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No. 94525-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BRANDON APELA AFOA,

Plaintiff/Respondent,

vs.

PORT OF SEATTLE,

Defendant/Petitioner.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WS AJ Foundation has an interest in the rights of persons seeking redress under the civil justice system, including an interest in the right of an injured worker to obtain full recovery from a jobsite owner who has a nondelegable duty to provide workers with a safe workplace by virtue of its retention of the right to control the manner of work on the jobsite.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case requires the Court to decide whether the nondelegable duty imposed on a jobsite owner who retains control over workplace safety was abrogated by the enactment of RCW 4.22.070, and whether a defendant waives its right to assert the affirmative defense of nonparty fault when its assertion of the defense is dilatory or inconsistent with its prior conduct. The underlying facts are drawn from the Court of Appeals opinion and the briefing of the parties. *See Afoa v. Port of Seattle*, 198 Wn. App. 206, 393 P.3d 802 (2017); Port Pet. for Rev. at 2-7; Afoa Ans. to Pet. for Rev. at 1-3; Afoa Supp. Br. at 1-2; Port Supp. Br. at 1-2.

For purposes of this brief, the following facts are relevant. The Port of Seattle is the owner and operator of Seattle-Tacoma International Airport (Sea-Tac). The Port enters into lease agreements with various airlines, granting them permission to use its property to provide air services, subject to control and management by the Port. The airlines may then contract with other entities to provide various services. One such entity is Evergreen Aviation Ground Logistics Enterprises, Inc. (EAGLE). On the basis of an agreement between Hawaiian Airlines and EAGLE, the Port executed a separate licensing agreement with EAGLE, allowing it to operate at Sea-Tac, subject to the Port's control. While the original agreement was between Hawaiian and EAGLE, China Airlines, British Airways and Eva Air also utilized EAGLE's ground services.

Afoa was an employee of EAGLE. While operating a "tug/push-back vehicle" on the airfield, the brakes and steering failed, causing Afoa to lose control of the vehicle. Afoa collided with a large, broken piece of loading equipment that had been left on the tarmac. On impact, the equipment fell on Afoa, crushing his spine and leaving him paralyzed.

Afoa 1

In February of 2009, Afoa sued the Port, asserting violations of its nondelegable duties to maintain a safe workplace under the retained con-

trol doctrine. The Port indicated it would assert nonparty fault, but did not identify the potential at-fault entities. Afoa moved to strike the defense as insufficient, which the court denied. The Port then moved for summary judgment, arguing the retained control doctrine is inapplicable where the injured worker is employed by a licensee and not an independent contractor, and that it owed no statutory duties under RCW 49.17.060(2), the specific duty clause of the Washington Industrial Safety and Health Act of 1973, Ch. 49.17 RCW (WISHA). The trial court granted the Port's motion.

The Court of Appeals reversed and this Court affirmed the Court of Appeals. *See Afoa v. Port of Seattle*, 176 Wn.2d 460, 296 P.3d 800 (2013) (*Afoa I*). The Court held the retained control doctrine turns not on status, but rather on retention of control over workplace safety, and genuine issues of material fact remained as to whether the Port retained control over the manner of work done at Sea-Tac. The Court remanded for trial.

Afoa's Federal Action Against the Air Carriers

In December, 2010, Afoa filed suit against the four airlines that had contracted with EAGLE. The airlines removed the action to federal court and Port counsel substituted as counsel for the airlines. The action was stayed until 2013. The federal court denied Afoa's motion to add the Port as a defendant, and dismissed Afoa's claims against the airlines in 2014.

Afoa II

On remand, after the federal court dismissal and over five years after the complaint was filed, the trial court granted the Port's motion to amend its answer to name the airlines as at-fault nonparties. At trial, the jury found the Port retained the right of control and that Afoa suffered \$40,000,000 in damages, and allocated 25% fault to the Port, .2% to Afoa, and the remaining 74.8% equally among the airlines. The court entered judgment against the Port in the amount of \$10 million.

The Port appealed and Afoa cross-appealed, and the Court of Appeals affirmed in part and reversed in part. It held the Port's duty to maintain a safe workplace under the retained control doctrine was *nondelegable*, that the Port was vicariously liable for the fault of the non-party air carriers, and that the trial court erred in allocating fault to the airlines. The Court of Appeals remanded for entry of judgment against the Port in the amount of \$39,920,000. This Court granted the Port's petition for review.

III. ISSUES PRESENTED

1. Does RCW 4.22.070, properly construed, evidence the Legislature's intent to abrogate the nondelegable duty to maintain workplace safety imposed on a jobsite owner who retains the right to control the manner of work on the jobsite?

2. In granting the Port's motion to amend its answer to name the airlines as at-fault nonparties, did the trial court abuse its discretion when it failed to apply the doctrine of waiver, to determine whether the Port's motion was dilatory or inconsistent with its prior conduct, resulting in prejudice to Afoa?

IV. SUMMARY OF ARGUMENT

Nondelegable duties impose vicarious liability in situations in which the public interest is so important that it is determined the responsible party may not delegate liability to another. One such duty is that imposed on a jobsite owner who retains control over safety of the jobsite.

Statutes are construed in light of existing law, and will not be construed to derogate the common law absent clear legislative intent. RCW 4.22.070 established several liability as the general rule, but RCW 4.22.070(1)(a) retained principles of vicarious liability, imposing vicarious liability when a party is "acting as an agent or servant" of another. A non-delegable duty is triggered by a jobsite owner's retention of the right to control the manner of work on the jobsite, and where such control is retained, those functioning within the scope of the owner's control on the jobsite may be said to be acting as an agent or servant of the jobsite owner.

The trial court abused its discretion in granting the Port's motion to amend. Nonparty fault is an affirmative defense which may be waived if

not pleaded. Waiver is found when its assertion is dilatory or inconsistent with the defendant's prior conduct and results in prejudice to the plaintiff. Here, the Port's late motion was dilatory and potentially inconsistent with its prior conduct, and the trial court erred in failing to apply the doctrine of waiver to determine whether the Port waived its right to assert the defense.

V. ARGUMENT

A. **A Jobsite Owner Who Retains The Right To Control The Manner Of Work On The Jobsite Has A Nondelegable Duty To Maintain Workplace Safety And Should Not Be Permitted To Delegate Liability By Allocating Fault Under RCW 4.22.070.**

1. **Nondelegable duties impose vicarious liability on entities when the importance to the community is so great that the responsible party should not be permitted to delegate liability to another.**

Nondelegable duties impose vicarious liability on entities that are well-situated to ensure the safety of others. "Such a duty may be imposed by statute by contract, by franchise or charter or by the common law." *Sea Farms, Inc v. Foster & Marshall Realty, Inc.*, 42 Wn. App. 308, 312-13, 711 P.2d 1049 (1985), *review denied*, 105 Wn.2d 1010 (1986) (citations omitted). It is difficult to suggest the criterion by which nondelegable duties may be identified, "other than the conclusion of the courts that the responsibility is so important to the community that the employer . . . should

not be permitted to transfer it to another.” *Millican v. N.A. Degerstrom, Inc.*, 177 Wn. App. 881, 892, 313 P.3d 1215 (2013), *review denied*, 179 Wn.2d 1026 (2014) (citation omitted). In *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 331-32, 582 P.2d 500 (1978), the Court noted such duties are imposed for public policy reasons. It cited Prosser, who explains nondelegable duties are a form of vicarious, as opposed to direct, liability:

In the first place, quite apart from any question of vicarious responsibility, the employer may be liable for any negligence of his own in connection with the work to be done. . . . [T]here are numerous situations in which it may be negligence to rely upon another person, and the defendant is not relieved of the obligation of taking reasonable precautions himself. But the cases of "non-delegable duty" go further, and hold the employer liable for the negligence of the contractor, although he has himself done everything that could reasonably be required of him. They are thus cases of vicarious liability.

W. Prosser, *Handbook of the Law of Torts*, 469-70 (4th ed. 1971).

2. Jobsite owners who retain the right to control the manner of work on the jobsite have a nondelegable duty to provide workers with a safe place to work.

Re: Common Law Duty

At common law, a master’s duty to maintain safe working conditions for its servants was nondelegable. *See Myers v. Little Church by the Side of the Road*, 37 Wn.2d 897, 904, 227 P.2d 165 (1951); *see also Greenleaf v. Puget Sound Bridge & Dredging Co.*, 58 Wn.2d 647, 650-52,

364 P.2d 796 (1961). In *Myers*, the Court examined the liability of an employer for injuries sustained by its employee when its elevator malfunctioned. The employer argued the malfunction was due not to its own negligence but rather that of the elevator service company, and that the employee could not seek damages from the employer. The Court disagreed:

[R]espondent cannot escape liability for the negligence of the elevator company on the theory that the latter was an independent contractor. . . [R]espondent cannot insulate itself from liability proving that it used reasonable care in selecting the elevator company which was to perform respondent's duty of making reasonable repairs. This would no more release the master from liability than were he to prove that an employee who had been negligent in repairing the elevator had been selected for the purpose with reasonable care.

Myers, 37 Wn.2d at 904 (brackets added). Significantly, the focus of the nondelegable duty imposed at common law is on control over the workplace. *See id.* at 904 (holding “[t]he master’s duty to provide the servant with a reasonably safe place to work is nondelegable”; brackets added).

The Court in *Kelley* described the retained control doctrine as:

The general rule at common law is that one who engages an independent contractor . . . is not liable for injuries to employees of the independent contractor resulting from their work. . . . A common law exception to the general rule of non liability 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.

Kelley, 90 Wn.2d at 330. In *Afoa I*, this Court noted that the retained control doctrine, also termed the “safe workplace doctrine,” is grounded in the common law rule articulated in *Myers*. See *Afoa I*, 176 Wn.2d at 475 (observing that the “common law workplace safety doctrine has its roots in the master-servant relationship”). It went on to recognize that the doctrine has expanded “beyond the narrow confines of the master-servant relationship.” *Id.*, 176 Wn.2d at 475. The Court examined the common law retained control doctrine discussed in *Kelley* and *Kamla v Space Needle Corp.*, 147 Wn.2d 114, 123-24, 52 P.3d 472 (2002), and emphasized that public policy concerns reflected in the common law rule are particularly relevant in a complex multi-employer jobsite, like Sea-Tac:

Kelley and *Kamla* stand for the proposition that when an entity . . . retains control over the manner in which work is done on a work site, that entity has a duty to keep common work areas safe because it is best able to prevent harm to workers. . . . [O]ur doctrine seeks to place the safety burden on the entity in the best position to ensure a safe working environment. . . . Where there are multiple employers performing a variety of tasks in a complex working environment, it is essential that a safe workplace duty be placed on a landlord who retains the right to control the movements of all workers on the site to ensure safety. . . . The policy of encouraging a safe workplace is even more urgent in a complex, modern, multi-employer work site like Sea-Tac Airport than a simpler, more traditional master-servant arrangement.

Afoa I, 176 Wn.2d at 478-79 (brackets added). The duty is triggered when landowners “retain control over the worksite,” and creates a duty “to maintain safe common work areas.” *Id.*, 176 Wn.2d at 475. “[T]he relevant inquiry is whether the principal retained control over the work site, not whether there was a direct employment relationship between the parties.” *Id.* at 477 (citation omitted; brackets added).¹

Re: Statutory Duty

In *Stute v. P.B.M.C.*, 114 Wn.2d 454, 463-64, 788 P.2d 545 (1990), the Court held the supervisory control of a general contractor constitutes per se control over the workplace, and general contractors have a nondelegable duty to comply with safety regulations under WISHA’s specific duty clause, RCW 49.17.060(2).² Jobsite owners, in contrast, are not per se liable, but may have a duty to comply with WISHA if they retain control over the manner in which contractors complete their work. *See Afoa I*, 176

¹ Of course, it is also the case that the *extent* of control retained by the owner over the jobsite must be sufficiently pervasive. The majority in *Afoa I* clarified that the duty may be found where a jobsite owner retains the right to control the manner of work on the jobsite to *such an extent* that those functioning within the scope of the owner’s control — here at Sea-Tac — are not free to do the work in their own way. *See Afoa I*, 176 Wn.2d at 478 (noting that “if everything Afoa alleges is true . . . the Port appears to exercise nearly plenary control over Sea-Tac and the manner in which work is performed on the premises”). Here, the Port retained control over work done on the jobsite, and because EAGLE functioned within the scope of the Port’s control — at Sea-Tac — the Port retained control over the manner in which EAGLE performed its work.

² RCW 49.17.060 is reproduced in the Appendix to this brief.

Wn.2d at 472 (citing *Kamla*, 147 Wn.2d at 125). Thus, under *Stute*, *Kamla*, and *Afoa I*, jobsite owners have a nondelegable duty to comply with WISHA if they retain the right of control over workplace safety.

3. **Properly construed, RCW 4.22.070 did not abrogate nondelegable duties under the retained control doctrine.**
 - a. **RCW 4.22.070 must be construed in light of existing common law, and statutory law is not deemed to abrogate common law unless there is a clear indication that the Legislature so intended.**

The Legislature has established that the common law “shall be the rule of decision in all the courts of this state.” RCW 4.04.010. As such, the Court is “hesitant to recognize an abrogation or derogation from the common law absent clear evidence of the legislature's intent to deviate from the common law.” *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 77, 196 P.3d 691 (2008). In *Marble v. Clein*, 55 Wn.2d 315, 317, 347 P.2d 830 (1959), the Court explained that because the Legislature is deemed to be aware of common law when it enacts legislation, common law provides helpful guidance in ascertaining legislative intent:

No statute enters a field which was before entirely unoccupied. It either affirms, modifies, or repeals some portion of the previously existing law. In order, therefore, to form a correct estimate of its scope and effect, it is necessary to have a thorough understanding of the laws, both common and statutory, which heretofore were applic-

able to the same subject. Whether the statute affirms the rule of the common law upon the same point, or whether it supplements it, supersedes it, or annuls it, the legislative enactment must be construed with reference to the common law; for in this way alone is it possible to reach a just appreciation of its purpose and effect. Again, the common law must be allowed to stand unaltered as far as is consistent with the reasonable interpretation of the new law.

Marble, 55 Wn.2d at 317 (citation omitted).

In *Afoa I*, this Court emphasized the well-established common law rule under the retained control doctrine: “Under our common law safe workplace doctrine, landowners . . . that retain control over a worksite have a duty to maintain safe common work areas.” 176 Wn.2d at 475.

- b. RCW 4.22.070(1)(a) evidences the Legislature’s intent to preserve common law principles of vicarious liability, and under the retained control doctrine, a job-site owner’s control over the manner of work on the jobsite encompasses control over those entities functioning on the job-site, who thereby may be said to be “acting as” agents or servants of the jobsite owner.**

RCW 4.22.070 was enacted as part of the Tort Reform Act. Laws of 1986 Ch. 305.³ § .070 has been construed to establish proportionate liability as the general rule under Washington law. *See Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 294, 840 P.2d 860 (1992). The statute in-

³ RCW 4.22.070 is reproduced in the Appendix to this brief.

cludes several exceptions, however, including § .070(1)(a), which provides that “[a] party shall be responsible for the fault of another person or for payment of the proportionate share of another party . . . when a person was acting as an agent or servant of the party” (brackets added).

At common law, the Court looked to whether the owner relinquished control over the manner of work to determine whether those acting on its behalf were acting as agents or servants. *See Barclay v. Puget Sound Lumber Co.*, 48 Wash. 241, 243, 93 P. 430 (1908) (holding that the worker’s relation to the owner “was rather that of an agent than that of an independent contractor [because it] did not lease or surrender to him the management or control of this department . . . [i]t still retained control as to the manner and mode of doing the work”; brackets added); *see also Miles v. Pound Motor Co.*, 10 Wn.2d 492, 505, 117 P.2d 179 (1941); *Kelsey Lane Homeowners Ass’n v. Kelsey Lane Co.*, 125 Wn. App. 227, 236-37, 103 P.3d 1256 (2005).

The exception in § .070(1)(a) reflects the Legislature’s intent to retain principles of vicarious liability, and to preclude vicariously liable parties from allocating fault to a party whose negligence it is legally obligated to assume. *See Johnson v. REI*, 159 Wn. App. 939, 950, 247 P.3d 18,

review denied, Peterson v. REI, 172 Wn.2d 1007 (2011) (noting § .070(1)(a) “explicitly retains principles of common law vicarious liability”).

A jobsite owner has a nondelegable duty to workers on the jobsite when it retains the right to control workplace safety. *See Afoa I*, 176 Wn.2d at 472. In *Kamla*, the Court explained why control is the critical inquiry in evaluating whether a duty may be found. “Employers are not liable for injuries incurred by independent contractors because employers cannot control the manner in which the independent contractor works. Conversely, employers are liable for injuries incurred by employees precisely because the employer retains control over the manner in which the employee works.” *Kamla* at 119-20. The Court explained: “There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.” *Kamla*, 147 Wn.2d at 121.

By virtue of its retained control over jobsite safety, a jobsite owner retains control over the manner of work undertaken by workers on the jobsite. In that sense, those operating on the jobsite and within the scope of the owner’s control may be said to be “acting as” agents or servants of the owner. *See* RCW 4.22.070(1)(a). Notably, the statutory language excepts from several liability those situations where a party is “acting as” an agent or servant, and does not expressly require agent or servant status.

In sum, where a jobsite owner retains control over the worksite, those working on the jobsite act under the control of the jobsite owner. While the relationship between the parties may not rise to the level of agent or servant *status*, those performing work on the jobsite — within the scope of the owner’s control over the jobsite — may be said to be “acting as an agent or servant,” and properly fall within the exception to the general rule of several liability.

B. Nonparty Fault Is An Affirmative Defense Which May Be Waived If Not Pleaded, And The Trial Court Abused Its Discretion By Failing To Apply The Doctrine Of Waiver To Determine Whether The Port’s Late Motion To Amend, Which Prejudiced Afoa’s Ability To Obtain Full Recovery, Was Dilatory Or Inconsistent With Its Prior Conduct.

Fault allocation under RCW 4.22.070 “is not self-executing.” *Adcox v. Children’s Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 25, 864 P.2d 921 (1993). CR 12(i) provides that nonparty fault is an affirmative defense that must be expressly plead. This requirement applies both to the assertion of the defense and the identification of the at-fault nonparties:

- (i) Nonparty at Fault. Whenever a defendant or a third party defendant intends to claim for purposes of RCW 4.22.070(1) that a nonparty is at fault, such claim is an affirmative defense which shall be affirmatively pleaded by the party making the claim. *The identity of any nonparty claimed to be at fault, if known to the party making the claim, shall also be affirmatively pleaded.*

CR 12(i) (*italics added*). The language of the rule is mandatory, stating that if at-fault nonparties are known, they “shall” be pleaded. CR 8(c) reinforces that a party “shall set forth” all affirmative defenses.⁴

Here, there can be no argument that the airlines were not known. As Afoa points out, as early as April 27, 2009, the Port acknowledged that EAGLE’s only access to the grounds at Sea-Tac was by virtue of a Certificate of Carrier Support from an air carrier holding an operating agreement with the Port. *See* Afoa Supp. Br., App. B at 58. The Port thus would have had knowledge of all airlines that had executed licensing agreements with EAGLE. Moreover, the airlines were later represented in the federal action by the same counsel that represented the Port (and were also insured by the same insurer). Notwithstanding these facts, the Port did not name the airlines for over five years, instead claiming it was pursuing a sole proximate cause defense. Indeed, as late as July of 2013, while Port counsel was representing the airlines in the federal action, the Port represented that it had “not had sufficient time to generate evidence to identify potentially liable non-parties.” Afoa Supp. Br., App. B at 60. The Port only named

⁴ CR 8, CR 12 & CR 15 are reproduced in the Appendix to this brief.

these parties after the federal action against the airlines had been dismissed and the statute of limitations had expired.

Whether to grant leave to amend is within the discretion of the trial court. *See Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). A court abuses its discretion when it fails to apply the proper legal standard. *See Hundtofte v. Encarnacion*, 181 Wn.2d 1, 6-7, 330 P.3d 168 (2014).

Here, the trial court failed to acknowledge that an affirmative defense is waived if not pleaded, and failed to examine whether the Port waived the right to assert nonparty fault as an affirmative defense.⁵ Assertion of a late defense may constitute waiver when either “(1) assertion of the defense is inconsistent with defendant’s prior behavior or (2) the defendant has been dilatory in asserting the defense.” *King v. Snohomish County*, 146 Wn.2d 420, 424, 47 P.3d 563 (2002) (citing *Lybbert v. Grant County*, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000)). Only if the substantial

⁵ The trial court instead relied on *Wilson* for the proposition that under CR 15(a), leave to amend “shall be freely given when justice so requires.” The court granted the Port’s motion, concluding Afoa could not claim surprise because he was aware the airlines were potential at-fault parties. However, notice is necessary, in part, to prevent the plaintiff’s surprise as to the defendant’s *assertion* of the defense, not merely the plaintiff’s awareness that the nonparty is potentially at fault. *See Gunn v. Reily*, 185 Wn. App. 517, 344 P.3d 1225, *review denied*, 183 Wn.2d 1004 (2015). Moreover, unfair surprise focuses, in part, on unfairness resulting from a defendant’s intentional delay in asserting the defense. The Court in *Wilson* notes: “[The defendant] raised these issues on the eve of trial, after being aware of the factual basis for the proposed amendments since before the arbitration. Unfair surprise is a factor which may be considered in determining whether permitting amendment would cause prejudice.” 137 Wn.2d at 508 (brackets added).

rights of the plaintiff have not been affected will noncompliance be excused. *Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 76, 549 P.2d 9 (1976).

The policy considerations underlying a defendant's burden to plead affirmative defenses are well-recognized. The doctrine of waiver "is designed to prevent a defendant from ambushing a plaintiff during litigation either through delay in asserting a defense or misdirecting the plaintiff away from a defense for a tactical advantage." *King*, 146 Wn.2d at 424. In *Lybbert*, this Court examined the doctrine of waiver for affirmative defenses, and explained its importance in encouraging efficient resolution of claims and discouraging gamesmanship:

We believe the doctrine of waiver is sensible and consistent with the policy and spirit behind our modern day procedural rules, which exist to foster and promote "the just, speedy, and inexpensive determination of every action." CR 1(1). If litigants are at liberty to act in an inconsistent fashion or employ delaying tactics, the purpose behind the procedural rules may be compromised.

Our holding today . . . underscores the importance of preventing the litigation process from being inhibited by inconsistent or dilatory conduct on the part of litigants.

[T]he doctrine of waiver complements our current notion of procedural fairness and [we] believe its application, in appropriate circumstances, will serve to reduce the likelihood that the "trial by ambush" style of advocacy, which has little place in our present-day adversarial system, will be employed.

Lybbert, 141 Wn.2d at 39-40 (brackets added).

Here, the Port's late motion was clearly dilatory, occurring more than five years after the filing of the complaint. Moreover, to the extent its representation that it intended to seek a sole proximate cause defense misled the plaintiff, its late assertion of nonparty fault was inconsistent with its prior conduct. This late amendment also prejudiced Afoa, as the statute of limitations had run and summary judgment in the federal action had been granted. At that late stage in the litigation, Afoa was unable to litigate his claims against the airlines and the Port in the same action.

More recently, the court of appeals, Division II, relied on *King* to hold that failure to timely plead or disclose an affirmative defense constituted waiver. *See Gunn v. Reily*, 185 Wn. App. 517, 344 P.3d 1225, *review denied*, 183 Wn.2d 1004 (2015). The court clarified the relevant inquiry is not whether a plaintiff knows the nonparty is potentially at fault, but whether the plaintiff is on notice the defendant intends to identify them:

[The defendants] disclosed that Oasis was the company that [the plaintiffs] hired to construct the well and that they were on [the plaintiffs'] property, but they did not disclose that they intended to argue that Oasis was liable for the damages to [the plaintiffs'] property. . . . Contrary to Washington's notice pleading rules, [the plaintiff] was not on notice that the [defendants] intended to argue that Oasis was at fault.

Gunn, 185 Wn. App. at 529-30 (brackets added).

Here, the Port asserts that “as early as 2009, the Port put plaintiff on notice it would attempt to prove that other entities were responsible for the accident,” Port Supp. Br. at 14, but did not identify the at-fault nonparties, despite the fact that they were known by the Port. The Port did not identify the airlines as at-fault entities until more than five years after the complaint was filed. This late disclosure was dilatory, arguably inconsistent with its prior conduct and prejudicial to Afoa.⁶

VI. CONCLUSION

The Court should adopt the arguments advanced in this brief in the course of resolving this appeal.

DATED this 4th day of December, 2017.


VALERIE D. MCOMIE


For DANIEL E. HUNTINGTON,
with authority

On Behalf of WSAJ Foundation

⁶ The trial court misapplied the “prejudice” inquiry in its decision, focusing narrowly on the single factor of surprise, rather than inquiring as to *unfair* surprise or examining the presence of prejudice more broadly. In *Wilson*, on which the court relies, this Court emphasized the “touchstone” of whether amendments may be permitted under CR 15(a) is *prejudice*, and that factors which “may” be considered in finding prejudice “include undue delay, unfair surprise, and jury confusion.” 137 Wn.2d at 505-06. The trial court did not address the other factors nor make a determination as to whether granting the Port’s motion to amend would result in prejudice to Afoa.

Appendix

West's Revised Code of Washington Annotated
Title 49. Labor Regulations (Refs & Annos)
Chapter 49.17. Washington Industrial Safety and Health Act (Refs & Annos)

West's RCWA 49.17.060

49.17.060. Employer--General safety standard--Compliance

Effective: June 10, 2010

[Currentness](#)

Each employer:

(1) Shall furnish to each of his or her employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his or her employees: **PROVIDED**, That no citation or order assessing a penalty shall be issued to any employer solely under the authority of this subsection except where no applicable rule or regulation has been adopted by the department covering the unsafe or unhealthful condition of employment at the workplace; and

(2) Shall comply with the rules, regulations, and orders promulgated under this chapter.

Credits

[[2010 c 8 § 12007](#), eff. June 10, 2010; 1973 c 80 § 6.]

[Notes of Decisions \(138\)](#)

West's RCWA 49.17.060, WA ST 49.17.060

The statutes are current through the 2017 Third Special Session of the Washington legislature.



KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

[West's Revised Code of Washington Annotated](#)

[Title 4. Civil Procedure \(Refs & Annos\)](#)

[Chapter 4.22. Contributory Fault--Effect--Imputation--Contribution--Settlement Agreements \(Refs & Annos\)](#)

West's RCWA 4.22.070

4.22.070. Percentage of fault--Determination--Exception--Limitations

[Currentness](#)

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title 51 RCW. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [claimant's] total damages.

(2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under [RCW 4.22.040](#), [4.22.050](#), and [4.22.060](#).

(3)(a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.

(b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.

(c) Nothing in this section shall affect any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.

Superior Court Civil Rules

CR 8
GENERAL RULES OF PLEADING

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross claim, or third party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which the pleader deems the pleader is entitled. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials. A party shall state in short and plain terms the defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make his denials as specific denials of designated averments or paragraphs, or the pleader may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, the pleader may do so by general denial subject to the obligations set forth in rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fault of a nonparty, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitation, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure To Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading To Be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice. The adoption of this rule shall not be considered an adoption or approval of the forms of pleading in the Appendix of Forms approved in rule 84, Federal Rules of Civil Procedure.

[Adopted effective March 1, 1974; amended effective September 18, 1992; April 28, 2015.]

Superior Court Civil Rules

CR 12
DEFENSES AND OBJECTIONS

(a) When Presented. A defendant shall serve an answer within the following periods:

(1) Within 20 days, exclusive of the day of service, after the service of the summons and complaint upon the defendant pursuant to rule 4;

(2) Within 60 days from the date of the first publication of the summons if the summons is served by publication in accordance with rule 4(d)(3);

(3) Within 60 days after the service of the summons upon the defendant if the summons is served upon the defendant personally out of the state in accordance with RCW 4.28.180 and 4.28.185 or on the Secretary of State as provided by RCW 46.64.040.

(4) Within the period fixed by any other applicable statutes or rules. A party served with a pleading stating a cross claim against another party shall serve an answer thereto within 20 days after the service upon that other party. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court.

(A) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action.

(B) If the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) lack of jurisdiction over the subject matter;

(2) lack of jurisdiction over the person;

(3) improper venue;

(4) insufficiency of process;

(5) insufficiency of service of process;

(6) failure to state a claim upon which relief can be granted;

(7) failure to join a party under rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the pleader may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in section (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in section (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, or if more particularity in that pleading will further the efficient economical disposition of the action, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after the notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion To Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to

be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection (h) (2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived;

(A) if omitted from a motion in the circumstances described in section (g); or

(B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

(i) Nonparty at Fault. Whenever a defendant or a third party defendant intends to claim for purposes of RCW 4.22.070(1) that a nonparty is at fault, such claim is an affirmative defense which shall be affirmatively pleaded by the party making the claim. The identity of any nonparty claimed to be at fault, if known to the party making the claim, shall also be affirmatively pleaded.

[Adopted effective March 1, 1974; amended effective January 1, 1972; January 1, 1980; September 18, 1992; April 28, 2015.]

Superior Court Civil Rules

CR 15
AMENDED AND SUPPLEMENTAL PLEADINGS

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. If a party moves to amend a pleading, a copy of the proposed amended pleading, denominated "proposed" and unsigned, shall be attached to the motion.

If a motion to amend is granted, the moving party shall thereafter file the amended pleading and, pursuant to rule 5, serve a copy thereof on all other parties. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments To Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the original party, the party to be brought in by amendment (1) has received such notice of the institution of the action that the new party will not be prejudiced in maintaining her or his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the new party.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

(e) Interlineations. No amendments shall be made to any pleading by erasing or adding words to the original on file, without first obtaining leave of court.

[Adopted effective July 1, 1967; amended effective September 1, 2005; amended effective April 28, 2015.]

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