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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRANDON APELA AFOA,

Respondent,

v.

PORT OF SEATTLE,

Petitioner.

RESPONDENT BRANDON AFOA'S SUPPLEMENTAL BRIEF

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ORIGINAL

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I. INTRODUCTION

The Port of Seattle seeks to dismantle over a hundred years of Washington law protecting workers. Under the common law rule in Washington, the party best able to control the means and manner of work at the jobsite is responsible for protecting safety of all works on the jobsite – not just its own employees. *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 330, 582 P.2d 500 (1978). The Legislature has enhanced these duties by statute, under the WISHA specific duty clause of RCW 49.17.060 (2). *Stute v. PBMC, Inc.*, 114 Wn.2d 454, 460, 788 P.2d 545 (1990). “This furthers the purpose of WISHA to assure safe and healthy working conditions for every person working in Washington.” *Stute, supra*, 114 Wn.2d at 458. These rules are grounded in Washington law that has been established for over a century. *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)).

Now the Port of Seattle seeks to undo what both this Court and the Legislature have done, arguing that its pervasive power to control the manner of work and protect worker safety at the jobsite is irrelevant so long as it carefully styles its contract with the injured worker’s employer as a “license” instead of a “subcontract.” It seeks this ruling *as a matter of law* in a case in which the disputed record, read most favorably to the

nonmoving injured employee, demonstrates: (1) that the Port is engaged in a proprietary activity (running an airport) from which its annual revenues exceed \$4 billion, CP 363-64; (2) Mr. Afoa was injured while providing essential ground services without which no airport can function; (3) the Port is a major employer of 22,000 airport employees at the jobsite where Mr. Afoa was injured, CP 363-64; (4) the jobsite was in the restricted Air Movement Area, which the Port's contracts state is "subject at all times to the exclusive control and management by the Port," CP 402 § 2.1; (5) the Port-EAGLE license agreement requires that EAGLE comply with all Port regulations, CP 207 ¶ 9; (6) the Port's pervasive regulations require that EAGLE and its employees "shall comply with written or oral instructions issued by the Director [of Aviation of the Port] or Port employees to enforce these regulations," CP 141 ¶ 1; (7) the Port actually controlled many specific areas of work, including the safety and operation of the vehicles upon which Mr. Afoa was injured; and (8) the Port benefited financially from fees generated under its license agreement with EAGLE.

If this Court reverses Division One's decision, then a wide range of commercial activity currently conducted under general contractor/owner-subcontractor agreements will be shifted into license agreements, which *in substance* retain all the control and economic benefit provisions of the traditional-style arrangements, solely to avoid protection of worker safety.

The result will be: (1) diminished protection of workers on common jobsites throughout the State; (2) diminished safety for workers and the traveling public at the Port of Seattle; (3) frustration of the intent of the Legislature in enacting WISHA; and (4) elevation of form over substance.

Division One's decision should be AFFIRMED.

II. ARGUMENT

A. Division One Properly Applied Existing Law, Which Should Not Be Changed to Create a Formalistic Loophole for Avoiding Protection of Worker Safety

1. The Party In Control of the Manner of Work at the Common Jobsite Is Liable for Worker Injury

In *Kelley v. Howard S. Wright Construction Co.*, *supra*, 90 Wn.2d 323, an employee of a subcontractor sued the general contractor for injuries suffered in a fall. This Court's fundamental rationale for imposing liability was the right to control the work:

A common law exception to the general rule of nonliability exists where the employer of the independent contractor, the general contractor in this case, *retains control over some part of the work*. The general then has a duty, within the scope of that control, to provide a safe place of work. The test of control is not the actual interference with the work of the subcontractor, but *the right to exercise such control*.

Id. at 330-31 (citations omitted) (emphasis added).

Stute v. PBMC, *supra*, 114 Wn.2d 454, applied this rule to the employer in charge of a common work area, under the specific duty clause

of WISHA, RCW 49.17.060 (2) (“Each employer: . . . (2) Shall comply with the rules, regulations, and orders promulgated under this chapter.”). As in *Kelley*, the injured employee was not an employee of the general contractor. In imposing liability, this Court held:

[T]he 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.

Stute, supra, 114 Wn.2d at 458 (citations omitted). “In *Kelley*, general supervisory functions were sufficient to establish control over the work conditions of the subcontractor's employee.” *Stute, supra*, 114 Wn.2d at 461. *Stute* explained the overriding workplace safety rationale:

“Placing ultimate responsibility on the general contractor for job safety in common work areas will, from a practical, economic standpoint, render it more likely that the various subcontractors being supervised by the general contractor will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas.”

Stute, supra, 114 Wn.2d at 461 (quoting, *Funk v. General Motors Corp.*, 392 Mich. 91, 104, 220 N.W.2d 641 (1974)).

Significantly, neither *Kelley* nor *Stute* nor their progeny turn at all on the formal contractual status of the parties. The substantive question is the right to control, and the substantive policy is determining which party is

best able to ensure worker safety in a common workplace.¹ The Port's formalistic arguments here are reminiscent of arguments rejected by Division One in *Husfloen v. MTA*, 58 Wn. App. 686, 794 P.2d 859 (1990), where a subcontractor was held liable under WISHA for injury to another subcontractor's employee:

MTA maintains that *Stute* is distinguishable because it involved two rather than three levels of employers as is the case here. *This factual distinction is without consequence.* Bill's Plumbing had hired MTA, a subcontractor, to build a foundation and in so doing placed MTA's supervisor in charge of the project site on the day the accident occurred. . . . MTA supervised exclusively the actual pouring of the concrete. MTA was possibly in a better position to ensure that Pumpcrete complied with safety regulations than was Bill's Plumbing. Therefore, MTA did not avoid owing a duty to Husfloen merely because it was a subcontractor, not the general contractor of the project.

Id. at 689-90 (emphasis added).

¹ See, *Neil v. NWCC Investments V, LLC*, 155 Wn. App. 119, 126-29, 229 P.3d 837 (Div. 1, 2010) (rule recognized, but in absence of evidence of retention of control, no liability); *Arnold v. Saberhagen Holdings*, 157 Wn. App. 649, 663-66, 240 P.3d 162 (Div. 2, 8/31/2010) (stressing liability for control over common work area); *Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 247-49, 85 P.3d 918 (Div. 1, 2004); *Husfloen v. MTA*, 58 Wn. App. 686, 689-90, 794 P.2d 859 (Div. 1, 1990); *Weinert v. Bronco Nat. Co.*, 58 Wn. App. 692, 696, 795 P.2d 1167 (Div. 1, 1990). In *Hennig v. Crosby Group, Inc.*, 116 Wn.2d 131, 802 P.2d 790 (1991), and *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 52 P.3d 472 (2002), this Court clarified that mere control over aspects of contract administration, as opposed to the means and methods of performing the work, was not sufficient to impose *Kelley/Stute* liability. Nothing in these decisions vitiates the rule of *Kelley/Stute* – indeed, both cases rely on the basic rule that the power to control the means of work in a common workplace gives rise to liability, and then move on from there. See, *Hennig, supra*, 116 Wn.2d at 134 (quoting *Kelley*, court notes the “exception to the general rule of nonliability” for retained “control over some part of the work”); *Kamla, supra*, 147 Wn.2d at 120-21 (Court rejects Space Needle's request that it modify the “retained control” test of *Kelley*).

The policy of ensuring safety for all employees explains why the duty of compliance with WISHA is not determined mechanistically by the contractual status of the parties, but instead falls on the party “in the best position to ensure compliance with safety regulations.” *Stute, supra*, 114 Wn.2d at 463. While that party was the general contractor in *Kelley* and *Stute*, in other cases it has been recognized that the owner of the property where the work is performed is the party best able to ensure compliance with safety regulations. *Kinney v. Space Needle Corp., supra*, 121 Wn. App. at 249; *Doss v. ITT Rayonier, Inc.*, 60 Wn. App. 125, 127 n.2, 803 P.2d 4 (Div. 2 1991); *Weinert v. Bronco Nat’l Co., supra*, 58 Wn. App. at 696. Significantly, the Port is the owner of the airfield area where Mr. Afoa was injured, CP 396, and has liability under these authorities through its actions and control, regardless of its licensor-licensee agreements. Furthermore, as a major employer, the Port is obviously a sophisticated party, able to identify and implement the regulatory protections of WISHA. Therefore, it is appropriate that the Port be held responsible if violations of WISHA regulations contributed to the serious injury suffered by Mr. Afoa.²

² WISHA regulations potentially violated here are detailed at *Brief of Appellant* (Court of Appeals) pp. 23-24. Most significant among these are the duty to ensure that powered industrial tractors protect the operator from falling objects, WAC 296-863-20025, and the duty to ensure that these tractors are maintained in safe working condition, WAC 296-863-30020. Also, storage of dangerous debris in the roadways demonstrates an unsafe jobsite, in violation of WAC 296-800-11005 as well as WAC 296-863-40010. These are issues of fact for the jury.

2. **Division One Properly Decided Based on Power of Control, not Formalistic Labels on Contracts**

The Port attempts to avoid the weight of this authority by harping on the fact that its contract with EAGLE is called a “license agreement” instead of a “subcontract”. That is a formal distinction without a difference. The Court of Appeals got it exactly right, when it held:

The Port’s argument that it owes no duty to Afoa because EAGLE is not an independent contractor with the Port and its contract with EAGLE is merely a “license agreement,” misses the mark. Whether the agreement between the Port and EAGLE is called a “license agreement” or any other term is immaterial. Nor does it mater that the Port does not consider EAGLE to be an “independent contractor.” *The 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.* The Port contends that it does not. But an examination of the agreement between EAGLE and the Port, when viewed in a light most favorable to Afoa, reveals questions of material fact on this issue.

Afoa v. Port of Seattle, 160 Wn. App. 234, 241, 247 P.3d 482 (Div. 1 2011) (emphasis added). It is the *substance of control* under the contractual relationship, not the *formal title* given to the contractual relationship, that governs liability. *See, e.g., Phillips v. Kaiser Aluminum*, 74 Wn. App. 741, 875 P.2d 1228 (Div. 2, 1994) (“Whether a right to control has been retained depends on the parties’ contract, the parties’ conduct, and other relevant factors.”); *Rho Co., Inc. v. Dept. of Revenue*, 52 Wn. App. 196, 207, 758 P.2d 553 (Div. 1, 1988) (error to determine control solely on form of

contract instead of actual substance of control); *Jackson v. Standard Oil Co. of California*, 8 Wn. App. 83, 93, 505 P.2d 139, 145 (Div. 2, 1972) (“[A] written contract provision disclaiming control is not determinative on the question of control. The relationship of the parties, as amplified by the operating manual, the nature of the undertaking itself, and the amount of control actually exercised in performance of the undertaking, are the determinative factors.”).

B. The Actual “License Agreement” Between the Port and EAGLE Demonstrates the Port’s Pervasive Control and Undermines the Port’s Argument

Throughout this proceeding, the Port has relied upon its “licensor-licensee” relationship to profess a level of non-involvement with the services performed by EAGLE and its employees that is totally at odds with the record. For example, the Port argues that its license agreements “simply grant to the licensees the non-exclusive use of the Air Operations Area . . . in common with others to conduct air and ground service operations,” and that “there is no evidence whatsoever that the Port retained control over the manner in which [EAGLE] performed or completed their work.” *Brief of Respondent* (Court of Appeals) pp.2-3. Similarly, in its Petition for Review, the Port argues that “[a] license affords the licensee mere ‘permission to do certain acts, which he can assert against the licensor only, and which is ordinarily terminable or

revocable at the will of the latter, and is not transferable.” *Petition for Review* at 6 (citations omitted).

The truth is that the Port’s license agreement with EAGLE goes well beyond “mere permission” for the use of land. Instead, it imposes a pervasive scheme of control over EAGLE’s services that helps the Port coordinate a number of trades in a complex commercial operation, much the same way that subcontracts serve the purposes of an owner and/or general contractor. The Port is a major employer engaged in the proprietary activity of running an airport, for which purpose it exerts pervasive control over a closed jobsite. The Port expressly retains “exclusive control and management by the Port” over the jobsite, CP 402 § 2.1, and it requires that “Licensee [EAGLE] shall comply with all Port regulations” CP 207 ¶ 9. The Port regulations made applicable to EAGLE by the license agreement provide minute detail such as: “No person shall use the roads . . . in such manner as to hinder or obstruct their proper use,” CP 143 ¶ 10(b); “All vehicular equipment in the Air Operations Area . . . must at all times comply with any lawful signal or direction of Port employees,” CP 162 ¶C(1); “No person shall park any motor vehicle or other equipment or materials in the Air Operations Area of the Airport except in a neat and orderly manner and at such points as prescribed by the Director,” CP 164 ¶ C(12); “No person shall operate

any motor vehicle or motorized equipment in the Air Operations Area of the Airport unless such motor vehicle or motorized equipment is in a reasonably safe condition for such operation,” CP 164 ¶ C(15). The Port requires special testing and licensing for all ground service company employees performing duties in the airfield area. CP 291-317. The Port’s radio towers monitor activities of ground service personnel in the airfield area. CP 346-48. All this and more is rigorously enforced by Port Ramp Patrol and Port Police against EAGLE employees, CP 349-53, right down to when and where airplanes are to be moved, CP 345, removal of defective equipment from the airfield area, CP 351 (deicer missing headlight), CP 352-53 (water truck with broken brake light), where to fuel, where to unload containers, and how to tow a train of dollies. CP 349-51.

In addition to the many Port regulations pertaining to operation and maintenance of vehicles in the air operations area, the Port regulations require that EAGLE and its employees “shall comply with written or oral instructions issued by the Director [of Aviation of the Port] or Port employees to enforce these regulations,” CP 141 ¶ 1. EAGLE managers have made it clear to their employees that they are to follow the Port’s instructions, even if they conflict with instructions from EAGLE’s managers. CP 345. There are numerous specific instances of Port control over movement of vehicles and equipment, towing of baggage, unloading

and loading of containers, and the like, in the record. CP 349-53. The Port enforces safety by ordering defective vehicles off the airfield until repaired to its satisfaction. CP 289, 366-70.

On this record, the Port is more analogous to a general contractor in the best position to ensure the safety of all employees at a common jobsite, than to a passive property owner imposing conditions on the use of its land. It is not accurate to argue, as the Port has, that “there is no evidence whatsoever that the Port retained control over the manner in which [EAGLE] performed or completed their work.” *Brief of Respondent* (Court of Appeals) p.3. The Port controls every aspect of EAGLE’s performance of its work via paragraph 9 of the license agreement, which provides that “Licensee shall comply with all Port regulations . . .” CP 207 ¶ 9. There is nothing wrong with such a provision – the Port is fully within its rights in imposing it. But by doing so, the Port has clearly seized complete control over the means and manner in which EAGLE’s services are performed, and it is therefore in the best position to ensure worker safety for all employees at this common jobsite.

The Port has also argued that “nothing in the license agreements even remotely suggests that the licensees are performing work for the Port.” *Brief of Respondent* (Court of Appeals) p. 3. While it is formally accurate (and legally immaterial) that EAGLE does not “work for” the

Port, it is not accurate to imply that EAGLE does not perform any services of value to the Port. The Port is in the business of running an airport, from which its annual revenue is approximately \$4.3 billion. CP 363-64. One of its primary sources of revenue is gate rents charged to airlines. Airlines must have ground service contractors such as Mr. Afoa's employer EAGLE in order to function. If the airlines did not contract for those services, then the Port would have to provide them and pass the costs through to the airlines. Rather than structure it this way, the Port uses paragraph 5 of the license agreement to ensure that EAGLE or other ground service companies will provide these services:

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 ¶ 5. The Port therefore exercises control over the services provided by EAGLE, and directly benefits from these services because they make the Port's entire business model possible. This goes well beyond "mere permission" to use the premises, and more than "remotely suggests" that EAGLE is performing services for the Port.

Under its license agreement with EAGLE, the Port also charges EAGLE a direct annual user fee of \$500 per year, and a parking/storage

fee of \$0.72 / square foot for use of parking and storage of equipment on the airfield. CP 204 ¶ 4. Therefore, the Port benefits directly from its contract with EAGLE.

C. Potential Consequences of this Court's Ruling

1. This Court Should Not Undermine WISHA

WISHA was enacted "in order to assure, insofar as may reasonably be possible, safe and healthful working conditions for *every man and woman working in the state of Washington.*" RCW 49.17.010 (Laws of 1973 c 80 § 1) (emphasis added). This is not a formalistic purpose. Nor is it a mandate from the Legislature for clever lawyers to draft contracts in such a way that only some of the men and women working in the state of Washington receive safe and healthful working conditions.

WISHA expressly addresses the issue raised by the Port in its definition of "employer," which it defines 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

RCW 49.17.020 (4). This definition covers "any person . . . or other business entity which engages in any business, industry, profession, or

activity in this state and *employs one or more persons or who contracts with one or more persons, the essence of which is the personal labor of such person or persons . . .*” (Emphasis added). Therefore, WISHA expressly instructs the court to look to the substance – the “essence,” as it is called here – of the contractual relationship. So long as personal labor is involved, WISHA applies.

Furthermore, under the first clause of this disjunctive definition, the fact that the Port employs one or more persons – even if not the person injured – at the jobsite, is in itself sufficient to trigger WISHA. The undisputed material facts show that the Port is a major employer, with approximately “22,000 airport employees.” CP 363.

Finally, WISHA’s definition speaks to the grievances of AMICI such as the City of Kent, because it expressly provides that WISHA applies not merely to private parties, but also to “the state, counties, cities, and all municipal corporations, public corporations, [and] political subdivisions of the state . . .” RCW 49.17.020 (4). As discussed below, this does not necessarily mean that every time a private contractor’s employee is injured somewhere in the City that the City is necessarily liable under WISHA. For example, there is an obvious distinction between work performed for the benefit of the cable company, on lines in the public street over which many parties exercise degrees of control, and

work performed to help the Port further its proprietary activity of running an airport, done in a closed common jobsite over which the Port has exclusive control. But it does mean that, in cases in which the proprietary party with substantial control over the common jobsite is a municipal corporation, the Legislature has decided that WISHA's worker safety and health regulations must be obeyed. This Court, in the exercise of judicial restraint, is duty-bound to honor the Legislature's determination, and it must not permit the Port or any other entity to contract around it.

2. Imposition of Liability on the Port Does Not Threaten the General Power of Municipalities to Use Licenses to Govern

Amici opposing the grant of review have suggested that there is no difference between this case and a municipality granting licenses to private contractors to perform work on the streets or other public areas in a city. Amici are mistaken.

First, there is a clear difference between a general requirement to comply with existing ordinances applicable to all, and a specific requirement to comply with a set of rules applicable to a closed and tightly controlled common jobsite. A general requirement to comply with law applies equally to all, and creates no actionable duty under the Public Duty Doctrine. *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 784-85, 30 P.3d 1261 (2001).

Second, Amicus City of Kent admits that, when it imposes conditions on the grant of a license/permit to work in the public city thoroughfare, it nonetheless “does not retain the right to control the means and manner of how employees of contractors and subcontractors perform their construction work.” *Joint AMICI Memo Supporting Petition for Review* at 9. Obviously, what municipalities do generally in issuing permits falls far short of the pervasive scheme of control implemented by the Port in this case.

Third, the Port is not acting in a general governmental capacity, but is instead acting in a proprietary capacity for which purpose it is controlling a closed common jobsite. “A government acts in a proprietary capacity when it engages in a business-like venture” *Dorsch v. City of Tacoma*, 92 Wn. App. 131, 135-36, 960 P.2d 489 (Div. 2 1998). General grants of licenses under ordinances are simply not comparable to contractual imposition of special rules governing proprietary work at a closed common jobsite. The former is immune under the Public Duty Doctrine, because “a duty to all is a duty to no one.” *J&B Development Co. v. King County*, 100 Wn.2d 299, 303, 669 P.2d 468 (1983). “The public duty doctrine does not apply where the government is performing a proprietary function.” *Dorsch, supra*, 92 Wn. App. at 135-36. The *Kelley/Stute* duties should apply to municipal corporations that act in a

proprietary capacity and retain substantial control over the means and manner of work in a closed common jobsite. Any lesser holding would undermine the Legislative choice in WISHA to include “municipal corporations” under the definition of “employer”. RCW 49.17.020 (4). At the same time, this does not mean that this Court is broadly opening municipalities to a new realm of liability merely for granting permits. By so holding, this Court is merely enforcing existing law under *Kelley/Stute* and WISHA.

3. The Restatement Third Makes Clear that Formalism Must Be Avoided in Determining Liability of Parties Exercising Control Over Others

The Port relies on the the definitions of “independent contractor” and “employer” from the Second Restatement of Agency to suggest that the holding in favor of Mr. Afoa is contrary to independent contractor jurisprudence. *Petition for Review* at 5. In fact, the cited provisions of the Second Restatement have been superseded by the provisions of the Third Restatement of Agency, which emphasizes the right to control, rather than formalistic categories. The Third Restatement begins by saying that, in all agency relationships, “the agent shall act . . . subject to the principal’s control,” Restatement (Third) Agency §1.01 (2006) (Agency defined). The Third Restatement rejects reliance on categories such as “independent contractor”:

Agency encompasses a wide and diverse range of relationships. . . . [T]he 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. . . . This Restatement does not use the term “independent contractor,” except in discussing other material that uses the term.

Restatement (Third) §1.01 cmt. c. The Third Restatement instead makes it clear that the substance of the relationship governs over form:

Whether a relationship is characterized as agency in an agreement between parties or in the context of industry or popular usage is not controlling.

Restatement (Third) Agency §1.02.

Whether a relationship is one of agency is a legal conclusion made after an assessment of the facts of the relationship and the application of the law of agency to those facts. Although agency is a consensual relationship, how the parties to any given relationship label it is not dispositive.

Restatement (Third) Agency §1.02, cmt a.

It is appropriate for the court to consider whether the parties’ characterization serves a function other than circumventing an otherwise-applicable statute, regulation, or rule of law

Restatement (Third) Agency §1.02, cmt b. In this case, the Court of Appeals appropriately applied the law creating an exception to nonliability for right of control of the workplace, to the facts of the right of control evidenced by the Port-EAGLE “license agreement” and the Port regulations. The Court of Appeals did not rely upon the characterization of the relationship made by the Port, which seems to serve no purpose

other than attempting to evade the *Kelley/Stute* rules of common-law and statutory WISHA liability. That is the proper approach, exactly in accord with Washington law and the Third Restatement. The Port's arguments appear to have no other purpose than to circumvent the otherwise applicable rules of liability for control of a common jobsite.

D. Mr. Afoa is a Business Invitee

A "business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." Restatement (Second) of Torts §332 (3) (1965); *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986). As the above arguments make clear, Mr. Afoa was on the Port's premises for purposes related to running an airport – ground services – and so he is a business visitor to whom the Port owes the duties of an invitee.

The Port argues that Mr. Afoa could not be a business invitee because he was not "invited" onto the premises. *Petition for Review* p.19. The Port licensed EAGLE to perform services on the airfield area, CP 205 ¶ 5, and it specifically issued a badge to Mr. Afoa authorizing him to work there. CP 290. A reasonable juror could find that Mr. Afoa was invited by the Port onto the premises where he suffered injury.

The Port argued below that Mr. Afoa's presence was not for the Port's economic benefit. *Brief of Respondent* p.33. The Port shifts ground

now to argue that economic benefit is not the key; “[t]he determinative issue” is “real or supposed mutuality of interest in the subject” of the visitor’s purpose. *Petition for Review* at 18. A reasonable juror could find that Mr. Afoa’s performance of the ground services that made it possible for the airlines to do business with the Port was in the mutual interest of all parties. *Restatement, supra*, § 332(3); *see, Beebe v. Moses*, 113 Wn. App. 464, 467-68, 54 P.3d 188 (Div. 3 2002).³

The Port relies on *Kamla* to argue essentially the same thing it argues on the merits of the *Kelley/Stute* issue: that a landowner/licensor cannot be liable because of the formal contractual structure and the absence of the element of control. *Petition for Review* at 15-17. All that has been said before applies equally to refute this argument: it is mere formalism, which ignores the actual pervasive right to control created by the substantive terms of the Port-EAGLE license agreement.

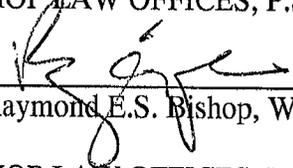
III. CONCLUSION

In the interest of worker safety, and to avoid the wholesale gutting of WISHA, Division One should be AFFIRMED.

³ The presence on the tarmac of the broken-down loader which fell on Mr. Afoa is a condition of the land. Mr. Afoa testified that “[t]he broken cargo loader that [he] collided with had been on the Port premises for well over two weeks.” CP 288. In light of the evidence of constant patrolling of the area by Port Ramp Patrol and Port Police, this creates a jury question on whether the Port knew or should have known that the loader created an unreasonable risk of harm, and thus breached its duties owed to an invitee under *Restatement (Second) of Torts* §343A (1965).

Dated at Normandy Park, WA, this 12th day of August, 2011.

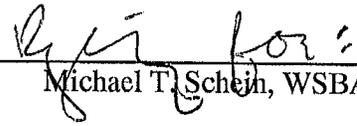
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

CERTIFICATE OF SERVICE

I certify that on today's date I served via e-mail and via United States Mail, postage pre-paid to:

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the following document(s):

- RESPONDENT BRANDON AFOA'S SUPPLEMENTAL BRIEF

Dated this 12th day of August, 2011.

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- RESPONDENT BRANDON AFOA'S SUPPLEMENTAL BRIEF
- Certificate of Service

Thank you,

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