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SUPREME COURT
OF THE STATE OF WASHINGTON

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

SUPPLEMENTAL BRIEF OF PETITIONER PORT OF SEATTLE

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ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. ISSUES FOR SUPPLEMENTAL BRIEFING	1
II. SUMMARY OF ARGUMENT	1
III. ARGUMENT	3
A. The Distinctions Between A License Agreement and An Employer-Independent Contractor Or A Principal-Agent Relationship Are Both Material and Critical In Correctly Analyzing Whether The Port Is Liable Under The Common Law Retained Control Doctrine For Injury Sustained By Mr. Afoa And Whether The Port Owed Mr. Afoa Any Statutory Duty Under WISHA	3
1. The RESTATEMENT (SECOND) OF AGENCY (1958) and the RESTATEMENT (THIRD) OF AGENCY (2006) Both Require That An Employer/Principal Assent To An Independent Contractor/Agent Doing Something For It Or On Its Behalf	3
2. The Language of the RESTATEMENT (SECOND) OF TORTS § 414 Requires Entrustment Of Work Before The Retained Control Exception Applies	8
B. The Port Is Not An “Employer” As Defined By WISHA Under The Facts Of The <i>Afoa</i> Case	11
C. This Court Should Reverse The Appellate Court’s Holding That Mr. Afoa Was A Business Invitee	17
IV. CONCLUSION	19

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Afoa v. Port of Seattle</i> , 160 Wn. App. 234, 241, 247 P.3d 482 (2011)	10, 11, 17
<i>Doss v. ITT Rayonier Inc.</i> , 60 Wn. App. 125, 803 P.2d 4 (1991)	14
<i>Kamla v. Space Needle Corp.</i> , 147 Wn.2d 114, 52 P.3d 472 (2002)	4, 5, 14, 15, 16
<i>Kelley v. Howard S. Wright Const. Co.</i> , 90 Wn.2d 323, 582 P.2d 500 (1978)	4, 17
<i>Stute v. P.B.M.C.</i> , 114 Wn.2d 454,788 P.2d 545 (1990)	4, 5, 14, 17
<i>Thompson v. Katzer</i> , 86 Wn. App. 280, 936 P.2d 421 (1997)	17, 18
<i>Weinert v. Bronco Nat'l Co.</i> , 58 Wn. App. 692, 795 P.2d 1167 (Div. I 1990)	14
<u>Statutes</u>	
RCW 49.17.020(4)	2, 11, 13, 16
RCW 49.17.060	12, 14
Washington Industrial Safety and Health Act (“WISHA”)	passim
<u>Other Authorities</u>	
RESTATEMENT (THIRD) OF AGENCY (2006)	1, 3, 4, 5, 6
RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006)	6

RESTATEMENT (SECOND) OF AGENCY (1958) 3, 4, 5, 6
RESTATEMENT (SECOND) OF AGENCY § 2(3) (1958) 6
RESTATEMENT (SECOND) OF TORTS § 414 (1965) 4, 8

I. ISSUES FOR SUPPLEMENTAL BRIEFING

1. Whether the RESTATEMENT (THIRD) OF AGENCY (2006) supports the Port's position that no employer-independent contractor relationship existed between it and EAGLE to which the retained control exception could apply.

2. Whether the Port was an "employer" of either Mr. Afoa, EAGLE, or the airlines at the time of Mr. Afoa's work related injury.

3. Whether the Court of Appeals was correct in its decision that Mr. "Afoa was present on the Port's property for a business purpose that benefitted both parties and was therefore a business invitee."

II. SUMMARY OF SUPPLEMENTAL ARGUMENT

The RESTATEMENT (THIRD) OF AGENCY (2006) is in keeping with the Port's position in the *Afoa* case. There must be an employer-independent contractor or principal-agent relationship in which the employer/principal assents to an independent contractor/agent doing something for it or on its behalf. There also must exist assent on the part of the independent contractor/agent to do something for or on behalf of the employer/principal. Only if these circumstances exist is it then appropriate to determine whether the employer/principal retained control over some or all of the work being

performed for or on behalf of the employer/principal by its independent contractor/agent.

In the *Afoa* case, there is no evidence that the Port ever hired or retained EAGLE, Mr. Afoa, or the airlines to do something for it or on its behalf. In the *Afoa* case, there was no Port work being performed for or on its behalf by EAGLE over which the Port could retain control.

The Court of Appeals erred in reversing the trial court's granting of summary judgment in favor of the Port when it held that there was a question of material fact concerning whether the Port retained control over the ground support operations undertaken by EAGLE for the airlines. The underlying problem with the Court of Appeals' analysis is that EAGLE was not performing those operations for or on behalf of the Port. As such, the general rule of nonliability and the retained control exception thereto applicable to work related injuries to the employees of independent contractors do not apply to the Port. Consequently, whether or not the conditions of the Port's license in any way affected the manner in which EAGLE or Mr. Afoa did their work for the airlines is not a fact that was material to the trial court's decision to grant the Port's motion for summary judgment.

The Port is not an employer of EAGLE, Mr. Afoa, or of the airlines under the definition of "employer" set forth in RCW 49.17.020(4). As such,

the Port was not required to comply with the nondelegable duties imposed by WISHA so as to prevent the work-related injury suffered by Mr. Afoa.

At the time of his injury, Mr. Afoa was not in the Air Operations Area (“AOA”) of Seattle-Tacoma International Airport (“STIA”) to conduct business dealings with the Port. As such, there was no mutuality of interest between the Port and Mr. Afoa. Consequently, Mr. Afoa was a licensee at the time of his injury and not an invitee as the Court of Appeals incorrectly concluded.

III. ARGUMENT

A. The Distinctions Between A License Agreement and An Employer-Independent Contractor Or A Principal-Agent Relationship Are Both Material and Critical In Correctly Analyzing Whether The Port Is Liable Under The Common Law Retained Control Doctrine For Injury Sustained By Mr. Afoa And Whether The Port Owed Mr. Afoa Any Statutory Duty Under WISHA.

1. The RESTATEMENT (SECOND) OF AGENCY (1958) and the RESTATEMENT (THIRD) OF AGENCY (2006) Both Require That An Employer/Principal Assent to An Independent Contractor/Agent Doing Something For It Or On Its Behalf.

In Mr. Afoa’s opposition to the Port’s Petition for Discretionary Review, he argues that the Court of Appeals was correct in its belief that “whether the Port’s agreement with EAGLE is called a license agreement or any other term is immaterial.” (Resp. Answer To Pet. For Review at 10-12.)

Mr. Afoa elaborates on this argument by contending that the Port incorrectly has relied upon the principles set forth in the RESTATEMENT (SECOND) OF AGENCY (1958) regarding retained control due to the fact they have been superceded by the RESTATEMENT (THIRD) OF AGENCY (2006). (Id. at 12-13.) Mr. Afoa concludes his argument in this regard by claiming that the Port's distinction between a licensor-licensee relationship and an employer-independent contractor relationship is an attempt "to evade the *Kelley/Stute* rules of common-law and statutory WISHA liability." (Id. at 13.) Both Mr. Afoa's arguments and the Court of Appeals' belief that "whether the Port's agreement with EAGLE is called a license agreement or any other term is immaterial" are fundamentally incorrect.

It is the general rule that an employer of an independent contractor is not liable for work-related injuries to its independent contractor's employees. *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 330, 582 P.2d 500 (1978); *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 460, 788 P.2d 545 (1990). One narrow exception thereto is where the employer of the independent contractor has retained control over the manner in which the independent contractor's work is done. *See e.g., Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 130, 52 P.3d 472 (2002) (citing RESTATEMENT (SECOND) OF TORTS § 414 (1965)). The general rule of nonliability of employers for work-

related injuries to the employees of its independent contractors and the retained control exception thereto are the primary legal principles upon which Washington's common law and statutory WISHA liability for work-related injuries is based. *Kamla v. Space Needle Corp.*, 147 Wn.2d at 125 (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"); *Stute*, 114 Wn.2d at 464 ("the general contractor's innate supervisory authority constitutes sufficient control over the workplace.").

It necessarily follows that, in order for the general rule of nonliability and the retained control exception thereto to apply to an employer-independent contractor relationship, such a relationship must first exist. In the *Afoa* case, there was no employer-independent contractor or agency relationship between the Port and EAGLE. For this reason alone, Mr. Afoa's claim against the Port must fail, and the decision of the Court of Appeals must be reversed.

Contrary to Mr. Afoa's argument, both the definitions of "independent contractor" and "agency", as defined respectively in the RESTATEMENT (SECOND) OF AGENCY (1958) and the RESTATEMENT (THIRD) OF AGENCY (2006), establish that no employer-independent contractor or agency

relationship existed between the Port and EAGLE. The RESTATEMENT (SECOND) OF AGENCY § 2(3) defines “independent contractor” as “a person who contracts with another to do something for him but 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.” (emphasis supplied).

In comment c to the RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) the concern was expressed that the “common term ‘independent contractor’ is equivocal in meaning and confusing in usage because some termed independent contractors are agents while others are nonagent service providers.” Based upon this concern, the RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006), defines agency as follows:

Agency is the fiduciary relationship that arises when a person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act. (emphasis supplied).

Under both the definition of “independent contractor”, as set forth in the RESTATEMENT (SECOND) OF AGENCY, and the definition of “agency”, as set forth in the RESTATEMENT (THIRD) OF AGENCY, it is required that the employer/principal must contract for or assent to the independent contractor/agent doing something for or acting on behalf of the

employer/principal. Only in this situation can it be said that there is work over which the employer/principal can retain control.

In the absence of an agreement that work is to be performed for or on behalf of the employer/principal two results follow therefrom. First, the predicate factual pattern to which the general rule of nonliability applies does not exist. Second, because there are no facts to which the general rule of nonliability applies, there also are no facts to which the retained control exception thereto might apply.

In the *Afoa* case, there are no facts which establish an employer/principal-independent contractor/agent relationship between the Port and either Mr. Afoa, EAGLE, or any of the airlines that hired EAGLE to perform ground support services. In particular, there is no language in the license agreement whereby the Port manifests assent to EAGLE that EAGLE was to act on the Port's behalf in providing ground support services to airlines flying in and out of STIA. Correspondingly, there is no language in the license agreement which provides that EAGLE manifests assent or otherwise consents so to act.

This lack of any manifestation of assent that EAGLE was hired by the Port to provide ground support services for the airlines on the Port's behalf, or for that matter to do anything for or on behalf of the Port, is the critical

distinction that the Port has been asserting. The undisputed fact is that the Port never hired or in any way agreed with EAGLE that EAGLE was in any way doing something for the Port or was in any way acting on the Port's behalf. Under these circumstances, there is no factual pattern in the *Afoa* case to which the general rule of nonliability and the retained control exception thereto can apply. As such, the common law retained control exception is not a legal theory upon which the Port can be held liable for Mr. Afoa's injuries.

For these reasons, and contrary to the decision of the Court of Appeals, the Port's Rules and Regulations are nothing more than conditions with which its licensees must comply in order to go onto and remain on the Port's land. While the trial court recognized these basic and very material distinctions, unfortunately, the Court of Appeals did not. It was this failure on the part of the Court of Appeals that caused it to commit reversible error when it reversed the trial court's granting of the Port's motion for summary judgement.

2. The Language of the RESTATEMENT (SECOND) OF TORTS § 414 Requires Entrustment Of Work Before The Retained Control Exception Applies.

The foregoing arguments are further supported by the RESTATEMENT (SECOND) OF TORTS § 414 (1965) (Retained Control Exception). When the actual language of the first two phrases of this exception to the general rule

of nonliability is analyzed, it is evident that there must first exist a relationship whereby an employer entrusts work to an independent contractor before the retained control exception to the general rule of nonliability can apply thereto.

The “retained control” exception states as follows:

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.

(1) One who entrusts work to an independent contractor,

This portion of the retained control exception explicitly sets forth the underlying requirement that a principal must actually entrust work to the independent contractor. Neither Mr. Afoa nor the Court of Appeals ever identified any work that the Port in any way entrusted EAGLE to perform either for or on behalf of the Port.

(2) but who retains the control of any part of the work,

This phrase requires that in order for the retained control exception to the general rule of nonliability to apply, the employer must retain control over the work that was actually entrusted by the employer to the independent contractor to be performed for or on the employer’s behalf. In the *Afoa* case,

no Port work was entrusted to EAGLE. As such, there was no Port work over which the Port could retain control.

In reaching its decision to reverse the trial court's granting of the Port's motion for summary judgment, the Court of Appeals completely failed to address the underlying basis for the application of the retained control doctrine, which is the actual entrustment of the principal's work to the independent contractor. Instead, the Court of Appeals mistakenly focused upon the control issue. This mistaken analysis is evidenced by its incorrect phrasing of the issue in terms of whether or not there was a "contractual relationship with EAGLE by which it retained control over the manner in which EAGLE provided ground services" *Afoa v. Port of Seattle*, 160 Wn. App. 234, 241, 247 P.3d 482 (2011).

In phrasing the issue as it did, the Court of Appeals failed to correctly analyze the material differences between a license agreement and an employment agreement. Had it properly done so, it would have recognized that there first must exist an entrustment of the principal's work to an independent contractor before an issue of retention of control over such work can arise. The failure of the Court of Appeals to identify such work and to then assume that the Port retained control over work that EAGLE was performing for some other entities was reversible error.

B. The Port Is Not An “Employer” As Defined By WISHA Under The Facts Of The *Afoa* Case.

Contrary to the Court of Appeals’ characterization of the Port’s arguments, the Port has never contended that it is not an employer. *Afoa*, 160 Wn. App. at 241. The Port’s actual position is that it is not the employer of either Mr. Afoa, EAGLE, or any of the airlines with which EAGLE had contracted to provide ground support services. The Port believes that this distinction is critical in determining whether statutory WISHA duties are owed to injured workers, such as Mr. Afoa. The Port also believes that the pertinent language of RCW 49.17.020(4) supports its position that an entity must be the employer of one or more of the involved entities, and not just an employer of other persons in general, before statutory WISHA duties might be owed.

RCW 49.17.020(4) provides as follows:

The term ‘employer’ means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees or who contracts with one or more persons, the essence of which is the personal labor of such person or persons and includes the state, counties, cities, and all municipal corporations, public corporations, political subdivisions of the state, and charitable organizations: PROVIDED, That any person, partnership, or business entity not having employees, and who is covered by the industrial insurance act shall be considered both an employer and an employee.

(emphasis supplied).

The Port did not hire Mr. Afoa as an employee. The Port did not hire Mr. Afoa as an independent contractor to perform labor on the Port's behalf. The Port did not hire EAGLE as an independent contractor to perform labor on the Port's behalf. Likewise, the Port did not hire any of the air carriers with which EAGLE had contracted to provide ground support as an independent contractor to perform labor on the Port's behalf. As such, the Port was not an "employer" of either Mr. Afoa, EAGLE or the air carriers within the meaning of RCW 49.17.060.

Because the Port is not an "employer" of either Mr. Afoa, EAGLE, or the air carriers, it is unreasonable to conclude that the Port owed Mr. Afoa any specific duty to comply with or enforce any allegedly applicable WISHA regulations. To so hold would expand liability for work place injuries to an unreasonable and unforeseeable extent.

For example, Landowner A is the employer of numerous employees. Landowner A gives Company B a license to go onto its land to do wildlife research and prepare a documentary film. Landowner A has rules applicable to all persons on its land that they must conduct all activities while on the land in a safe and reasonable manner and that all motor vehicles used on

Landowner A's property must be designed and properly maintained in accordance with all applicable rules and regulations.

Landowner A also licenses other companies to do research and engage in other activities on its land. Neither Company B, Researcher C, nor any of the other licensee companies are employees of Landowner A.

Company B's employee, Researcher C, goes onto the land of Landowner A to conduct the research Landowner A's license permitted Company B to conduct. While conducting research, Researcher C drives a vehicle that is subject to WAC regulations in terms of its design and construction. Because of a design defect in the vehicle, which was prohibited by the WAC regulation, and due to faulty maintenance of the vehicle by Company B, the vehicle Researcher C is driving crashes into a tree. Researcher C is seriously injured.

Under the *Afoa* Court of Appeals' unreasonably expansive interpretation of the definition of employer under RCW 49.17.020(4), Landowner A, an employer in its own right, but not the employer of Researcher C, would face liability for Researcher C's injuries. This is because the *Afoa* decision imposes upon Landowner A the obligation to ensure WISHA compliant work conditions for the employees of all employers on its land. This would be the case even where an injured worker, such as

Researcher C, was not performing any work for or on behalf of Landowner A. This would be the case simply because Landowner A insisted upon compliance with its license agreements safety conditions which might somehow impact the manner in which Researcher C did his or her job.

Such construction of the WISHA statutes also is completely contrary to the holding in *Kamla*. Subsequent to the decision in *Stute*, Division I and Division II of the Court of Appeals expanded *Stute's* nondelegable duty of ensuring that work conditions are WISHA compliant to parties other than general contractors. See *Weinert v. Bronco Nat'l Co.*, 58 Wn. App. 692, 795 P.2d 1167 (Div. I 1990) (owner/developer) and *Doss v. ITT Rayonier Inc.*, 60 Wn. App. 125, 803 P.2d 4 (Div. II 1991) (jobsite owner). In *Kamla*, however, this Court limited the expansion of *Stute's* nondelegable duty determination.

In *Kamla*, and contrary to the Division II Court of Appeals' decision in *Doss*, this Court specifically held that jobsite owners or landowners are not per se liable under the statutory requirements of RCW 49.17.060. *Kamla*, 147 Wn.2d at 123. The *Kamla* Court so held even though an employer-independent contractor relationship existed between the Space Needle and Pyro-Spectaculars.

In *Kamla*, the Space Needle actually hired Pyro-Spectaculars to install a New Year's Eve fireworks display at the Space Needle. As set forth herein, no such employer-independent contractor relationship existed between the Port and either Mr. Afoa, EAGLE, or the airlines.

In addition, this Court in *Kamla* held that jobsite owners do not play a role sufficiently analogous to general contractors to justify imposing upon them the same nondelegable duty to ensure WISHA compliance when there is no general contractor. *Kamla*, 147 Wn.2d at 123-124. In *Kamla*, this Court obviously intended to limit, not expand, the class of landowners upon whom WISHA's nondelegable duties could be imposed. This Court did so even where the Space Needle had an employer-independent contractor relationship with Pyro-Spectaculars.

Instead of being guided by this Court's decision in *Kamla* to limit the class of landowners who must comply with WISHA's nondelegable duties, the Court of Appeals in *Afoa* did just the opposite. It expanded the class to include landowners, such as the Port, who do not even have an employer-independent contractor relationship with the injured worker's employer.

In effect, the Court of Appeals in *Afoa* greatly expanded the class of landowners who must comply with WISHA's nondelegable duties. This class includes landowners who do not have any employment relationship with any

of the involved parties. It also includes those landowners who are licensors and for whom their licensees are not doing anything for them and are not acting on their behalf. Such an expansion of the class of “employers” cannot possibly be in keeping with the intent of the legislature under the WISHA statutes and cannot be in keeping with the definition of “employer” under RCW 49.17.020(4). Such an expansion also is contrary to the *Kamla* Court’s expressed intention to limit the class of landowners upon whom the nondelegable WISHA duties should be imposed. In enacting WISHA, it is difficult to believe that the legislature intended that its legislation would be construed in such an expansive fashion.

This expansion of the class of persons who could face liability for work place injuries is of great concern to the business community. In support of the Port’s Petition for Discretionary Review, an Amici Curiae Memorandum was filed by the Association of Washington Business, the Washington Retail Association, the Washington Public Ports Association, the City of Kent, and the Airports Council International – North America. This is a diverse coalition of public and private organizations who are or who represent commercial and industrial premises owners who routinely structure legal relationships with vendors and other outside entities according to licenses allowing limited commercial use of their premises. As noted in the

Memorandum of the Amici Curiae, “[I]t is a tremendous upheaval of commercial expectation to now discover that restrictions in the license or franchise may now be construed as controls over the means and manner of a vendor’s work sufficient to attach *Kelley/Stute* liability.” (Mem. Amici at 9.)

C. This Court Should Reverse The Appellate Court’s Holding That Mr. Afoa Is A Business Invitee.

The Court of Appeals held that “Afoa was present on the Port’s property for a business purpose that benefitted both parties and was therefore a business invitee.” *Afoa*, 160 Wn. App. at 249. In its Petition for Discretionary Review, the Port urged review of this portion of the Court of Appeals’ decision. (Pet. Disc. Rev. at 1.)

The basis for the Port’s request is that under Washington law whether or not an economic benefit is conferred is not the determinative issue in deciding if a person is an invitee or a licensee. (*Id.* at 18.) Instead, relying upon the holding in *Thompson v. Katzer*, 86 Wn. App 280, 286, 936 P.2d 421, *review denied*, 133 Wn.2d 1020, 948 P.2d 387 (1997), the Port urged that the determinative issue is whether there is “a real or supposed mutuality of interest in the subject to which the visitor’s business or purpose relates.” *Id.* The *Thompson* Court further explained its holding by analogizing that “[i]f the law were otherwise, every guest who brings a bottle of wine to the

host of a residential dinner party would be a 'business visitor,' and the distinction between invitees and licensees, recently re-affirmed by the Supreme Court, would be obliterated." *Id.* at 286-87.

Here, EAGLE approached the Port for permission to access the AOA so that it could provide ground support services for the airlines with which EAGLE had contracted. The Port granted this request pursuant to the license agreement. The sole purpose for EAGLE and Mr. Afoa being present in the AOA at the time of Mr. Afoa's injury was EAGLE's and Mr. Afoa's business dealings with the airlines. Neither were in the AOA for a purpose directly or indirectly connected with business dealings with the Port.

The fact that EAGLE paid and the Port received a nominal fee for the issuance of the license does not alter the fact that neither EAGLE nor Mr. Afoa were involved in business dealings with the Port at the time of Mr. Afoa's injury. Since no such business dealings with the Port existed at that time, there was no mutuality of interest between the Port and Mr. Afoa as required by the holding in *Thompson*. As such, Mr. Afoa was a licensee at the time of his injury and not an invitee as the Court of Appeals incorrectly concluded.

V. CONCLUSION

The Court of Appeals in *Afoa* has created a new theory of tort liability, which might aptly be called “the control doctrine”. Pursuant to this new legal theory, any landowner that is an employer to anyone can be held liable under the common law and WISHA for any work related injury on its land if the landowner has any safety rules that can in any way be interpreted as somehow impacting the manner in which the employee of a different employer performs work thereon. This new legal theory does not require an employer-independent contractor relationship. It does not require a principal-agent relationship. It does not even require that the injured worker, who is employed by a different employer, be performing any work for or on behalf of the landowner. The Court of Appeals’ decision goes far beyond any decision ever rendered by any court of this state.

The Court of Appeals uses the work place cases to justify its decision. Yet, these work place cases actually have nothing to do with the facts of the *Afoa* case. Each and every one of the work place cases decided before *Afoa* involves an employer-independent contractor scenario where the independent contractor is doing something for or on behalf of its employer. Such scenario is completely absent in the *Afoa* case.

Under the facts of the *Afoa* case, the Court of Appeals erred when it decided that the Port owed Mr. Afoa a common law duty pursuant to the retained control exception. The Court of Appeals erred when it held that the Port owed Mr. Afoa a statutory duty of care under WISHA. Likewise, the Court of Appeals erred when it held that Mr. Afoa was a business invitee, when in fact and in law he was a licensee at the time of his injury.

The Port requests that this Court reverse the entirety of the decision of the Court of Appeals. It further requests that the *Afoa* case be remanded to the trial court for entry of a judgment in favor of the Port which dismisses the entirety of Mr. Afoa's claims against it with prejudice.

RESPECTFULLY SUBMITTED, this 12th day of August, 2011.

NORTHCRAFT, BIGBY & BIGGS, P.C.

By  #38111
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Attorney for Petitioner Port of Seattle

CERTIFICATE OF SERVICE

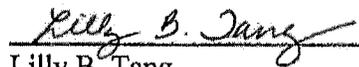
I, Lilly B. Tang, hereby certify under penalty of perjury under the laws of the state of Washington, that on August 12, 2011, I served via e-mail and U.S. mail, postage prepaid to:

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SIGNED in Seattle, Washington, on August 12, 2011.


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