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NO. 94525-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRANDON APELA AFOA, an individual,

Respondent,

vs.

PORT OF SEATTLE, a Local Government Entity in the State of Washington,

Petitioner.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Judith H. Ramseyer, Judge

PETITIONER'S ANSWER TO WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION AMICUS BRIEF

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I. ARGUMENT

A. THE LEGISLATURE MADE CLEAR RCW 4.22.070 DEROGATES FROM COMMON LAW VICARIOUS LIABILITY EXCEPT AS STATED IN RCW 4.22.070(1)(a).

As part of the Tort Reform Act of 1986, the Legislature enacted RCW 4.22.070(1), which provides in pertinent part (emphases added):

> 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.... 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.

Although the Washington State Association for Justice Foundation (WSAJ) admits this case depends on the construction of RCW 4.22.070 (Brief of Amicus Curiae WSAJ 4), WSAJ spends little, if any, time discussing the statutory language highlighted above. Instead, WSAJ asks the Court to find (1) the Legislature did not intend to abrogate other types of common law vicarious liability and (2) the RCW 4.22.070(1)(a) agency exception applies. Where, as here, however the common law conflicts

with the express terms of a statute, the statute controls, and the statutory agency exception does not apply.

1. RCW 4.22.070's Language Shows the Legislature Intended To Abrogate Common Law Vicarious Liability in Cases Like This.

Under RCW 4.22.070, "the trier of fact ***shall*** determine the percentage of the total fault which is attributable to ***every*** entity which caused the claimant's damages" "[i]n ***all*** actions involving fault of more than one entity." The statute specifies that "[j]udgment ***shall*** be entered against ***each*** defendant ... ***in an amount which represents that party's proportionate share of the claimant's total damages.***" Further, the statute provides that "[t]he liability of ***each*** defendant shall be several only and ***shall not be joint.***" "Shall" means "shall": this Court has already decided that as used in RCW 4.22.070, it is mandatory. *Clark v. Pacificorp,* 116 Wn.2d 804, 818-19, 809 P.2d 176 (1991); *Waste Management, Inc. v. Utilities & Transp. Comm'n,* 123 Wn.2d 621, 629, 869 P.2d 1034 (1994). In addition, "all" means "all," and "every" and "each" mean "every" and "each." *State ex rel. Evans v. Brotherhood of Friends,* 41 Wn.2d 133, 145, 247 P.2d 787 (1952); https://www.merriam-webster.com/dictionary/each.

Giving these terms their ordinary meaning, *University of Washington v. City of Seattle,* 188 Wn.2d 823, 837, 399 P.3d 519 (2017), the statutory language unambiguously requires a jury to determine the

percentage of fault attributable to every entity responsible. Unless one of the specifically enumerated exceptions applies, the statute instructs that judgment be entered against each defendant in an amount that represents that party's individual share of the plaintiff's total damages. *See, e.g.*, *Kottler v. State*, 136 Wn.2d 437, 443, 963 P.2d 834 (1998); *Clark*, 118 Wn.2d at 181. That is what the trial court did here.

In RCW 4.22.070(1) the Legislature elected to except two specified types of common law vicarious and joint and several liability from the statute's several liability only rule—agency and parties acting in concert.[1] Its decision not to except other types of vicarious or joint and several liability from RCW 4.22.070(1)'s allocation of fault rule must have been intentional. *See In re Hopkins*, 137 Wn.2d 897, 901, 976 P.2d 616 (1999) (finding that "[i]in such circumstances, 'the silence of the Legislature is telling' and must be given effect.'")

Had the Legislature intended to except situations like the one here from fault allocation and several liability, it would have said so. *See Doe ex rel. Doe v. Washington State Patrol,* 185 Wn.2d 363, 378-79, 374 P.3d 63 (2016). For example, as have many legislatures elsewhere, the Legislature could have enacted an exemption expressly excepting ***all***

[1] In addition, the Legislature specified joint and several liability if plaintiff were not at fault (which is not the case here (CP 4841-42)), and that RCW 4.22.070 would not apply to certain types of commercial or environmental claims. RCW 4.22.070(1)(b), (3).

vicarious liability. *See, e.g.*, N.M.S.A. 41-3A-1C(2); Ohio R.C. 2307.22, .24(B); S.C. Code 15-38-15(C)(3)(a); T.C.A. (Tenn.) 29-11-107(c). It did not. Or it could have explicitly exempted nondelegable duties. *See* CPLR (N.Y.) 1602. Again, it did not. Instead the Legislature chose to make only two specific exceptions, neither of which apply here. RCW 4.22.070(1)(a).[2]

Johnson v. Recreational Equipment, Inc., 159 Wn. App. 939, 247 P.3d 18, *rev. denied*, 172 Wn.2d 1007 (2011), is inapposite as it involved the Washington Product Liability Act, RCW ch. 7.72, which expressly required vicarious liability. Common law vicarious liability was not at issue.

Further, to interpret the statute as WSAJ does would be contrary to the legislative intent behind the Tort Reform Act of 1986. The Legislature declared that "[t]he purpose of [that Act] is to enact further reforms in order to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance" and that "counties, cities, and other governmental entities" were being faced with "increased exposure to lawsuits and awards and dramatic increases in the

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[2] For a discussion of why the statute's agency exception does not apply, *see* Section I.A.2 below. WSAJ does not contend the "acting in concert" exception applies. For the reasons stated in its Supplemental Brief, there is no basis to conclude the Port and the airlines were "acting in concert". *See* Supplemental Brief at 9-10.

cost of insurance coverage," leading to "higher taxes, loss of essential services, and loss of the protection provided by adequate insurance." 1986 Wash. Laws ch. 305, § 100. The Port, a governmental entity, should not be required to bear the entire risk of injury, when the airlines were also in a position, if not the best position, to ensure that EAGLE was complying with both its WISHA and contractual duties and responsibilities.[3]

2. RCW 4.22.070(1)(a)'s Agency Exception Does Not Apply.

RCW 4.22.070(1)(a) 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." Apparently admitting the Port's relationship with the airlines did not "rise to the level of agent or servant status," WSAJ argues a jury did not need to find an agency relationship because the airlines were "acting as" agents or servants. (WSAJ Amicus Brief at 15) (emphasis omitted). But Washington law draws no such distinction. Cases discussing the

[3] Courts have recognized that oftentimes a subcontractor is, in fact, the entity in the better position to inspect and supervise the activities of a third-tier subcontractor with whom it has contracted. *See, e.g.*, *Weinert v. Bronco Nat. Co.*, 58 Wn. App. 692, 697, 795 P.2d 1167, 1170 (1990). Here, the airlines were the entities in the best position to inspect and supervise EAGLE's activities. The airlines not only hired EAGLE to perform services for them, but each did one or more of the following: trained EAGLE employees; required it to provide pushbacks, perform "in accordance with the Carrier's instructions," do whatever the airline told EAGLE to do; and reserved the rights to inspect EAGLE's services, provide supervision therefor, perform safety audits, and typically had a safety representative present when EAGLE worked a flight to ensure it was performing up to standard. (RP 954, 979, 996, 2874, 2879, 2941, 2967-68, 3005; Exs. 322-25).

agency exception apply traditional agency principles to determine if an agency relationship exists. *See, e.g., Yong Tao v. Heng Bin Li,* 140 Wn. App. 825, 831, 166 P.3d 1263 (2007*), rev. denied,* 163 Wn.2d 1045 (2008) (in context of RCW 4.22.070(1), essential elements of agency relationship are control and consent) (citing *Moss v. Vadman*, 77 Wn.2d 396, 402-03, 463 P.2d 159 (1969)). The cases do **not** discuss different "levels" of an agency relationship.[4]

WSAJ argues that since the Port retained "control over the manner of work undertaken by workers on the job-site" the statutory agency exception should apply as to "those operating on the jobsite and within the scope of the owner's control" (WSAJ Amicus Brief at 14) To reach that conclusion, the Court must make a leap for which there is no legal or factual basis.

First, the jury was never asked to determine whether the airlines were the Port's agents, let alone whether the Port retained "control over the manner of work undertaken" by all workers at the airport or "control over the[ir] worksite." (WSAJ Amicus Brief 14, 15) Rather, the jury was

[4] Washington Civil Pattern Jury Instruction No. 50.01 defines an agent as "a person employed under an express or implied agreement to perform services for another, called the principal, and who is subject to the principal's control or right to control the manner and means of performing the services." Notably there is no pattern instruction for "acting as an agent or servant."

asked about the Port's retention of the right to control the manner in which only EAGLE did its work. (CP 4780-4834)\, 4839-42)

Second, plaintiff failed to assert until posttrial motions that the airlines were the Port's agents for purposes of complying with the Port's WISHA and common law obligations, and as a result, has not preserved this issue for appeal. (CP 3389-3402, 4390-94, 5460-77, 5919-29, 7572, 8484-507, 8798-804, 9005) Consequently, this Court should not consider WSAJ's argument in this regard. *Kee v. Wah Sing Chong,* 31 Wash. 678, 679, 72 P. 473 (1903); *see also Kerns v. Pickett,* 49 Wn.2d 770, 772, 306 P.2d 1112 (1957). *See* Port's Supplemental Brief at 9-12.

Third, the airlines cannot have been the Port's agents as a matter of law. Pursuant to the applicable Federal Aviation Regulations governing the operations of airports and certificated air carriers, the Port cannot legally act as the "principal" of an airline because it cannot control the manner in which the airlines operate. *See, e.g.,* 14 C.F.R. Part 139; 14 C.F.R. Part 121; *see also* Supplemental Brief at pp. 11-12. Moreover, the agency exception, based on vicarious liability principles, applies only where a party has actually delegated its nondelegable duties to a third party, which subsequently breaches those duties. *See, e.g., Afoa v. Port of Seattle*, 198 Wn. App. 206, 231-32, 393 P.3d 802 (2017) (quoting *Millican v. N.A. Degerstrom, Inc.,* 177 Wn. App. 881, 896, 313 P.3d 1215 (2013),

rev. denied, 179 Wn,2d 1026 (2014)) ("'[t]he label 'nondelegable duty' does not mean that an actor is not permitted to delegate the activity to an independent contractor. Rather, the term signals that the actor will be vicariously liable for the contractor's tortious conduct in ***the course of carrying out the activity.***'") (emphases added). Here, the Port did not delegate its WISHA-related duties and responsibilities to the airlines. (*See, e.g.*, Exs. 675-678). As a result, the Port cannot be vicariously liable for the actions of the airlines as a matter of law because the airlines were not carrying out the Port's safety responsibilities under WISHA.[5]

Fourth, alternatively, agency is a question of fact. *Moss v. Vadman*, 77 Wn.2d at 403. Since plaintiff failed to argue the statutory agency issue until posttrial motions (CP 3389-3402, 4390-94, 5460-77, 5919-29, 7572, 8484-507, 8798-804, 9005), the jury was never asked to determine whether agency between the Port and the airlines existed. (CP 4780-4834, 4839-42)

Agency requires, *inter alia*, a finding of "consent by one person that another shall act on his behalf and subject to his control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control." *Moss*, 77 Wn. 2d at 402-03; *see also Yong Tao*

[5]The Associated General Contractors of Washington (AGC) asserted substantially similar arguments in its amicus curiae brief. In the interests of judicial economy, the Port incorporates by reference the arguments asserted on pages 8-16 of the AGC brief.

v. Heng Bin Li, 140 Wn. App. at 831. The Port and the airlines' relationship was contractual. There was no term or provision in those contracts wherein the Port delegated to or entrusted the airlines to carry out the Port's WISHA-related duties and responsibilities. (Exs. 675-678)

In addition, the record supports a finding that the Port did **not** retain the right to control the airlines vis-à-vis their control over EAGLE, whose failure to properly maintain the pushback plaintiff was riding caused the accident. *See* RP 954, 979, 996, 2874, 2879, 2941, 2967-68, 3005; Exs. 322-25. For example, EAGLE's contracts with the airlines typically included standardized contracts created by the International Air Transport Association, an international airline trade association. (RP 975-76; Exs. 322-25) There was no evidence the Port had anything to do with the creation of such contracts. These standardized contracts included provisions that EAGLE was to perform services including those with a safety aspect according to the airline's procedures and/or instructions. (Ex. 322, Evergreen 00225, art. 5, §§ 5.1, 5.2; Ex. 323, PORT 119742, art. 5, §§ 5.1, 5.2; Ex. 324, PORT 119742, art. 5, §§ 5.1, 5.2; Ex. 325, Hawaiian 1 (incorporating by reference IATA Airport Handling Manual (AHM) 810)).

Further, the case law cited by WSAJ does not support finding an agency relationship between the Port and the airlines. WSAJ cites *Barclay*

v. Puget Sound Lumber Co., 48 Wash. 241, 243, 93 P. 430 (1908) for the proposition that a court will find agency where an owner does not relinquish control over the manner of work to those acting on its behalf. But in *Barclay,* the owner retained the agent to hire workers to work ***for the owner***. Here, the airlines were licensed by the Port to use the airport and the airlines retained EAGLE to provide ground services ***for the airlines***.

The Port has a constitutional right to a jury trial. WASH. CONST. art. I, § 21. WSAJ is asking that the air carriers be held the Port's agents as a matter of law, even though the Port either could not have been the airlines' principle as a matter of law, or under the evidence, was entitled to have a jury decide the issue. Depriving the Port of a jury trial on the issue would violate its constitutional right.

B. WSAJ CONFUSES DIRECT AND VICARIOUS LIABILITY.

WSAJ cites many of this Court's cases for the proposition that when a landowner retains the requisite right of control, it is vicariously liable. But WSAJ confuses direct liability with vicarious liability.

Like the instant case (CP 4589-91, 4807, 4839), *Kamla v. Space Needle Corp.,* 147 Wn.2d 114, 52 P.3d 472 (2002), and *Kelley v. Howard S. Wright Constr. Co.,* 90 Wn.2d 323, 582 P.2d 500 (1978), were decided under the retained control doctrine of RESTATEMENT (SECOND) OF TORTS §

414 (1965). Under that doctrine, a landowner that retains the right of control is directly liable ***for its own negligence***. *Phillips v. Kaiser Aluminum & Chem. Corp.,* 74 Wn. App. 741, 750-51, 875 P.2d 1228 (1994); *see also* RESTATEMENT (SECOND) OF TORTS at 371-72 (1965). In *Stute v. P.B.M.C., Inc.,* 114 Wn.2d 454, 460-65, 788 P.2d 545 (1990), and *Greenleaf v. Puget Sound Bridge & Dredging Co.,* 58 Wn.2d 647, 364 P.2d 796 (1961), the defendants' liability was also premised on their own negligence. *See Kelley,* 90 Wn.2d at 330 (citing *Greenleaf* with approval).

WSAJ also cites *Myers v. Little Church,* 37 Wn.2d 897, 227 P.2d 165 (1951). That case provides no support for WSAJ here. ***There the employer of an injured employee***[6] was held vicariously liable for the negligence of an elevator company that had failed to properly repair an elevator on the employer's premises. Employers generally had a nondelegable duty to their own employees to provide a safe workplace, and such employees had "a right to look to the master for the discharge of that duty" even if the master had delegated that duty to another. *Shannon v. Consolidated Tiger & Poorman Min. Co.,* 24 Wash. 119, 133, 64 P. 169 (1901).

But in this case, an employee of the Port has not sued the Port. Rather, this Court has held that this case is analogous to where the

[6] *Myers* predated the 1961 enactment of the Industrial Insurance Act, RCW tit. 51. The Act's predecessor statute evidently did not apply.

employee of an independent contractor is seeking to hold the landowner liable under section 414. *Afoa v. Port of Seattle* (*Afoa* I), 176 Wn.2d 460, 475-82, concurrence/dissent 487-88, 296 P.3d 800 (2013). Such liability is direct, *i.e.,* the Port is liable for its own negligence. *Phillips,* 74 Wn. App. at 750-51.

Hence, the foregoing cases cited by WSAJ do not support its position.

C. ALLOWING THE PORT TO AMEND ITS ANSWER TO IDENTIFY THE AIRLINES AS NONPARTIES AT FAULT WAS NOT AN ABUSE OF DISCRETION.

1. This Court Will Not Review an Issue Raised Only by Amicus Curiae.

WSAJ argues the trial court abused its discretion in granting the Port's motion for leave to amend to name nonparties at fault on the ground the Port waived the affirmative defense. But plaintiff has not argued waiver on appeal; instead, he argues violation of CR 12(i). (Brief of Respondent/Cross-Appellant 57-64; Afoa's Reply Brief in Support of Cross-Appeal 18-21) This Court will not consider issues raised by amicus alone. *Ruff v. County of King,* 125 Wn.2d 697, 704 n.2, 887 P.2d 886 (1995). For that reason alone, this Court should not consider WSAJ's argument.

2. The Port Did Not Waive the Defense.

In any event, no abuse of discretion occurred. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). A review of the timeline relevant to this issue is required. The complaint was filed in February 2009. The Port was the only named defendant. The Port answered in April 2009, alleging its intention to assert nonparty liability as an affirmative defense, naming EAGLE as well as unknown persons. Plaintiff moved to strike this defense solely because fault could not be allocated to EAGLE, plaintiff's RCW tit. 51 employer, under RCW 4.22.070. The trial court agreed fault could not be allocated to EAGLE, but otherwise denied the motion, thereby leaving intact the nonparties-at-fault defense as to unknown persons. (CP 1-10, 11-16, 5189-93, 5203-04)

The trial court granted summary judgment for the Port in November 2009, just over nine months after the complaint was filed. (CP 488-89) *Afoa* I, 176 Wn.2d at 466. Plaintiff's reconsideration motion was denied on November 30, 2009. (CP 7858-60) Plaintiff appealed four days later. (CP 5853)

Just before the limitations period was to expire, plaintiff finally sued the four airlines that had contracted with EAGLE. (CP 6921, 7020-48) The case was removed to federal court and ultimately stayed pending the appeal's outcome. (CP 5362, 7050-57). More than three years after

plaintiff filed his appeal, this Court affirmed the Court of Appeals' reversal of summary judgment. *Afoa* I, 176 Wn.2d at 464. The mandate was issued on February 27, 2013. (CP 5251-52).

Plaintiff then moved to amend to join the Port in the federal action. The district court denied the motion (CP 5381-85), explaining (CP 5385) (emphases added):

> Plaintiff knew that the Port was potentially liable for his injuries and sued the Port. ***For reasons only Plaintiff can know, he decided not to sue the Airline Defendants and product manufacturers in that same suit. The Court agrees*** with Plaintiff ***that trying his claims against the Airline Defendants*** and product manufacturers ***separately from his claims against the Port will result in duplicative proceedings*** that will waste the resources of the courts and the parties, and may result in inconsistent judgments. Those unfortunate outcomes, however, are ***the result of Plaintiff's decision not to name all potential tortfeasors in his initial action against the Port***. ...

In the meantime, more than a year before trial in the instant action, the Port, in answer to plaintiff's interrogatories, advised that in light of, and based on, plaintiff's claims against the four airlines in federal court, it intended to claim the air carriers were at fault. (CP 7645)

Ultimately, all four air carriers were dismissed on summary judgment in the federal action. (CP 8426) Plaintiff did not appeal. Thereafter, five months before trial, the Port moved to amend its answer to identify the air carriers as nonparties at fault. (CP 7595-606)

WSAJ argues the trial court should have considered whether the Port waived its right to assert nonparty fault as an affirmative defense, and that its failure to do so is akin to applying an improper legal standard. *See* WSAJ Brief at p. 17. Assuming this Court will review an issue raised only by amicus on appeal, the record does not support WSAJ's waiver claim.

Failure to timely assert an affirmative defense may constitute waiver if the asserted defense is "inconsistent with the defendant's prior behavior" or when "the defendant has been dilatory in asserting the defense." *King v. Snohomish County*, 146 Wn.2d 420, 424, 47 P.3d 563 (2002). WSAJ recognizes, however, that noncompliance will be excused if the plaintiff's substantial rights have not been affected. (WSAJ Amicus Brief 17-18) (citing *Farmers Ins. Co. v. Miller,* 87 Wn.2d 70, 76, 549 P.2d 9 (1976).

First, WSAJ claims "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." (WSAJ Amicus Brief 19) This claim is baseless. The sole proximate cause defense dealt only with the Port's affirmative defense that the conduct of plaintiff's employer, EAGLE, was the sole proximate cause. But the Port's affirmative defense also asserted that other unknown entities were at fault.

When the trial court denied plaintiff's motion to strike the Port's nonparties-at-fault defense, it left the unnamed entities at-fault defense intact. (CP 15-16, 5189-93, 5203-04) There was no inconsistent behavior.

Second, the Port was not dilatory. It asserted nonparty fault as an affirmative defense in its answer approximately two months after the complaint was filed, putting plaintiff on notice there were nonparty entities potentially at fault. (CP 1-10, 15) A year before trial, in discovery, the Port told plaintiff that based on plaintiff's own claims against the airlines in his federal suit, the Port intended to argue at trial that the airlines were at fault. (CP 7645) In short, the Port was not trying to "hide the ball." *See, e.g.*, *King v. Snohomish County,* 146 Wn.2d at 424-25 (defendant waived right to assert affirmative defense at trial because it failed to clarify or explain basis for asserted defense in response to interrogatories). Therefore, this Court cannot find dilatory behavior. *Id.* at 424 (defendant not dilatory because it raised the defense in its original answer to complaint).

WSAJ also argues the Port's motion to name the airlines as non-parties at fault was untimely because it was made five years after this suit was filed. (WSAJ Amicus Brief at 4-5) WSAJ ignores the Port's earlier interrogatory answer that it would argue the carriers were at fault. Moreover, delay, in and of itself, is insufficient to deny a motion to

amend. *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983). And WSAJ admits that noncompliance, if any, can be excused if plaintiff's substantial rights have not been affected. (WSAJ Amicus Brief 17-18)

Plaintiff's substantial rights were not affected by the Port even if it did delay. Once the trial court granted the Port summary judgment, plaintiff could have, before filing his appeal, moved to amend his complaint to sue the airlines in this case. Even had he not known their identities through his work with EAGLE, his attorneys knew their identity no later October 2009, when the Port provided them with its agreements with the airlines. (CP 320)

Instead, he elected to sue the airlines in a separate suit. That he did not sue the carriers so in the same suit as the Port, was, as the United States District Court for the Western District of Washington held, due solely to his own actions. (CP 5383, 6858-67, 6909, 7300-01).

Plaintiff cites *Gunn v. Reily*, 185 Wn. App. 517, 344 P.3d 1225, *rev. denied*, 183 Wn.2d 1004 (2015), for the proposition it is insufficient for a plaintiff to know there are nonparties potentially at fault, but that defendant must notify plaintiff it intends to actually argue those parties are at fault. Unlike the Port in this case, however, the *Gunn* defendants failed to disclose in discovery their intent to argue that a nonparty was at fault

even though it identified that nonparty. Instead, they revealed their intent to argue nonparty fault for the first time in their trial brief. *Id.* at 530.

Lastly, plaintiff could not have been unfairly surprised or suffered any prejudice due to the court's permitting the Port to name the four airlines as nonparties at fault. Plaintiff knew the airlines were parties potentially at fault, as evidenced by the fact that he filed claims against them in 2010. (CP 6921, 7020-48, 7050-57) Further, plaintiff suffered no prejudice because he had the opportunity to argue at trial that the airlines were fault free with the benefit of knowing the airlines' arguments in federal court.

II. CONCLUSION

WSAJ's interpretation of RCW 4.22.070 is contrary to its plain language and inconsistent with the Legislature's intent in enacting the Tort Reform Act of 1986. Fault was therefore properly allocated to the airlines under the clear terms of RCW 4.22.070(1). This Court should reverse the panel's decision on fault allocation and reinstate the trial court's judgment.

Further, the trial court did not abuse its discretion by permitting the Port to amend its answer to name the airlines as nonparties at fault. This Court should, therefore, uphold the trial court's ruling on this issue.

DATED this 2nd day of January, 2018.

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