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No. 85784-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRANDON APELA AFOA,

Respondent,

v.

PORT OF SEATTLE,

Petitioner.

**RESPONDENT'S ANSWER TO AMICI CURIAE
MEMORANDUM**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. ARGUMENT	1
A. A Disputed Issue of Material Fact on Settled Law is Not an Issue of Substantial Public Interest	1
B. The Substance of the Relationship, Not its Form, Governs the Issue of Right to Control	4
III. CONCLUSION	7

TABLE OF AUTHORITIES

<i>Friends of Snoqualmie v. King Cty. Boundary Rev. Bd.</i> , 118 Wn.2d 488, 825 P.2d 300 (1992)	3
<i>Greenleaf v. Puget Sound Bridge & Dredging Co.</i> , 58 Wn.2d 647, 651 364 P.2d 796 (1961)	3
<i>Kelley v. Howard S. Wright Const. Co.</i> , 90 Wn.2d 323, 582 P.2d 500 (1978)	passim
<i>Meyers v. Syndicate Heat & Power Co.</i> , 47 Wash. 48, 91 P. 549, 551 (1907)	3
<i>Riehl v. Foodmaker, Inc.</i> , 152 Wn.2d 138, 94 P.3d 930 (2004)	3
<i>Stute v. PBMC, Inc.</i> , 114 Wn.2d 454, 788 P.2d 545 (1990)	passim
RCW 49.17.020(4)	4
RAP 13.4(b)	1, 2, 7

I. INTRODUCTION

A group of business organizations, municipal associations and a municipal corporation have joined to support the Port of Seattle's Petition for Review, based solely on the issue of whether the Petition involves an issue of substantial public interest. *Amici Mem.* at 5; RAP 13.4(b). Amici add nothing new to the Port's argument. This is still an effort to transform the finding of disputed material facts regarding control of the jobsite, based on the particular terms of the license agreement and the controlling conduct of the Port, into a broadly-applicable dispute over fundamental principles. Reversal of summary judgment based on a proper finding of disputed material fact is not a matter of public interest, but is only of concern to the particular parties. Any broad holding this Court might want to make in this case, would be hamstrung by the factual record. Accordingly, review should be denied.

II. ARGUMENT

A. **A Disputed Issue of Material Fact on Settled Law is Not an Issue of Substantial Public Interest**

Division One's decision presents a narrow question of law on the merits:

Is there a disputed question of material fact that the Port, as the owner of the jobsite and a major employer of employees working on the common jobsite, has retained

control over the manner of performance of ground services under its agreement with EAGLE?

Division One's finding of a disputed issue of material fact was triggered by the actual language of the Port's extensive written schedule of rules and regulations, and lengthy written signatory leases and operating agreements that granted Eagle use of the airfield area "subject at all times to the exclusive control and management by the Port." CP 402 § 2.1.]

The question before the Court now is whether to accept review of this decision. The immediate issue is:

Does application of the facts of this case involving a contract in which the Port expressly retains control, to the longstanding rules of *Wright* and *Stute* – reaffirmed in *Kamla* – that the party with actual power to control the means and methods of work at the jobsite is liable for injury to all workers there under common law and WISHA, create an issue of substantial public interest that should be determined by the Supreme Court under RAP 13.4(b)(4)?

The answer is clearly "no." This Court needs to conserve its valuable time and resources for addressing open questions of significant legal policy. It should not get enmeshed in resolution of factual disputes over application of settled rules, no matter how much political clout lies on one side of the question.

The rules of *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 330, 582 P.2d 500 (1978) (right to control determines common-law liability), and *Stute v. PBMC, Inc.*, 114 Wn.2d 454, 460, 788 P.2d 545

(1990) (right to control determines liability under WISHA), have been around for at least 33 and 21 years respectively. These rules are grounded in Washington law that has been established for over 100 years. See *Greenleaf v. Puget Sound Bridge & Dredging Co.*, 58 Wn.2d 647, 651 364 P.2d 796 (1961) (quoting *Meyers v. Syndicate Heat & Power Co.*, 47 Wash. 48, 91 P. 549, 551 (1907)). “‘The Legislature is presumed to be aware of judicial interpretation of its enactments,’ and where statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language.” *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting, *Friends of Snoqualmie v. King Cty. Boundary Rev. Bd.*, 118 Wn.2d 488, 496-97, 825 P.2d 300 (1992)). If the Amici have a problem with the longstanding law in this area, they should take it to the legislature.

As Division One carefully explained, *Pet. Rev.*, App. A at 7-9, and as we briefed in our Opposition to the Petition for Review, *Answer to Pet. Rev.*, at 3-4, 11, there is ample evidence in this record to support the finding that the Port was in actual control over the jobsite that is the airfield operating area. This may well differ with respect to jobsites where, for example, a cable or sewer line repair company obtains a license to work on city streets. See, *Amici Mem.* at 9. It is unlikely that

the City of Kent is also an “employer” under the definition of WISHA RCW 49.17.020(4), with respect to a sewer line repair company’s work, like the Port is an employer with respect to the airfield, CP 363, and thus the added liability of “employer” to “landowner” may distinguish these other situations. *See, Answer Pet. Rev. at 2, 17; & infra, §II(C)*. Regardless – each case must be decided on its own facts. 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. If they do not, then the result will likely be different. Either way, the rule is unchanged, the outcome is determined by facts, and no issue of substantial public interest is presented here.

B. The Substance of the Relationship, Not its Form, Governs the Issue of Right to Control

The big issue the Port and Amici want to ride into this Court is the abstract question of whether the rule of *Wright* and *Stute* can apply to a landowner in a licensor-licensee relationship. Yet Amici immediately concede the fundamental point on which Division One’s decision is based, that “**the name of the relationship is not decisive, but the substance of the relationship is.**” *Amici Mem. at 6* (emphasis added).

From that point forward, the dispute is factual, and raises no issue of substantial public interest.

Curiously, Amici never address the actual substance of the relationship between the Port and Eagle, instead retreating to generalities about the differences between licenses and principal-contractor agreements. *Id.* at 6-7. Amici assert that there is no description of scope of work in the Port-EAGLE agreement, *id.* at 7, ignoring ¶ 5, which states:

Licensee's only use of the Premises shall be for the purpose of providing aircraft ground handling services within the AOA [airfield operations area], including loading/ unloading aircraft cargo, baggage or mail, aircraft movement and/or aircraft maintenance, interior/exterior aircraft cleaning, and aircraft water, lavatory and fueling services and for storing/parking Licensee's equipment.

CP 205 (License Agreement ¶ 5). Amici insist "there is no retained control over the means and manner of performing work because there is no work being performed for the Port" *Amici Mem.* at 7-8. Amici's argument falls back upon the thin distinction that the Port is controlling the means and manner in which Eagle performs work *for the airlines, rather than for the Port*. That is a distinction without a difference under *Wright* and *Stute*. The only question is right to control the means and manner of work -- not for whom the party formally works. *Stute, supra*, 114 Wn.2d at 458 ("the specific duty clause is not confined to just the

employer's own employees but applies to all employees who may be harmed by an employer's violation of the WISHA regulations. This furthers the purpose of WISHA to assure safe and healthy working conditions for every person working in Washington.”).

Amici's formalistic argument is further undermined by the actual record, because *in substance* the Port benefits economically from the work by EAGLE that it controls. The Port-EAGLE “license agreement” plainly states that EAGLE must pay to the Port a \$500 license fee annually, plus a land rent of \$0.72 for each square foot of parking and storage space it uses, so the Port benefits financially and directly from EAGLE's work. CP 204. The Port also benefits indirectly, because it charges gate fees to the airlines, who in turn could not operate without the ground services provided by EAGLE and Mr. Afoa. CP 418-427, CP 552. If so-called “licensees” were not hired by the airlines to perform these services, the Port would need to hire someone to do it.

Again, to quote the Amici, “the name of the relationship is not decisive, but the substance of the relationship is.” *Amici Mem.* at 6. The substance is that the Port retains control over ground baggage loading and unloading, and aircraft moving, and it reaps financial rewards from these services. The substance is that the Port, with its pervasive regulatory scheme and its cadre of Port Police and Ramp Patrol employees, is in the

best position to ensure the safety of ALL employees working in the air operations area where Brandon Afoa was rendered paraplegic in a tragic accident. The substance is that summary judgment was premature -- there is a disputed issue of material fact on the issue of right to control the means and manner of work. The only reasonable conclusion is that Division One's routine application of the facts to the law, in order to send this case back for trial, is about as far from an issue of substantial public interest as a ruling could be.

III. CONCLUSION

No matter how many powerful Amici climb on board, they cannot alter the fundamental fact that Division One's decision merely found a disputed issue of material fact on the question of control of the means and methods of work at the jobsite based on this particular record, and that this ruling is grounded in well-settled law. Nor can they change the fact -- which they concede in their Memorandum -- that it is the substance of the relationship, not the formal name given to the parties' agreement, which determines liability. There is no issue of substantial public interest here, RAP 13.4(b)(1), and this Court should deny review.

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Dated at Seattle, WA, this 14th day of June, 2011.

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BRANDON APELA AFOA, an individual,

Plaintiff / Respondent,

vs.

PORT OF SEATTLE, a Local Government
Entity in the State of Washington,
Defendant / Petitioner.

No. 85784-9

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RESPONDENT'S ANSWER TO AMICI CURIAE MEMORANDUM

Dated this 14th day of June, 2011.

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RESPONDENT'S ANSWER TO AMICI CURIAE MEMORANDUM

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