To this latter group of employees, the Port owes to them only the common law duties prescribed by the trespasser, licensee, and invitee classifications, and that is all.

II. CONCLUSION

The arguments advanced by WSAJF in support of the Court of Appeals' *Afoa* decision should not be adopted by this Court.

RESPECTFULLY SUBMITTED, this 6th day of February, 2012.

NORTHCRAFT, BIGBY & BIGGS, P.C.

By *Mark S. Northcraft* #29271
For: Mark S. Northcraft, WSBA #7888
Attorney for Petitioner Port of Seattle

CERTIFICATE OF SERVICE

I, Lilly B. Tang, hereby certify under penalty of perjury under the laws of the state of Washington, that on February 6, 2012, I served via e-mail and U.S. mail, postage prepaid to:

Raymond E. S. Bishop
Derek K. Moore
Bishop Law Offices, P.S.
19743 - 1st Avenue South
Seattle, WA 98148-2401

Michael T. Schein
Sullivan & Thoreson
701 Fifth Avenue, Suite 4600
Seattle, WA 98104

Kristopher I. Tefft
Association of Washington Business
General Counsel
P. O. Box 658
Olympia, WA 98507-0658

Brandi Vena
Washington Public Ports Association
1501 Capitol Way, Suite 304
Olympia, WA 98507

Peter J. Kirsch
Kaplan Kirsch & Rockwell, LLC
1675 Broadway, Suite 2300
Denver, CO 80202

W. Eric Pilsk
Kaplan Kirsch & Rockwell, LLC
1001 Connecticut Ave. NW, Suite 800
Washington, DC 20036

Monica Hargrove
General Counsel
Airports Council International -
North America
1775 K Street N.W., Suite 500
Washington, D.C. 20006

Arthur Pat Fitzpatrick
Civil Division, Law Department
220 Fourth Avenue South
Kent, WA 98032

Masako Kanazawa
Assistant Attorney General
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188

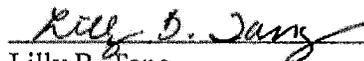
Bryan P. Harnetiaux
517 E. 17th Avenue
Spokane, WA 99230

George M. Ahren
100 E. Broadway
Moses Lake, WA 98837

and served a copy via e-mail upon:

Stewart Estes
sestes@kbmlawyers.com

SIGNED in Seattle, Washington, on February 6, 2012.


Lilly B. Tang

OFFICE RECEPTIONIST, CLERK

To: Lilly Tang
Cc: Raymond E. S. Bishop (rbishop@accidentsandinjuries.com); Derek Moore; Michael T. Schein (mschein@sullthor.com); 'Kris Tefft' (KrisT@AWB.ORG); Brandi Vena (bvena@washingtonports.org); pkirsch@kaplankirsch.com; epilsk@kaplankirsch.com; mhargrove@aci-na.org; 'pfitzpatrick@ci.kent.wa.us' (pfitzpatrick@ci.kent.wa.us); masakok@atg.wa.gov; amicuswsajf@wsajf.ORG; gahrend@ahrendlaw.com; sestres@kbmlawyers.com; Marks Northcraft
Subject: RE: Afoa v. Port of Seattle; No. 85784-9

Rec. 2-6-12

From: Lilly Tang [mailto:lilly_tang@northcraft.com]
Sent: Monday, February 06, 2012 2:15 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Raymond E. S. Bishop (rbishop@accidentsandinjuries.com); Derek Moore; Michael T. Schein (mschein@sullthor.com); 'Kris Tefft' (KrisT@AWB.ORG); Brandi Vena (bvena@washingtonports.org); pkirsch@kaplankirsch.com; epilsk@kaplankirsch.com; mhargrove@aci-na.org; 'pfitzpatrick@ci.kent.wa.us' (pfitzpatrick@ci.kent.wa.us); masakok@atg.wa.gov; amicuswsajf@wsajf.ORG; gahrend@ahrendlaw.com; sestres@kbmlawyers.com; Marks Northcraft
Subject: Afoa v. Port of Seattle; No. 85784-9

Please find attached the following documents regarding the above referenced matter:

1. Answer of Petitioner Port of Seattle to Brief of Amicus Curiae Department of Labor & Industries; and
2. Answer of Petitioner Port of Seattle to Brief of Amicus Curiae Washington State Association for Justice Foundation

Lilly B. Tang
Legal Assistant
Northcraft, Bigby & Biggs, P.C.
819 Virginia Street, Suite C-2
Seattle, WA 98101
(206) 623-0229 phone
(206) 623-0234 fax

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