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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

BRANDON APELA AFOA, an individual,

Respondent/Cross-Appellant,

vs.

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

Appellant/Cross-Respondent.

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

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

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8-2-16

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## REPLY

Plaintiff's theme is that the Port of Seattle was responsible for all worker safety at Seattle-Tacoma International Airport ("STIA"). Although the statement—"If the Port does not keep Sea-Tac Airport safe for workers, it is difficult to imagine who will," *Afoa v. Port of Seattle*, 176 Wn.2d 460, 479, 296 P.3d 800 (2013)—was made on a limited summary judgment record, plaintiff claims the Port had authority over every STIA employer and employee and thus was best able to ensure safety for all 18,000 workers, although only 800 were Port employees. (RP 2957) (Brief of Respondent/Cross-Appellant 1, 25)

But in deciding this case, this Court should keep in mind why the Port was not best able to ensure safety for all workers at STIA:

1. This case is about one worker, not every worker at STIA.
2. The FAA, not the Port, was and is responsible for controlling air navigation and aircraft on runways and taxiways. (RP 2924, 2966, 3019)
3. TSA, not the Port, was and is responsible for, among other things, screening passengers. 49 USC §§ 114(d)-(e); 44901(a)-(b).
4. The air carriers were and are responsible for providing, maintaining, and operating aircraft. (RP 963, 2967)

5. The Port was responsible for providing transportation facilities for air carrier operations. (RP 2965)

6. The air carriers, not the Port, have and exercise their right to retain ground services operators (“GSO”) to provide them with ground services that they, not the Port, select. (RP 2967-68, 3005; Exs. 322-25) The carriers’ GSO contracts require the GSOs to perform their flight operation services “in accordance with the Carrier’s instructions” and require GSOs, not the Port, to provide pushbacks. (Ex. 322, Evergreen 00225, 00238; Ex. 323, Evergreen 00295, PORT 119742; Ex. 324, Evergreen 00327, PORT 11972; Ex. 325, Evergreen 225) One former British Air station manager testified, “In reality, whatever the airline told the ground handler to do they would do” and “if [he] told EAGLE what to do with respect to safety aspects, they were contractually obligated to do it.” (RP 979, 996) The pushback at issue was owned by EAGLE, not the Port. (Ex. 549, EAGLE-BK 000137)

7. Accordingly, it was EAGLE, not the Port, that ordered plaintiff to take the pushback in question to a different gate, the journey that culminated in the accident. (RP 2234)

8. The air carriers contractually reserved the right to “inspect [EAGLE’s] services,” provide a supervisor to supervise those services, and required that “[i]n the provision of the services as a whole, due regard

shall be paid to safety, security, local and international regulations, applicable IATA and/or ICAO and/or other governing rules, regulations and procedures and the aforementioned request(s) of the Carrier ....” (Ex. 322, Evergreen 225-26; Ex. 323, PORT 119742-43; Ex. 324, PORT 11972-43; Ex. 325, Evergreen 225-26)

9. The air carriers had safety managers; a carrier safety representative was typically present when GSOs worked a flight to ensure the GSOs were performing up to carrier standards. Carriers could do performance audits of GSOs including safety. (RP 954, 2874, 2879, 2941)

10. GSOs retained by air carriers obtained a license from the Port to come onto airport premises to perform the GSOs’ contracts with their carriers. As part of that license, the GSOs “certif[ied] that equipment brought onto the Premises will be maintained in safe and operational condition,” and agreed such equipment “shall remain the sole responsibility” of the GSO, the GSO “shall be solely responsible for the maintenance of its equipment,” and that the Port “accept[ed] no liability for [the GSO’s] equipment”. (Ex. 311, PORT 12)

11. Whether the air carriers actually exercised all rights to control they retained is immaterial. Retention of the right to control, not the exercise thereof, is enough. *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 330–31, 582 P.2d 500 (1978).

12. The air carriers and the GSOs, not the Port, were responsible for training GSO employees how to do their jobs. (RP 355, 375, 1188, 1398, 1702-03, 2388-90, 2608-09, 2630, 2647, 2660-61; Ex. 322, ¶ 18.3; Ex. 549; Ex. 550, EAGLE-BK 438-41) For example, Hawaiian Air taught plaintiff and other EAGLE employees “Ramp Handling 101”, including ramp safety. (RP 1188, 1197-1201) British Air’s EAGLE contract said British Air “shall provide initial training to the Handling Company.” (Ex. 322, ¶ 18.3) One of plaintiff’s co-workers testified China Air had given him training. (RP 355) EAGLE’s employee training manual contained detailed instructions including safety instructions for each service EAGLE offered its client air carriers. (Ex. 549)

In contrast, the Port provided the training the Federal Aviation and Transportation Safety Administrations required it to provide. (RP 1363-64, 2379, 2388, 2759, 2785-86) Since employers at STIA know what their workers’ duties are best, the Port’s training manager was unfamiliar with such things as ramp workers’ duties and her staff did not have the expertise to provide detailed ground service vehicle (“GSV”) safety training. (RP 2388, 2608-09)

## I. ARGUMENT

### A. QUESTION NO. 1'S DISJUNCTIVE LANGUAGE WAS PREJUDICIAL ERROR.

Plaintiff claims Question No. 1 is reviewable for abuse of discretion. But the issue is whether substantive or procedural law or both required it to be phrased in the conjunctive. These are questions of law. Review is *de novo*. See *State v. Schaler*, 169 Wn.2d 274, 282, 236 P.3d 858 (2010); *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009).

#### 1. Plaintiff's Invited Error Argument Misreads Question No. 1 As Compared to the Port's Proposed Question.

Plaintiff complains the Port invited error in Question No. 1's use of the disjunctive "or." Plaintiff's argument is based on a misreading of both Question No. 1 and the Port's proposed question.

Question No. 1 read (CP 4839) (emphases added):

Did the defendant retain a right to control the manner in which the plaintiff's employer, [EAGLE], *performed its work or maintained its equipment* used to provide ground support work ....?

As phrased, the question distinguished between the manner in which EAGLE (1) performed its work versus (2) maintained its equipment.

In contrast, the Port's proposed question provided (CP 4673):

Did the [Port] retain a right to direct the manner in which the plaintiff's employer [EAGLE] *performed or completed the maintenance of the equipment* used by EAGLE to provide ground support work ....?

(Emphases added.). Unlike Question No. 1, this proposed question asked only about the right to control the manner in which EAGLE performed or completed *maintenance of its equipment*. Work was not mentioned.

The invited error doctrine is based on the premise that “a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial.” *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). The Port did not set up Question No. 1’s error that allowed the jury to answer “yes” merely by finding the Port retained the right to control the manner in which EAGLE performed its work, regardless whether the Port retained the right to control the manner in which EAGLE maintained the very equipment, *i.e.*, instrumentality, that caused plaintiff’s injury. Plaintiff’s invited error argument is baseless.

## **2. Question No. 1 Conflicted with Jury Instructions.**

Plaintiff agrees *Capers v. Bon Marche*, 91 Wn. App. 138, 144, 955 P.2d 822 (1998), set forth the “correct statement of the rule” when it held a special verdict form may not contain language inconsistent with or contradictory to correct instructions. (Br. Resp./Cross-App. 18 n.52) Special verdict form Question No. 1 contains language inconsistent with or contradictory to correct instructions because it permitted the jury to find the requisite retention of the right to control by finding the Port retained the right to control the manner in which the EAGLE *either* (1) performed

its work *or* (2) maintained its equipment, *i.e.*, instrumentalities. (CP 4839)

But the instructions said otherwise.

Specifically, Instruction Nos. 23 and 26—which plaintiff agrees are “unobjectionable” (Br. Resp./Cross-App. 17) and thus are the law of the case—said (CP 4807, 4810) (emphases added):

A land owner such as the defendant has a duty to maintain a safe work place at a job site for the benefit of a worker who is not employed by the land owner only if the landowner retains the right to control *the manner and instrumentalities* by which the work is performed by that worker at the job site.

A land owner, like the defendant, has a duty to ensure compliance with applicable safety regulations for the benefit of a worker who is not defendant’s employee, like plaintiff, only if the land owner retains the right to control *the manner and instrumentalities* by which the work is performed by that worker at the job site.

Thus, these instructions told the jury that the manner in which an EAGLE worker performed work was different than the instrumentalities by which that work was done. The instructions also told the jury that to hold the Port liable, it had to find the Port retained the right to control *both* the manner in which an EAGLE worker performed work *and* the instrumentalities by which the work was done. But Question No. 1 told the jury that to find the Port liable, it had to find the Port retained the right to control the manner in which EAGLE *either* (1) performed its work *or* (2) maintained its equipment, *i.e.*, instrumentalities. The instructions’

conjunctive phrasing directly conflicted with Question No. 1's disjunctive phrasing. The instructions required putting an "and" in Question No. 1.

Plaintiff argues this conflict is nothing more than "a distinction without a difference" and that under *Afoa I* and *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 52 P.3d 472 (2002), the different phrasings are interchangeable. (Br. Resp./Cross-App. 11, 16-17) Even if this were true, the jury could not possibly know that. The jury simply knew the instructions said that to find the Port liable, the jury had to find it retained the right to control *both* the manner in which EAGLE's work was performed *and* the instrumentalities, but Question No. 1 said that to find the Port liable, the jury had to find the Port merely retained the right to control the manner in which EAGLE performed its work *or* maintained its equipment, an instrumentality.

Plaintiff also claims Instruction No. 13's conjunctive phrasing was erroneous and favored the Port.<sup>1</sup> (Br. Resp./Cross-App. 17-18) But even plaintiff's proposed language for this instruction—"manner *and* instrumentalities" of work—was phrased in the conjunctive. (CP 3090,

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<sup>1</sup>Instruction No. 13(1)(a) & (c) included "retained the right to control the manner in which [EAGLE] performed its work *and* maintained the equipment" and "retained control of the manner in which EAGLE employees performed their work *and* maintained their equipment" (emphasis added). Although plaintiff excepted to Instruction No. 13, he did not complain about its "ands." In fact, plaintiff's proposed version of the instruction was phrased in the conjunctive. (CP 3090, 3092, 3097, 3098, 3119, 4795; RP 3213-16)

3098) (emphases added). Thus, plaintiff agreed the manner of work was different than its instrumentalities and that to find the Port liable, the jury had to find it retained the right to control over both.

**3. The Law of the Case Doctrine Does Not Preclude the Port from Challenging Question No. 1.**

Citing *Roberson v Perez*, 156 Wn.2d 33, 123 P.3d 844 (2005), plaintiff claims the rule that instructions not excepted to become the law of the case does not apply where trial occurred upon remand from appeal. That is not what *Roberson* says.

In *Roberson* the trial court dismissed negligent investigation claims arising out of a county's investigation of a sex ring. The Court of Appeals reversed and remanded. A jury then found the county liable. On appeal, the county argued for the first time that plaintiffs had no cause of action. Although the county had not objected to instructions setting forth the cause of action, this Court rejected the argument that this precluded reviewing whether plaintiffs could recover at all.

Specifically, this Court had, in another case, clarified the scope of negligent investigation claims after the Court of Appeals *Roberson* decision. To permit the *Roberson* jury instructions to control instead of new case law would mean "a reviewing court could never review a case based on the law as it exists at the time of appeal." 156 Wn.2d at 43.

Further, the county's not objecting to instructions was irrelevant if plaintiffs were not entitled to recover: "No man should be allowed to recover in any case unless there is evidence to support his contention." 156 Wn.2d at 43-44 (quoting *Tonkovich v Dep't of Labor & Indus.*, 31 Wn.2d 220, 225, 195 P.2d 638 (1948)) (emphasis omitted). Because the *Roberson* plaintiffs had no cause of action, the law of the case doctrine did not apply. *Id.* at 44.

In short, *Roberson* held, "No principle of the law of the case doctrine requires upholding a ... verdict where intervening, controlling precedent from this court demonstrates that the plaintiff is not entitled to recover." 156 Wn.2d at 47. Consequently, *Roberson* does not apply here, as there is no intervening precedent precluding plaintiff's cause of action. *Cf.* RAP 2.5(a) (failure to establish facts on which relief can be granted raisable for first time on appeal).

#### **4. The Law Required Question No. 1 To Be in the Conjunctive.**

In any case, *Afoa* I required Question No. 1 to be in the conjunctive. *Afoa* I said, "jobsite owners have a specific duty to comply with WISHA regulations if they retain control over the manner *and* instrumentalities of work," "[w]e hold only that jobsite owners must comply with WISHA regulations if they retain control over the manner

*and* instrumentalities of work,” and “[t]he Port had a duty to maintain safe common areas if it retained control over the manner *and* instrumentalities of work.” 176 Wn.2d at 472, 473, 478. Page 1 of plaintiff’s brief quotes *Afoa I*, 176 Wn.2d at 478-79, about control over both the manner of work *and* instrumentalities. *Afoa I* never used the disjunctive.

Moreover, “instrumentalities” is not mere surplusage. *Afoa I* used “instrumentalities” for a reason: here, unlike *Kelley, Stute v. PBMC, Inc.*, 114 Wn.2d 454, 788 P.2d 545 (1990), and *Kamla*, the injuries were caused by a defective instrumentality, the pushback. Indeed, when faced with injury caused by an independent contractor’s improper maintenance or repair of an instrumentality, courts elsewhere have held that the defendant’s liability depends on whether it retained the right to control the manner in which the maintenance or repair was performed. *See, e.g., Caruso v. Aetna Cas. & Sur. Co.*, 181 Ga. App. 829, 354 S.E.2d 18 (1987); *McNamara v. Massachusetts Port Auth.*, 30 Mass. App. Ct. 716, 573 N.E.2d 510, 512, *rev. denied*, 410 Mass. 1104 (1991).

Thus, *Afoa I* belies the argument that putting “and” instead of “or” in Question No. 1 is contrary to *Afoa I*. (Br. Resp./Cross-App. 15) Further, even if plaintiff arguably excepted to the proposed “and” and the failure to give his question, he did not properly except to the so-called “turn the wrench” language and failed to comply with CR 51(f) as to both Question

No. 1 and the failure to give his proposed question. (RP 3243-44, 3247)  
Thus, Question No. 1, other than the “or,” is the law of the case as to both parties to this appeal. *Thomas v. Gen’l Constr. Co.*, 4 Wn. App. 44, 47, 480 P.2d 241 (1971); *State v. McKenzie*, 56 Wn.2d 897, 903, 355 P.2d 834 (1960).

Even if it were not, Question No. 1 would still have to include the “and,” because contrary to plaintiff’s arguments, there was no evidence that something other than poor maintenance created the required causal connection. A landowner has a duty provide a safe place of work to employees of an independent contractor but only “within the scope of [any] control” of the independent contractor’s work. *Stute*, 114 Wn.2d at 464; *Cano-Garcia v. King County*, 168 Wn. App. 223, 246, 277 P.3d 34 (2012). The employee’s injuries must be “caused by the employer’s failure to exercise that control with reasonable care.” *Bozung v. Condo. Builders, Inc.*, 42 Wn. App. 442, 446, 711 P.2d 1090 (1985). Although the jury was told that any negligence had to proximately cause the injury (CP 4800), it was not instructed the negligence, if any, had to involve the control retained. Had Question No.1 been phrased in the conjunctive, it would have had this effect under the facts of this case.

For example, plaintiff argues WISHA training requirements provide the required causal connection, but points to no evidence that

training would have even included what he needed to do to have avoided the accident. (Br. Resp./Cross-App. 14-15) Plaintiff tacitly admits the WISHA regulation requiring vehicles like the pushback to be kept in safe condition and properly serviced implicates only the maintenance prong of Question No. 1, which the jury did not have to find under Question No. 1 as given. (*Id.* at 14) The Port's alleged control over access to the airfield and ability to order defective equipment off the airfield have no causal connection because it was undisputed the hydraulic fluid gauge indicating the fluid level was too low<sup>2</sup> was covered so Port ground personnel would not have seen it and that the braking and steering problems occurred only intermittently. (RP 247, 255, 313) Moreover, such "control" is not the type of control the retained control doctrine requires. *McNamara v. Massachusetts Port Authority*, 30 Mass.App. Ct. 716, 573 N.E. 2d 510, *rev. denied*, 410 Mass. 1104 (1991). Rather, such "control" is nothing more than rejecting noncompliance with the contract and demanding correction. *Id.* at 512.

The inspection program plaintiff advocated would not have the required causal connection because such programs require inspection only during specified intervals such as quarterly. (RP 1602) In this case, when

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<sup>2</sup> The low hydraulic fluid caused both brake and steering failure. (RP 286-87, 310-11)

the hydraulic fluid level became too low is unknown and could have been too low for as little as a month (RP 302), so whether an inspection program would have caught the problem is speculative. The Port's control over where the cargo loader was parked cannot have the requisite causal connection because the cargo loader's location was a primary issue in the premises liability claim and the jury found the Port not negligent for that claim. In other words, the cargo loader's location did not present an unreasonable risk of harm. (CP 4589, 4804, 4840) Further, plaintiff has failed to explain how the Port's allegedly telling Toiva Gaoa how to do his work had a causal connection to this accident. (Br. Resp./Cross-App. 13)

Finally, the WISHA regulation instruction on daily vehicle inspections, including inspections after each shift also included a requirement that any deficiencies be corrected. (CP 4818) This requirement implicates Question No. 1's maintenance prong, not the work prong.

Plaintiff claims the Port cannot show prejudice. But plaintiff's brief does not even mention *Hall v. Corp. of Catholic Archbishop*, 80 Wn.2d 797, 498 P.2d 844 (1972), let alone try to explain why it does not apply. As discussed at page 17 in the Port's opening brief, *Hall* held, "Where instructions are inconsistent or contradictory on a given material point, their use is prejudicial, for the reason that it is impossible to know

what effect they may have [had] on the verdict.” *Id.* at 804. Here the instructions were inconsistent and contradictory with Question No. 1 on a material point. The Port was prejudiced.

If Question No. 1 had been phrased in the conjunctive, the jury—to find the Port liable—would have had to find the Port retained the right to control the manner in which EAGLE both (1) performed its work and (2) maintained its equipment. There was no substantial evidence of (2). Hence, if Question No. 1 should have been phrased in the conjunctive, the Port is entitled to reversal and remand for entry of judgment for the Port.<sup>3</sup>

**5. The Port Could Not Argue Its Theory of the Case.**

The Port’s theory was that plaintiff had to present substantial evidence that, among other things, it retained the right to control the manner in which EAGLE maintained EAGLE’s ground service equipment. But Question No. 1’s disjunctive phrasing did not permit the Port to argue this. Pages 18-19 of plaintiff’s brief are illustrative. There plaintiff says that in closing argument, the Port argued (emphases added):

[T]hat no evidence showed that the Port retained the right to control how ... GSPs do their work or maintain their equipment ...[or] that the “exclusive control” provision in the SLOA “doesn’t mean we intend to tell the air carriers

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<sup>3</sup> Even if there were substantial evidence the Port retained the right to control the manner in which EAGLE maintained its equipment, plaintiff has not disputed the Port’s alternative proposed relief, a new trial on the control issue only.

how to do their work or maintain their equipment, or, likewise, with the ground service equipment.

Thus, the Port was precluded from arguing that even if the jury found the Port had retained the right to control the manner in which EAGLE performed its work, that was not enough; that to hold the Port liable, the jury also had to find the Port retained the right to control the manner in which EAGLE maintained its equipment. Plaintiff's claim the Port was able to argue its theory of the case is without foundation.

**B. SUBSTANTIAL EVIDENCE DID NOT SUPPORT THE VERDICT.**

Plaintiff does not dispute there was no evidence the Port controlled the manner in which EAGLE performed its equipment maintenance. Instead he claims there was substantial evidence the Port controlled the manner in which EAGLE performed its work, relying heavily on the Port's agreements with EAGLE and with the air carriers and the Port's rules. But plaintiff admits contract provisions are "not dispositive." (Br. Resp./Cross-App. 21 n.61 (quoting RESTATEMENT (THIRD) OF TORTS *Liability for Physical & Emotional Harm* § 56, comment e)). In addition, mere inspection and supervision to ensure contract compliance does not show the required control. *Hennig v. Crosby Group*, 116 Wn.2d 131, 134, 802 P.2d 790 (1991); *McNamara*, 573 N.E.2d at 511-12 (retention of right to order vehicles out of service until defective condition was corrected did not constitute control required under RESTATEMENT (SECOND) OF TORTS §

414). And “not every licensor or jobsite owner takes on a common law duty to maintain a safe workplace anytime it requires on-site workers to comply with safety rules and regulations.” *Afoa*, 176 Wn.2d at 481; see *Beil v. Telesis Constr., Inc.*, 608 Pa. 273, 11 A.3d 456, 468-69 (2011); *Miller v. Great Lakes Steel Corp.*, 112 Mich. App. 122, 315 N.W.2d 558, 560 (1982).

Plaintiff has not addressed these limitations, let alone pages 20-29 of the Port’s opening brief, explaining why it had no reason to and did not control the manner in which EAGLE performed its work and was not in the best position to do so. Even if Question No. 1 as given were correct, substantial evidence did not support the jury’s “yes” answer.

**C. FEDERAL LAW PREEMPTS PLAINTIFF’S CLAIMS.**

Question No. 1’s wording was prejudicial error and substantial evidence of the requisite control did not exist. But even if Question No.1 were correct and the evidence supported the verdict, federal preemption would still require reversal and entry of judgment for the Port or a new trial on the control issue.

Plaintiff discounts the Port’s preemption argument, primarily because of OSHA/WISHA and because there is allegedly no federal regulation over GSVs on the ramp. Plaintiff is wrong. OSHA/WISHA does not “reverse preempt” his WISHA claim (plaintiff does not suggest it

would “reverse preempt” his common law claim). In addition, the FAA regulates not only GSVs in the movement and safety areas<sup>4</sup>, but also such vehicles’ *access* to those areas, which includes the nonmovement area, *i.e.*, ramp, where the pushback was. (Ex. 2, p. 5; RP 2122) Moreover, EAGLE’s pushbacks were expected to be used in the movement areas.

**1. OSHA/WISHA Does Not Reverse Preempt Federal Air Commerce Safety Law.**

Citing 29 USC § 667(b), plaintiff claims preemption does not apply because OSHA requires states to govern worker safety while the FAA is responsible for only air transport safety. Plaintiff also says *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 112 S. Ct. 2374, 120 L.Ed.2d 73 (1992), held that section 667(b) (aka OSHA section 18(b)) “gave the States the option of pre-empting federal regulation entirely” so that WISHA preempts federal law. (Br. Resp./Cross-App. 38-39 & n.110) (emphasis omitted). Plaintiff is wrong.

Section 667(a) of 29 USC provides, “Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue *with respect to which no*

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<sup>4</sup> “Movement area” means “the runways, taxiways, and other areas of an airport that are used for taxiing, takeoff, and landing of aircraft, exclusive of loading ramps and aircraft parking areas.” 14 CFR § 139.5. *See also* Ex. 2, at 6. “Safety areas” means a runway or taxiway and surrounding surfaces suitable for aircraft to use in the event of undershooting or overshooting the runway or unintentionally leaving the taxiway. 29 CFR § 139.5.

*standard is in effect under section 655 of this title*” (emphasis added). Section 667(b) permits states to submit their own plans for occupational safety and health standards “with respect to which a Federal standard has been promulgated *under section 655 of this title*” (emphasis added). The Secretary of Labor will approve such plans if, among other things, they include standards “at least as effective in providing safe and healthful employment and places of employment as the standards promulgated *under section 655 of this title.*” *Id.* § 667(c)(2) (emphasis added).

Section 655 of 29 USC authorizes the Secretary of Labor to promulgate occupational safety and health rules. Sections 667(b) and (c)(2) apply, by their terms, only as to standards promulgated under section 655. These were the statutes at issue in *Gade*, which made clear those sections deal with standards promulgated by the Secretary of Labor. *See Gade*, 505 U.S. at 97 (quoting 29 USC § 667(b)). The statutory scheme does not say OSHA/WISHA reverse preempts statutes, regulations, or standards not promulgated under section 655. OSHA/WISHA does not reverse preempt FAA or TSA regulations.

Plaintiff also argues 49 USC § 40103, dealing with sovereignty and airspace use, limits FAA responsibility to air transport safety. But section 40101(d)(1) of 49 USC states:

In carrying out subpart III [Safety] of this part ...., the [Federal Aviation] Administrator shall consider the following matters, among others, as being in the public interest:

- (1) assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce ....

Safety in air commerce or transport could not exist without safety at airports, especially the airfield. Indeed, 49 USC § 47101(a)(1) makes “the safe operation of the airport ... system ... the highest aviation priority.”

Plaintiff’s other cited cases are also inapposite. *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857 (9<sup>th</sup> Cir. 1987), did not even involve airports, aviation, or the Federal Aviation Act. The issue in *United Air Lines, Inc. v. OSHA Appeals Bd.*, 32 Cal.3d 762, 187 Cal. Rptr. 387, 654 P.2d 157 (1982), was an air carrier’s failure to place a guardrail on an elevated work platform *inside an aircraft ground maintenance facility*. Consequently, the state WISHA equivalent applied. In contrast, this case involves a GSV driven *on the airfield* where, as plaintiff describes it, “100,000 pound pushbacks ... operate next to aircraft.” (Br. Resp./Cross-App. 40)

## 2. The Pushback Was Regulated by Federal Law.

Section 139.329 of 14 CFR provides in part (emphases added):

In a manner authorized by the [Federal Aviation Administration] Administrator, each [airport] certificate holder must—

- (a) *Limit access* to movement areas and safety areas only to those pedestrians and ground vehicles necessary for airport operations;

(b) *Establish and implement procedures for the safe and orderly access to, and operation in, movement areas and safety areas by pedestrians and ground vehicles, including provisions identifying the consequences of noncompliance with the procedures by an employee, tenant, or contractor;*

....

Plaintiff misreads the regulation when he claims it does not involve ramp operations. Section 139.329(b) requires certificated airport operators like the Port to establish and implement procedures for ground vehicles' "safe and orderly *access to, and operation in, movement areas and safety areas*" (emphasis added).<sup>5</sup> GSVs coming from the ramp would have to cross the ramp and possibly other nonmovement areas to access the movement area.<sup>6</sup> Accordingly, to maintain safe and orderly access to the movement and safety areas, airports must maintain safety of *all GSVs in nonmovement areas including the ramp*.

To comply with 14 CFR pt. 139, certificated airport operators are legally required to perform certain activities "[i]n a manner authorized by the [FAA]." 14 CFR §§ 139.301-313, .317-.343. Accordingly, certain

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<sup>5</sup> EAGLE expected its pushbacks to be used on taxiways, which are part of the movement area. 14 CFR § 139.5 (Ex. 549, EAGLE-BK 258, 260-61 (¶¶ 8, 20)) EAGLE had at least one employee with the type of blue badge that authorized him to drive on the movement area. (RP 1671-72)

<sup>6</sup>GSVs typically operate on nonmovement areas, which are also used for equipment storage. (RP 696)

FAA advisory circulars assist airport operators to comply with pt. 139 “[i]n a manner authorized by the [FAA].” (Exs. 182-83)

For example, recognizing that 14 CFR § 139.329 requires airport owners to establish procedures for safe and orderly *access* to movement and safety areas, Advisory Circular 150/5210-20 called for airport operators to establish procedures and policies for vehicle access and operation “on the airside,” including “such matters as access, vehicle operator requirements, vehicle requirements, operations, and enforcement,” as a way of complying with 14 CFR pt. 139. (Ex. 182, ¶ 3.a) The Advisory Circular stated airport operators should incorporate such procedures and policies into tenant leases and agreements. (*Id.*)

In addition, Advisory Circular 150/5200-18C said airport operators should conduct “general observation” of ground vehicles whenever inspectors were in the air operations area to, among other things, determine whether drivers were following airport procedures for orderly ground vehicle operation. (Ex. 183, ¶ 11.a.(1)) The airside and air operations area include the ramp. (Exs. 2, p. 5, 482, PORT 24); <http://www.dictionary.com/browse/airside>.

Accordingly, the Port promulgated rules and procedures for GSVs, including rules for driver qualifications, parking, vehicle operations, and vehicle condition. Its licensing agreements required tenants to comply.

(Ex. 482, § 4; Ex. 311, PORT 12) Plaintiff claims the existence and enforcement of these rules and procedures established the control required to hold the Port liable under state law. But, as Advisory Circular 150/5200-18C (Ex. 183) indicates, these rules were part of the Port's compliance with 14 CFR pt. 139. Moreover, the Port promised to enforce these rules in its Airport Certification Manual ("ACM"). (Ex. 495, PORT 4039) Section 139.201(a) of 14 CFR required the Port to comply with its ACM. *See Blackwell v. Panhandle Helicopter, Inc.*, 94 F. Supp.3d 1205, 1211-12 (2015) (FAA regulation forbidding helicopter operator from acting contrary to rotorcraft-load combination flight manual preempted claim based on noncompliance with such manual).

Citing *Fellner v. Tri-Union Seafoods, LLC*, 539 F.3d 237 (3d Cir. 2008), plaintiff claims advisory circulars are not mandatory and thus not preemptive. But nowhere does plaintiff, let alone *Fellner* (which involved a consumer advisory issued by the Federal Drug Administration), discuss that the Advisory Circulars here provide methods by which the Port could comply with 14 CFR pt. 139, as well as with the Port's Airport Operating Certificate ("AOC") and ACM, as required by 14 CFR §§ 139.101(a) and .201(a).

In fact, *Fellner* acknowledges that federal agency action authorized by statute, albeit short of formal notice and comment rulemaking, may

“also have preemptive effect over state law.” 539 F.3d at 244. The FAA is statutorily authorized to issue advisory circulars on airport safety. 49 USC §§ 106(f)(2)(iii), 44701(b)(2).

Moreover, the informal FDA documents in *Fellner* did not preempt state law because they were “not agency interpretations of regulations claimed to preempt state law.” 539 F.3d at 250. By identifying some methods for complying with 14 CFR pt. 139, which requires regulatory compliance “[i]n a manner authorized by the [FAA],” the Advisory Circulars interpret part 139 and thus have preemptive effect. *See* 14 CFR §§ 139.301-.313, .317-.343.

Even if the Port complied with 14 CFR pt. 139 in different ways than FAA advisory circulars suggested, it is difficult to imagine how it could have complied with those regulations without what plaintiff would call “control.” For example, neither FAA regulations nor advisory circulars expressly required the Port to enter into an agreement with the FAA for the Port to operate a control tower to regulate nonmovement area air traffic (including aircraft being pushed or towed by GSVs). (Ex. 498; RP 2753, 2815, 2874, 3351) The tower’s regulation of air traffic, including aircraft being towed or pushed by GSVs, in the nonmovement area qualifies as a procedure for maintaining safe and orderly *access to* the movement and safety areas, as required by 14 CFR 139.329.

Plaintiff claims 14 CFR § 139.327, the self-inspection regulation, does not focus on ground service operations or worker safety. But one of plaintiff's experts, at plaintiff's behest, read to the jury the following quote from Advisory Circular 150/5200-18C (Ex. 183) about self-inspection (RP 1583) (quoting Ex. 183, ¶ 6.a) (emphasis added):

It is customary to assign the job of assuring overall *airport ground safety* to the airport manager or operations supervisor. Primary attention should be given to such operational items as ... *ground vehicles* ....

Nonetheless, plaintiff claims 14 CFR § 139.327's primary focus rests on "any unusual condition ... that may affect safe air carrier operations." (Br. Resp./Cross-App. 33) (emphasis omitted) (purporting to quote section 139.327(a)(1)-(3)). Plaintiff misreads the self-inspection regulation. Section 139.327(a) says (emphases added):

(a) In a manner authorized by the [FAA] Administrator, each certificate holder must inspect the airport *to assure compliance with [14 CFR §§ 139.301-139.343] according to the following schedule:*

- (1) Daily, except as otherwise required by the Airport Certification Manual;
- (2) When required by any unusual condition, such as construction activities or meteorological conditions, that may affect safe air carrier operations; and
- (3) Immediately after an accident or incident.

Thus, far from stating *what* self-inspection must include, section 139.327(a)(2) prescribes one of three occasions *when* self-inspection must

occur. As section 139.327's introductory paragraph shows, that section requires self-inspection to ensure compliance with, among other things, section 139.329, regulating ground vehicles and requiring their safe and orderly access to movement and safety areas.

Consequently, paragraph 6.a of Advisory Circular No. 150-5200-18C (Ex. 183) tells airport operators that as to self-inspection, “[p]rimary attention should be given to such operational items as ... ground vehicles ....” Paragraph 11 (Ex. 183) states this should be done whenever “inspection personnel are on the air operations area,” which includes ramps. (Ex. 2, p. 5) The Advisory Circular also states a self-inspection program in accordance with the circular will constitute “acceptable means of compliance” (but not the only means of compliance) with 14 CFR pt. 139. Thus, claiming section 139.327 does not include ground service operations on the ramp is inaccurate.

Plaintiff's reliance on 14 CFR § 139.327(b)(3)(iv) is misplaced as that rule deals only with training.

### **3. Plaintiff's Claims Are Conflict Preempted.**

Conflict preemption exists when “state law penalizes what federal law requires.” *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873, 120 S. Ct. 1913, 146 L.Ed.2d 914 (2000). States may not use common law to question federal decisions or extract money from those abiding thereby.

*Bieneman v. City of Chicago*, 864 F.2d 463, 472-73 (7<sup>th</sup> Cir. 1988). Using the Port's compliance with federal regulations to show the requisite control penalizes the Port for doing what federal law required it to do, contrary to *Geier* and *Bieneman*.

Plaintiff claims there is no conflict preemption because the advisory circulars and the Port's rules promulgated to comply with federal law have no preemptive effect. As discussed *supra*, plaintiff is wrong.

Plaintiff further claims TSA regulations have no preemptive effect because they do not deal with worker safety. But to show the requisite control, plaintiff repeatedly introduced evidence of the Port's compliance with TSA regulations such as 49 CFR §§ 1542.201-.213. (*E.g.*, RP 140-41, 178, 335, 476-77, 546-47, 1229-31, 2282) Plaintiff was essentially arguing the Port's compliance with TSA regulations should be penalized.

Plaintiff claims the Port controls access to the STIA airfield. The Port is required to do so by federal law: specifically, 49 CFR § 1542.203 requires each airport operator to establish an air operation area (which includes both movement and nonmovement areas (RP 1379)) and prevent and detect unauthorized entry, presence, and movement of individuals and ground vehicles. Airport operators must also control access to secured and security identification display areas. *Id.* §§ 1542.201, .205.

Finally, plaintiff repeatedly argues the FAA does not govern worker safety. The Port agrees as to workers such as concessionaire employees in the terminal or maintenance workers in hangars or garages. But the FAA regulates safety of ground vehicle access to the movement and safety areas. 14 CFR § 139.329. Regulating GSV safety means regulating the safety of, among others, GSV drivers. Because plaintiff is seeking to penalize what federal law requires, his claims are conflict preempted. *See Geier*, 529 U.S. at 871, 873.

#### **4. Plaintiff's Claims Are Field Preempted.**

Plaintiff argues there was no pervasive federal regulation of ground services on the ramp. But as discussed *supra*, section 329 of 14 CFR required the Port to establish and implement procedures for GSVs' safe and orderly access to the movement and safety areas, thereby requiring the Port to deal with GSV safety in nonmovement areas including the ramp. Thus, there was sufficient pervasive regulation of the pushback and other GSVs on the ramp to require field preemption.

Pages 46-48 of the Port's opening brief explained that field preemption occurs when substantive federal law is addressed to the same object or ends as the state law, *see Ray v. Atl. Richfield Co.*, 435 U.S. 151, 164-65, 98 S. Ct. 988, 55 L.Ed.2d 179 (1978), and that even absent FAA regulations and advisory circulars, *Napier v. Atl. Coast Line R.R. Co.*, 272

U.S. 605, 47 S. Ct. 207, 71 L. Ed. 432 (1926), compel a ruling that plaintiff's claims are field preempted. Plaintiff has not mentioned *Ray* or *Napier*, let alone tried to explain why they do not require preemption here.

It is true that *Blackwell*, 94 F. Supp. 3d at 1210, 1213-14, held that not all the claims before it were field-preempted.<sup>7</sup> The nonpreempted claims were not pervasively addressed by regulations. 94 F. Supp. at 1213. Further, none of the arguably pertinent regulations there were like 29 CFR pt. 139, requiring airport operators to act “[i]n a manner authorized by” the FAA, with FAA advisory circulars setting forth ways to comply with pt. 139 “[i]n a manner authorized by” the FAA.

Plaintiff posits that any field preemption should extend only to the standard of care, which he equates to holding the Port “ultimately responsible” for all safety at STIA. (Br. Resp./Cross-App. 35-36 n.100) No federal statute or regulation says airport owners like the Port are “ultimately responsible” for all airport safety. But even if that were federal law, it should result in complete field preemption, precluding need for any new trial on the standard of care.

Plaintiff's cases are in any event inapposite. The plaintiff in *Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995 (9th Cir. 2013), was using

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<sup>7</sup> *Blackwell* was discussing field, not conflict, preemption, 94 F. Supp.3d at 1210, as plaintiff seems to think. (Br. Resp./Cross-App. 36 & n.101)

federal law to establish the standard of care. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S. Ct. 615, 78 L.Ed.2d 443 (1984); the issue was whether federal law preempted punitive damages. Here the evidence at issue was used to show the Port's alleged control. Moreover, the federal standard of care does not include such WISHA regulations as WAC 296-863-30010, set forth in Instruction No. 34 (CP 4818), requiring inspection of powered industrial trucks both before they are put into service and after every shift. The federal standard of care also does not require regular GSV inspection programs as plaintiff advocated. (Ex. 182, ¶ 9; RP 1899) Consequently, even if there were not complete field preemption and even if a new trial on both the control and standard of care issue were required, evidence of Port conduct required by federal law would be excluded.

**5. The Airline Deregulation Act Expressly Preempts Plaintiff's Claims.**

Plaintiff does not dispute the Airline Deregulation Act's preemption clause, 49 USC § 41713(b)<sup>8</sup>, is construed broadly, not limited to claims against airlines, and can apply to state common law only indirectly affecting prices or services. Nor does he dispute the airlines at

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<sup>8</sup> Section 41713(b)(1) provides:

[A] State [or] political subdivision of a State ... may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

STIA would bear the cost of the inspection program he advocates, significantly impacting their prices or services.

Contrary to plaintiff's claim, the services to be impacted would be airline services, not third-party ground services. Although some courts have held section 41713(b)(1) does not apply to personal injury claims, at least one has held the Act preempts some personal injury claims; others remain undecided. *Perdigao v. Delta Airlines, Inc.*, 973 So.2d 33 (La. App. 2007); see *Allen v. Spirit Airlines, Inc.*, 981 F. Supp. 2d 688, 691 n.2 (2013); *Universal Coin & Bullion, Ltd. v. FedEx Corp.*, 971 F. Supp.2d 754, 760 (W.D. Tenn. 2013). Unlike in *Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 805, 357 P.3d 1040 (2015), where the airlines were "behav[ing] as an employer," *id.* at 805-06, the carriers here would not be. Even if the Port were acting as a WISHA employer in some respects, it would not be doing so in charging the airlines for an inspection program.

## II. CONCLUSION

Question No. 1 should have been phrased in the conjunctive. There was no evidence the Port retained the right to control the manner in which EAGLE maintained its equipment. Alternatively, substantial evidence did not support the "yes" answer to the question as given. Either way, the Port is entitled to reversal and judgment as a matter of law.

In any event, the FAA and TSA heavily regulated STIA, especially as to airfield activities including GSVs. Virtually everything plaintiff contends constitutes “control” was part of the Port’s efforts to comply with federal regulations. The Port is entitled to reversal and judgment as a matter of law due to federal preemption. At the very least, the Port is entitled to exclusion of all such evidence in a new trial on control.

## **RESPONSE TO CROSS-APPEAL**

### **I. NATURE OF CROSS-APPEAL**

RCW 4.22.070(1) required the jury to decide whether to allocate fault to the nonparty air carriers for which EAGLE provided ground services. Arguing nondelegable duty, collateral estoppel, and res judicata (while taking some swipes at the Port’s trial counsel), plaintiff claims the jury should not have been able to do so as a matter of law. Further, plaintiff argues the Port should not have been allowed to amend its affirmative answers to identify the carriers as at-fault nonparties.

Plaintiff’s arguments are meritless. But what Plaintiff neglects to mention is the core fact about this cross-appeal: it exists solely because he failed to join the carriers in this suit, which he easily could have done.

## II. STATEMENT OF ISSUES

1. Assuming arguendo the Port had a nondelegable duty to provide plaintiff a safe workplace, did that preclude the jury from deciding whether to allocate fault to nonparties as required by RCW 4.22.070(1)?

a. Did the Port even have such a nondelegable duty?

b. Even if it did, was the jury precluded from allocating fault to nonparties as required by RCW 4.22.070(1)?

c. Did plaintiff properly preserve for appeal whether the Port was vicariously liable and whether either exception to RCW 4.22.070(1) applies?

d. Does the agency exception to RCW 4.22.070(1) apply where there was no evidence the air carriers were the Port's agents?

e. Does the "acting in concert" exception to RCW 4.22.070(1) apply where the Port's relationship with the air carriers was a legitimate commercial relationship and there was no evidence it and the carriers were consciously acting together in an unlawful manner?

2. Did the trial court abuse its discretion in permitting the Port to amend its affirmative defenses to identify the air carriers as nonparties at fault where plaintiff had already sued them?

3. Does collateral estoppel or res judicata preclude the Port from proving that fault should be allocated to the air carriers, where the

Port was not a party nor in privity with them in a separate suit filed by plaintiff, and plaintiff could have avoided the problems of which he now complains had he simply sued them in the instant action?

### **III. STATEMENT OF CASE**

#### **A. STATEMENT OF RELEVANT FACTS.**

Plaintiff Brandon Afoa began working for EAGLE in August 2007, after being fired by another GSO. The accident at issue occurred on December 26, 2007. (CP 5; RP 2197, 3002)

#### **B. STATEMENT OF PROCEDURE.**

##### **1. Pretrial Proceedings Pre-Plaintiff's Federal Case.**

Plaintiff sued the Port as the sole defendant in February 2009. The Port's April 2009 answer denied liability. Among its affirmative defenses the Port, pursuant to CR 12(i), raised the fault of others, naming EAGLE as well as unknown persons. Plaintiff moved to strike this defense solely because fault could not be allocated to EAGLE, plaintiff's Title 51 RCW employer. The trial court agreed fault could not be allocated to EAGLE, but otherwise denied the motion. (CP 1-10, 14-15, 5189-93, 5203-04)

The Port obtained summary judgment. Plaintiff's reconsideration motion was denied. The appeal took more than 3 years, resulting in reversal and remand for trial. (CP 488-500) *Afoa v. Port of Seattle*, 176

Wn.2d 460, 296 P.3d 800 (2013), *aff'g* 160 Wn. App. 234, 247 P.3d 482 (2011).

**2. Plaintiff's Federal Case Against the Air Carriers.**

Meanwhile, in December 2010, while his appeal in this action was pending and shortly before the limitations period on his claim was to expire, plaintiff brought a separate suit against, among others, the four air carriers for which EAGLE worked. Although in the instant action plaintiff had been claiming, and would continue to claim, the Port could not allocate fault to the carriers, plaintiff's second suit claimed the carriers were negligent and violated WISHA. (CP 6921, 7020-48)

Plaintiff had filed his second suit in state court, but the case was removed to federal court. (For ease of reference, it will be called "federal case" or words to that effect.) In October 2012, nearly two years after it had originally been filed in state court, the federal case was stayed pending plaintiff's state court appeal. (CP 5375-79, 6922, 7066-68)

In 2013, after the federal court stay was lifted, Afoa sought to amend his complaint against the air carriers to name the Port as a defendant. The federal court denied his motion (CP 6922, 7119-23), stating, among other things (CP 7122, 7123) (emphases added):

...Plaintiff's failure to join the Port earlier was the result of "*inexcusable neglect*"....

....

*... For reasons only Plaintiff can know, he decided not to sue the Airline Defendants ... in that same suit [as the Port].* The Court agrees with Plaintiff that trying his claims against 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.* The Court cannot skirt the rules of civil procedure and deny Defendants the benefit of a federal forum in an effort to conserve limited judicial resources.

By July 2014 the federal court had dismissed the air carriers on summary judgment. (CP 6858,-67, 6909, 7300-01) Plaintiff did not appeal.

### **3. State Court Proceedings Post Filing of Federal Case.**

Meanwhile, although plaintiff was arguing in federal court the air carriers were at fault, in this suit he was repeatedly but unsuccessfully trying to prevent allocation of fault to them. (CP 3174-84, 3389-402, 4688-92, 5460-802, 5935-36, 6189-212, 8061-68, 8484-507, 8876-78) Permitting the Port to amend its answer to identify the carriers as nonparties at fault, the trial court explained (CP 8062):

Afoa did sue the Airlines and, in his multiple Complaints, repeatedly asserted the Airlines' fault. As a result, the Port's failure to amend earlier has not prejudiced Afoa.

At the close of the evidence at trial, plaintiff's motion for judgment as a matter of law that fault could not be allocated was denied. After the jury allocated some fault to the air carriers, plaintiff unsuccessfully renewed his motion. (RP 3203; CP 4840-42, 8993-9007, 9197-209)

Ultimately three different trial judges rejected his many attempts to preclude fault allocation. (CP 3174-84, 5935-36, 8876-78, 9197-209)

#### IV. ARGUMENT

The gist of plaintiff's cross-appeal is that the jury should not have been allowed to allocate fault to the four nonparty air carriers for which EAGLE worked. But plaintiff could have avoided this situation. As the federal court explained, "[f]or reasons only Plaintiff can know, he decided not to sue the Airline Defendants ... in th[e] same suit" and any "unfortunate outcomes" are "the result of [his] decision not to name all potential tortfeasors in his initial action against the Port." (CP 7123)

Preliminarily, this Court should disregard the discussion at pages 63 and 70 of plaintiff's brief citing CP 9016-17, the jury foreman's declaration saying how the jury would have ruled had it been precluded from allocating fault. The trial court disregarded the declaration because "'a juror may not impeach his own verdict ....' *Mathisen v. Norton*, 187 Wash. 240, 246 (1936)." (CP 9201) Plaintiff has not appealed this ruling, nor could he. Quoting juror testimony the trial court properly disregarded as inhering in the verdict is wholly improper. *Allen v. Farmers' & Merchants' Bank*, 76 Wash. 51, 61-62, 135 P. 621 (1913).

**A. THE JURY COULD PROPERLY ALLOCATE FAULT TO NON-PARTIES.**

**1. RCW 4.22.070(1) Mandates Allocation of Fault.**

Plaintiff argues public policy forbids allocating fault in this case. (*E.g.*, Br. Resp./Cross-App. 43-51) But the Legislature—“the fundamental source” for this State’s public policy—has already determined the applicable public policy—RCW 4.22.070(1)’s permitting nonparty fault allocation. *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 419 n.5, 282 P.3d 1069 (2012); *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001).

RCW 4.22.070(1) states in 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. 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 ... 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 ....

Since this statutory language is clear on its face, “courts must give effect to its plain meaning” and “assume the Legislature means exactly what it says.” *Chelan County v. Nykreim*, 146 Wn.2d 904, 926, 52 P.3d 1 (2002).

The jury here did exactly what the statute commands; it determined the percentage of total fault attributable to every entity that caused plaintiff’s damages. But plaintiff asks this Court to ignore this legislative mandate. Plaintiff’s arguments should be rejected.

**a. The Port Did Not Have a Nondelegable Duty.**

Plaintiff claims the Port had a nondelegable duty under case law, WISHA, and contract that overrides RCW 4.22.070(1). (Br. Resp./Cross-App. 43-46 & n.125) Plaintiff’s claim has no legal basis.<sup>9</sup>

First, the Port did not have a nondelegable duty. The *Afoa I* majority does not say it did. Rather, the nondelegable duty to provide a safe workplace under WISHA applies to general contractors. *Kamla*, 147 Wn.2d at 122. Jobsite owners like the Port do not have such a nondelegable duty, *id.* at 123-25:

The second question is whether jobsite owners play a role sufficiently analogous to general contractors to justify imposing upon them the same nondelegable duty to ensure WISHA compliance when there is no general contractor. We hold they do not.

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<sup>9</sup> Even if, as plaintiff claims, the Port conceded this below, courts are not bound by stipulations as to the law. *State v. Drum*, 168 Wn.2d 23, 33, 225 P.3d 237 (2010).

*Id.* at 124-25.

The nondelegable duty imposed on general contractors by contract exists because general contractors typically contractually assume all responsibility for initiating, maintaining, and supervising all safety precautions and programs. *Kelley*, 90 Wn.2d at 333. The Port did not make such an assumption. (E.g., Ex. 311, PORT 12 (EAGLE certifies equipment to be maintained in safe condition and accepts sole responsibility therefor); RP 2964, 2966, 3019 (FAA responsible for movement in movement areas)); see Br. Resp./Cross-App. 20-29.

Finally, plaintiff has shown no basis for the Port to have had a common law nondelegable duty. Such a nondelegable duty, had it existed, would have been for vicarious liability. *Millican v. N.A. Degerstrom, Inc.*, 177 Wn. App. 881, 890-91, 313 P.3d 1215 (2013). None of plaintiff's authorities provides a basis for such liability. (Br. Resp./Cross-App. 45-46) *Haverty v. Int'l Stevedoring Co.*, 134 Wash. 235, 235 P. 360 (1925), involved a traditional master-servant relationship not present here. *Kamla*, as discussed *supra*, rejected the argument a jobsite owner could have a nondelegable duty under WISHA. 147 Wn.2d at 123-25. *Stute* also dealt only with WISHA nondelegable duties. 114 Wn.2d at 462-64. The *Afoa I* majority did not even mention nondelegability. 176 Wn.2d at 464-82.

*Millican* noted a principal could have common law nondelegable vicarious liability for an independent contractor under RESTATEMENT (SECOND) OF TORTS §§ 416-29 (1965), 177 Wn. App. at 890-91, but plaintiff has not mentioned any of these sections, in this appeal or in the trial court. It is too late now. *Stansbury v. Dep't of Labor & Indus.*, 36 Wn.2d 330, 332, 217 P.2d 785 (1950). Even if he had, it would do him no good, since RCW 4.22.070(1)(a) does not except a principal's vicarious liability for an independent contractor from RCW 4.22.070(1).

**b. Even If the Port Had a Nondelegable Duty, RCW 4.22.070 Requires Allocation of Fault.**

Even if the Port had a nondelegable duty, "it is the Legislature's prerogative to change or define tort law." Thus, the Legislature was free to determine whether fault should be allocated. *Geschwind v. Flanagan*, 121 Wn.2d 833, 841, 854 P.2d 1061 (1993).

The Legislature is presumed to know this Court's pronouncements. *Reese v. City of Seattle*, 81 Wn.2d 374, 382, 503 P.2d 64 (1972). Judicially-adopted nondelegable duties of various types existed long before RCW 4.22.070(1)'s 1986 enactment. *See, e.g., Kelley*, 90 Wn.2d at 332-33; *Drake v. City of Seattle*, 30 Wash. 81, 84, 70 P. 231 (1902); *McDonough v. Great Northern Ry. Co.*, 15 Wash. 244, 258, 46 P. 334 (1896). If the Legislature had wanted to except from RCW 4.22.070(1) all

nondelegable duties or the type claimed to exist here, it easily could have done so. It did not.

Thus, this Court has recognized that “the Legislature abolished joint and several liability ... in *all cases* except those falling within an exception listed in RCW 4.22.070.” *Kottler v. State*, 136 Wn.2d 437, 445, 963 P.2d 834 (1998) (emphasis added). The Legislature has chosen just three situations where the statutory mandate for fault allocation and several liability does not apply: (1) fault cannot be allocated to a claimant’s RCW Title 51 employer, RCW 4.22.070(1); (2) a party is responsible for another’s fault or for payment of another party’s proportionate share if (a) they were acting in concert, RCW 4.22.070(1)(a), or (b) when a person was acting as that party’s agent or servant, *id.*<sup>10</sup> See *Kottler*, 136 Wn.2d at 446 (Legislature retains joint and several liability “in but three areas”). The Legislature chose not to except anything else from RCW 4.22.070(1)(a).

In addition, RCW 4.22.070 was enacted in 1986, well after the 1973 passage of RCW 49.17.060, from which any WISHA duties the Port might have to plaintiff arise. The Legislature is presumed to know of its past legislation and how courts have interpreted it. *In re Marriage of*

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<sup>10</sup>As will be discussed *infra*, plaintiff failed to preserve for review the statutory exceptions to RCW 4.22.070(1), which do not apply anyway.

*Little*, 96 Wn.2d 183, 189-90, 634 P.2d 498 (1981). It could have excepted RCW 49.17.060 from RCW 4.22.070(1). But it did not.

The fault allocation statute is also more specific than the WISHA statute. Unlike RCW 4.22.070(1), RCW 49.17.060 says nothing about fault when there are nonparty concurrent tortfeasors. Even if the statutes are inconsistent (which they are not), the “more specific statute controls over the earlier and more general one.” *Anderson v Dussault*, 181 Wn.2d 360, 371, 333 P.3d 395 (2014).

In any event, the two statutes do not conflict. Statutes must be read together to achieve a “harmonious total statutory scheme ... which maintains the integrity of the respective statutes.” *State ex rel. Peninsula Neigh. Ass’n v. Wash. State Dep’t of Transp.*, 142 Wn.2d 328, 342, 12 P.3d 134 (2000). The Port is not claiming any nondelegable duty it may have had could be conveyed elsewhere; it is asserting that RCW 4.22.070(1) makes fault allocable for purposes of recovering damages for breach of that duty.

The vast majority of Washington cases plaintiff cites were decided pre-RCW 4.22.070(1) and thus are inapposite. *See, e.g.*, Br. Resp./Cross-App. 44 n.126. Although *Afoa I* (176 Wn.2d at 475) cited *Myers v. Little Church*, 37 Wn.2d 897, 901-02, 227 P.2d 165 (1951), neither case involved fault allocation.

Plaintiff's cases decided post-RCW 4.22.070's enactment also do not support his claim that nondelegability overrides RCW 4.22.070(1): *Kamla*, 147 Wn.2d 114, *Stute*, 114 Wn.2d 454, *Millican*, 177 Wn. App. 881, *Neil v. NWCC Investments v. LLC*, 155 Wn. App. 119, 229 P.3d 837 (2010), and *Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 85 P.3d 918 (2004), do not even mention the statute.

Plaintiff's out-of-state cases, Brief of Respondent/Cross-Appellant 49 n.138, are also unpersuasive. With one exception, they did not involve statutorily mandated fault allocation. The exception, *Reid v Berkowitz*, 315 P.3d 185 (Colo. App. 2013), held Colorado's fault allocation statute inapplicable to vicarious liability. As will be discussed, unlike the statute in *Reid*, the Washington Legislature has expressly excepted two types of vicarious liability from RCW 4.22.070(1), but they do not apply here.

Plaintiff's reliance on 29 CFR § 1926.16(a) is misplaced. Unlike RCW 49.17.060, which is broadly phrased in terms of "employer," this regulation expressly applies only to prime contractors and their subcontractors performing construction contracts and does not purport to regulate a civil plaintiff's damages recovery. *See* 29 CFR §1926.10; *see generally Pedraza v. Shell Oil Co.*, 942 F.2d 48 (1<sup>st</sup> Cir. 1991). The Port was not a prime contractor to a construction contract.

RCW 49.17.060's broad definition of "employer" does not mean the Port and the air carriers were principal and agents so that any duty the Port might have was nondelegable. As discussed *supra*, landowners do not have a nondelegable duty under WISHA. *Kamla*, 147 Wn.2d at 123-25.

Plaintiff also misses the significance of *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 912 P.2d 472 (1996). This Court held that even though a general contractor has a nondelegable duty, its subcontractors owe a *distinct concurrent duty* to maintain a safe workplace. *Id.* at 756-59. This makes sense: to absolve concurrent tortfeasors completely would lead to more accidents, not fewer.

Thus, even if the Port had a nondelegable duty, that did not mean the air carriers did not have any duty. As RCW 4.22.070(1) provides, "the trier of fact shall determine the percentage of the total fault ... attributable to *every entity* which caused the claimant's damages," but "[j]udgment shall be entered ... in an amount which represents that *party's* proportionate share ...." (emphases added). *See Barton v. State, Dep't of Transp.*, 178 Wn.2d 193, 202, 308 P.3d 597 (2013). The air carriers were entities, but only the Port was a party for purposes of RCW 4.22.070(1). The Port was not liable for the air carriers' fault.

Plaintiff ignores these well-established legal principles. Instead, quoting *Bishop v. Miche*, 137 Wn.2d 518, 529, 973 P.2d 465 (1999), he

claims this Court should not overrule a decision lightly. (Br. Resp./Cross-App. 52) But *Bishop* was referring to this Court overruling its own decision, not to the Legislature enacting a statute to supersede case law. Indeed, *Bishop* noted that “if the Legislature chose to do so, it could enact legislation” requiring a different result. 137 Wn.2d at 528-29. Here, the Legislature has enacted RCW 4.22.070(1).

Plaintiff also claims the Port should not be able to “shift” its duty to others to create a “fragmented, reactive game of chance” that will allegedly defy WISHA.<sup>11</sup> (Br. Resp./Cross-App. 51) The duty has not been shifted. The jury found that both the Port and the air carriers had breached their own respective duties. *See Moen*, 128 Wn.2d at 756-59. Further, plaintiff could have avoided allocation without recovery from the nonparty tortfeasors had he just joined the air carriers in this suit.

**2. Plaintiff Failed To Preserve His RCW 4.22.070(1)(a) Agency/Acting in Concert Vicarious Liability Issue.**

Plaintiff claims nondelegable duty is a species of vicarious liability and that RCW 4.22.070(1)'s two exceptions preclude fault allocation for vicarious liability. Plaintiff is wrong, but this Court need not address this

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<sup>11</sup> Plaintiff also claims Michael Ehl said the Port was “the one entity best able to keep SeaTac safe. RP 3021/1-7” (Br. Resp./Cross-App. 50) RP 3021/1-7 shows Mr. Ehl did not say that. He did say the effort to keep STIA safe was a collective one among stakeholders and that the Port was governed by and complied with FARs (federal air regulations), *i.e.*, 14 CFR pt. 139. (RP 3019-21)

theory because he has failed to properly preserve it for appeal. *See State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009).

For example, although plaintiff filed multiple pretrial motions to preclude the jury from allocating fault to the air carriers, he failed to raise RCW 4.22.070(1)(a)'s agency exception until posttrial motions. (CP 3389-3402, 4390-94, 5460-77, 5919-29, 6819-212, 7572, 8484-507, 8798-804, 9005) That is too late. *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). In fact, plaintiff now claims Exs. 675-78 prove his agency theory. (Br. Resp./Cross-App. 45 & n.130) These exhibits were in plaintiff's attorneys' possession at least as early as October 2009, more than *five years before* trial. (CP 320, 4693-768) Yet he never raised the agency theory until *after* the verdict. (CP 9005)

To the best of the undersigned's knowledge, "vicarious liability" came up only once pre-trial—in a long quote from a case in plaintiff's *reply* memorandum for partial summary judgment. That was too late. *White v. Kent Med. Ctr., Inc.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991). Further, the quote spoke of vicarious liability for an *independent contractor's* negligence (CP 4392), not for an *agent's* negligence, as plaintiff now claims. (Br. Resp./Cross-App. 52)

A nondelegable duty can result in vicarious liability for the fault of independent contractors. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS ch. 15, Topic 2, p. 394. But RCW 4.22.070(1)(a)'s agency exception applies only to vicarious liability for the fault of agents or servants. *See G. Sisk, Interpretation of the Statutory Modification of Joint & Several Liability: Resisting the Deconstruction of Tort Reform*, 16 U. PUGET SOUND L. REV. 1, 109-10 (1992). Plaintiff correctly does not claim the statutory exception applies to vicarious liability for the fault of independent contractors.

Moreover, with two exceptions,<sup>12</sup> this matter including the Port's affirmative defenses was tried under the retained control doctrine of RESTATEMENT (SECOND) OF TORTS § 414 and *Kelley* and its progeny including *Afoa I.* (*E.g.*, CP 4795, 4807-08, 4810, 8622-28) That doctrine imposes *direct, not vicarious*, liability on an independent contractor's employer.<sup>13</sup> *Id.*, *comment a*; *Millican*, 177 Wn. App. at 890; *Phillips v. Kaiser Alum. & Chem. Corp.*, 74 Wn. App. 741, 750-51, 875 P.2d 1228 (1994). The doctrine is not based on the agency theory plaintiff now espouses. The jury instructions never mentioned agency nor was the jury

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<sup>12</sup> Instruction Nos. 22 and 27 allowed the jury to find the air carriers at fault without finding they retained any control whatsoever over EAGLE. (CP 4806, 4811)

<sup>13</sup> Pages 47, 50, and 52 of plaintiff's brief cite *Millican*, 177 Wn. App. at 896-97, *Ft. Lowell-NSS Ltd. Partnership v. Kelly*, 166 Ariz. 96, 101, 800 P.2d 962 (1990), and RESTATEMENT (THIRD) OF TORTS § 13. As those authorities show, however, plaintiff's citations deal only with vicarious, not direct liability.

told that if the carriers were at fault, the Port would be liable for it. *Compare* Washington Pattern Jury Instruction 50.03 with CP 4780-834, 4839-42. Indeed, plaintiff never proposed, or excepted to the absence of instructions on agency or vicarious liability. (CP 3063-122; RP 3203-52). Plaintiff's new theory is precluded. *Moore v. Smith*, 89 Wn.2d 932, 940, 578 P.2d 26 (1978); *Ball v. Smith*, 87 Wn.2d 717, 720, 556 P.2d 936 (1976).

Plaintiff did not raise the "acting in concert" exception of RCW 4.22.070(1)(a) until after the close of evidence and his vicarious liability/agency theory of RCW 4.22.070(1)(a) until after the verdict. (CP 8939-40, 9005) Both were too late. *Kee*, 31 Wash. at 679; *U.S. Fire Ins. Co. v. Roberts & Schaefer Co.*, 37 Wn. App. 683, 688, 683 P.2d 600 (1984). This Court should not consider either theory.

**3. In Any Event, Plaintiff's Belated Vicarious Liability/RCW 4.22.070(1)(a) Argument Is Meritless.**

Even had plaintiff properly preserved his vicarious liability/RCW 4.22.070(1)(a) issues, he had to show the air carriers were (1) acting in concert with the Port, or (2) were the Port's agents or servants, as a matter of law. RCW 4.22.070(1)(a); *see generally Johnson v. REI*, 159 Wn. Ap. 939, 950, 247 P.3d 18 (2011). Plaintiff could not show either.

**a. The Port and the Air Carriers Were Not “Acting in Concert” under RCW 4.22.070(1)(a).**

“Acting in concert” in RCW 4.22.070(1)(a) does not mean what the average person might think.<sup>14</sup> Rather, as used in RCW 4.22.070(1)(a), it means “consciously act[ing] together in an unlawful manner.” *Kottler*, 136 Wn.2d at 448-49 (adopting analysis in *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 75 Wn. App. 480, 487-88, 878 P.2d 1246 (1994), *rev'd on other grounds*, 128 Wn.2d 745, 912 P.2d 472 (1996)).

For example, participating in a legitimate commercial relationship (e.g., general contractors and subcontractors at a construction site) is insufficient, even if a third person is harmed thereby. *Moen*, 75 Wn. App. at 486 (citing with approval G. Sisk, *Interpretation of the Statutory Modification of Joint & Several Liability: Resisting the Deconstruction of Tort Reform*, 16 U. PUGET SOUND L. REV. 1, 107 (1992)). Indeed, the “acting in concert” theory’s purpose is to deter antisocial conduct like group assaults and highway drag racing. Sisk, at 108.

The air carriers and the Port were participating in a legitimate commercial relationship and were not involved in antisocial conduct. There was no evidence the Port and the air carriers consciously acted

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<sup>14</sup> Although plaintiff’s counsel asked Michael Ehl of the Port whether the air carriers, GSOs, and the Port, among others, were “act[ing] in concert,” Mr. Ehl was never told what that term means as used in RCW 4.22.070(1)(a). (RP 3020) His testimony on this point thus does not implicate the statutory “acting in concert” exception.

together in an unlawful manner. The “acting in concert” prong of RCW 4.22.070(1)(a) cannot apply, let alone as a matter of law.

Plaintiff claims a broader definition of “acting in concert” should be adopted. But as this Court tacitly recognized when it adopted *Moen’s* “thorough analysis,” 75 Wn. App. at 486-88, “[i]f a broader interpretation were adopted, the exception for acting in concert would largely swallow the rule of several liability.” *Id.* at 488; *Kottler*, 136 Wn.2d at 448-49. Moreover, the Legislature is presumed to know judicial interpretations of its enactments. *Little*, 96 Wn.2d at 189-90. If the Legislature had wanted to broaden this Court’s 1998 definition, it could have. It has not.

**b. The Air Carriers Were Not the Port’s Agents.**

Plaintiff never raised his RCW 4.22.070(1)(a) agency theory in his many partial summary judgment and pre-verdict judgment as a matter of law motions. But even if he had, he would have had to show the Port and the carriers were in a principal/agent or master/servant relationship as a matter of law. *Kottler*, 136 Wn.2d at 448. He failed to do so.

Because he raised his agency theory too late, plaintiff now argues the right to control test of *Kelley*, *Stute*, *Kamla*, and *Afoa I*, also establishes “agent”/“servant” vicarious liability.” (Br. Resp./Cross-App. 53) Plaintiff is wrong.

RESTATEMENT (SECOND) OF TORTS § 414 embodies the *Kelley*, *Stute*, *Kamla*, and *Afoa I* retained control test. Comment a states:

The employer may ... retain a control less than that which is necessary to subject him to liability as master. ...Such ... control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in this Section ....

In other words, the whole point of the retained control test is to impose direct liability on an employer that is *not* in a master/servant or principal/agent relationship with the independent contractor. *See Hiatt v. Western Plastics, Inc.*, 2014 Ill. App.2d 140, 178, 36 N.E.3d 852, 873-74 (2014). *Kelley*, Washington's seminal retained control case, 90 Wn.2d 323, does not even mention the words "principal," "agent," or "agency." The majorities in *Kamla* and *Afoa I* mention "agency" only in the title of the RESTATEMENT (SECOND) OF AGENCY when the majorities cited that authority's "independent contractor" and "servant" definitions. Nowhere does *Afoa I* call any entity relevant to this case an agent or servant.

Furthermore, for the air carriers to be the Port's agents, mere control is insufficient, even if it existed. *See, e. g., Knapp v. Hill*, 276 Ill. App.3d 376, 657 N.E.2d 1068, 1071-72 (1995). Rather, a person must consent that another shall act *on his behalf*, as well as under his control. *Matsumura v. Eilert*, 74 Wn.2d 362, 368, 444 P.2d 806 (1968) (citing RESTATEMENT (SECOND) OF AGENCY § 1 (1958)); *see* RESTATEMENT

(THIRD) OF AGENCY § 1.01 (principal must manifest assent that agent shall act “on principal’s behalf”). Merely following rules imposed by contract does not mean one party thereto is acting on behalf of the other. *See Dolan v. King County*, 172 Wn.2d 299, 317, 258 P.3d 20 (2011) (prudent financial controls and careful oversight of contract compliance does not render contractor an agency of government). Yet that is what plaintiff seems to be contending.

Citing sections 2.1 and 4.7 of the Port’s agreements with the air carriers, plaintiff claims “any power the airlines might exercise is subject to Port ‘exclusive control.’” (Br. Resp./Cross-App. 45 & n.130 (citing Exs. 675-78)) But those sections deal only with the airfield area and common use gates, not with whether the carriers were acting on behalf of the Port or, in particular, whether the carriers’ control over EAGLE was done on the Port’s behalf, let alone under its control. (RP 873-74, 2321-26, 2349-50, 2915, 2918, 3012)

The Port has explained the air carriers’ retention of the right to control EAGLE in both its appellate briefs. Brief of Appellant/Cross-Respondent 5-7, 26-28; Reply and Response Brief of Appellant/Cross Respondent 1-4) There was no evidence the carriers were acting on the Port’s behalf, let alone under its control. Plaintiff’s contention the carriers were the Port’s agents is without foundation.

**B. THE TRIAL COURT WAS WITHIN ITS DISCRETION TO ALLOW THE PORT TO IDENTIFY CR 12(i) NONPARTIES AT FAULT.**

Plaintiff claims allowing the Port to amend its answer to name the carriers under CR 12(i) precluded him from joining and recovering from them. (CP 8993-9007) (Br. Resp./Cross-App. 43, 63) But plaintiff was the one to blame: Judge Coughenour stated, “*For reasons only Plaintiff can know, he decided not to sue the Airline Defendants*”; Judge Ramseyer said, “*But the decision of who to sue and when to sue them was Plaintiff’s*,” Judge Allred declared, “*[Plaintiff not being able to sue the air carriers in the instant action] is the consequence of Afoa’s litigation choices (including the decision to sue the Port and the Airlines separately).*” (CP 3176, 7123, 9199) (emphases added).

A ruling allowing amendment of a pleading is reviewed for manifest abuse of discretion. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). The trial court did not abuse its discretion here.

Leave to amend shall be freely given when justice so requires. *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983). Delay is relevant, but only if it causes undue hardship or prejudice. 100 Wn.2d at 349; *Appliance Buyers Credit Corp. v. Upton*, 65 Wn.2d 793, 800, 399 P.2d 587 (1965). Conclusory assertions of prejudice are

insufficient. *Walla v. Johnson*, 50 Wn. App. 879, 884, 751 P.2d 334 (1988).

The Port asserted that EAGLE and unknown entities were at fault in its original answer, filed in April 2009, just 2 months after the complaint. (CP 14-15) Plaintiff moved to strike the affirmative defense as to EAGLE since fault cannot be allocated to an RCW Title 51 employer. RCW 4.22.070. Nowhere did plaintiff complain about the Port's asserting unknown entities were at fault.<sup>15</sup> (CP 5189-93, 5199-202)

In July 2009 the trial court precluded the jury from allocating fault to EAGLE, but otherwise denied plaintiff's motion. (CP 5203-04) Because the Port's affirmative defense as to at-fault unidentified entities was not stricken, plaintiff was on notice nearly 6 years before the 2015 trial that the Port might try to allocate fault to nonparties other than EAGLE.

In fact, from when plaintiff filed this action to when he filed his first appeal, he had nearly 11 months to join the carriers as defendants in this suit. (CP 1, 493-500) He failed to do so. Instead, he waited until the limitations period was about to expire to bring a separate suit against the

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<sup>15</sup> Since plaintiff did not challenge the Port's asserting the fault of unknown entities, the Port's response dealt only with his challenge to naming EAGLE. (CP 5194-98) Thus, plaintiff's reliance at pages 58-59 of his brief on the Port's response is inapposite.

carriers, which was eventually removed to federal court. (CP 5332-60, 5362-73) At this point, it was 5 years before trial. (CP 4693)

Nonetheless, plaintiff argues that because of delay, the Port should not have been allowed to amend its answer to identify the air carriers. But *“delay, excusable or not, in and of itself is not sufficient reason to deny the motion”* to amend. *Caruso*, 100 Wn.2d at 349 (emphases added). For example, in *Caruso*, plaintiff was allowed to amend his complaint to allege defamation 5 years and 4 months after the original complaint. Indeed, this Court has ruled that it is an abuse of discretion to deny an amendment to a complaint to include a new defendant just a month before trial. *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, 166 Wn.2d 475, 483-84, 209 P.3d 863 (2009).

Although it was September 2014 when the Port moved to amend to identify the carriers, plaintiff had already sued the carriers 4 years earlier in December 2010. (CP 5332-60, 7595-613) Further, in a November 2013 interrogatory answer, nearly a year and a half before trial, the Port told plaintiff it intended to assert the carriers were at fault since plaintiff was doing so. (CP 7644-45) Plaintiff could not have been unfairly surprised or otherwise prejudiced. The trial court did not abuse its discretion in allowing the Port to amend its answer to identify the carriers.

Plaintiff concedes he had already done discovery as to the air carriers in the federal case and thus was not prejudiced in that regard. (Brief of Respondent/Cross-Appellant 62) Instead, he claims (1) the statute of limitations and res judicata/collateral estoppel prevented him from recovering against them, (2) he should have been able to have all liability determined in one proceeding, (3) the federal suit “wasted time and expense,” (4) his inability to join the air carriers resulted in a “skewed outcome,” and (5) the jury believed the Port and airlines were truly adverse. (*Id.* at 62-63) But plaintiff had nearly 11 months to join the carriers as defendants in this suit but failed to do so. (CP 1, 493-500) As the federal court recognized, “[t]h[e]se unfortunate outcomes ... are the result of Plaintiff’s decision not to name all potential tortfeasors in his initial action against the Port.” (CP 7123) (emphases added). If anything, the federal court’s ruling should collaterally estop plaintiff from claiming prejudice.

Plaintiff also claims prejudice due to alleged “unethical gamesmanship and conflict of interest.”<sup>16</sup> (Br. Resp./Cross-App. 63) Plaintiff has no standing to raise this. *See Burnett v. State Dep’t of*

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<sup>16</sup> An expert testified there was no ethical violation and criticized plaintiff’s ethics expert for rendering an opinion with insufficient information. (CP 8043-48)

*Corrections*, 187 Wn. App. 159, 170, 349 P.3d 42 (2015). In any event, it is irrelevant to his CR 12(i) motion.

There is no reason for plaintiff's proposed CR 12(i) "special rule." He simply should have sued the carriers herein when he had the chance.

**C. THE PORT IS NOT BOUND BY THE FEDERAL COURT'S DECISION.**

Plaintiff repeatedly but unsuccessfully moved to preclude the jury from allocating fault, arguing the Port was barred from such allocation by collateral estoppel or res judicata *as a matter of law*.<sup>17</sup> Res judicata, or claim preclusion, bars the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). The doctrine requires identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of persons for or against whom the claim is made. *Id.* Identity of parties requires privity if the party against whom res judicata was sought was not a party in the earlier suit. *Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 396, 429 P.2d 207 (1967).

A party claiming collateral estoppel must prove the following: (1) the issue decided in the proceeding was identical to the one presented in

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<sup>17</sup> On appeal, plaintiff has abandoned his judicial estoppel claim.

the current action, (2) the prior adjudication must have resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and (4) precluding relitigation of the issue will not work an injustice on the party against whom collateral estoppel is to be applied. *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004); *McDaniels v. Carlson*, 108 Wn.2d 299, 303, 738 P.2d 254 (1987). This cross-appeal involves whether there was privity and whether precluding allocation of fault in the instant action would work an injustice.

**1. There Was No Privity.**

The Port was not a party to plaintiff's federal action, so plaintiff claims it was in privity with the air carriers in that suit. Plaintiff is wrong.

Due process concerns forbid estopping a party who never appeared in a prior action. *Blonder-Tongue Labs., Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329, 91 S. Ct. 1434, 28 L.Ed.2d 788 (1971); see *Owens v. Kuro*, 56 Wn.2d 564, 568, 354 P.2d 696 (1960) (estoppel inapplicable to stranger to a judgment). Privity is thus construed strictly. *Spahi v. Hughes-NW, Inc.*, 107 Wn. App. 763, 775, 27 P.3d 1233, 33 P.3d 84 (2001); see *McDaniels v. Carlson*, 108 Wn.2d 299, 306, 738 P.2d 254 (1987). This Court has explained "privity" as follows:

“Privity does not arise from the mere fact that persons as litigants are interested in the same question or in proving or disproving the same state of facts. Privity ... is privity as it exists in relation to the subject matter of the litigation, and the rule is construed strictly to mean parties claiming under the same title. It denotes mutual or successive relationship to the same right or property....”

*United States v. Deaconess Medical Center*, 140 Wn.2d 104, 111, 994 P.2d 830 (2000) (quoting *Owens*, 56 Wn.2d at 568; *Loveridge*, 125 Wn.2d at 764). The same privity definition applies to collateral estoppel and res judicata. *Owens*, 56 Wn.2d at 568; *Barlindal v. City of Bonney Lake*, 84 Wn. App. 135, 143, 925 P.2d 1289 (1996).

Plaintiff claims privity can exist if the party to the prior action adequately represented the nonparty’s interest in that earlier litigation.<sup>18</sup> (Br. Resp./Cross-App. 66) But that principle does not apply here, as it typically applies to representative suits such as class actions or suits by trustees, guardians, and the like. *Taylor v. Sturgell*, 553 U.S. 880, 894-95, 128 S. Ct. 2161, 171 L.Ed.2d 155 (2008). Indeed, the few Washington cases in which one party was deemed to have been adequately represented by a party to prior litigation involved such relationships as employer-employee and deemed essentially identical to the employer or partner. See

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<sup>18</sup> Being insured by the same insurance company does not create privity. See *Cater v. Taylor*, 120 W. Va. 93, 196 S.E. 558 (1938); *Creeco Co. v. N. Ill. Gas Co.*, 73 Ill.App.2d 218, 219 N.E.2d 257, 260 (1966).

*Feature Realty, Inc. v. Kirkpatrick & Lockhart Preston Gates Ellis, LLP*, 161 Wn.2d 214, 223-25, 164 P.3d 500 (2007); *Kuhlman v. Thomas*, 78 Wn. App. 115, 121-22, 897 P.2d 365 (1995); *Woodley v. Myers Capital Corp.*, 67 Wn. App. 328, 337, 835 P.2d 239 (1992). The Port and air carriers have and had no such relationship.

Even if the adequate representation test applied, the air carriers did not properly represent the Port's interests in the federal case: in that case, the carriers successfully argued they were *not* at fault; in this case, the Port successfully argued they were at fault, although plaintiff could not recover against them because he had failed to join them when he could have. RCW 4.22.070; *see Allstate Ins. Co. v. Batacan*, 139 Wn.2d 443, 449-50, 986 P.2d 823 (1999); *Mailloux v. State Farm Mut. Auto. Ins. Co.*, 76 Wn. App. 507, 513, 887 P.2d 449 (1995). Hence, plaintiff's claim the Port and the carriers had "a fundamental unity of interest" must also fail. (Br. Resp./Cross-App. 68)

Plaintiff also claims the Port actually controlled, or substantially participated in the control of, the air carriers' defense in the federal action. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 39, *cited with approval in Loveridge*, 125 Wn.2d at 764 & n.17. This assertion is based on speculation and wishful thinking.

The requisite control for establishing privity exists only if “a person ha[s] effective choice as to the legal theories and proofs to be advanced in behalf of the party to the action.” RESTATEMENT (SECOND) OF JUDGMENTS § 39, *comment c*; accord *Allen v. V & A Bros., Inc.*, 208 N.J. 114, 26 A.3d 430, 445 (2011). Although the Port’s trial counsel in this case also represented the carriers in the federal case (after obtaining written waivers) (CP 8048), that is insufficient to show the Port actually controlled or substantially participated in control of the carriers’ defense. See, e.g., *Perez-Guzman v. Gracia*, 346 F.3d 229, 234 (1<sup>st</sup> Cir. 2003); *Yorulmazoglu v. Lake Forest Hosp.*, 359 Ill. App.3d 554, 834 N.E.2d 468, 474-75 (2005). There is no evidence the Port determined the carriers’ legal theories and proof in the federal suit. The carriers did exactly what any defendant in their position would do—they argued they were not liable.

Plaintiff contends this Court can infer Port control of the air carriers’ defense because the Port and/or the air carriers<sup>19</sup> (1) opposed his belated attempt to add the Port to the federal action<sup>20</sup>, and (2) refused to stipulate to (a) dismiss the carriers from the federal case and (b)

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<sup>19</sup> Plaintiff’s brief is unclear whether it is the Port or the air carriers that allegedly refused to do these things. (Br. Resp./Cross-App. 67)

<sup>20</sup> In the federal case, plaintiff moved to add the Port as a defendant *and* remand to state court, since both plaintiff and the Port are Washington State citizens. (CP 7119-20)

acknowledge the Port was solely in control of the work at STIA. But the Port and the carriers each had legitimate reasons for doing what they did.

Specifically, the Port would have opposed joinder since plaintiff was suing it in this case. The air carriers would have opposed joinder since making the Port a defendant would have destroyed diversity jurisdiction, requiring the case to be returned to state court. (CP 7120, 7123)

As to plaintiff's proposed stipulation, plaintiff's counsel drafted it with the superior court caption in the instant case and inserted signature lines only for himself and the Port's counsel. There was no signature line for the air carriers' counsel. (CP 6183-86) The Port had a legitimate reason not to agree to the stipulation, as it would have deprived it of the ability to defend on the basis it had not retained the required right to control. The air carriers had a legitimate reason not to agree to the stipulation because, as drafted by plaintiff's counsel, they were not parties to it and, even if they had been, (1) the air carriers had no right or ability to waive the Port's defense, and (2) the stipulation was to be filed only in the state court where the carriers were not parties. Indeed, the Port's attorney refusal to sign the stipulation indicates the Port was not controlling the air carriers' defense of the federal case.

Plaintiff also argues that because its employees testified for the air carriers in the federal case,<sup>21</sup> the Port was in privity with the carriers. This argument is nothing more than the virtual representation doctrine, allowing collateral estoppel to be used against a nonparty when a former suit involved a party with substantial identity of interests. *Garcia v. Wilson*, 63 Wn. App. 516, 520-21, 820 P.2d 964 (1991) (virtual representation doctrine requires nonparty to have participated in former adjudication, e.g., as a witness). That doctrine cannot apply here.

Most fundamentally, the doctrine must be applied cautiously to ensure the nonparty is not unjustly deprived of its day in court. *Garcia*, 63 Wn. App. at 520. Thus, not only must the nonparty have participated in the former adjudication, but the issue must have been fully and fairly litigated there, the evidence and testimony must be identical, and the suits' separation must have been due to some manipulation or tactical maneuvering by the nonparty to the later suit. *Id.* at 521.

Here, that the air carriers were defendants in a different suit than the Port was due to plaintiff, not the Port. As the federal court observed, plaintiff's failure to join the Port in a timely fashion in federal court was

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<sup>21</sup> Port employees testified that no air carrier had a right to control the tarmac where the accident occurred or participated in deciding where EAGLE could park its cargo loader. (CP 6726, 6762) They did not testify as to other aspects of the air carriers' retention of the right to control EAGLE, e.g., as set forth at Brief of Appellant/Cross-Respondent 5-7.

due to plaintiff's "inexcusable neglect." (CP 7122) And both federal *and* state courts recognized the carriers were not joined in the instant matter because plaintiff inexplicably failed to do so. (CP 3176, 7123, 9199)

None of plaintiff's cited cases featured the situation here: the party seeking estoppel electing to sue the party and the nonparty in two different suits when he could have joined them in one suit. Thus, those cases do not support his position. *See Stevens County v. Futurewise*, 146 Wn. App. 493, 192 P.3d 1 (2008); *State v. Cloud*, 95 Wn. App. 606, 976 P.2d 649 (1999); *Hackler v. Hackler*, 37 Wn. App. 791, 683 P.2d 241 (1984).

Finally, the United States Supreme Court has rejected the virtual representation doctrine. In *Taylor v. Sturgell*, 553 U.S. 880, 128 S. Ct. 1261, 171 L. Ed.2d 155 (2008), Justice Ginsburg, speaking for a unanimous Court, held the doctrine strays too far from the "fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party," would lead to circumvention of "protections, grounded in due process" and time-consuming and expensive discovery, and require district courts to apply imprecise and "opaque" standards to evaluate whether the doctrine should apply. *Id.* at 898, 901.

Because the Port was neither a party nor in privity with a party in the federal case, neither collateral estoppel nor res judicata applies to it.

## 2. Collateral Estoppel Would Work an Injustice.

Collateral estoppel's injustice prong is rooted in procedural unfairness. *State v. Vasquez*, 148 Wn.2d 303, 308, 59 P.3d 648 (2002). It would have been unjust to estop the Port from arguing the jury should allocate fault to the carriers when the Port was not a party to the federal case nor in privity with them. In fact, plaintiff admitted not wanting to sue the carriers (CP 8059, 8061-62), so his efforts in proving his case against them was questionable. For example, one reason the carriers obtained summary judgment in federal court was plaintiff's failure simply to cite any WISHA regulations that might apply, although subsequently plaintiff did not object to the jury in the instant case being instructed the carriers could be responsible under WISHA. (CP 4811, 4815-25, 6864; RP 3206)

Plaintiff claims injustice from inconsistent adjudications and the Port's allegedly benefitting from "conflict of interest and confidences of the airlines." (Br. Resp./Cross-App. 69) But collateral estoppel requires no injustice *to the party against whom estoppel is to be applied, i.e.*, the Port. *Christensen*, 152 Wn.2d at 307.

Regardless, the inconsistent adjudications were "the result of Plaintiff's decision not to name all potential tortfeasors in his initial action against the Port." (CP 7123) The claim the Port benefited is speculative.

Further, plaintiff has no standing to complain about alleged conflict of interest or confidentiality breach. *Burnett*, 187 Wn. App. at 170.

To deprive the Port of its day in court to prove the carriers' fault would be unjust. And as Judge Allred said, "it would be a misuse of the collateral estoppel and res judicata doctrines to allow Afoa to vehemently assert Airline liability in the Airline lawsuit, lose that lawsuit, and then use that loss to obtain a ruling in this case—as a matter of law—that the Airlines bear no fault under RCW 4.22.070(1)." (CP 3179)

#### V. CONCLUSION

The Port did not prevent plaintiff from suing and recovering from the air carriers. Plaintiff could have done so, but did not. This Court should affirm the denials of plaintiff's many motions to preclude fault allocation and the Port from amending its affirmative answer.

Dated this 12<sup>th</sup> day of August 2016.

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**Subject:** RE: Case No. 91995-0, Afoa v. Port of Seattle

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**Subject:** Case No. 91995-0, Afoa v. Port of Seattle

Attached for filing please find the following:

- Motion to Permit Overlength Brief of Appellant Cross/Respondent
- Reply Brief of Appellant/Cross- Respondent
- Affidavit of Service

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