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WASHINGTON STATE
SUPREME COURT

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRANDON APELA AFOA,
Respondent & Cross-Appellant,

v.

PORT OF SEATTLE,
Appellant.

**BRIEF OF RESPONDENT / CROSS APPELLANT
BRANDON APELA AFOA**

SULLIVAN LAW FIRM
Michael T. Schein, WSBA # 21646
Columbia Center
701 Fifth Avenue, Suite 4600
Seattle, WA 98104
(206) 903-0504

BISHOP LAW OFFICES, P.S.
Raymond E.S. Bishop, WSBA #22794
Derek K. Moore, WSBA #37921
19743 First Avenue South
Seattle, WA 98148

Attorneys for Respondent/Cross-Appellant
BRANDON APELA AFOA

 ORIGINAL

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I. INTRODUCTION

This is an action for personal injury damages against the Port of Seattle, owner and operator of Seattle Tacoma International Airport (“Seatac”), based on: (1) violation of the WISHA specific duty clause, RCW 49.17.060(2); and (2) common-law duty to provide a safe workplace in a multiemployer jobsite.¹ These are nondelegable duties that fall as a matter of law and sound public policy on the entity best able to control safety in a multiemployer jobsite.²

This Court is familiar with this case from *Afoa I*, which held:

If a jury accepts Afoa's allegations, the Port controls the manner in which work is performed at Sea-Tac Airport, controls the instrumentalities of work, and controls workplace safety. The Port is the only entity with sufficient supervisory and coordinating authority to ensure safety in this complex multiemployer work site. If the Port does not keep Sea-Tac Airport safe for workers, it is difficult to imagine who will.³

After a month and one-half trial, the jury *did* accept Mr. Afoa's evidence, to find that the Port controlled the manner of EAGLE's work at Seatac, and that damages total \$40 Million. CP 4839-41. However, the trial court allowed the Port to name four airline “empty chair” defendants *who were*

¹ There was also a premises liability claim on which the jury found against Mr. Afoa.

² *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 122, 52 P.3d 472 (2002); *Stute v. PBMC*, 114 Wn.2d 454, 463-64, 788 P.2d 545 (1990); *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 332-33, 582 P.2d 500 (1978).

³ *Afoa v. Port of Seattle*, 176 Wn.2d 460, 478-79, 296 P.3d 800 (2013) (citations omitted) (“Afoa I”) (App. A).

known to the Port all along, but who had not been named back when they could have been sued by the Plaintiff, in violation of the mandatory terms of CR 12(i). CP 3174, 8061. When the jury assigned 18.7% fault to each airline, the Port's nondelegable duty to provide a safe workplace was effectively delegated to parties who were not best able to control safety at Seatac, and against whom Plaintiff could not recover.⁴ This result was inconsistent with a prior Federal Court dismissal of the exact same claims against the airlines, in which the Port controlled the airlines' defense.⁵

The trial court entered judgment against the Port for \$10 Million. CP 4881. On cross-appeal, Mr. Afoa challenges the judgment and other rulings for: (1) violation of the non-delegable duty rule; (2) violation of CR 12(i)'s special rule for "empty chair" amendments; and (3) failure to apply res judicata/collateral estoppel to the Federal judgment.

The polished presentation of the Port's direct appeal masks its fundamental weakness. The jury instructions, read as a whole, correctly state the law, and if Interrogatory #1 adds a bit to this Court's formulation of the control test with the use of the word "or", that was done *at the Port's own request* to enable it to argue its unduly restrictive theory of the case, and therefore it was "invited error," not prejudicial, and cannot

⁴ CP 3174, 4688, 4842, 8876, 8934, 9197.

⁵ CP 6858, 6909, 8423.

be a basis for reversal. The sufficiency of the evidence argument is overwhelmed by mountains of evidence of control, detailed in Section III(B) *infra*, based on which reasonable jurors could find that the Port was the super-authoritative control over the manner of EAGLE's work, along with everything else at Seatac. The preemption argument deceptively fails to distinguish between the *movement area*, where FAA regulation is substantial, and the *nonmovement (or ramp) area*, where this injury occurred, and where there is very little FAA regulation. Furthermore, the Port's preemption argument fails to account for the *reverse preemptive* power of the State under OSHA/WISHA over *worker safety* as opposed to *air travel safety*, and it never explains the dire consequence of following it to its logical conclusion: complete nullification of worker safety regulation at all airports in the state, creating untold problems at these admittedly very dangerous job sites.

II. STATEMENT OF THE CASE

On December 26, 2007, Brandon Afoa, a 25-year-old ground service employee at Seatac, was driving a 100,000-pound "pushback" (the big machine to push jets back from the gates), that was poorly maintained and leaking hydraulic fluid.⁶ Mr. Afoa had been working at

⁶ RP 275/15-20, 240-54, 279-99, 2185/1-8, 3192/5-7.

the B-gates, his usual assignment, servicing Hawaiian Airlines flights for his direct employer, a ground service provider (“GSP”) called EAGLE,⁷ when a supervisor called and told him to drive the pushback to the S-gates for use by another EAGLE crew to service a China Airlines flight. He slowed to a walking speed as he approached gate S-15, planning to park next to the plane, but three broken-down dollies were in the way.⁸ He stepped lightly on the gas, then noticed that the brakes had failed. He was able to steer once to avoid people while yelling, “No brakes, no brakes!” – then the steering froze, and the pushback hit a broken-down cargo loader that had been parked against the jetway wall for about two weeks, in an area beyond Gate S-15 or any other gate.⁹ A heavy piece of the cargo loader fell on him, pinning him in his seat, causing grievous injury: a crushed spine and internal organs, permanent triplegia (loss of use of both legs and left arm), short gut syndrome (inability to effectively digest nutrients and need for external colostomy for elimination of waste), leaving him permanently paralyzed and wheelchair-bound, with twenty years lost life expectancy.¹⁰

⁷ RP 2231-32/22-3, 2267-68/23-14.

⁸ RP 2237-38/19-3, 2241/20-24, 2242/2-13, 2334/15-21; Exs. 139, 189.

⁹ RP 2238-39/10-15, 2239-40/24-22, 2241/9-19; Ex. 139.

¹⁰ RP 139/3-15, 1744/10-23, 1746-48, 1750-52, 1767, 1769, 1810-11/20-5, 1987/7-25, 1989-90/10-8; Ex. 488.

The Port omits a critical fact to understanding both the issues of control and preemption: *the airfield is divided into two very different parts, the “movement” and “nonmovement” areas, and while the Port and FAA share control over the movement area where planes take off, land, and taxi, the Port has near total control over the nonmovement area, which includes the “ramp” where this injury occurred.*¹¹ These two areas are clearly divided by a red-and-white painted stripe, known as the “vehicle control line,” and different rules and different badges for access apply in these two different areas.¹² Movement in the movement area is controlled by the FAA Airport Tower.¹³ *All movement on the ramp is controlled by the Ramp Tower, staffed by contractors hired by the Port.*¹⁴ In the words of the Port’s own orientation class, “[t]he term [nonmovement or ramp area] really describes an area on the airfield *not controlled by the FAA.*” Ex. 113 p.5 (emphasis added). Brandon was licensed to drive by the Port – not by EAGLE or any airline – only in the ramp area.¹⁵ The diagrams of the path he followed on the night of his

¹¹ RP 451-52/13-4, 452-53/17-4, 525-26/7-2, 695-97/8-22, 2355-56/21-9, 2989/16-18; Exs. 2, p.4; 113 pp.3-6; 482 *passim*, esp. §4; 311 ¶¶9, 11; 675-78 ¶2.1; CP 6500-01.

¹² RP 525/7-15, 706/6-22, 2753/1-11; Ex. 2, p.4.

¹³ RP 526-27/20-7, 695/23-25, 696-97/24-6, 2753/12-21.

¹⁴ RP 451-52/13-11, 526-27/3-7, 696-97/24-13, 956-57/17-2, 2815/8-12, 2874-75/16-17, Ex. 113 p.5; Ex. 188.

¹⁵ RP 2265-66/15-4, 2282-83/13-1; CP 216 ¶¶4-5.

injury shows that he travelled entirely within that area, and this terrible crash happened in the ramp area. Exs. 139, 189.

III. ARGUMENT AGAINST PORT'S APPEAL

A. Jury Interrogatory #1 is Not Reversible Error

The Port asks this Court to overturn the product of a month-and-one-half jury trial based on a single word – “or” – that the Port itself first proposed, which was adopted by the trial court to allow the Port to try its own erroneous theory of the case. Because (1) the interrogatory properly states the law; (2) the instructions, read as a whole, were not misleading; (3) they permitted the Port to argue its theory of the case; and (4) any possible error (which Plaintiff does not concede), was invited by the Port, the use of the word “or” is not reversible error.

1. “Or” was Requested by the Port and Served its Theory, so Any Challenge is Barred by the Invited Error Doctrine

“[A] party may not request an instruction and later complain on appeal that the requested instruction was given.”¹⁶ That is what the Port is doing here. The Port repeatedly asserted the erroneous argument, based (as it admitted) on the dissenting opinion in *Afoa I*, that control over the manner of work did not trigger common-law or WISHA liability, but that only operational-level control over the actual maintenance of the

¹⁶ *City of Seattle v. Patu*, 147 Wn.2d 717, 721, 58 P.3d 273 (2002).

pushback could trigger such liability.¹⁷ This untenably-narrow misconstruction of precedent is the “turning the wrench” theory, under which the Port argued that it had to either turn the wrench on the pushback, or at least directly supervise the turning of the wrench, to be liable. *That is not how this Court’s precedents formulate liability.*¹⁸

Pursuant to its erroneous theory, the Port’s proposed interrogatory #1 asked whether it “retained the right to direct the manner in which the plaintiff’s employer ... performed or completed the maintenance of the equipment used by EAGLE to provide ground support work for the non-party air carriers” CP 4673. *The Port’s proposal was the first and only proposal to interject the word “or” into Interrogatory #1.* Plaintiff’s proposed Interrogatory #1, exactly tracking *Afoa I*, asked, “Did defendant Port of Seattle retain the right to control the manner and instrumentalities of the work performed by ... EAGLE?” CP 3119. The trial court compromised, taking a bit from Plaintiff, and the lion’s share from the

¹⁷ RP 50/14-25, 2286-87/4-22; CP 1898, 4577, 4971.

¹⁸ *Kelley*, 90 Wn.2d at 330-31 (exception to common-law nonliability for independent contractors arises when defendant “retains control over some part of the work”; test is not “actual interference with the work” but the “right to exercise such control”); *Stute*, 114 Wn.2d at 461, 464 (follows *Kelley*, and holds re: WISHA specific duty that defendant “should bear the primary responsibility for compliance with safety regulations because the general contractor’s innate supervisory authority constitutes sufficient control over the workplace”); *Kamla*, 147 Wn.2d at 121 (“When we distill the principles evident in our case law, the proper inquiry becomes whether there is a retention of the right to direct the manner in which the work is performed”); *Afoa I*, 176 Wn.2d at 478 (“*Kelley* and *Kamla* stand for the proposition that when an entity ... retains control over

Port: “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 for the non-party air carriers ...?” CP 4839. This is exactly the Port’s proposed interrogatory, except for the addition of “its work”, which comes from “the work” in *Afoa I*. Read together with the proximate cause instructions, this fairly states the law, while favoring (on the “or” prong) the Port’s request that it be allowed to argue its “turning the wrench” theory.

If this Court were to find that the use of the disjunctive word “or” created error, it would be invited error. The Port should not be permitted to deprive this grievously injured Plaintiff of the fruits of this hard-fought jury trial by proposing an erroneous Interrogatory emphasizing their “turning the wrench” theory, and then complaining about it on appeal.¹⁹

2. The Instructions Fairly State the Law

a. Control over “The Manner of Work” Properly Distills the Case Law and States the Law of this Case

“Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a

the manner in which work is done on a work site, that entity has a duty to keep common work areas safe because it is best able to prevent harm to workers.”).

¹⁹ *Patu, supra*, 147 Wn.2d at 721; *Sdorra v. Dickinson*, 80 Wn. App. 695, 702-03, 910 P.2d 1328 (Div. 2 1996) (invited error to argue jury should not be allowed to consider contributory negligence, and then to seek new trial for failing to give jury verdict forms requiring the jury to compare fault).

whole, properly inform the jury of the law to be applied.”²⁰ “Special verdict forms are reviewed under this same standard.”²¹ A misstatement of the law is only reversible if it prejudices the objecting party.²² “It is axiomatic that the trial court has considerable discretion in how the instructions will be worded”²³ While the Port is correct that review for overall legal sufficiency is de novo, the abuse of discretion standard applies to the particular wording of jury instructions.²⁴ The trial court did not abuse its discretion by selecting and then slightly modifying the Port’s proposed Interrogatory #1.

In *Kamla*, after reviewing prior case law, this Court stated the test for control liability as follows:

When we distill the principles evident in our case law, the proper inquiry becomes **whether there is a retention of the right to direct the manner in which the work is performed**²⁵

In *Afoa I*, this Court went over this entire ground again, and held:

Kelley and *Kamla* stand for the proposition that when an entity ... retains control **over the manner in which work is done on a**

²⁰ *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995).

²¹ *Capers v. Bon Marche*, 91 Wn. App. 138, 142, 955 P.2d 822 (Div. 1 1998), *rev. den.*, 137 Wn.2d 1002 (1999) (citing *Hue, supra*).

²² *Hue, supra*.

²³ *Roberts v. Goering*, 68 Wn.2d 442, 455, 413 P.2d 626 (1966); *accord, e.g., State v. Ng*, 110 Wn.2d 32, 41, 750 P.2d 632 (1988); *Gammon v. Clark Equip. Co.*, 104 Wn.2d 613, 617, 707 P.2d 685 (1985); *State v. Dana*, 73 Wn.2d 533, 536, 439 P.2d 403 (1968).

²⁴ *Hue, supra*, 127 Wn.2d at 92 n.23; *Douglas v. Freeman*, 117 Wn.2d 242, 256, 814 P.2d 1160 (1991).

²⁵ *Kamla*, 147 Wn.2d at 121 (emphasis added).

work site, that entity has a duty to keep common work areas safe because it is best able to prevent harm to workers.²⁶

Interrogatory #1 asks the jury to determine whether “the defendant retained a right to control the manner in which ... (EAGLE) performed its work” CP 4839. This correctly applies the law.

The “manner of work” test quoted above from *Afoa I* is the law of this case.²⁷ The Port cites inapposite cases for the subsidiary rule that unobjected jury instructions become “law of the case”, *Brief of Appellant* at 17, 20 (“BA”), but that rule *does not apply to change the appellate ruling on remand*.²⁸ Interrogatory #1 correctly applies the law of *Afoa I*.

b. Variations in the *Afoa I* Control Test are Immaterial

From time to time, while stating this “manner of work” test, *Afoa I* added “and instrumentalities” to “the manner”, 176 Wn.2d at 472, 473,

²⁶ *Afoa I*, 176 Wn.2d at 478 (emphasis added); accord, Restatement (3d) Torts §56, cmt. c (“the hirer must retain some degree of control over the manner in which the work is done, such that the contractor is not entirely free to do the work in the contractor’s own manner”); Restatement (Second) Torts §414 (adopted in *Kelley*, 90 Wn.2d at 330, and quoted at p.10 of the Port’s Brief: “One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability”).

²⁷ *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005); *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992); RAP 12.2.

²⁸ None of the Port’s cited cases involved remand at all, let alone remand where the issue had been decided by the appellate court. The primary application of law of the case is that *appellate rulings govern the trial court on remand*. *Roberson v. Perez*, 156 Wn.2d at 41. The trial court could not alter the law of the case by disregarding the mandate. This is especially true here, where Plaintiff proposed and then urged return to the exact language of *Afoa I* for Interrogatory #1. CP 3119; RP 3247/7-12. Plaintiff never wavered in his claim to application of the law of *this case*. To suddenly change the rules after the game has been played would constitute manifest injustice. Law of the case should not be applied “where it would result in manifest injustice.” *Greene v. Rothschild*, 68 Wn.2d 1, 8, 414 P.2d 1013 (1966).

478, but it never stated any intent that this would change the meaning or create a two-prong test for “control” as is now suggested by the Port. The wording “manner of work” or “manner and instrumentalities of work” is a distinction without a difference, because the *Afoa I* Court treated these formulations as interchangeable. At other times, *Afoa I* characterized the requisite control as control over “EAGLE and Afoa,” *id.* at 474, 482, “work done on a jobsite,” *id.* at 470, “the manner in which contractors complete their work,” *id.* at 472, the “manner in which work is performed [or done],” *id.* at 478-79, 481, “some part of the work,” *id.* at 477, “work,” *id.* at 477, the “work site,” *id.* at 475, 477, 481, “the movements of all workers on the site to ensure safety,” *id.* at 479, “workplace safety,” *id.* at 475, 481, “worker safety,” *id.* at 481, and, finally, just “safety,” *id.* at 481. There is no indication anywhere that these slight variations in verbal formulation intended to change thirty-five years of jurisprudence since *Kelley*. Indeed, inasmuch as this Court provided both examples of control over the manner of work (*e.g.*, the Port retains “exclusive control” over the “airfield area” under its rules), and control over particular instrumentalities of work (Port required verification of braking system repair on Swissport pushback after brake failure), as evidence tending to show the requisite control, *id.* at 474, the Court did not make the fine

distinction relied on by the Port. No majority decision supports the “turning the wrench” theory.²⁹

By instructing that the jury must find the Port had “a right to control the manner in which the plaintiff’s employer, ... performed its work,” CP 4839, the trial court properly distilled the essence of *Afoa I* and the other case law. Exact wording was within the trial court’s discretion.³⁰ By adding, “or maintained its equipment,” the trial court added language that emphasized the Port’s theory of the case, at the Port’s request. This was hardly prejudicial to the Port, and does not constitute reversible error.

c. “And” Would have made Interrogatory #1 Erroneous

Use of the word “and” would have made Interrogatory #1 erroneous and prejudicial to the Plaintiff, by narrowing recovery only to control over maintenance of the pushback. The broader test used by this Court in *Afoa I* and *Kamla*, control over “the manner of work,” was the only wording that covered all the issues raised by the evidence.

The Port is mistaken that direct control over turning the wrench on the pushback was the only causal factor in Mr. Afoa’s injury. The Port controlled all access to the airfield, and was therefore responsible for

²⁹ It is only found in the dissenting opinion in *Afoa I*, 176 Wn.2d at 488-89, 491.

³⁰ *State v. Ng*, 110 Wn.2d at 41.

allowing a leaking, poorly-maintained pushback into the work place.³¹ There is ample evidence of Port control over access to the airfield, and its right to remove unsafe vehicles.³² Toiva Gaoa, Mr. Afoa's immediate supervisor, testified that the Port through its Ramp Patrol told him how and where to do his work, even when he was not violating Port Rules and Regulations ("Rules").³³ The Port oversaw operation of pushbacks, could order them stopped and red-tagged for any perceived safety problem, and could take direct action against vehicle operating privileges.³⁴ The Port considered but rejected a comprehensive ground service equipment ("GSE") inspection program because it would have cost too much, even though it was a "reasonable expectation" that a pre-inspection program would significantly reduce the risk of a poorly maintained 100,000 pound pushback with no brakes and steering on the airfield.³⁵ The Port also controlled all parking at the South Satellite, where broken-down clutter prevented Mr. Afoa from parking where he first intended to park when the brakes were still working.³⁶ The Port exercised the sole authority to direct where the cargo loader that Mr. Afoa struck was parked, and a

³¹ RP 314/18-22, 1028-29/14-14, 2591/21-24, 2604/9-25, 2765-66/21-13; Ex. 12.

³² Ex. 311 ¶11(A); *id.* ¶9; Ex. 482 at Port 31 ¶1, 51 ¶8, 52 ¶1, 53 ¶5(b), 54 ¶¶12 & 15.

³³ RP 427/18-23, 456-59/23-1.

³⁴ RP 1227-28/6-17, 474-75/7-3, 583/7-14, 652-53/20-5, 1268-69/16-20, 1272-74/21-7, 2693-94/2-19; Exs. 53, 208.

³⁵ RP 846-47/1-21, 848/3-17, 899/20-25.

³⁶ RP 134/16-24, 163-64/5-7, 183/10-20, 189/5-17, 327/8-14, 380/18-24, 553/14-24, 2237-38/19-3, 2241/9-13, 2242/2-13.

piece of the cargo loader fell on Mr. Afoa, causing his terrible injuries.³⁷ The cargo loader was broken-down and had been parked there for at least two weeks.³⁸ Had it not been there, Mr. Afoa would have hit the wall of the jetway, which would not have collapsed on him.³⁹ Thus, relevant evidence of control extends well beyond maintenance of the pushback, to evidence of control over access to the airfield, parking the cargo loader, permitting clutter around the South Satellite, and detailed control over daily ground service work.⁴⁰

In addition, the Port's violation of numerous WISHA regulations was evidence of negligence, as well as evidence of liability under WISHA. CP 4810, 4815-4825. This Court held in *Afoa I* that the Port is an "employer" under WISHA as to Mr. Afoa.⁴¹ The regulations required that pushbacks "are to be kept in safe condition and properly serviced,"⁴² and that a pushback "that is not in safe operating condition must be removed from service."⁴³ This latter regulatory duty goes beyond the details of maintenance, to focus on the employer's control over allowing unsafe vehicles into service. Another WISHA regulation requires that

³⁷ RP 139/3-15, 621/3-8, 1744/10-23, 1746-48, 1750-52, 1767, 1769, 1810-11/20-5, 1987/7-25, 1989-90/10-8, 2127-28/7-13; Exs. 311 ¶11(B), 488.

³⁸ RP 168/9-10, 229-30/21-14, 2251-52/16-3.

³⁹ RP 2103/12-19.

⁴⁰ RP 1248/19-22, 1249-50/15-8.

⁴¹ *Afoa I*, 176 Wn.2d at 473.

⁴² CP 4816 (Inst. #32, based on WAC 296-863-30005, -30020).

⁴³ CP 4817 (Inst. #33, based on WAC 296-863-30005).

pushbacks be inspected according to the manufacturer's instructions, and inspected daily before and after each shift, with any deficiencies reported and corrected.⁴⁴ Again, this duty is not maintenance, but inspection. Other regulations require pushback operators to successfully complete an operator training program, and have other specific training.⁴⁵ This, too, goes beyond maintenance, to require training. Finally, under *Afoa I* and *Kelley*, it was relevant to establish which entity was best able to protect the safety of all workers at this multiemployer workplace.⁴⁶

Counsel for Mr. Afoa objected to the Port's request for "and" on the grounds that it would impermissibly narrow the "control" test of *Afoa I*, and stated that if the Court was inclined to change "or" to "and", "we would renew our request to just say that, 'Did the defendant retain a right to control the manner and instrumentalities of Plaintiff's work,' period." RP 3247/7-12. It was not reversible error for the trial court to refuse to make the Interrogatory erroneous under the evidence in the case.

3. The Instructions Read as a Whole Were Not Misleading, or Prejudicial to the Port

The Port argues that Interrogatory #1 was misleading because it permitted the jury to find control liability in the absence of a causal

⁴⁴ CP 4818 (Inst. #34, based on WAC 296-863-30010).

⁴⁵ CP 4819-24 (Inst. ##35-40, based on WAC 296-863-60005).

⁴⁶ *Afoa I*, 176 Wn.2d at 477, 479, 481; *Kelley*, 90 Wn.2d at 331-32.

connection to injury. The Port is mistaken. Proximate cause was fully and properly instructed here.⁴⁷ Jury instructions must be read as a whole; if a verdict could be reversed based on abstracting a single word or instruction from the whole, no verdict could ever stand.⁴⁸ Causation does not require “turning the wrench.” The jury’s finding of causation is supported by Port control over the safety of GSE allowed on the ramp, negligent omission of its power to red-tag, detailed oversight of daily work through the Port Rules, Ramp Patrol, Port Police and Fire Departments, control over GSE movement by the Port Ramp Tower, and control over parking of the cargo loader and clutter at the South Satellite.⁴⁹ Viewing the instructions as a whole, the Port is mistaken that the jury was allowed to find liability in the absence of proximate cause.

The Port also argues that Interrogatory #1 conflicted with other instructions. The alleged “conflict” is a distinction without a difference to the extent the Port focuses on “control over the manner of work” versus “control over the manner and instrumentalities of work,” since, as

⁴⁷ CP 4792 (Inst. #10 – definition of proximate cause); *see also*, CP 4800 (Inst. #16 – Burden of Proof – “The plaintiff has the burden of proving ... that the defendant’s negligence was a proximate cause of the injury to the plaintiff.”); CP 4796 (Inst. #13 “The plaintiff claims that defendant’s conduct was a proximate cause of injuries and damages to plaintiff.”). Numerous other causation instructions were given. CP 4793 (Inst. #11 – multiple and sole proximate cause); CP 4794 (Inst. #12 – superseding cause); CP 4813 (Inst. #29 – sole proximate cause based on actions of EAGLE); CP 4814 (Inst. #30 – sole proximate cause based on actions of pushback manufacturer).

⁴⁸ *Hue, supra*, 127 Wn.2d at 92 (& cases cited).

⁴⁹ For record citations, see Section II, III(A)(2), *supra*; and Section III(B)(1), *infra*.

demonstrated above, *Afoa I* used those formulations (and a number of variations) interchangeably, but both *Afoa I* and *Kamla* hold that control over the manner of work properly distills the Supreme Court's precedents and the law of this case.⁵⁰ This eliminates any conflict with Instructions 23, 26 and 28, which are unobjectionable law of the case under *Afoa I*. As for Instruction #13, it is inconsistent because *that's the way the Port wrote it, it favored the Port, and it was accepted by the trial court over Plaintiff's objection.*⁵¹ Instruction #13 started out as Port's proposed #17:

The plaintiff claims that the defendant retained the right to direct the manner in which the plaintiff's employer, ... (EAGLE), performed and completed the maintenance of the equipment used by EAGLE to provide ground support work

CP 4623. Once again, Plaintiff's proposal exactly tracked the "manner and instrumentalities" language from *Afoa I*. CP 3090, 3098. Once again, the Court mostly used the Port's language, this time modifying it to say: "The plaintiff claims that the defendant retained the right to direct the manner in which the plaintiff's employer, ... (EAGLE), performed its work and maintained the equipment" CP 4795. This is an erroneous

⁵⁰ See, Section III(A)(2)(a)-(b), *supra*.

⁵¹ Mr. Afoa's counsel *did object* at length to Instruction #13. RP 3214-16. Specifically, Plaintiff objected that this instruction was too narrowly focused on maintenance of GSE, rather than on control over all manner and instrumentalities of the work. RP 3215-16/9-17. The Port's unduly restrictive "turning the wrench" theory has never become the law of this case. See, Notes 27-28, *supra*. The Port cannot transform the *dissenting opinion* in *Afoa I* into binding law on remand, simply by submitting patently erroneous instructions to the trial court.

statement of Plaintiff's claim *that operates to favor the Port*, in that it unduly narrows common-law and WISHA control liability to the "turning the wrench" theory. Therefore, it was not prejudicial to the Port, and there is no basis for reversal.⁵²

4. The Instructions Permitted the Parties to Argue their Case

Jury instructions should permit the parties to argue their theories of the case. *Hue, supra*, 127 Wn.2d at 92. The record from closing argument makes it clear that the Port was able to argue its "turning the wrench" theory. The Port opened by saying the case is "very simple" because, "[i]f EAGLE had properly maintained its equipment, Mr. Afoa's accident would not have happened." RP 3504/9-14. It stressed that EAGLE promised in its licensing agreement with the Port that it would maintain its own equipment. RP 3513/14-16. It argued that no evidence showed that the Port retained the right to control how air carriers or GSPs do their work or maintain their equipment, including under the Port Rules.⁵³ The Port argued that it was concerned "that the equipment be maintained, ... but [not] how they maintain it ...," RP 3514/14-19, and

⁵² *Patu*, 147 Wn.2d at 721 (invited error not reversible); *Hue*, 127 Wn.2d at 92 (prejudice required). The Port cites *Capers v. Bon Marche*, 91 Wn. App. at 144, for the proposition that a special verdict form may not conflict with correct instructions. *BA* at 17. This is a correct statement of the rule, but it does not help the Port. First, as discussed above, Instruction #13's use of "and" was not correct. Second, as *Capers* makes clear, such a conflict is only reversible error if it is prejudicial to the objecting party, *id.* at 144-45, and in this case both Instruction #13 and Interrogatory #1 were proposed by the Port and favorable to its "turning the wrench" theory.

that the “exclusive control” provision in the SLOA “doesn’t mean we intend to tell the air carriers how to do their work or maintain their equipment or, likewise, with the ground service equipment.”⁵⁴ All this showed why the jury must answer “no” to Interrogatory #1, which the Port summarized as, “the Port did not retain the right to control how the ground support people ... maintained their equipment, how the air carriers maintained their equipment, how they did their job.”⁵⁵

The instructions as a whole permitted the Port to argue its theory of the case, emphasizing control over pushback maintenance. At the same time, the disjunctive “or” permitted Plaintiff to argue that the Port’s pervasive control over the entirety of this multiemployer airfield and the manner of Mr. Afoa’s work demonstrates it was the entity best able to protect worker safety at Seatac, and therefore liable for control. The proximate cause instructions limited liability to Port control over work that was causally connected to Mr. Afoa’s injuries. This Court should not reverse based on the word “or” in Interrogatory #1.

B. Substantial Evidence Supports the Jury Finding of Control

After a month and one-half of hotly contested trial, thirty-nine witnesses called by plaintiff and fourteen called by the defense, plus

⁵³ RP 3509-10/17-4, 3512/9-14, 3513/21-24, 3517/1-13, 3520/11-17.

⁵⁴ RP 3515-16/17-1; *accord*, RP 3516/15-16, 3514-15/22-1.

⁵⁵ RP 3520-21/22-4; *see*, RP 3509/22-24.

hundreds of exhibits, the jury answered “YES” to Interrogatory #1,⁵⁶ thereby establishing that the Port controlled the manner in which Mr. Afoa’s employer performed ground service work. “An appellate court, in a law case, will not usurp the functions of a jury ... and reverse the judgment because the weight of testimony seems to be on the other side, or because, in a case of conflict of testimony, the jury believed the testimony of witnesses that it does not believe.”⁵⁷ “A decision is supported by substantial evidence if ‘the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.’”⁵⁸ “Review for support by substantial evidence is an extremely limited form of judicial review.”⁵⁹

1. Review of the Evidence

The jury’s verdict is amply supported by substantial evidence in the record demonstrating the Port’s authority to control EAGLE’s work:

➤ Under the GSOLA,⁶⁰ “[a]s solely determined by the Port, equipment appearing to be unsafe or unoperational is subject to towing, impoundment and storage charges.” Ex. 311 ¶11(A) (emphasis added).

⁵⁶ CP 4835-38, 4839, 4843-80.

⁵⁷ *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 573, 343 P.2d 183 (1959) (quoting *Graves v. H.L. Griffith Realty Co.*, 3 Wash. 742, 29 P. 344, 345 (1892)).

⁵⁸ *King Cty. v. Wash. Boundary Rev. Bd.*, 122 Wn.2d 648, 675, 860 P.2d 1024 (1993) (quoting *World Wide Video, Inc. v. Tukwila*, 117 Wn.2d 382, 387, 816 P.2d 18 (1991)).

⁵⁹ *Id.*

⁶⁰ GSOLA = EAGLE’s Ground Service Operator Licensing Agreement with the Port.

➤ The GSOLA required EAGLE to comply with all Port Rules.⁶¹ Ex. 311 ¶9. This meant that EAGLE had to follow not only the published Rules, but any “written or oral instructions” given by any Port employee.⁶² In addition to the Port Rules, the Airport Director was specifically authorized “to issue such other instructions as may be deemed necessary for the safety and well-being of Airport users or otherwise in the best interests of the Port.” Ex. 482 at Port 51, ¶8.⁶³

➤ The GSOLA controls parking of GSE not in use (such as the cargo loader that Mr. Afoa hit). “Any equipment that hinders circulation or is stored in an unsafe or disorderly fashion, *as determined solely by the Port*, is subject to towing, impoundment and storage charges.” Ex. 311 ¶11(B) (emphasis added). Parking is also controlled by the Port through its Rules.⁶⁴ The Port Ramp Operations Manager authorized EAGLE to

⁶¹ The Port mistakenly argues that this Court should not consider contractual provisions or Port Rules, even though this Court already did so in *Afoa I*, so this is law of the case. *Afoa I*, 176 Wn.2d at 474, 482. “Contractual terms that assign responsibility are relevant but not dispositive in determining whether a hirer retained control for purposes of tort liability.” Restatement (3d) Torts 56, cmt. e; *accord, e.g., Jackson v. Standard Oil Co.*, 8 Wn. App. 83, 91-93, 505 P.2d 139 (Div. 2 1972), *rev. den.*, 82 Wn.2d 1001 (1973) (control based on safety practices in manual incorporated into distributor’s contract).

⁶² Ex. 482 at Port 31, ¶1, 52 ¶2; RP 1330-31/21-24, 2782/7-21.

⁶³ Even Port Deputy General Counsel Isabel Safora had to admit that this was “broad language.” RP 2370/17-20. Confronted with this language, Ms. Safora disclaimed any testimony that the Port contracts do not “provide the Port with the authority to control the means and methods of Mr. Afoa’s work.” RP 2373/3-8.

⁶⁴ Ex. 482 at Port 54 ¶12 (“No person shall park any motor vehicle or other equipment ... in the Air Operations Area ... except ... at such points as prescribed by the [Airport] Director”).

park the cargo loader where it was located when it collapsed on Mr. Afoa. RP 2127-28/7-13.

➤ The only way to operate a vehicle on the ramp portion of the air operations area (where Plaintiff's injury occurred) was with authorization from the Port.⁶⁵ Entry to this area was controlled by the Port, not TSA.⁶⁶ Permission from the FAA Airport Tower was only required to enter the movement area – not the ramp area.⁶⁷ All movement on the ramp was controlled by the Ramp Tower, staffed by contractors hired by the Port.⁶⁸ Ground service employees called the Port's Ramp Tower the "Eye of Sauron," from *Lord of the Rings*. "[T]hey had full control ... [over] pretty much everything, pretty much everybody on there. They can spot you, spot-check you from where you're driving." RP 526/3-21.

➤ A key Port Rule states: "*No person shall operate any ... motorized equipment in the Air Operations Area ... unless such ... motorized equipment is in a reasonably safe condition for such operation.*" Ex. 482 at Port 54 ¶15 (emphasis added).⁶⁹ The Port had the

⁶⁵ Exs. 113 p.5, 482 at Port 53 ¶5(b).

⁶⁶ RP 1314/7-15, 1319/18-22, 1320/4-7, 2604/22-25, 2765-66/21-13.

⁶⁷ *Id.*; RP 2753/12-21.

⁶⁸ RP 451-52/13-11, 526-27/3-7, 696-97/24-13, 956-57/17-2, 2815/8-12, 2874-75/16-17, Ex. 188.

⁶⁹ Donald Roten, an Airport Duty Manager responsible for day-to-day operation of the airport, 1406/18-24, whose duties include supervising the Port's ramp patrol and enforcing the Port's Rules, RP 649/5-18, 743/2-8, 1406-07/18-2, testified that this rule means, "If I see something in an unsafe operation, I will have them stop it, will notify their management team, and tell them to replace it." RP 1409-10/21-4.

power to “red-tag” or impound any vehicle not in compliance, including one leaking hydraulic fluid like the pushback involved in this incident, so that it would have to be removed and/or repaired before it could be used again, and this was done to the EAGLE pushback after Afoa’s injury.⁷⁰

➤ One of many examples of Port authority to control the manner of work is the “Swissport incident” of September 2006, in which a ground service employee was driving a Swissport pushback that lost its brakes and went through the airport fence. RP 1237-38/3-25; Ex. 208. The Port ramp patrol escorted the employee off the airfield, RP 1260/5-12, cited him for reckless driving, and conditioned his airfield driving privileges on repeating a Port training course.⁷¹ Patrick Clancy, Port Manager of Airport Certification, requested emphasis briefing on vehicle inspections and safety, and verification of “*the complete repair of vehicle 300’s brake system before it is put back in service on the AOA.*” Ex. 208 p.2 (emphasis added). Mr. Clancy testified that the Port has authority to require GSPs to divulge their maintenance records. RP 1388-89/23-1.

➤ In August, 2008, another Swissport vehicle had failed brakes. Flexing its muscle under the Rules, the Port’s letter of August 4 states: “By 1600 on the 6 of August please provide me with written notification

⁷⁰ RP 474-75/7-3, 583/7-14, 652-53/20-5, 1268-69/16-20, 1272-74/21-7, 2693-94/2-19; Ex. 53.

⁷¹ RP 1244/2-11, 1245/1-9; Ex. 208 p.2.

that a complete equipment safety review has been complete.... *Any equipment found non-functional in any way will be removed from service until the equipment is properly repaired.*" Ex. 72 (emphasis added).

➤ A similar letter was sent to EAGLE's station manager, Roger Redifer, immediately after Mr. Afoa's injury, stating, "This will advise that if Evergreen EAGLE continues to violate the rules and regulations, the Port of Seattle may proceed with termination of this agreement." Ex. 90; RP 2717-18/22-9. Mr. Redifer sent such letters directly to the EAGLE home office. This and similar letters from the Port spurred Mr. Delford Smith, owner of EAGLE, to bring EAGLE into compliance with the Port's safety Rules, albeit too late for Mr. Afoa. RP 2718/10-22.

➤ EAGLE's station manager testified that the airport is managed on a day-to-day basis by the Port's director of aviation to ensure worker safety, and that whenever any policy or procedure came into question he directed EAGLE employees to comply with the Port's Rules, or to check with the Port if clarification was needed. RP 2691-92/3-1.

➤ Toiva Gaoa, EAGLE ramp supervisor, gave a number of specific examples of the Port controlling how he did his work. RP 456-61/23-23. According to Mr. Gaoa, the Port controls the S-gates (near where this incident happened), which were like a circus, and the Port was "the ringmaster," with everything run just as they wanted it. RP 448-49/12-23.

➤ Under leases (“SLOAs”) signed by each of the four nonparty airlines, §2.1 grants a nonexclusive right to use the airfield area “subject at all times to the *exclusive control and management by the Port.*”⁷²

➤ John Nance, a Seatac-based airline pilot and aviation expert who was also a former Port spokesman,⁷³ testified that “[s]omeone has to be responsible for overall operation or you have a community that is in chaos,” and that “it is to *the super authoritative source, which in this case is the Port of Seattle*, that responsibility really does lie ...,” RP 1502-03/18-8 (emphasis added), and that under the SLOAs, GSOLA and Rules, enforced by Ramp Patrol, Port Police and Port Fire Department, the Port controls the work on the Seatac ramp. RP 1543-44/19-12.

➤ The FAA holds the airport operator – in the case of Seatac, the Port of Seattle – ultimately responsible for safety at each of the 575 certificated airports in the United States.⁷⁴ According to Benedict Castellano, former manager of the FAA Airport Safety and Certification Branch who wrote the rules on this subject, RP 1878/1-9, if the Port were not held ultimately responsible for safety at Seatac, “chaos ensues” because “[e]verybody does their own thing.” RP 1901-02/18-4.

⁷² Ex. 675 at Port 277 (China); Ex. 676 at Port 3465 (British), Ex. 677 at Port 3648 (Eva); Ex. 678 at Port 190 (Hawaiian), RP 1510/8-19.

⁷³ RP 1484-85/24-12, 1489-90/20-11, 1491/14-22.

⁷⁴ Ex. 183 ¶6(a), p.3; RP 1885-86/20-8, 1958/2-9; 2763/20-25.

This is more than sufficient evidence to persuade fair-minded, rational persons that the Port has the authority to control the manner of EAGLE's work on the ramp at Seatac.⁷⁵ *A fair-minded jury was convinced.* We have been arguing about this since 2009 as the evidence mounts ever higher. Only those with a professional obligation to remain unconvinced could possibly do so. It is time for finality: this Court should hold that the control finding is supported by substantial evidence.

2. The Port's Redefinition of the "Control Test" from "Manner" to "Whether" is Barred by Law of the Case

The Port argues that, because Interrogatory #1 did not ask "whether" EAGLE maintained its equipment, but instead asked (in the words of *Afoa I* and *Kamla*) about control over "the manner" in which it

⁷⁵ There is too much other miscellaneous evidence of Port control to cite it all, nor is that necessary on a "substantial evidence" review. Other evidence includes: (1) Joshua Tuani, who'd worked at Seatac for seven different ground service providers from 1999-2007, testified that the Port intervened in the manner in which he did his work "all the time," RP 1225/4-15, 1248/19-22; (2) the admission of the Port's Director of Tenant Leases that Gate S-15, near where the injury occurred, is "a Port-controlled, common use gate", RP 873/18-21 & 885/6-7, *see also*, RP 2355-56/21-4 (Port Attorney Safora agrees); Ex. 675 at Port 284, ¶4.7 (SLOA states that "The Port shall retain exclusive control of the use of all Common Use Gates"); (3) the admission of the Senior Manager for Port Operations, Nicholas Harrison, that it was his understanding that the Port has "exclusive control and management over the airfield area," RP 1005/7-11; (4) the testimony of Roland Kaopuiki, Hawaiian Airlines Station Manager at Seatac, that his understanding of the §2.1 "exclusive control and management" language in the SLOA was that the Port was "the entity that enforced all rules and regulations ... at the airfield", and that no other entity at Seatac had power stronger than that of the Port, RP 1172-73/13-2; (5) Port Manager of Access Control Patrick O'Brien's admission that if any other entity had a rule that conflicted with a Port rule at Seatac, the Port's rule would govern, RP 1326/8-12; and (6) Port Ramp Operations Manager Daniel Cowdin's admission that he had oversight and operational control over all the nonmovement areas of the airfield, including the ramp, RP 2122/14-23.

did so, it is law of the case that the only material evidence is “how the equipment was maintained, not whether it was maintained.” BA at 20. This argument relies on the the Port’s flawed use of “law of the case.”⁷⁶ As already made clear, both *Afoa I* and *Kamla* state the test for common-law and WISHA liability in terms of control over the “manner” of work,⁷⁷ and this is the law of this case.⁷⁸ *Afoa I* and *Kamla* simply do not make the narrow distinction between “how” and “whether” relied on by the Port. Indeed, the Port’s own brief admits this. BA at 18-19 (“the proper inquiry becomes whether there is a retention of the right to direct the manner in which the work is performed”) (quoting *Kamla, supra*) (emphasis added by the Port). This argument is merely another variation of the erroneous “turning the wrench” theory.

It would have been error for the trial court to disregard the formulation of liability set forth in this Court’s precedents, including the law of this case in *Afoa I*, and to instruct instead that liability depends on “whether” the Port controls work. The evidence properly before the jury – the same kind of evidence relied upon by the Supreme Court in *Afoa I*, 176 Wn.2d at 474, 482 – establishes substantial evidence of Port control over the manner of EAGLE’s work.

⁷⁶ See, Notes 27-28, *supra*.

⁷⁷ *Afoa I*, 176 Wn.2d at 478; *Kamla*, 147 Wn.2d at 121.

⁷⁸ *Roberson v. Perez*, 156 Wn.2d at 41; see, Notes 27-28, *supra*.

C. State Worker Safety Protection on Airport Ramps is Not Preempted by the FAA's Duty to Protect Air Travel Safety

The Port's radical preemption argument asks this Court to be the first in the nation to hold that OSHA/WISHA worker safety regulation does not apply on what a Port Senior Manager called the "inherently dangerous environment" of the airfield. RP 3061/13-19; Ex. 112. It seeks this ruling despite the federal mandate under OSHA that States should control *worker safety*, 29 U.S.C. §667(b), while the FAA is primarily responsible for *air transport safety*. 49 U.S.C. §40103(a), (b).⁷⁹ It seeks this ruling though the FAA *does not* pervasively regulate *ground services on the ramp*, and its ground service circulars are purely advisory.⁸⁰

There are roughly 575 FAA-certificated airports in the United States. RP 1891/4-6. The FAA has thirty-five inspectors to cover all these airports, and therefore lacks the resources to be an effective regulator of worker safety in addition to air transport safety. RP 1603-04/25-14, 1891/7-23. For that reason, the FAA expects each certificated operator at the 575 airports around the country to be ultimately responsible for safety

⁷⁹ *Accord, United Air Lines, Inc. v. OSHA Appeals Bd.*, 32 Cal.3d 762, 767, 769-71, 187 Cal.Rptr. 387, 654 P.2d 157 (1982) ("UAL v. OSHA") (rejecting FAA preemption over ground maintenance employees because primary FAA mission is inflight safety of passengers, crew and aircraft, not health and safety of ground service employees).

⁸⁰ *Id.* at 774-77 (where FAA regulation is merely potential, it does not preempt actual worker safety regulation).

at its own airport.⁸¹ If this Court were to accept the Port's reckless preemption argument, it would fundamentally alter the mission of the FAA, and imperil the lives of airport workers and the traveling public.

1. Implied Conflict and Field Preemption – Legal Standards

The Federal Aviation Act (“FA Act”) contains no express preemption provision.⁸² Implied preemption comes in two forms: (1) field preemption; and (2) conflict preemption. “[F]ield pre-emption [applies] where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict pre-emption, where compliance with both federal and state regulation is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁸³ A tangential conflict between federal and state law is not enough: “for a state law to fall within the pre-empted zone, it must have some direct and substantial effect” on the federal regulation.⁸⁴ “To establish implied preemption, evidence of

⁸¹ Ex. 183 ¶6(a), p.3; RP 1885-86/20-8, 1958/2-9.

⁸² *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 US 624, 633 (1973); *Martin v. Midwest Express Holdings, Inc.*, 555 F.3d 806, 808 (9th Cir. 2009).

⁸³ *Gade v. National Solid Wastes Mngmt. Ass’n*, 505 US 88, 98 (1992) (internal quotes and multiple citations omitted).

⁸⁴ *English v. General Elec. Co.*, 496 U.S. 72, 85 (1990).

*Congressional intent to displace state authority is required.*⁸⁵ “In Washington, there is a strong presumption against finding preemption.”⁸⁶

Preemption is not free-floating; the case law focuses on “*federal regulations in the specific area covered by the tort claim or state law at issue.*”⁸⁷ Federal power over aviation is strongest “[t]he moment a ship taxis onto a runway . . . ,”⁸⁸ which means onto the *movement area*, not the *nonmovement area*. That is exactly where the evidence in this case shows that the FAA Tower takes over from the Port’s Ramp Tower. But that is not where Brandon performed his services, or where he suffered his injuries. In addition, federal power is strongest over *air transportation safety* and the *aircraft itself*, not *ground services* or *worker safety*.⁸⁹ Even in this core area, not all state tort law is preempted.⁹⁰

⁸⁵ *Goodspeed Airport LLC v. East Haddam Inland Wetlands Comm’n*, 634 F.3d 206, 209 (2d Cir. 2011) (emphasis added).

⁸⁶ *Dept. Labor & Indus. v. State*, 111 Wn.2d 586, 588, 762 P.2d 348 (1988); *accord*, e.g., *City of Burbank*, 411 US at 633; *Goodspeed*, 634 F.3d at 210 (“presumption against the preemption of the states’ exercise of their historic police power to regulate safety”).

⁸⁷ *Martin*, 555 F.3d at 809 (emphasis added); *accord*, *Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995, 1006 (9th Cir. 2013); *see*, *Gustafson v. City of Lake Angelus*, 76 F.3d 778, 783 (6th Cir. 1996); *Blackwell v. Panhandle Helicopter*, 94 F.Supp.3d 1205, 1210 (D.OR. 2015). *Montalvo v. Spirit Airlines*, 508 F.3d 464 (9th Cir. 2007), relied on extensively by the Port, was carefully distinguished and narrowed by the Ninth Circuit in *Martin*, 555 F.3d at 809-11. *See*, *Gilstrap*, *supra*, 709 F.3d at 1004.

⁸⁸ *Burbank*, 411 U.S. at 634 (quoting, *NW Airlines v. Minnesota*, 322 U.S. 292, 303 (1944)).

⁸⁹ *Gustafson*, 76 F.3d at 783; *UAL v. OSHA*, 32 Cal.3d at 769-72.

⁹⁰ *Martin*, 555 F.3d at 812 (slip and fall on aircraft stairs not preempted because of lack of pervasive regulation specifically addressing construction of the stairs).

The Port's Brief inescapably concedes the case against preemption of worker safety regulation by repeatedly citing to Federal power over "aviation safety" or "air transportation safety." BA at 32, 33. Because there is no pervasive FAA regulation of worker safety or ground services on the ramp, field preemption does not apply. Because OSHA / WISHA and common-law safe workplace tort liability does not interfere with Federal regulation of air transport safety, and in fact complements the purposes and objectives of Congress, there is no conflict preemption.

2. There is No Pervasive Federal Regulation of Ground Services on the Ramp, Therefore No Field Preemption

Part 139 of CFR 14 governs "Certification of Airports," and its principle operational provisions are in subpart D.⁹¹ According to former FAA airport certification manager Benedict Castellano:

Part 139 ... do[es] not contain a lot of requirements on the ramp area. Most of Part 139 deals with runways and taxiways or that part of the airport known as the movement area.... The nonmovement areas, the ramps and aprons, Part 139 requires the airport operator to maintain the pavement safely to make sure that markings are maintained properly.... Anything dealing with fueling trucks ... the airport operator has to inspect, that is a requirement. But as far as the other areas of the ramp, there is no [federal] requirement to have a ground service equipment inspection.

RP 1900/1-12. The Subpart D regulations relied upon by the Port bear out

⁹¹ 14 CFR Part 139; RP 1362/6-23, 1877/7-12, 1878-79/22-3, *see*, BA at 33.

Mr. Castellano's well-informed testimony. Of the twenty-two separate regulations in Subpart D, only one is titled "Pedestrians and ground vehicles." 14 CFR §139.329. This federal rule first requires the airport operator to "[l]imit access to *movement areas and safety areas* only to those ... ground vehicles necessary for airport operations." *Id.* §139.329(a) (emphasis added).⁹² This rule also requires the airport operator to, "[e]stablish and implement procedures for the safe and orderly access to and operation in *movement areas and safety areas* by ... ground vehicles," *id.* §139.329(b), ensure control over ground vehicles "in *movement areas or safety areas*", *id.* §§139.329(c), (d), and to ensure training and keep records on the training regarding the *movement area* safe access and operation duties of (b), *id.* §§139.329(e), (f). This rule, principally relied upon by the Port, BA at 38, 40, 41, 42, 45, 47, *has nothing to do with operations on the ramp.*

The Port's next most-cited federal regulation, 14 CFR §139.327, "Self-inspection program," requires the airport operator to "inspect the airport to ensure compliance with this subpart" *Id.* §139.327(a). By incorporating other limitations on the scope of the Subpart D rules, §139.327 is primarily focused on the movement area. The Port-drafted Safety Management Systems ("SMS") document admits this: "Under ...

⁹² "Safety areas" are extensions off the runways and taxiways for use in emergencies,

Part 139 (14 CFR Part 139), airports ... are required to perform regular ... self inspections (139.327) of the airfield *with a focus on the movement area including runways and taxiways.*⁹³ CP 4260 (emphasis added). Self inspection under this rule focuses not on worker safety or ground service operations, but on “any unusual condition ... that may affect *safe air carrier operations.*” *Id.* §139.327(a)(1)-(3) (emphasis added). This rule’s only specific mention of “ground vehicles” is “ground vehicles in the *movement areas and safety areas.*” *Id.* §139.327(b)(3)(iv).

None of the other twenty Part D rules touch on worker safety or inspection, maintenance or placement of GSE, and those few whose application includes the ramp area have nothing to do with worker safety.⁹⁴ *The FA Act creates pervasive regulation of air transport in the movement area, not of ground services or worker safety on the ramp.*

and thus within the movement area. *Id.* §§139.5 (definitions), 139.309 (“Safety areas”).

⁹³ The SMS is not a mandatory FAA requirement, RP 3083/16-21, and is “authored by, sponsored by, the airport operating entity,” which “is the Port of Seattle.” CP 4115/6-12.

⁹⁴ *See*, 14 CFR §139.301 “Records” (main purpose is keeping records on other substantive rules); *id.* §139.303 “Personnel” (requires airport to employ sufficient qualified personnel to comply with these rules, and to “[t]rain all persons who access *movement areas and safety areas*”, §139.303(c) (emphasis added)); *id.* §139.305 “Paved areas” and §139.307 “Unpaved areas” (while applicable to the ramp as well as the movement area, these two rules focus on the surface beneath “aircraft”, have no applicability to inspection, maintenance or placement of GSE, and focus on *air safety*, not *worker safety*); *id.* §139.309 “Safety areas” (extensions off the runways and taxiways for use in emergencies, and thus within the movement area, and focused on *air safety*, not *worker safety*); *id.* §139.311 “Marking, signs, and lighting” (all within runways, taxiways, and movement area, focused on *air safety*, not *worker safety*); *id.* §139.313 “Snow and ice control” (“on each movement area,” *id.* §139.313(a)); *id.* §§139.315, .317, .319 “Aircraft rescue and firefighting: Index Determination,” “Aircraft rescue and firefighting: Equipment and agents,” “Aircraft rescue and firefighting:

The FAA has promulgated two “Advisory Circulars” relating to ground services, each prominently quoted by the Port. BA pp.34, 37.⁹⁵

Operational requirements,” (indexed to length of air carrier aircraft and average daily departures, rules specify number of vehicles and firefighting agents required, and other equipment, communications, staffing, training and response times requirements for firefighters); *id.* §139.321 “Handling and storing of hazardous substances and materials” (policies for the same, especially focusing on fueling agents; nothing to do with other ground support services); *id.* §139.323 “Traffic and wind direction indicators” (“information to pilots” on “each runway”, focused on *air safety*, not *worker safety*); *id.* §139.325 “Airport emergency plan” (for “[a]ircraft ... accidents,” “[b]omb incidents,” structural or fuel “fires”, “[n]atural disaster”, “[h]azardous materials ... incidents,” “[s]abotage, hijack ... and other unlawful interference,” power outages, and “[w]ater rescue situations,” *id.* §139.325(b), not worker injury or death); *id.* §139.331 “Obstructions” (requires marking, lighting or removal of FAA-determined “obstructions”, focused on *air safety*, not *worker safety*); *id.* §139.333 “Protection of NAVAIDS” (prohibits airport construction that interferes with the air traffic control signal or facilities); *id.* §139.335 “Public protection” (airport must prevent inadvertent entry to the *movement area*, and provide reasonable protection of persons and property from “aircraft blast”); *id.* §139.337 “Wildlife hazard management” (airport operator must act to “alleviate wildlife hazards wherever they are detected”, including formulating a “wildlife hazard management plan”, focused on *air safety*, not *worker safety*); *id.* §139.339 “Airport condition reporting” (requires airport operator to collect and disseminate to air carriers (not GSPs) information regarding conditions “on movement areas, safety areas, or loading ramps”, including surface irregularities and snow and ice, or “[o]bjects on the movement area or safety areas”, or “[a]ny other condition ... that might ... adversely affect the safe operations of air carriers,” thus focused on *air safety*, not *worker safety*); *id.* §139.341 “Identifying, marking, and lighting construction and other unserviceable areas” (this applies to construction or unserviceable areas “on or adjacent to any movement area or any other area of the airport on which air carrier aircraft may be operated,” *id.* §139.341(a)(i), and to construction equipment or roads “which might affect the safe movement of aircraft on the airport,” *id.* §139.341(a)(ii), thus focused on *air safety*, not *worker safety*); *id.* §139.343 “Noncomplying conditions” (when “uncorrected unsafe conditions exist on the airport,” the airport operator “must limit air carrier operations to those portions of the airport not rendered unsafe by those conditions” – again, directed to air carriers, not ground service operators, and *air safety*, not *worker safety*).

⁹⁵ The Port’s featured quote from Advisory Circular No. 5200-18150/5200-18 ¶6(a), BA p.37, says two things, neither of which help the Port in its preemption claim, but both of which hurt the Port on the issues of control and nondelegable duty. First, it says that “[s]afety self-inspections,” including of “ground vehicles, ... can be made the responsibility of” “individual air carriers ... or other tenants.” *Id.* Second, it adds that: “However, ... the FAA will hold the certificate holder [here, the Port] ultimately responsible for operating the airport safely.” *Id.* This does not demonstrate FAA control over ground vehicle safety, but that the FAA expects **the Port** to control the safety of ground vehicles. How the Port does it is fully within the Port’s discretion.

The first, AC No. 150/5210-20, applies generally to “Ground Vehicle Operations on Airports.” Ex. 182. The second, AC No. 5200-18150/5200-18, applicable to “Airport Safety Self-Inspection,” devotes only one small subsection to “ground vehicle inspections.” Ex. 183, *see*, ¶11(a). As the name implies, these “Advisory Circulars” are *purely advisory, not mandatory*. RP 1899/16-21, 2763/9-19, 3140/4-7. As such, they are not evidence of pervasive control or in conflict with State law.⁹⁶

The Port admits, as it must, that the FAA does not approve its Rules. BA at 34. The evidence is very clear that the “FAA do[es] not approve airport rules and regulations”; that its approval is of the ACM, not any particular method of compliance.⁹⁷ The Port has broad discretion as to how it will meet FAA requirements and advisories, and it has written its Rules to govern the matters it has decided to control.⁹⁸ The Rules applicable at Seatac were written by Port managers, not by the FAA, and not by the airlines or the ground service operators.⁹⁹

There is no FA Act pervasive regulation of worker safety or ground services on the ramp, and therefore no field preemption.¹⁰⁰

⁹⁶ *See, Fellner v. Tri-Union Seafoods, LLC*, 539 F.3d 237, 250, 253-54 (3d Cir. 2008).

⁹⁷ RP 1941/3-6, 1941-42/18-4, 1943-44/10-20.

⁹⁸ RP 2978-79/11-1, 2793/9-19; 2999/9-20; 3002/16-19.

⁹⁹ RP 1365-66/1-1. Likewise, the Port training video for driving in the nonmovement area was written by Port managers, RP 1371/15-19, not the FAA, and not by the airlines or ground service operators. RP 1372/14-22.

¹⁰⁰ In the alternative, in the unlikely event that this Court were to find field preemption, it should only extend to *the standard of care*, not to *the state remedies*. This is the

3. There is No Conflict Preemption

The Port's seven specific alleged "conflicts" are not conflicts at all when the proper scope and purpose of FAA regulation is understood. All but #2 rely on citations to *advisory circulars*, and the erroneous view that Subpart D applies to regulation of GSE on the ramp. Numbers 4 and 7 rely on the erroneous view that the Port's Rules applicable to GSE on the ramp are federally-mandated. What the Port's argument boils down to is that the *general* FAA position that the airport operator is ultimately responsible for safety at its airport *preempts all other safety regulation at Seatac, including WISHA*. That is a grievously overbroad application of implied conflict preemption.¹⁰¹ It turns preemption on its head, because all the FAA is doing is throwing up its hands, and saying, "you do it!" It would devastate worker safety by replacing a functioning, specific code of occupational safety regulation with one very general, amorphous mandate from an agency that isn't even charged with protecting worker

teaching of *Gilstrap v. UAL*, 709 F.3d at 1005-06, 1010; *accord, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984); 49 USC §40120(c). As a practical matter, this should not change the applicable law – instead of applying state WISHA and common-law control standards to the issue breach of duty, the operative rule would be the FAA's requirement that the Port shall be ultimately responsible for safety at Seatac.

¹⁰¹ See, *Blackwell v. Panhandle Helicopter, supra*, 94 F.Supp.3d at 1214-15 (general safety regulations that leave wide room for discretion do not preempt common-law or statutory damages claim regarding safety of ground workers).

safety.¹⁰² *The FAA's position that the Port is responsible for safety at Seatac creates no conflict between any specific federal regulation of ground services on the ramp and WISHA or state common law. Unexercised federal power does not preempt WISHA regulation.*¹⁰³

Nor is there any preemption based on TSA regulations. TSA's core mission is *transportation security*, not *worker safety*.¹⁰⁴ The Port's only explanation for how the cited TSA statutes conflict with WISHA is that they require airports to control access to the airfield. BA at 35. The Port did this before TSA came along, and TSA only adds a security identification program which has nothing to do with regulation of worker safety, ground services, or inspection, maintenance or storage of GSE.¹⁰⁵ Furthermore, while TSA staffs passenger checkpoints, access to the airfield at Seatac is controlled by the Port, not TSA or FAA.¹⁰⁶

Kelley and Stute do not penalize what federal law requires: (1) the FAA does not govern worker safety, and does not pervasively regulate activities on the ramp; (2) the FAA does not dictate, draft, approve, or

¹⁰² *UAL v. OSHA*, 32 Cal.3d at 776-77 (preemption rejected where it would improperly substitute undeveloped scattered FAA regulation for existing comprehensive state worker safety regulation).

¹⁰³ *Herman v. Tidewater Pacific, Inc.*, 160 F.3d 1239, 1245-46 (9th Cir. 1998); *Cook v. Ancich*, 119 F.Supp.2d 1118, 1119 (WDWA 2000).

¹⁰⁴ 49 USC §114(d) ("The Under Secretary shall be responsible for security in all modes of transportation, including ... civil aviation security ..."); *id.* §44903(c).

¹⁰⁵ RP 1028-29/14-5, 1311-12/16-9, 1334/4-12, 2382/15-25.

¹⁰⁶ RP 1028-29/14-14, 2591/21-24, 2604/9-25, 2765-66/21-13.

adopt the Port's Rules; and (3) the TSA does not regulate worker safety or ground services at all. "The possibility of interference does not justify preemption."¹⁰⁷ The Port's radical preemption argument must fail.

4. OSHA Creates State Law "Reverse Preemption"

"Preemption fundamentally is a question of Congressional intent." *English*, 496 U.S. at 78-79. This Court must therefore balance Congress's intent to give the FAA authority over air transport safety, against Congressional intent to give *the States* comprehensive power over regulation of worker safety under WISHA/OSHA. Congress enacted OSHA in 1970,¹⁰⁸ allowing states to develop their own worker safety standards, while requiring that they be "at least as effective in providing safe and healthful employment and places of employment" as OSHA standards.¹⁰⁹ OSHA §18(b) is the key provision:

Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. § 667(b) (§18(b)). Unlike the usual Federal preemption of State law, §18(b) creates "*reverse preemption*":

¹⁰⁷ *Dept. of Labor & Indus. v. State*, 111 Wn.2d at 586; accord, *English*, 496 U.S. at 90.

¹⁰⁸ Public Law 91-596, 84 Stat. 1590 (1970).

¹⁰⁹ 29 U.S.C. § 667(c)(2); *SuperValu, Inc. v. Dept. of Labor and Indus.*, 158 Wn.2d 422, 425, 144 P.3d 1160 (2006).

Congress not only reserved certain areas to state regulation, but it also, in §18(b) of the Act, *gave the States the option of pre-empting federal regulation entirely.*¹¹⁰

In 1973, the Washington Legislature enacted WISHA,¹¹¹ giving the Department of Labor and Industry the authority to create and enforce safety standards to “assure, insofar as may reasonably be possible, safe and healthful working conditions” for every worker in Washington.¹¹² WISHA standards “shall equal or exceed the standards prescribed by [OSHA].”¹¹³ Washington’s plan has been adopted by the Federal government, 29 CFR 1952.120, and therefore State worker safety law under WISHA preempts Federal law in Washington State.¹¹⁴

In light of this express Congressional intention to allow states to preempt Federal law in the area of worker safety, the Port’s argument that Mr. Afoa’s WISHA claim is impliedly preempted by regulation under the FA Act is untenable.¹¹⁵ Congress manifestly *did not* intend to occupy the field of worker safety in Washington; instead, it intended just the opposite, by empowering the State of Washington to take over this job.

¹¹⁰ *Gade v. Nat’l Solid Waste*, 505 U.S. at 97, 102 (emphasis added).

¹¹¹ Laws of 1973, ch.80 (codified at ch. 49.17, RCW).

¹¹² RCW 49.17.010; *SuperValu*, 158 Wn.2d at 425.

¹¹³ RCW 49.17.010; *accord, Afoa I*, 176 Wn.2d at 470, 472.

¹¹⁴ *Gade*, 505 U.S. at 97, 102.

¹¹⁵ *UAL v. OSHA, supra*, 31 Cal.3d at 771, 777; *see, Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 864 (9th Cir. 1987) (Cal/OSHA shows Congressional intent to permit State regulation of worker safety in face of alleged preemption by Labor Management Relations Act).

Conflict preemption exists when it is “impossible” to comply with both state and federal law, “or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹¹⁶ The Port’s argument about “penalizing” conduct which Federal law mandates has no applicability here, not only because the FA Act mandates nothing about ground services on the ramp, but also because Federal OSHA law surely *does mandate worker protections backed by penalties*. 29 USC §667(c)(2).

WISHA protection of worker safety on the ramp *complements*, rather than obstructs, achievement of the FA Act’s purpose of air transportation safety. Regulations ensuring regular inspection and safety of GSE, and training of operators of 100,000 pound pushbacks that operate next to aircraft, tend to increase overall safety for passengers.¹¹⁷ Assessing damages against worker safety violations that might also imperil air transport safety does not “penalize” what Federal law requires, or create an “obstacle” to the “full purposes” of Congress; rather, the opposite is true: by ensuring worker safety, State law helps to carry out *both* the Congressional purposes expressed in OSHA, and in the FA Act.

The consequences of accepting the Port’s preemption argument are potentially devastating to the program of worker safety created by

¹¹⁶ *Gade*, 505 US at 98; BA at 36.

Congress under OSHA. If the Port's preemption argument had any legitimacy, then *worker safety and health laws would be preempted and invalid in all 575 airports around the country*. Congress did not intend such a far-reaching, dangerous result.

5. There is No Express Preemption under the ADA

The Airline Deregulation Act ["ADA"] has a narrow preemption provision that only preempts laws "related to a *price, route, or service of an air carrier*" 49 USC §41713(b)(1) (emphasis added).

"Congress's 'clear and manifest purpose' in enacting the ADA was to achieve ... the economic deregulation of the airline industry"
"... Nothing in the Act itself, or its legislative history, indicates that Congress had a 'clear and manifest purpose' to displace state [laws] in actions that do not affect deregulation in more than a 'peripheral manner.'"¹¹⁸

As a matter of law, liability for "personal injury does not sufficiently interfere with the objectives of airline deregulation to warrant preemption of the action...."¹¹⁹ "[T]he terms 'price,' 'route' and 'service' were used by Congress in the public utility sense; that is, 'service ... refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is

¹¹⁷ RP 899/4-25, 1519-20/22-7, 1503-04/9-23.

¹¹⁸ *Air Transp. Ass'n v. San Francisco*, 266 F.3d 1064, 1070 (9th Cir. 2001) (quoting *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir. 1988) (en banc)).

¹¹⁹ *Duncan v. Northwest Airlines, Inc.*, 208 F.3d 1112, 1115 (9th Cir. 2000); accord, *Charas*, 160 F.3d at 1266.

provided.”¹²⁰ “[S]ervice of an air carrier” as used in the ADA does not encompass third-party ground services.¹²¹ The ADA’s narrow preemption clause is not intended to set aside State laws related to worker safety in ground services because such laws have little to no effect on deregulation of airline price, route and service.¹²²

“If a state law’s effect on price, route or service is ‘too tenuous, remote, or peripheral,’ then the state law is not preempted.”¹²³ This Court held in *Filo Foods* that even if a minimum wage ordinance had some indirect affect on airline prices and services, “the ADA does not preempt generally applicable laws that regulate how an airline behaves as an employer....”¹²⁴ Since the Port is acting as the statutory WISHA employer in this matter, the ADA does not preempt this action.

BRANDON AFOA’S CROSS-APPEAL

IV. ASSIGNMENTS OF ERROR & STATEMENT OF ISSUES

A. Assignments of Error

The trial court committed reversible error by entry of:

¹²⁰ *Air Transp. Ass’n*, 266 F.3d at 1071 (quoting *Charas*, 160 F.3d at 1265-66).

¹²¹ *Amerijet Intern., Inc. v. Miami-Dade Cty.*, 7 F.Supp.3d 1231, 1238 (SDFL 2014), *aff’d*, 627 Fed.Appx. 744, 748 (11th Cir. 2015).

¹²² *Sakellaridis v. Polar Air Cargo*, 104 F.Supp.2d 160, 163 (EDNY 2000) (rejecting FA Act & ADA preemption of injured employee’s statutory worker safety claims).

¹²³ *Air Transp. Ass’n*, 266 F.3d at 1071 (quoting *Morales v. TWA, Inc.*, 504 U.S. 374, 390 (1992)); *accord, Filo Foods, LLC v. City of Seatac*, 183 Wn.2d 770, 805, 357 P.3d 1040 (2015); *see, Andersen v. American Airlines, Inc.*, 2 F.3d 590, 597 (5th Cir. 1993) (ADA does not preempt airline mechanic’s wrongful discharge claim).

¹²⁴ *Filo Foods*, 183 Wn.2d at 805-07.

1. Order re: Amendment and Summary Judgment, CP 3174, and denying reconsideration of same, CP 8061;
2. Order Denying Plaintiff's MPSJ re: Airline "Empty Chair" Liability & Judicial Estoppel, CP 8876;
3. Order Denying Plaintiff's MPSJ re: Port's Nondelegable Duty Under WISHA Specific Duty Clause, CP 4688;
4. Denial of Plaintiff's CR 50 Motion for Directed Verdict, CP 8934; RP 3182-85, 3201-02;
5. Order on Plaintiff's Post-Trial Motions, CP 9197; and
6. Judgment reduced by airline fault, CP 4881.

B. Issues Pertaining to Assignments of Error

1. Was it reversible error to permit the Port to shift liability to the airlines for part of its nondelegable duty to maintain a safe workplace and comply with WISHA?
2. Was it reversible error to grant the Port's motion to amend to add "empty chair" defenses against previously known airline nonparties after it was too late for them to be joined?
3. Was it reversible error to refuse to hold the Port bound to the prior Federal Court dismissal of the same claims against the airlines?

V. LEGAL ARGUMENT IN SUPPORT OF CROSS-APPEAL

A. The Trial Court Committed Reversible Error by Letting the Port Shift Liability for its Nondelegable Duties to the Airlines

1. The Port Has a Nondelegable Duty to Provide Mr. Afoa with a Safe Workplace and Safe Equipment

As statutory employer under WISHA, and jobsite owner with control over the work of independent contractors, the Port has a legal

duty to provide a safe workplace to *all workers* on the ramp, which is “*nondelegable*” under *Kelley*, *Stute* and *Kamla*.¹²⁵

In Washington prior to the adoption of WISHA, the court held that RCW 49.16.030 (WISHA's predecessor) created a *nondelegable duty* on general contractors to provide a safe place to work for employees of subcontractors. *Kelley*, 90 Wn. at 333, 582 P.2d 500 The policy reasons behind the court's holdings have not changed and give added force to the language of WISHA.

Stute, 114 Wn.2d at 463-64 (emphasis added). *For at least 120 years*, Washington common law has imposed a *nondelegable duty* on employers and owners to *provide a safe workplace and safe equipment* both to direct employees and to employees of independent contractors.¹²⁶

¹²⁵ *Kamla*, 147 Wn.2d 122 (“In Washington, all general contractors have a nondelegable specific duty to ensure compliance with all WISHA regulations”); *Stute*, 114 Wn.2d at 463-64; *Kelley*, 90 Wn.2d at 332-33; *accord, e.g., Neil v. NWCC Investments V, LLC*, 155 Wn. App. 119, 121-22, 229 P.3d 837 (Div. 1), *rev. den.*, 169 Wn.2d 1018 (2010); *Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 249, 85 P.3d 918 (Div. 1 2004).

¹²⁶ *Guy v. Northwest Bible College*, 64 Wn.2d 116, 118, 390 P.2d 708 (1964); *Myers v. Little Church by the Side of the Road*, 37 Wn.2d 897, 904, 227 P.2d 165 (1951) (*cited with approval, Afoa I*, 176 Wn.2d at 475); *Cotton v. Morck Hotel Co.*, 32 Wn.2d 326, 336, 201 P.2d 711 (1949); *Buss v. Wachsmith*, 190 Wash. 673, 680, 70 P.2d 417 (1937); *Carlson v. P.F. Collier & Son Corp.*, 190 Wash. 301, 311, 67 P.2d 842 (1937); *Pellerin v. Washington Veneer Co.*, 163 Wash. 555, 563, 2 P.2d 658 (1931); *Haverty v. Int'l Stevedoring Co.*, 134 Wash. 235, 243-44, 235 P. 360 (1925); *Britton v. Rumbaugh*, 128 Wash. 445, 449, 222 P. 899 (1924); *Acres v. Frederick & Nelson*, 79 Wash. 402, 409-10, 140 P. 370 (1914); *Dumas v. Walville Lumber Co.*, 64 Wash. 381, 386, 116 P. 1091 (1911); *Westerlund v. Rothschild*, 53 Wash. 626, 627-28, 102 P. 765 (1909); *Tills v. Great Northern Ry. Co.*, 50 Wash. 536, 541, 97 P. 737 (1908); *Howland v. Standard Milling & Logging Co.*, 50 Wash. 34, 37, 96 P. 686 (1908); *Comrade v. Atlas Lumber & Shingle Co.*, 44 Wash. 470, 474, 87 P. 517 (1906); *Ball v. Megrath*, 43 Wash. 107, 110, 86 P. 382 (1906); *Dossett v. St. Paul & Tacoma Lumber Co.*, 40 Wash. 276, 286, 82 P. 273 (1905); *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 545, 82 P. 114 (1905); *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 396, 68 P. 896 (1902); *Costa v. Pacific Coast Co.*, 26 Wash. 138, 142, 66 P. 398 (1901); *McDonough v. Great Northern Ry. Co.*, 15 Wash. 244, 258, 46 P. 334 (1896); *Marsland v. Bullitt Co.*, 3 Wn. App. 286, 292, 474 P.2d 589 (Div. 1 1970).

Nondelegable duties are based on “the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another.”¹²⁷ Whether an employer seeks to shift responsibility for workplace injury to fellow servants or to independent contractors, the basic policy against permitting such a shift is the same: *protection of worker safety*. It undermines worker safety to allow the person best situated to protect safety at the jobsite to shift liability to another party. A nondelegable safety duty is imposed because workers are relatively powerless, must follow directions, and rely on those with control over the job site for their safety.¹²⁸ The duty is nondelegable because the employer or jobsite owner is in “the best position to ensure a safe working environment.”¹²⁹ That is certainly true of the Port here, where any power the airlines might exercise is subject to Port “exclusive control,”¹³⁰ and where the airline station managers testified that each airline only exercises its subordinate control over its own gate, and only during loading and unloading; that

¹²⁷ *Millican v. N.A. Degerstrom, Inc.*, 177 Wn. App. 881, 892, 313 P.3d 1215 (Div. 3 2013), *rev. den.*, 179 Wn.2d 1026 (2014) (quoting, W. Page Keeton, et. al., *Prosser and Keeton on the Law of Torts* at 512 (West 5th Ed. 1984)).

¹²⁸ *Haverty*, 134 Wash. at 244.

¹²⁹ *Afoa I*, 176 Wn.2d at 479, 481; *Kamla*, 147 W.2d at 124; *Stute*, 114 Wn.2d at 463.

¹³⁰ Exs. 675-78 ¶¶2.1, 4.7.

airlines could not control other airlines, and could not tell EAGLE what to do when traveling between the gates of one airline and another.¹³¹

The safe workplace duty is also nondelegable because it is founded on a special statutory duty: the WISHA specific duty statute, RCW 49.17.060(2), requiring compliance with WISHA regulations as to all workers at the job site. Restatement (Second) Torts §424 & cmt. a (“whenever a statute or an administrative regulation imposes a duty upon one doing particular work to provide safeguards or precautions for the safety of others ... *the employer cannot delegate his duty to provide such safeguards or precautions to an independent contractor*”).¹³²

This nondelegable safety duty can also be assumed by contract:

Finally, *we hold Wright assumed a nondelegable duty of care to employees of subcontractors in its contract with the owners.* In Article 10 of the contract Wright assumed responsibility “for initiating, maintaining and supervising all safety precautions and programs in connection with the work.”¹³³

The many SLOA and GSOLA contractual provisions reserving to the Port super-authoritative control over safety at Seatac create a

¹³¹ RP 1008-09/14-1, 1170/8-12, 1170-71/24-11.

¹³² *Accord, e.g., Kelley*, 90 Wn.2d at 332-33 (holding that predecessor to WISHA specific duty statute “created a nondelegable duty on the part of a general contractor to provide a safe place of work for employees of subcontractors on the job site”); *Millican*, 177 Wn. App. at 893; *Armiger v. Associated Outdoor Clubs, Inc.*, 48 So.3d 864, 876 (Fl. App. 2010); Restatement (Third) Torts §57 cmt. b.

¹³³ *Kelley*, 90 Wn.2d at 333 (emphasis added).

nondelegable common-law contractual duty of care owed to Mr. Afoa that cannot be shifted to the airlines.¹³⁴

2. The Port's Nondelegable Duty Bars Shifting Direct Liability

Washington law imposing on the Port a nondelegable duty to provide a safe workplace to Mr. Afoa is *overwhelming*. The real issue here is the effect of this duty on the Port's attempt to shift liability to the airlines. The answer is clear: *the right to delegate the work but not the responsibility is the core meaning of "nondelegable duty."*

"The label 'nondelegable duty' does not mean that an actor is not permitted to delegate the activity to an independent contractor. Rather, the term signals that the actor will be vicariously liable for the contractor's tortious conduct in the course of carrying out the activity." Restatement (Third) Torts: Liability For Physical and Emotional Harm §57 cmt. b (2012). Stated differently, "a 'non-delegable duty' requires the person upon whom it is imposed to answer for it that care is exercised by anyone, even though he be an independent contractor, to whom the performance of the duty is entrusted." Restatement (Second) ch.15, topic 2, intro. note.¹³⁵

This principle was recognized in *Myers v. Little Church*, 37 Wn.2d 897. The night clerk at the hotel operated by Little Church sued for injuries to his foot suffered while attempting to free the elevator, which tended to stick between floors. *Id.* at 899-901. The trial court set

¹³⁴ The fact that *Kelley* and WISHA specific duties are *nondelegable* does not make them *exclusive* – other controlling entities can be liable. *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 757, 912 P.2d 472 (1996); *Weinert v. Bronco Nat'l Co.*, 58 Wn. App. 692, 696, 795 P.2d 1167 (Div. 1 1990). But each entity with sufficient control to have a nondelegable duty must bear full direct liability to the injured worker.

¹³⁵ *Millican*, 177 Wn. App. at 896-97.

aside plaintiff's judgment because the employer's independent contractor was responsible for maintenance of the elevator. *Id.* at 899, 903. The Supreme Court reversed, holding that the employer was fully responsible:

The master's duty to provide the servant with a reasonably safe place to work is nondelegable. ... Therefore respondent cannot escape liability for the negligence of the elevator company on the theory that the latter was an independent contractor

Id. at 904 (citations omitted). To the same effect is *Acres v. Frederick & Nelson*, 79 Wash. 402, in which an employee sued for injuries suffered when he fell into an elevator shaft. *Id.* at 404. This Court labeled the employer's effort to shift blame to the elevator repair contractor "fallacious," in part because "the duty of the master to use reasonable care to keep the place reasonably safe was a continuing and nondelegable one." *Id.* at 409-10. Likewise, the Port's common law and WISHA duty to maintain a safe workplace for all workers on the Seatac job site was continuing and nondelegable, and it was error to permit the Port to avoid this duty by shifting blame onto airline independent contractors.¹³⁶

In *Guy v. NW Bible College*, the Washington Supreme Court held that a college could not shift blame to its architects for personal injuries suffered when a ceiling screen fell on the dean of women:

¹³⁶ *Blancher v. Bank of California*, 47 Wn.2d 1, 286 P.2d 92 (1955), held that the bank could not shift liability to its independent remodeling contractor for a customer's fall, because of its nondelegable duty to provide safe premises to its invitee. *Id.* at 8-9.

Even though we assume the plans were defective, this would not relieve the college of its responsibility to provide its employees with a reasonably safe place to work. An employer has a positive, nondelegable duty to furnish his employees with a reasonably safe place to work. The rule is correctly stated:

“The duty to furnish safe tools, machinery, appliances, and places for work is a positive, affirmative duty resting on the master, and cannot be delegated to another, or, rather, *cannot be delegated to another so as to relieve the master of his primary liability*, and the agency or person to whom the duty is attempted to be delegated is immaterial. This is true no matter how carefully the person or agency to whom the duty is attempted to be delegated is selected or how competent or reputable he or it may be.”

Id. at 118-19.¹³⁷

Many cases from other jurisdictions agree with Washington that a party may not shift liability for a nondelegable duty.¹³⁸ As stated by the Supreme Court of Arizona:

The nondelegable duty exception is somewhat of a misnomer because it refers to duties for which the employer must retain

¹³⁷ *Guy*, 64 Wn.2d at 118-19 (quoting 56 C.J.S. Master & Servant §204) (emphasis added, some citations omitted).

¹³⁸ *E.g.*, *Ft. Lowell-NSS Ltd. Partnership v. Kelly*, 166 Ariz. 96, 100-05, 800 P.2d 962 (1990) (owner properly denied summary judgment due to its nondelegable duty to provide safe premises to invitees, in this case to an employee of operator of storage facility on its property who was injured by electric shock); *Reid v. Berkowitz*, 315 P.3d 185, 191-92 (Col.App. 2013) (trial court did not commit harmful error by refusing builder's proposed instruction under which jury could apportion liability to coworkers on construction site, because builder's duty to maintain safe workplace was nondelegable); *Armiger*, 48 So.3d at 874-76 (owner subject to nondelegable duty to maintain safe workplace creates direct liability that cannot be shifted to cleaning contractor; while the owner may hire independent contractors, “the owner may not contract away his or her legal responsibility for the proper performance of the nondelegable duty”); *Rizzuto v. LA Wegner Contracting Co.*, 91 N.Y.2d 343, 349-50, 693 N.E.2d 1068 (1998) (worker safety statute imposed on owner or general contractor a nondelegable duty to provide safe workplace where injuries sustained due to another's negligence); *Johansen v. Anderson*, 555 N.W.2d 588, 591-93 (ND 1996) (owner of granary equipment owes nondelegable duty which “cannot be intrusted to another, so as to exonerate” the owner from liability to employee killed due to contractor's negligent modification of equipment).

responsibility, despite proper delegation to another. Such situations exist where the employer is under a higher duty to some class of persons. This duty may be imposed by statute, by contract, by franchise or charter, or by the common law. Prosser & Keeton § 71, at 511. If the employer delegates performance of a special duty to an independent contractor and the latter is negligent, *the employer will remain liable for any resulting injury to the protected class of persons, as if the negligence had been his own.* The exception is premised on the principle that certain duties of an employer are of such importance that he may not escape liability merely by delegating performance to another. 5 F. Harper, F. James, O. Gray, *The Law of Torts* §26.11, at 83-88 (2d ed. 1986).¹³⁹

Mark Coates, the senior Port manager in charge of safety at Seatac, admits that an airport is an “inherently dangerous environment.” Ex. 112 p.1. There are over 200 other employers that have 16-18,000 employees at Seatac. BA at 5. While other entities may have fragmented control over certain gates or equipment or work at particular times, no other entity at Seatac has comprehensive super-authoritative control over all of Seatac and all the work performed there.¹⁴⁰ Even Michael Ehl, the Port’s Director of Aviation Operations, admitted that the Port was the one entity best able to keep Seatac safe. RP 3021/1-7. But despite this admission and the holding in *Afoa I* that the Port is an “employer” under WISHA with a duty owed to all workers on the multiemployer jobsite, the Port persists in *refusing to enforce WISHA except as to its own*

¹³⁹ *Ft. Lowell-NSS*, 166 Ariz. at 101 (emphasis added; citations omitted).

¹⁴⁰ RP 1502-03/18-8, 1543-44/19-12; *Afoa I*, 176 Wn.2d at 478-79 (Port best able to control safety at Seatac).

employees. Indeed, the Port has tried to make a virtue of defiance of its RCW 49.17.060(2) specific duty, both in testimony, RP 1086/3-6, 3071/11-13, and even in its Brief before this Court. BA at 22, 25-26. *To compel compliance, this Court needs to clearly hold that the Port cannot shift its direct liability to injured workers onto its contractors.* The Port is the one party best able to ensure safety at Seatac by controlling every airline and every ground service provider, yet it still shirks that fundamental duty. Unless and until this Court gives teeth to the Port's "nondelegable duty," safety will continue to be a fragmented, reactive game of chance at this complex multiemployer jobsite, and WISHA will be defied.¹⁴¹

3. Nondelegable Duty Survives Tort Reform

The Port conceded the law of nondelegable duty, but defended below based on the 1986 Tort Reform Act. CP 4379. Under that Act, liability is several unless the claim fits within express statutory exceptions.¹⁴² But even after enactment of Tort Reform, this Court has

¹⁴¹ Nondelegability protects the injured employee, not other contractors. Depending on the terms of its agreements, the Port may be able to recover against other contractors based on contractual indemnity. *Gilbert H. Moen*, 128 Wn.2d at 759-60. This is fully consistent with protecting the primacy of the nondelegable duty to the worker. *Guy*, 64 Wn.2d at 119 ("Although the architects may ultimately bear the loss in a situation such as this, the primary duty of the employer to provide a reasonably safe place to work is not affected."). A nondelegable duty places the risk of uncollectability back on the tortfeasor who has attempted to delegate a duty that is too important to pass on to others.

¹⁴² RCW 4.22.030, .070; *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 294, 840 P.2d 860 (1992).

continued to hold that control imposes a “nondelegable duty.”¹⁴³ This presents a question of law for de novo review: *is the Tort Reform Act at odds with the many authorities on nondelegable duty, including the post-1986 holdings, requiring all these cases be overruled?* “Overruling a prior decision is a serious step, not to be undertaken lightly.”¹⁴⁴ Overruling multiple decisions is even more serious.

Fortunately, it is not warranted here:

A person whose liability is imputed based on the tortious acts of another is liable for the entire share of comparative responsibility assigned to the other, regardless of whether joint and several liability or several liability is the governing rule for independent tortfeasors who cause an indivisible injury.¹⁴⁵

According to the commentary, not only does this rule apply to cases of respondeat superior under the general law of agency, but it also specifically applies to cases in which “[n]ondelegability rules impose liability on a principal who hired an agent to perform a task.”¹⁴⁶

RCW 4.22.070(1) contains an express exception:

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

RCW 4.22.070(1)(a). This provision makes it clear that Tort Reform does

¹⁴³ *Kamla*, 147 Wn.2d at 122 [2002]; *Stute*, 114 Wn.2d at 463-64 [1990].

¹⁴⁴ *Bishop v. Miche*, 137 Wn.2d 518, 529, 973 P.2d 465 (1999).

¹⁴⁵ Restatement (Third) Torts – *Apportionment of Liability* §13.

¹⁴⁶ *Id.* cmt. a (emphasis added).

not abrogate the law of vicarious liability for breaches of a controlling entity's nondelegable duty, which is firmly rooted in agency law. After quoting both the Restatement (Second) Agency definition of "independent contractor" (not controlled) and "employee" ("subject to the right to control"), this Court reaffirmed the "right to control" liability test in *Kamla*, 147 Wn.2d at 119. *Afoa I* also characterized the governing issue in *Kelley* and *Kamla* as agency-law "right to control".¹⁴⁷ The Port's control rights under its agreements with EAGLE and the airlines not only trigger its nondelegable duty to maintain a safe workplace under *Kelley*, *Stute*, *Kamla* and *Afoa I*, but also its vicarious liability as a principal over the airlines as its agents to carry out its safe workplace duty.

Because the same "right to control" test that imposes liability under *Kelley*, *Stute*, *Kamla* and *Afoa I*, also establishes "agent" and "servant" vicarious liability, the nondelegability of the duty to furnish a safe workplace is preserved by, and totally consistent with, the language of RCW 4.22.070(1)(a). "[A]gency is a consensual relation between two persons created by law by which a principal has *a right to control* the conduct of the agent and the agent has a power to affect the legal relations of the principal.... *Consent and control are the essential*

¹⁴⁷ *Afoa I*, 176 Wn.2d at 476 (Majority), *id.* at 488 (Dissent).

*elements of an agency.*¹⁴⁸ “[V]icarious liability of a principal for the negligent acts of any agent or servant is dependent upon whether the principal *controls or has the right to control* the details of the physical movements of the agent while such person is conducting the authorized transaction.”¹⁴⁹ “The doctrine of respondeat superior, which is the basis of vicarious tort liability..., requires that the one charged with imputed liability have control of or the right to control the physical actions of the negligent actor.”¹⁵⁰ A master-servant relationship is distinguished from an independent contractor by the right to control the manner of work.¹⁵¹

“The Legislature is presumed to be aware of judicial interpretation of its enactments.”¹⁵² Thus, it is presumed to be aware of

¹⁴⁸ *Moss v. Vadman*, 77 Wn.2d 396, 403, 463 P.2d 159 (1969) (emphasis added); *accord, e.g.*, Restatement (Third) Agency §1.01 (defining agency as fiduciary relationship arising by agreement between principal and agent that “agent shall act on the principal’s behalf and subject to the principal’s control”); Restatement (Second) Agency §1 (same); *Tao v. Li*, 140 Wn. App. 825, 831, 166 P.3d 1263 (Div. 3 2007), *rev. den.*, 163 Wn.2d 1045 (2008); *O’Brien v. Hafer*, 122 Wn. App. 279, 283-84, 93 P.3d 930 (Div. 1 2004). A master-servant relationship is a special form of agency, in which “one engages another to perform a task for the former’s benefit.” *Id.* at 281.

¹⁴⁹ *McClellan v. St. Regis Paper Co.*, 6 Wn. App. 727, 729-30, 496 P.2d 571 (Div. 2), *rev. den.*, 81 Wn.2d 1003 (1972); *accord, e.g.*, *Larner v. Torgerson Corp.*, 93 Wn.2d 801, 804-05, 613 P.2d 780 (1980). This Court recently recognized that “right to control” is the key when negligence is at issue, citing not only *Larner v. Torgerson*, *supra*, but also – significantly – *Kamla. See, Chicago Title Ins. Co. v. Ins. Comm’r*, 178 Wn.2d 120, 143, 309 P.3d 372 (2013). The fact that “right to control” is an alternative, but not the only, test for agency vicarious liability, *id.* at 144, is immaterial.

¹⁵⁰ *McClellan*, 6 Wn. App. at 732.

¹⁵¹ *Kamla*, 147 Wn.2d at 119 (*quoting*, Restatement (Second) Agency §§2(2), (3)); *accord, e.g.*, Restatement (Second) Agency §§15, 220; Restatement (Third) Agency §7.07(1), (3)(a); *Stelter v. Dept. Labor & Indus.*, 147 Wn.2d 702, 712, 57 P.3d 248 (2002); *O’Brien v. Hafer*, 122 Wn. App. at 281; *McClellan*, 6 Wn. App. at 729.

¹⁵² *Friends of Snoqualmie Valley v. King Cty. Boundary Rev. Bd.*, 118 Wn.2d 488, 496, 825 P.2d 300 (1992).

the long line of authority creating a nondelegable duty to maintain a safe workplace for employees and controlled subcontractors, including the 1978 decision in *Kelley* recognizing a common-law nondelegable duty based on the right to control the work. It is also presumed to be aware that this nondelegable duty depends on proof of the same right to control that establishes agency and/or a master-servant relationship. *Against that legal backdrop, it chose to preserve in the Tort Reform Act vicarious liability for agents and servants.* This demonstrates that the Legislature did not intend to abrogate the controlling person's nondelegable duty to maintain a safe work place, or the long line of authority supporting it.¹⁵³

In the words of the Tort Reform Act, the Port, as the super-authoritative control over everyone at Seatac, "*shall be responsible*" for any fault attributed to the airlines or EAGLE.¹⁵⁴

WISHA/OSHA add force to the argument that the nondelegable duty is not abrogated by the Tort Reform Act. "When two statutes are in apparent conflict, this court will, if possible, reconcile them to the end that each may be given effect."¹⁵⁵ As this Court held in *Afoa I*, the Port

¹⁵³ It is significant that there is no express change to nondelegable duty in the text of the Tort Reform Act. "In construing a statute, a court will not assume that the legislature intended to effect a significant change in the law by implication." *Philippides v. Bernard*, 151 Wn.2d 376, 385, 88 P.3d 939 (2004).

¹⁵⁴ RCW 4.22.070(1)(a) (emphasis added).

¹⁵⁵ *King v. DSHS*, 110 Wn.2d 793, 799, 756 P.2d 1303 (1988).

“easily falls within” the broad definition of “employer” for purposes of WISHA.¹⁵⁶ Under WISHA, the specific duty to comply with WISHA as to every worker on the jobsite is expressly imposed on “each employer.” RCW 49.17.060(2). By regulation under OSHA, “[i]n no case shall the prime contractor be relieved of overall responsibility for compliance of this part for *all work to be performed under the contract.*” 29 CFR §1926.16(a) (emphasis added). “[T]he prime contractor assumes all obligations prescribed as employer obligations under the standards contained in this part, *whether or not he subcontracts any part of the work.*” *Id.* §1926.16(b) (emphasis added). Taken together, this means that the prime contractor/employer’s responsibility under OSHA is *nondelegable*. Under 29 USC §667(c)(2) and RCW 49.17.010, Washington worker safety standards must equal or exceed OSHA standards.¹⁵⁷ Construing RCW 4.22.070 to allow the owner or prime contractor to shift some of its safety duty would drop WISHA below the OSHA nondelegability standard, thus creating a conflict between RCW 4.22.070 on the one hand, and 29 USC §667(c)(2) and RCW 49.17.010, .060(2), on the other hand. This Court should construe RCW 4.22.070(1)(a) to avoid this conflict while giving each statute full effect.

¹⁵⁶ *Afoa I*, 176 Wn.2d at 473 (citing, RCW 49.17.020(4)).

¹⁵⁷ *Afoa I*, 176 Wn.2d at 470, 472 (citing, 29 USC §667(c)(2) & RCW 49.17.010).

The nondelegable duty doctrine also survives under the exception for “acting in concert”. RCW 4.22.070(1)(a). This narrow exception “requires the actors consciously act together in an unlawful manner.”¹⁵⁸ Violation of multiple WISHA regulations is the unlawful act.¹⁵⁹ In this case, the Port did not merely negligently fail to comply, but it consciously decided not comply with its WISHA specific duty to contractor employees, as admitted in its Brief at p.22, 25-26, by delegating compliance to contractors and then failing to staff its office or instruct its personnel that they were in any way responsible for WISHA compliance for workers who were not direct Port employees. This is consciously acting together to violate the Port’s legal obligations under the WISHA specific duty clause, RCW 49.17.060(2), and associated regulations.

As a matter of law, the Tort Reform Act does not demonstrate Legislative intent to abrogate the *Stute/Kamla* nondelegable duty rule.

B. The Trial Court Committed Reversible Error by Granting the Port’s Motion to Amend in Violation of CR 12(i)

¹⁵⁸ *Kottler v. State*, 136 Wn.2d 437, 448, 963 P.2d 834 (1998) (internal quotes omitted). It may be that this Court has read this exception too narrowly. There are three bases for “acting in concert” liability under Restatement (Second) Torts §876, only one of which requires a “knowing” state of mind. Acting in concert liability also exists if the actor, “(a) does a tortious act in concert with the other or pursuant to a common design with him, or ... (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.” *Id.* These require that the common conduct be “tortious,” not that it be knowing or intentional. *Id.*, cmt. c. The Institute took no position on whether there could be “strict liability” acting in concert, but it did not raise the bar beyond negligence. *Id.*, Caveat.
¹⁵⁹ *E.g.*, WAC 296-863-30005, -30020; CP 4815-4825.

1. Procedural Gamesmanship

This lawsuit was filed in February 2009, based on a December 2007 injury. CP 3-10. The Port's April 2009 answer asserted nonparty liability, but it did not name the airlines as potentially liable parties. CP 15. As detailed below, CR 12(i) requires that the identity of known nonparties "shall" be affirmatively pleaded. The Port's answer named EAGLE "and/or presently unknown persons" for purposes of CR 12(i). CP 15. Because the identity of the airlines who contract with EAGLE were at all times known to the Port, the airlines should have been named.

On April 15, 2009, Mr. Afoa moved to strike the "empty chair" affirmative defenses as insufficient. CP 5189-93. The Port's April 27th response states that "[a] prerequisite" to EAGLE's license from the Port "was proof that EAGLE had received a Certificate of Carrier Support from an air carrier holding a current operating agreement with the Port," and that "EAGLE's only use of the [airfield] shall be for the purpose of providing aircraft ground handling services" CP 5196 (emphasis in original). Thus, the Port immediately demonstrated that the airlines with whom EAGLE contracted were *known* potentially liable parties.¹⁶⁰ The Port misled Plaintiff by claiming that the "reason for asserting the subject

¹⁶⁰ The Port repeated all this in its October 2009 Motion for Summary Judgment, again demonstrating it knew of potential airline involvement. CP 178-79, 5890.

affirmative defenses was to put Mr. Afoa and his counsel on notice that the Port will pursue a sole proximate cause defense.” CP 5198 (emphasis in original). The Port made no mention in its briefing of any intent to assert an empty chair defense against the airlines. *Id.* at 5194-98. The trial court ruled that EAGLE is immune from suit as the Title 51 RCW employer, but otherwise denied the motion to strike. CP 5203-04.

Afoa’s complaint was erroneously dismissed in November 2009, based in part on the Port’s argument that it did not directly hire EAGLE.¹⁶¹ With the case still pending in the Court of Appeals, and the statute of limitations approaching, Plaintiff was forced to file a precautionary action against four airlines that directly hired EAGLE.¹⁶² This state lawsuit was removed to Federal Court. CP 5362. Port counsel substituted as counsel for the airlines in Federal Court, and proceeded to aggressively defend based on declarations from both Port and airline personnel, testifying that the airlines had *no responsibility* for Mr. Afoa’s injuries.¹⁶³ The airlines, under control of Port counsel, vigorously resisted Plaintiff’s repeated efforts to add the Port in Federal Court and/or get the claims against the airlines remanded so they could be joined with the present action, and even refused a proposed stipulation for dismissal that

¹⁶¹ CP 180, 488-89; *see, Afoa I.*

¹⁶² CP 5332. China Airlines, Hawaiian Airlines, British Airways, and Eva Air. *Id.*

¹⁶³ CP 2944-49, 2951-53, 6737-51, 6753-58, 6869-83, 6911.

would have freed the airlines from all liability, conditioned on admission that the Port was solely in control at Seatac. CP 5381-85, 6181-86.¹⁶⁴

The *Afoa I* mandate issued February 27, 2013. CP 5251. In July 2013, Plaintiff attempted once again to smoke out the Port's "empty chair" defenses by filing a motion to preclude allocation of fault to nonparties, CP 5460, to which the Port responded that, although it knew of the Federal Court action against the airlines, it "has not had sufficient time to generate evidence to identify potentially liable non-parties." CP 5859-60. This was tactical manipulation – the Port knew of the airlines' potential liability, but could not name them because Port counsel was representing them in Federal Court, diligently seeking summary judgment that they were *not liable*. CP 6147, 6916. The trial court was persuaded to give the Port more time to name empty chairs. CP 5935-36.

By orders entered in February and June 2014, the Federal Court granted summary judgment to the airlines, dismissing all claims against them. CP 6858, 8423. In the teeth of the Federal Court orders, to the shock of Plaintiff, on September 19, 2014, 5½ years after commencement of this action, the Port moved to amend to name as "allegedly liable nonparties" the four airlines it had defended in Federal Court as

¹⁶⁴ Professor David Boerner testified that Port counsel had a serious conflict of interest. CP 7995-8021.

blameless. CP 7595. Of course, by then it was impossible for Plaintiff to name the airlines in state court, because of res judicata, collateral estoppel, and statute of limitations. On October 27, 2014, the trial court granted that motion, CP 3174, in violation of CR 8(c) and 12(i).¹⁶⁵

2. Prejudicial Violation of CR 12(i)

CR 8(c) includes “fault of a nonparty” as one of the affirmative defenses that a party is required to set forth in a responsive pleading. The obligation to name known nonparties allegedly at fault is subject to a special, enhanced pleading rule, under CR 12(i):

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

CR 12(i) (emphasis added). “Shall” when used in a rule or statute “is presumptively imperative and creates a mandatory duty unless a contrary legislative intent is shown.”¹⁶⁶ The Port knows and has known of the airlines served by EAGLE from the very outset of this litigation back in 2009. It was thus the Port’s affirmative duty to comply with CR 12(i) by identifying the defensive claim against the airlines back in April 2009.

¹⁶⁵ The standard of review is abuse of discretion, but a court “would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.” *Washington State Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

¹⁶⁶ *Goldmark v. McKenna*, 172 Wn.2d 568, 575, 259 P.3d 1095 (2011).

Had it complied with this simple and direct civil rule, Plaintiff would have asserted direct claims against the airlines, and the entire universe of liability could have been adjudicated here in a single proceeding. But the Port opted to play “hide the ball” with its empty chair defense that it claimed was for the purpose of asserting “sole proximate cause” against EAGLE, preferring gamesmanship to fair trial. CP 5198, 6147, 6916.

CR 12(i) imposed on the Port a mandatory duty to disclose the known airline parties in its answer of April 2009. “RCW 4.22.070 is not self-executing.”¹⁶⁷ On the face of this special rule applicable to “nonparty fault” under “RCW 4.22.070,” its purpose is to address the problem of the *stealth empty chair*, and to ensure that exactly what happened here would not happen: the defense hidden until it was too late for the plaintiff to join the nonparties in the same lawsuit. *Strict enforcement of CR 12(i) is essential to achieving its purpose.*¹⁶⁸

The prejudice here was not the inability to prepare or do discovery against the airlines. That had already been done in Federal Court. The prejudice was the Port’s deliberate maneuvering to delay

¹⁶⁷ *Adcox v. Children’s Orthopedic Hosp.*, 123 Wn.2d 15, 25, 864 P.2d 921 (1993).

¹⁶⁸ Tort Reform under RCW ch. 4.22 aims “to encourage settlement *while assuring full compensation to tort victims.*” *Seattle Western Indus., Inc. v. David A. Mowat Co.*, 110 Wn.2d 1, 5, 750 P.2d 245 (1994) (emphasis added). Although the 1986 reforms sought to fairly apportion fault among responsible parties, that was never intended to be in derogation of this age-old “full compensation” principle.

identifying the airlines as empty chairs until such a time as both the statute of limitations and res judicata/collateral estoppel prevented Mr. Afoa from recovering against them. The prejudice was denial of Mr. Afoa's chance to have all liability determined in a single proceeding, thus avoiding *inconsistent adjudications*. The prejudice was the wasted time and expense of the Federal proceeding. The prejudice was the unethical gamesmanship and conflict of interest, in which Port counsel played opposite sides of the same issue while concurrently representing and gaining confidences of both the airlines and the Port.¹⁶⁹ The prejudice was a skewed outcome because the airlines could not be joined, and therefore were not represented by their own counsel with vigor and added resources. The prejudice was deception of the jury because they believed the Port and the airlines were truly adverse, when they were in fact collusive, and therefore the jurors could not properly evaluate the credibility of Port witnesses attributing fault to the airlines. CP 9016-17.

Failure to enforce CR 12(i) means that, although the jury found that \$40 Million is the amount required to make Mr. Afoa whole, and that Mr. Afoa is only responsible for 0.2% of the fault, he will only be able to recover \$10 Million on this jury award. The prejudice is \$30 Million

¹⁶⁹ CP 6141, 7995-8021; RPC 1.6, 1.7, 1.8, 1.9. We may never know whether the confidences gained by Port counsel from the airlines permitted it to make its more effective case against the airlines.

worth of fault totally unrecoverable by a young man whose life has been shattered, who cannot be made whole in accordance with the verdict of the jury, absent relief from this Court.

This Court should hold that CR 12(i) creates a *special rule of prejudice* applicable to amendments to name “empty chair” nonparty defendants: *If the identity of the nonparty was known to the defendant at an earlier time when Plaintiff could have added a claim against the nonparty, but the motion to amend is brought when that claim is legally barred, prejudice is presumed and the amendment must be denied.*

C. The Trial Court Erred by Not Ruling that the Federal Court Summary Judgment Bars the Port’s Empty Chair Defense

Res judicata prevents relitigation of the same claim where a subsequent claim involves the same (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of persons for or against whom the claim made.¹⁷⁰ Collateral estoppel requires proof that: (1) the issue decided in the prior action is identical with the one presented in the second action; (2) the prior action ended in a final judgment on the merits; (3) the party against whom it is asserted was a party or in privity with the party to the prior action; and (4) application of the doctrine does not work an injustice.¹⁷¹ The trial court erred by not holding the Port

¹⁷⁰ *In re Estate of Black*, 153 Wn.2d 152, 170, 102 P.3d 796 (2004).

¹⁷¹ *State v. Vasquez*, 148 Wn.2d 303, 308, 59 P.3d 648 (2002).

bound to the Federal Court summary judgment that the airlines were not liable under *Kelley* or *Stute*/WISHA.

1. The Federal Court Decided the Same Issue

Mr. Afoa sued the airlines based on the same theories he asserted against the Port: (1) premises liability; (2) common-law control liability; and (3) WISHA specific duty liability under *Stute*. CP 3-10, 5332-60. His claim against the airlines arose from the same nucleus of operative fact as the Port's defense: Mr. Afoa's injury on the poorly-maintained pushback, and control over the manner of work at Seatac. *Id.* The evidence is the same, and the Plaintiff's federal claims and the Port's state defense involve the same right – airline breach of plaintiff's right to a safe workplace. Thus, the first two elements of res judicata are established.¹⁷²

The issue decided in Federal Court was identical for collateral estoppel purposes to the issue presented in State Court by the empty chair defense: whether the airlines breached their safe work place duty under *Kelley* or WISHA, or premises liability.¹⁷³ These issues were fully litigated, analyzed in detail in the Federal Court's summary judgment order, and decided on the merits adversely to Mr. Afoa.¹⁷⁴ The Federal

¹⁷² *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983).

¹⁷³ *Id.* at 665.

¹⁷⁴ CP 5387-97, 6858-6867; 6869-6883; 8423-24.

Court entered final judgment on the merits. CP 6909. Elements (1) and (2) of collateral estoppel are satisfied.¹⁷⁵

2. Identity of Parties is Satisfied by Privity and Control

“Even a nonparty may have a concurrence of identity if the nonparty is in privity with a party.”¹⁷⁶ Nonparty privity is established if the party to the prior action “adequately represented the nonparty's interest in the prior proceeding,”¹⁷⁷ or if the nonparty “is in actual control of the litigation, or substantially participates in it even though not in actual control.”¹⁷⁸ As stated by the U.S. Supreme Court:

To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

¹⁷⁵ The trial court seemed to believe that the summary judgment was due to a failure of plaintiff to conduct discovery. CP 3179. However, the extraordinarily detailed Federal complaints demonstrate substantial investigation, CP 5403-44, 7765-7805, and the final Hawaiian summary judgment was only acquiesced in *after* plaintiff took Roland Kaupuiki's deposition (defended by Port Counsel), and he confirmed his declaration statements that Hawaiian had no control whatsoever over Mr. Afoa's work. CP 6893-6901. Plaintiff's failure to travel to Taiwan for the deposition of one China Airlines executive who had testified by declaration, does not mean that the judgment was not “on the merits”. Plaintiff – unlike AIG – does not have unlimited resources, and if failure to take one deposition has this effect, then no final judgment will ever be “on the merits.”

¹⁷⁶ *Stevens Cty. v. Futurewise*, 146 Wn. App. 493, 503, 192 P.3d 1 (Div. 3 2008), *rev. den.*, 165 Wn. 2d 1038 (2009) (discussing *res judicata*).

¹⁷⁷ *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 764, 887 P.2d 898 (1995).

¹⁷⁸ *Future Realty, Inc. v. KLP&E, LP*, 161 Wn.2d 214, 224, 164 P.3d 500 (2007); *accord*, e.g., *Mutual of Enumclaw Ins. Co. v. State Farm Ins. Co.*, 37 Wn. App. 690, 693, 682 P.2d 317 (Div. 1 1984); Restatement (Second) Judgments §39 (“A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party.”).

These interests are similarly implicated when nonparties *assume control over litigation in which they have a direct financial or proprietary interest* and then seek to redetermine issues previously resolved.... [T]he persons for whose benefit and at whose direction a cause of action is litigated cannot be said to be “strangers to the cause.... [O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own ... is as much bound ... as he would be if he had been a party to the record.”¹⁷⁹

In this case, the Port’s attorney took over representation of the four airlines after the case was removed to Federal Court under joint representation agreements. CP 6114. In the words of Port / Airline counsel: “This case involves *a single attorney* who represents multiple parties.... *This issue involves five defendants, who are represented by a single law firm, in the State and Federal action.*” CP 6141 (emphasis added). The Port was clearly in control because it acted against the putative interests of the airlines by (1) resisting efforts to add the Port, which would have spread the potential liability of the airline clients, and (2) refusing a proposed stipulation for dismissal that would have freed the airlines from all Federal or State liability, but which would have acknowledged the Port was solely in control of the work at Seatac.¹⁸⁰

¹⁷⁹ *State of Montana v. United States*, 440 U.S. 147, 153-54 (1979) (emphasis added) (quoting, *Souffront v. Compagnie des Sucrecries*, 217 U.S. 475, 486-87 (1910)).

¹⁸⁰ CP 5381-85, 6181-86. As Judge North ruled: “On the face of it, it is not apparent to the Court how Mr. Northcraft avoids having conflicts of interest between his clients. It appears that the Port would want to shift blame to one or more of the airlines and the airlines would want to blame the Port.” CP 6153.

Port/Airline counsel presented testimony from Port speaking agents, as well as airline witnesses, supported by argument, to prove that the airlines had no control over Mr. Afoa's work.¹⁸¹ "[A] witness in a trial who is 'fully acquainted with its character and object,' and 'interested in [its] results' may be collaterally estopped from bringing a later claim on the same issue."¹⁸² Privity exists "when the nonparty participated in the former adjudication, for instance as a witness, and when there is evidence that the subsequent action was the product of some manipulation or tactical maneuvering."¹⁸³ That describes the Port exactly.

The Port and airlines shared a fundamental unity of interest, because they were all indemnified by the same AIG policy, issued to EAGLE. CP 6169, 6913-15. Unlike truly adverse litigants, it did not matter between them who was actually at fault – all that mattered was to manipulate the dual forums to the overall advantage of their single insurer. *The airline Federal Court defense and the Port State Court prosecution of the case against the airlines became all part of one unified defense strategy, under the control of the Port.* As a matter of law, the Port was in privity with the airlines, and should be bound to the Federal

¹⁸¹ CP 2944-49, 2951-53, 6737-51, 6753-58, 6869-83, 6911.

¹⁸² *State v. Cloud*, 95 Wn. App. 606, 614, 976 P.2d 649 (Div. 1, 1999) (quoting *Hackler v. Hackler*, 37 Wn. App. 791, 795, 683 P.2d 241, rev. den., 102 Wn.2d 1021 (1984)).

¹⁸³ *Stevens Cty. v. Futurewise*, 146 Wn. App. at 508.

judgment as a matter of res judicata and/or collateral estoppel. The allocation of fault to the airlines should be reversed.¹⁸⁴

D. Appellate Remedy Requested on Cross-Appeal

Due to the injuries he suffered, Mr. Afoa has been hospitalized eleven times from the date of remand in 2013 to the filing of the Statement of Grounds for Direct Review. App. C to SGDR (Afoa Decl., ¶2). He was hospitalized again May 3-10, 2016, as this brief was being written. His life expectancy (shortened by twenty years) is now thirty years, but there are no guarantees. This case has been going *over seven years*, since February 2009. The Port as a public entity need not post a bond to stay the judgment, which has not been paid, and bears interest at the low rate of 2.12%.¹⁸⁵ *Justice delayed is justice denied.* The cost of continued plaintiff's litigation against a well-financed insurer like AIG is enormous. *Justice should not be for sale, nor should it depend on economically overpowering one's adversary.* To the maximum extent compatible with law, this Court should grant final relief.

¹⁸⁴ The final element of collateral estoppel – that it does not work an injustice – is powerfully present here; indeed, applying the Federal Court judgment to the Port is essential to avoid injustice. The Port through its counsel and speaking agents contended against airline liability in Federal Court. Not only is there no injustice in holding the Port to the result that it worked to obtain, but the injustice of: (1) inconsistent court adjudications on the same issues; and (2) allowing the Port to benefit from the putative conflict of interest and confidences of the airlines, strongly places the interest of justice on the side of binding the Port to the Federal Court final judgment on the merits.

¹⁸⁵ CP 4881; App. C (Afoa Decl., ¶3).

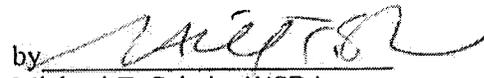
Mr. Afoa's \$40 Million damages were set by the jury in fair trial. The Port has claimed the amount is excessive, so under no circumstances should damages be set aside or re-tried. According to the jury foreman, "[h]ad the airline defendants not been on the verdict form, the fault allocated to them would have gone to the Port." CP 9017. As a matter of law, the Port should be held liable for all fault of its contractors, both based on vicarious liability, and/or because it is all a breach of the Port's nondelegable duty to provide a safe workplace. Judgment *for all reversed airline fault should be entered against the Port as a matter of law.*¹⁸⁶

VI. CONCLUSION

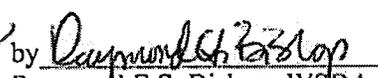
For all the foregoing reasons, the judgment should be reversed and remanded with instructions to enter judgment in favor of Mr. Afoa against the Port for the full amount of the \$40 Million verdict, less Plaintiff's 0.2% fault, plus interest and costs.

Dated at Seattle, WA, this 18th day of May, 2016.

SULLIVAN LAW FIRM

by 
Michael T. Schein, WSBA
#21646

BISHOP LAW OFFICES, P.S.

by 
Raymond E.S. Bishop, WSBA
#22794
Derek K. Moore, WSBA #37921

Attorneys for Respondent/Cross-Appellant Brandon Afoa

¹⁸⁶ *Weden v. San Juan Cty.*, 135 Wn.2d 678, 710, 958 P.2d 273 (1998); *Lewis v. Scott*, 54 Wn.2d 851, 860, 341 P.2d 488 (1959); *Allen v. Union Pac. R. Co.*, 8 Wn. App. 743, 746, 509 P.2d 99 (Div. 1 1973).

APPENDIX A

H

Supreme Court of Washington,
En Banc.
Brandon Apela AFOA, an individual, Respondent,
v.
PORT OF SEATTLE, a Local Government Entity in
the State of Washington, Petitioner.

No. 85784-9.
Argued Feb. 16, 2012.
Decided Jan. 31, 2013.

Background: Employee of company, which provided airport ground handling services, sued owner/operator of airport for injuries he sustained while operating vehicle on tarmac. The Superior Court, King County, Cheryl B. Carey, J., granted owner/operator of airport summary judgment. Employee appealed. The Court of Appeals, Spearman, J., 160 Wash.App. 234, 247 P.3d 482, reversed and remanded, and appeal was taken.

Holdings: The Supreme Court, en banc, Wiggins, J., held that:

- (1) employee was a business invitee for purposes of his premises liability claim;
- (2) material issue of fact as to whether owner/operator of airport breached its duty to employee precluded grant of summary judgment to owner/operator on employee's premises liability claim;
- (3) material issue of fact as to airport operator's control over company and over company's employee precluded grant of summary judgment to operator on employee's Washington Industrial Safety and Health Act (WISHA) claim; and
- (4) material issues of fact as to whether airport operator had duty to maintain safe common work areas precluded grant of summary judgment to operator on employee's common law claim for failure to maintain

safe workplace.

Affirmed and remanded.

Madsen, C.J., concurred and dissented and filed opinion in which C. Johnson and J. Johnson, JJ., joined.

West Headnotes

[1] Appeal and Error 30 ↪ 893(1)

30 Appeal and Error
30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate

Court

30k893(1) k. In general. Most Cited

Cases

Supreme Court reviews summary judgment motions de novo, engaging in the same inquiry as the trial court.

[2] Judgment 228 ↪ 181(2)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(2) k. Absence of issue of fact.

Most Cited Cases

Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

[3] Judgment 228 ↪ 185(2)

228 Judgment

228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(2) k. Presumptions and burden
of proof. Most Cited Cases

Judgment 228 ↪185(6)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(6) k. Existence or non-
existence of fact issue. Most Cited Cases

On summary judgment, courts consider all dis-
puted facts in the light most favorable to the nonmov-
ing party, and summary judgment is appropriate only
if reasonable minds could reach but one conclusion.

[4] Judgment 228 ↪181(33)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) k. Tort cases in general.
Most Cited Cases

Summary judgment is inappropriate where the
existence of a legal duty depends on disputed materi-
al facts.

[5] Negligence 272 ↪1036

272 Negligence
272XVII Premises Liability
272XVII(C) Standard of Care
272k1034 Status of Entrant
272k1036 k. Care dependent on status.
Most Cited Cases

Under common law premises liability, a land-

owner owes differing duties to entrants onto land
depending on the entrant's status as a trespasser, a
licensee, or an invitee.

[6] Automobiles 48A ↪281

48A Automobiles
48AVI Injuries from Defects or Obstructions in
Highways and Other Public Places
48AVI(A) Nature and Grounds of Liability
48Ak281 k. Status of injured person as
traveler or trespasser. Most Cited Cases

Aviation 48B ↪232.1

48B Aviation
48BV Airports and Services
48Bk232 Injuries from Operation and
Maintenance of Airports in General
48Bk232.1 k. In general. Most Cited Cases

Employee, who was injured while operating ve-
hicle on airport's tarmac as part of his employment
duties for company, which provided airport ground
handling services, was a "business invitee," and thus,
airport operator owed employee duty to prevent harm
caused by open and obvious danger if it should have
anticipated the harm, despite the open and obvious
nature of danger; employee was business invitee be-
cause he was on premises for purpose connected to
business dealings with airport operator, airport opera-
tor licensed company to enter the premises to per-
form specific tasks, expressly contemplating that
company's employees would perform those tasks, and
there was mutuality of interest, in that airport opera-
tor had an interest in having work done by contrac-
tors like company.

[7] Negligence 272 ↪1037(2)

272 Negligence
272XVII Premises Liability
272XVII(C) Standard of Care

272k1034 Status of Entrant
272k1037 Invitees
272k1037(2) k. Who are invitees.
Most Cited Cases

Negligence 272 ↪ 1037(6)

272 Negligence
272XVII Premises Liability
272XVII(C) Standard of Care
272k1034 Status of Entrant
272k1037 Invitees
272k1037(6) k. Implied invitation.
Most Cited Cases

“Business invitee” is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land, and the invitation can be either express or implied permission gathered from the words or conduct of the landowner. Restatement (Second) of Torts § 332.

[8] Negligence 272 ↪ 1040(2)

272 Negligence
272XVII Premises Liability
272XVII(C) Standard of Care
272k1034 Status of Entrant
272k1040 Licensees
272k1040(2) k. Who are licensees.
Most Cited Cases

“Licensee” is a person who is privileged to enter or remain on land only by virtue of the possessor's consent, and this includes social guests and others invited onto the land who do not meet the legal definition of an invitee. Restatement (Second) of Torts § 330.

[9] Judgment 228 ↪ 181(33)

228 Judgment

228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) k. Tort cases in general.
Most Cited Cases

Material issue of fact as to whether owner/operator of airport breached its duty to business invitee, who was injured while operating vehicle on airport tarmac, precluded grant of summary judgment to owner/operator of airport on invitee's premises liability claim.

[10] Labor and Employment 231H ↪ 2561

231H Labor and Employment
231HXIV Safety and Health Regulation in General
231Hk2558 Concurrent or Conflicting Statutes or Regulations
231Hk2561 k. State preemption of local laws and actions. Most Cited Cases

Federal Occupational Safety and Health Act (OSHA) requires states to comply with its rules or else enact safe workplace standards at least as effective as OSHA in ensuring worker safety. Occupational Safety and Health Act of 1970, § 18(c)(2), 29 U.S.C.A. § 667(c)(2).

[11] Labor and Employment 231H ↪ 2563

231H Labor and Employment
231HXIV Safety and Health Regulation in General
231Hk2562 Employers and Industries Regulated in General
231Hk2563 k. In general. Most Cited Cases

Labor and Employment 231H ↪ 2577

231H Labor and Employment
231HXIV Safety and Health Regulation in Gen-

eral

231Hk2577 k. General duty. Most Cited Cases

Labor and Employment 231H 2784

231H Labor and Employment

231HXVII Employer's Liability to Employees

231HXVII(A) In General

231HXVII(A)1 Nature and Scope of Employer's Duty

231Hk2784 k. Liability as insurer; relationship to workers' compensation. Most Cited Cases

Under Washington Industrial Safety and Health Act (WISHA), employers must comply with two distinct duties: (1) they have general duty to maintain a workplace free from recognized hazards, and this duty runs only from an employer to its employees; and (2) they have a specific duty to comply with WISHA regulations, and unlike the general duty, the specific duty runs to any employee who may be harmed by the employer's violation of the safety rule, but even the specific duty does not create per se liability for anyone deemed an employer. West's RCWA 49.17.060(1,2).

[12] Labor and Employment 231H 2563

231H Labor and Employment

231HXIV Safety and Health Regulation in General

231Hk2562 Employers and Industries Regulated in General

231Hk2563 k. In general. Most Cited Cases

Jobsite owners have a duty to comply with Washington Industrial Safety and Health Act (WISHA) only if they retain control over the manner in which contractors complete their work; this rule recognizes the reality that not all jobsite owners are similarly knowledgeable about safety standards within a given trade. West's RCWA 49.17.060.

[13] Labor and Employment 231H 2563

231H Labor and Employment

231HXIV Safety and Health Regulation in General

231Hk2562 Employers and Industries Regulated in General

231Hk2563 k. In general. Most Cited Cases

Under the federal "multi-employer workplace rule," employer who controls or creates a workplace safety hazard may be liable under Occupational Safety and Health Act (OSHA), even if the injured employees work only for a different employer. Occupational Safety and Health Act of 1970, § 2 et seq., 29 U.S.C.A. § 651 et seq.

[14] Labor and Employment 231H 2561

231H Labor and Employment

231HXIV Safety and Health Regulation in General

231Hk2558 Concurrent or Conflicting Statutes or Regulations

231Hk2561 k. State preemption of local laws and actions. Most Cited Cases

As a matter of federal law, Washington Industrial Safety and Health Act (WISHA) protections must equal or exceed Occupational Safety and Health Act (OSHA) standards. Occupational Safety and Health Act of 1970, § 18(c)(2), 29 U.S.C.A. § 667(c)(2); West's RCWA 49.17.060.

[15] Labor and Employment 231H 2563

231H Labor and Employment

231HXIV Safety and Health Regulation in General

231Hk2562 Employers and Industries Regulated in General

231Hk2563 k. In general. Most Cited Cases

Jobsite owners have a specific duty to comply with Washington Industrial Safety and Health Act (WISHA) regulations if they retain control over the manner and instrumentalities of work being done on the jobsite, and this duty extends to all workers on the jobsite that may be harmed by WISHA violations. West's RCWA 49.17.060.

[16] Labor and Employment 231H ↪2577

231H Labor and Employment

231HXIV Safety and Health Regulation in General

231Hk2577 k. General duty. Most Cited Cases

The specific duty to prevent Washington Industrial Safety and Health Act (WISHA) violations does not run only to the principal's employees, but to all workers on the work site who may be harmed by WISHA violations; no employer-employee relationship is required. West's RCWA 49.17.060.

[17] Labor and Employment 231H ↪2563

231H Labor and Employment

231HXIV Safety and Health Regulation in General

231Hk2562 Employers and Industries Regulated in General

231Hk2563 k. In general. Most Cited Cases

It made no difference if owner/operator of airport labeled itself a licensor and company, that provided airport ground handling services, a licensee for purposes of Washington Industrial Safety and Health Act (WISHA) claim brought against airport operator by company's employee, who was injured while operating vehicle on tarmac; no employer-employee relationship was required for purposes of WISHA. West's RCWA 49.17.060.

[18] Labor and Employment 231H ↪2570

231H Labor and Employment

231HXIV Safety and Health Regulation in General

231Hk2570 k. Persons protected. Most Cited Cases

Even if laborer, who worked for company providing airport ground handling services, was not an employee of owner/operator of airport, owner/operator of airport was an "employer" and laborer was an "employee" under Washington Industrial Safety and Health Act (WISHA). West's RCWA 49.17.020(4, 5), 49.17.060(2).

[19] Labor and Employment 231H ↪2570

231H Labor and Employment

231HXIV Safety and Health Regulation in General

231Hk2570 k. Persons protected. Most Cited Cases

Labor and Employment 231H ↪2577

231H Labor and Employment

231HXIV Safety and Health Regulation in General

231Hk2577 k. General duty. Most Cited Cases

Washington Industrial Safety and Health Act's (WISHA) specific duty does not require a direct employment relationship. West's RCWA 49.17.060(2).

[20] Labor and Employment 231H ↪2570

231H Labor and Employment

231HXIV Safety and Health Regulation in General

231Hk2570 k. Persons protected. Most Cited Cases

Employee's Washington Industrial Safety and Health Act (WISHA) claim is not defeated as a matter of law merely because that employee is labeled a licensee. West's RCWA 49.17.060.

[21] Judgment 228  **181(21)**

228 Judgment

- 228V On Motion or Summary Proceeding
- 228k181 Grounds for Summary Judgment
- 228k181(15) Particular Cases
- 228k181(21) k. Employees, cases involving. Most Cited Cases

Judgment 228  **181(33)**

228 Judgment

- 228V On Motion or Summary Proceeding
- 228k181 Grounds for Summary Judgment
- 228k181(15) Particular Cases
- 228k181(33) k. Tort cases in general. Most Cited Cases

Material issue of fact as to airport owner/operator's control over company, which provided airport ground handling services, and over company's employee, who was injured while operating vehicle on tarmac, precluded grant of summary judgment to owner/operator of airport on employee's Washington Industrial Safety and Health Act (WISHA) claim. West's RCWA 49.17.060.

[22] Negligence 272  **1204(5)**

272 Negligence

- 272XVII Premises Liability
- 272XVII(G) Liabilities Relating to Construction, Demolition and Repair
- 272k1204 Accidents and Injuries in General
- 272k1204(4) Safe Workplace Laws
- 272k1204(5) k. In general. Most Cited Cases

ed Cases

Negligence 272  **1205(7)**

272 Negligence

- 272XVII Premises Liability
- 272XVII(G) Liabilities Relating to Construction, Demolition and Repair
- 272k1205 Liabilities of Particular Persons Other Than Owners or Occupiers
- 272k1205(6) Contractors
- 272k1205(7) k. In general. Most Cited Cases

Under common law safe workplace doctrine, landowners and general contractors that retain control over a work site have a duty to maintain safe common work areas.

[23] Judgment 228  **181(21)**

228 Judgment

- 228V On Motion or Summary Proceeding
- 228k181 Grounds for Summary Judgment
- 228k181(15) Particular Cases
- 228k181(21) k. Employees, cases involving. Most Cited Cases

Judgment 228  **181(33)**

228 Judgment

- 228V On Motion or Summary Proceeding
- 228k181 Grounds for Summary Judgment
- 228k181(15) Particular Cases
- 228k181(33) k. Tort cases in general. Most Cited Cases

Material issues of fact as to whether owner/operator of airport had duty to maintain safe common work areas precluded grant of summary judgment to airport owner/operator on common law claim for failure to maintain safe workplace brought against airport owner/operator by employee, who was injured

while operating vehicle on airport tarmac for his employer.

[24] Labor and Employment 231H ↪29

231H Labor and Employment
231HI In General
231Hk28 Independent Contractors and Their Employees
231Hk29 k. In general. Most Cited Cases

“Independent contractor” is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. Restatement (Second) of Agency § 2(3).

[25] Labor and Employment 231H ↪2570

231H Labor and Employment
231HXIV Safety and Health Regulation in General
231Hk2570 k. Persons protected. Most Cited Cases

Labor and Employment 231H ↪3125

231H Labor and Employment
231HXVIII Rights and Liabilities as to Third Parties
231HXVIII(C) Work of Independent Contractor
231Hk3125 k. In general. Most Cited Cases

At common law, a principal who hires an independent contractor is not liable for harm resulting from the contractor's work, and in particular, the principal has no duty to maintain a safe workplace for a contractor's employees and is not liable for their injuries.

[26] Labor and Employment 231H ↪2563

231H Labor and Employment
231HXIV Safety and Health Regulation in General
231Hk2562 Employers and Industries Regulated in General
231Hk2563 k. In general. Most Cited Cases

Labor and Employment 231H ↪2577

231H Labor and Employment
231HXIV Safety and Health Regulation in General
231Hk2577 k. General duty. Most Cited Cases

Existence of a safe workplace duty depends on retained control over work, not on labels or contractual designations such as independent contractor or general contractor.

[27] Labor and Employment 231H ↪2563

231H Labor and Employment
231HXIV Safety and Health Regulation in General
231Hk2562 Employers and Industries Regulated in General
231Hk2563 k. In general. Most Cited Cases

Labor and Employment 231H ↪2577

231H Labor and Employment
231HXIV Safety and Health Regulation in General
231Hk2577 k. General duty. Most Cited Cases

Owner/operator of airport could not avoid the safe workplace doctrine by referring to formalistic labels, and as such, owner/operator of airport had a duty to maintain safe common areas if it retained control over the manner and instrumentalities of work

done by company, which provided airport ground handling services, and company's employee, who was injured while operating vehicle on tarmac; owner/operator of airport could not absolve itself of its responsibility under the law simply by declining to "hire" contractors and instead issuing them licenses.

[28] Labor and Employment 231H ↪2577

231H Labor and Employment
231HXIV Safety and Health Regulation in General
231Hk2577 k. General duty. Most Cited Cases

Labor and Employment 231H ↪2750

231H Labor and Employment
231HXVII Employer's Liability to Employees
231HXVII(A) In General
231HXVII(A)1 Nature and Scope of Employer's Duty
231Hk2750 k. In general. Most Cited Cases

Safety of workers does not depend on the formalities of contract language, and instead, safe workplace doctrine seeks to place the safety burden on the entity in the best position to ensure a safe working environment.

[29] Labor and Employment 231H ↪2563

231H Labor and Employment
231HXIV Safety and Health Regulation in General
231Hk2562 Employers and Industries Regulated in General
231Hk2563 k. In general. Most Cited Cases

Where there are multiple employers performing a variety of tasks in a complex working environment, it is essential that a safe workplace duty be placed on

a landlord who retains the right to control the movements of all workers on the site to ensure safety.

[30] Labor and Employment 231H ↪2563

231H Labor and Employment
231HXIV Safety and Health Regulation in General
231Hk2562 Employers and Industries Regulated in General
231Hk2563 k. In general. Most Cited Cases

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, but where a licensor undertakes to control worker safety in a large, complex work site, such as an airport and is in the best position to control safety, there is a duty to maintain safe common work areas within the scope of retained control.

[31] Labor and Employment 231H ↪2563

231H Labor and Employment
231HXIV Safety and Health Regulation in General
231Hk2562 Employers and Industries Regulated in General
231Hk2563 k. In general. Most Cited Cases

Jobsite owner who exercises pervasive control over a work site should keep that work site safe for all workers, just as a general contractor is required to keep a construction site safe, and just as a master is required to provide a safe workplace for its servants at common law.

**803 Mark Steven Northcraft, Northcraft Bigby & Biggs PC, Seattle, WA, for Petitioner.

Raymond Everett Sean Bishop, Derek K. Moore, Bishop Law Offices PS, Normandy Park, WA, Michael T. Schein, Sullivan & Thoreson, Seattle, WA,

for Respondent.

Peter J. Kirsch, W. Eric Pilsk, Kaplan Kirsch & Rockwell, Denver, CO, Monica Hargrove, Airports Council International, Washington, DC, amicus counsel for Airports Council International—North America.

Kristopher Ian Tefft, Association of Washington Business, Olympia, WA, amicus counsel for Washington Retail Association.

Arthur Merritt Fitzpatrick, City of Kent, Kent, WA, amicus counsel for City of Kent.

Anastasia R. Sandstrom, Attorney General's Office, Seattle, WA, amicus counsel for Department of Labor & Industries.

Brandi L. Ross, Washington Public Ports Association, Olympia, WA, amicus counsel for Washington Public Ports Association.

Bryan Patrick Harnetiaux, Attorney at Law, Spokane, WA, George M. Ahrend, Ahrend Albrecht PLLC, Ephrata, WA, amicus counsel for Washington State Association for Justice Foundation.

WIGGINS, J.

*464 ¶ 1 Should we extend to the Port of Seattle (Port), which owns and operates Seattle–Tacoma International Airport (Sea–Tac Airport), the principles of liability imposed on other entities that control the common area of a multiemployer workplace? Brandon Afoa was paralyzed in an accident while he was working at Sea–Tac Airport and seeks to recover from the Port on three theories we have applied in other multiemployer workplace cases: as a business invitee; for breach of safety regulations under the Washington Industrial Safety and Health Act of 1973 (WISHA), chapter 49.17 RCW; and the duty of a general contractor to maintain a safe common area for any employee of subcontractors. We conclude

that the same principles that apply to other multiemployer workplaces apply to Sea–Tac and that a jury could find the Port liable under any of these three theories. We affirm the Court of Appeals, which reversed the trial court's summary judgment dismissing Afoa's claims, and remand for further proceedings.

****804 FACTS**

¶ 2 Brandon Afoa was severely injured while working at Sea–Tac Airport. He was driving a powered industrial *465 vehicle called a “tug” or “pushback” that moves airplanes to and from passenger gates. As he drove the tug/pushback toward Gate S–16, he lost control of the vehicle and yelled for help. He crashed into a “K-loader,” a large piece of loading equipment that fell on him causing severe injuries. The parties dispute the cause of the accident.

¶ 3 Afoa filed suit against the Port in King County Superior Court, alleging that the Port failed to maintain safe premises and violated common law and statutory duties to maintain a safe workplace. The Port moved for summary judgment, arguing it had no duty to Afoa because Afoa was not the Port's “employee.”

¶ 4 Indeed, the Port and Afoa do not enjoy a direct employer–employee relationship. Afoa works for Evergreen Aviation Ground Logistics Enterprises Inc. (EAGLE), which contracts with airlines to provide ground services such as loading and unloading. The Port does not employ EAGLE or contract for its services, but EAGLE nevertheless must obtain a license from the Port before it can work on the premises.

¶ 5 Although the Port does not employ Afoa or EAGLE, Afoa alleges that the Port controls the manner in which he performs his work at Sea–Tac Airport. First, he claims the Port retains control over the “Airfield Area” (where the accident allegedly took place) in its lease agreement with the airlines, which grants the airlines use of the Airfield Area “subject at

all times to the exclusive control and management by the Port.” Clerk’s Papers (CP) at 274. Second, Afoa claims the Port retains control through its license agreement with EAGLE, which requires EAGLE to abide by all Port rules and regulations and allows the Port to inspect EAGLE’s work. The agreement also disclaims liability for accidents and equipment malfunctions. Finally, Afoa claims the Port retains control over EAGLE by the Port’s conduct. He specifically claims that the Port continuously controls and supervises the actions of EAGLE and its employees and that the Port previously asserted control over tug/pushback brake *466 maintenance following an incident that was similar to, and three months before, Afoa’s accident.

¶ 6 The Port moved for summary judgment, arguing that none of Afoa’s claims were viable because neither Afoa nor EAGLE was the Port’s employee, but instead EAGLE was a licensee and the Port a licensor.

¶ 7 The trial court granted the Port’s summary judgment motion, dismissing Afoa’s claims. The Court of Appeals reversed, holding that all of Afoa’s claims were viable and that summary judgment was inappropriate because all of Afoa’s claims hinged on genuine issues of material fact. *Afoa v. Port of Seattle*, 160 Wash.App. 234, 247 P.3d 482 (2011). We granted review to decide whether summary judgment was appropriate and to examine these important issues of workplace safety. *Afoa v. Port of Seattle*, 171 Wash.2d 1031, 257 P.3d 664 (2011).

STANDARD OF REVIEW

[1][2][3][4] ¶ 8 We review summary judgment motions de novo, engaging in the same inquiry as the trial court. *City of Sequim v. Malkasian*, 157 Wash.2d 251, 261, 138 P.3d 943 (2006). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* We consider all disputed facts in the light most favorable to the nonmoving party, and

summary judgment is appropriate only if reasonable minds could reach but one conclusion. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wash.2d 471, 484, 258 P.3d 676 (2011). Finally, summary judgment is inappropriate where the existence of a legal duty depends on disputed material facts. *Sjogren v. Props. of Pac. Nw., LLC*, 118 Wash.App. 144, 148, 75 P.3d 592 (2003).

ANALYSIS

¶ 9 We hold that there are genuine issues of material fact precluding summary judgment on all three of Afoa’s claims *467 against the Port. We analyze each claim in turn—**805 premises liability, Afoa’s statutory claim under WISHA, chapter 49.17 RCW, and the duty of certain parties in control of a common work area to provide adequate safety precautions. For all three claims, the Port potentially owed a duty to Afoa, and genuine factual issues preclude summary judgment. Accordingly, we affirm the Court of Appeals on all three issues.

I. Afoa’s premises liability claim is potentially viable. Afoa is a business invitee and there are triable issues of fact whether the Port breached its corresponding duty to Afoa.

[5][6] ¶ 10 Afoa and the Port dispute Afoa’s status and standard of care under Afoa’s theory of premises liability. Under common law premises liability, a landowner owes differing duties to entrants onto land depending on the entrant’s status as a trespasser, a licensee, or an invitee. *Iwai v. State*, 129 Wash.2d 84, 90–91, 915 P.2d 1089 (1996). We hold that Afoa is a business invitee. We also affirm the Court of Appeals’ reversal of summary judgment because there are genuine issues of material fact on this claim.

[7] ¶ 11 A “business invitee” is a person who is “invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.” *Younce v. Ferguson*, 106 Wash.2d 658, 667, 724 P.2d 991 (1986) (quoting RESTATEMENT (SECOND) OF TORTS §

332(3) (1965)). An invitation can be either express or implied permission gathered from the words or conduct of the landowner. *See* RESTATEMENT (SECOND) OF TORTS § 332 cmt. c.

[8] ¶ 12 In contrast, a licensee is “a person who is privileged to enter or remain on land only by virtue of the possessor's consent.” *Younce*, 106 Wash.2d at 667, 724 P.2d 991 (quoting RESTATEMENT (SECOND) OF TORTS § 330). This includes social guests and others invited onto the land who do not meet the legal definition of an invitee. *Id.*

*468 ¶ 13 Our premises liability analysis cannot begin and end with the fact that the Port has labeled its contract with Afoa's employer EAGLE as a “license.” Instead, we must look at the substance of the relationship to determine Afoa's status.

¶ 14 Afoa was plainly a business invitee because he was on the premises for a purpose connected to business dealings with the Port. There is simply no genuine dispute in the record on this point. The Port is in the business of running an airport, and Afoa was doing airport work. Indeed, he was doing work (loading and unloading airplanes) without which Sea-Tac Airport could not operate. Afoa was unquestionably on the premises for a purpose connected to business, so he is a business invitee. On this record, no reasonable jury could find otherwise.

¶ 15 The Port's two arguments to the contrary are unpersuasive. First, the Port claims it did not “invite” Afoa onto the premises, so he cannot be a business invitee. This argument is flawed because the Port confuses the common law term of art with social convention. At common law, an invitation can consist of any words or conduct “which justifies others in believing that the possessor desires them to enter the land...” RESTATEMENT (SECOND) OF TORTS § 332 cmts. b & c. Here, the Port licensed EAGLE to enter the premises to perform specific tasks, expressly contemplating that EAGLE's employees would

perform those tasks. This is the essence of an invitation. The Port licensed EAGLE to contract with airlines knowing that EAGLE's work would take place on the premises. The Port's conduct justifies EAGLE in thinking its entry was desired, so the Port's claim that it did not invite EAGLE onto the premises is unavailing. Furthermore, EAGLE can be physically present at Sea-Tac Airport only in the form of its employees, so its employees are clearly within the scope of the invitation.

¶ 16 Second, the Port argues that Afoa is not an invitee because there was no “mutuality of interest.” Pet. for Discretionary Review at 18 *469 (quoting *Thompson v. Katzer*, 86 Wash.App. 280, 286–87, 936 P.2d 421 (1997) (quoting *Eneresen v. Anderson*, 55 Wash.2d 486, 488, 348 P.2d 401 (1960))). *Thompson* considered “mutuality of interest” as a factor in distinguishing between a business invitee and a social guest; here, in **806 contrast, it is clear that Afoa was not a social guest. In any event, the record in this case plainly establishes mutuality of interest. The Port unquestionably has an interest in having work done by contractors like EAGLE: The Port operates a complex commercial enterprise from which it substantially benefits, and contractors like EAGLE are part of that enterprise. The Port's second argument also fails.

¶ 17 As a matter of law, Afoa is a business invitee.

[9] ¶ 18 Having established this, we further conclude that there are genuine issues of material fact about whether the Port breached its duty to Afoa. Because Afoa was an invitee, the Port owed him a duty to prevent “harm caused by an open and obvious danger” if it “should have anticipated the harm, despite the open and obvious nature of the danger.” *Kamla v. Space Needle Corp.*, 147 Wash.2d 114, 126, 52 P.3d 472 (2002). Afoa presents record evidence of such a danger; he claims there was clutter in his work area—in particular the broken-down K-

loader that fell on him. Afoa submitted an aerial photograph and declaration suggesting that his injury resulted from this clutter. The Port did not rebut this evidence, so there is a genuine issue for the factfinder about whether the Port breached its premises liability duty. Thus, we affirm the Court of Appeals' reversal of summary judgment.

II. Afoa has a potentially viable WISHA claim, and there are triable issues of fact regarding that claim.

¶ 19 Turning to Afoa's claim that the Port had a statutory duty to comply with WISHA regulations, we hold that the Port may indeed have had a duty under WISHA, and again factual issues preclude summary judgment. Accordingly, we affirm the Court of Appeals.

*470 A. Jobsite owners such as the Port have a statutory duty to prevent WISHA violations if they retain control over work done on a jobsite.

[10] ¶ 20 Our legislature passed WISHA in 1973 to ensure worker safety and supplement the federal Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651–678. *See* ch. 49.17 RCW; *SuperValu, Inc. v. Dep't. of Labor & Indus.*, 158 Wash.2d 422, 425, 144 P.3d 1160 (2006). OSHA requires states to comply with its rules or else enact safe workplace standards at least as effective as OSHA in ensuring worker safety. 29 U.S.C. § 667(c)(2); *SuperValu*, 158 Wash.2d at 425, 144 P.3d 1160. In addition, our constitution requires the legislature to “pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health.” WASH. CONST. art. II, § 35.

¶ 21 WISHA directs our Department of Labor and Industries to promulgate regulations that equal or exceed standards promulgated under OSHA. RCW 49.17.010, .040. WISHA's purpose is to assure “safe and healthful working conditions for every man and woman working in the state of Washington,” and to “create, maintain, continue, and enhance the industri-

al safety and health program of the state.” RCW 49.17.010.

[11] ¶ 22 Under WISHA, and in particular RCW 49.17.060, employers must comply with two distinct duties:

¶ 23 Each employer:

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

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

RCW 49.17.060.^{FN1}

FN1. WISHA defines “employer” and “employee” broadly:

The term “employer” means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees or who contracts with one or more persons, the essence of which is the personal labor of such person or persons and includes the state, counties, cities, and all municipal corporations, public corporations, political subdivisions of the state, and charitable organizations: PROVIDED, That any person, partnership, or business entity not having employees, and

who is covered by the industrial insurance act shall be considered both an employer and an employee.

RCW 49.17.020(4).

The term “employee” means an employee of an employer who is employed in the business of his or her employer whether by way of manual labor or otherwise and every person in this state who is engaged in the employment of or who is working under an independent contract the essence of which is his or her personal labor for an employer under this chapter whether by way of manual labor or otherwise.

RCW 49.17.020(5).

¶ 24 These two distinct duties arise from RCW 49.17.060's two subsections. See ****807** *Goucher v. J.R. Simplot Co.*, 104 Wash.2d 662, 671, 709 P.2d 774 (1985). Subsection (1) creates a “general duty” to maintain a workplace free from recognized hazards; this duty runs only from an employer to its employees. *Id.* Subsection (2), on the other hand, creates a “specific duty” for employers to comply with WISHA regulations. *Id.* Unlike the general duty, the specific duty runs to *any* employee who may be harmed by the employer's violation of the safety rules. *Id.*; see also *Stute v. P.B.M.C., Inc.*, 114 Wash.2d 454, 460, 788 P.2d 545 (1990). We adopted this rule in *Goucher* and *Stute*, relying on the Sixth Circuit Court of Appeals' decision in *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799 (6th Cir.1984). That case interpreted the parallel clause in OSHA as extending the specific duty to all employees on the work site who may be affected by work safety violations, irrespective of any employer-employee relationship. *Id.* at 804–05.

[12] ¶ 25 ***472** But even the specific duty does not create per se liability for anyone deemed an “em-

ployer.” In *Kamla*, we held that although general contractors and similar employers *always* have a duty to comply with WISHA regulations, the person or entity that owns the jobsite is not per se liable for WISHA violations. *Kamla*, 147 Wash.2d at 125, 52 P.3d 472. Rather, jobsite owners have a duty to comply with WISHA only if they retain control over the manner in which contractors complete their work. *Id.* This rule recognizes the reality that not all jobsite owners are similarly knowledgeable about safety standards within a given trade. *Id.* at 124, 52 P.3d 472.

[13][14] ¶ 26 Our holding in *Kamla* is consistent with the federal “multi-employer workplace rule.” See *Amicus Curiae Br. by Wash. State Dep't of Labor & Indus.* at 7. Under that rule, an employer who controls or creates a workplace safety hazard may be liable under OSHA even if the injured employees work only for a different employer. See *Martinez Melgoza & Assocs. v. Dep't. of Labor & Indus.*, 125 Wash.App. 843, 848–49, 106 P.3d 776 (2005) (citing OSHA cases). And certainly, as a matter of federal law, WISHA protections must equal or exceed OSHA standards. 29 U.S.C. § 667(c)(2); *SuperValu*, 158 Wash.2d at 425, 144 P.3d 1160.

[15] ¶ 27 In sum, it is settled law that jobsite owners have a specific duty to comply with WISHA regulations if they retain control over the manner and instrumentalities of work being done on the jobsite. Further, this duty extends to all workers on the jobsite that may be harmed by WISHA violations.

B. Contrary to the Port's assertions, a jobsite owner's specific duty does not depend on the existence of a direct employment relationship.

¶ 28 Turning to the specific issue presented by this case, the Port argues that it owes Afoa no duty to comply with WISHA regulations because its relationship with EAGLE and Afoa is not that of an employer and employee. Instead, the Port claims it is only a licensor and EAGLE is a licensee.

[16][17] ¶ 29 *473 We reject the Port's argument, which is inconsistent with our holdings in *Goucher* and *Stute*. As we made clear in those cases, the specific duty to prevent WISHA violations does not run only to the principal's employees, but to all workers on the work site who may be harmed by **808 WISHA violations. *Goucher*, 104 Wash.2d at 671, 709 P.2d 774; *Stute*, 114 Wash.2d at 460, 788 P.2d 545. No employer-employee relationship is required, so it makes no difference if the Port labels itself a licensor and EAGLE a licensee.

[18] ¶ 30 In addition, the express language of WISHA undermines the Port's argument. Subsection (2) imposes the specific duty on "employers," which is defined broadly. See RCW 49.17.020(4). The Port easily falls within this definition. Likewise, Afoa easily falls within the definition of an "employee." See RCW 49.17.020(5). Thus, even if Afoa is not the Port's employee, the Port is an "employer" and Afoa is an "employee" under the statute. That is all WISHA requires for a specific duty to arise. See RCW 49.17.060(2).

[19][20] ¶ 31 We reaffirm *Goucher* and *Stute* and hold that WISHA's specific duty does not require a direct employment relationship. To read the statute in any other way would contravene both federal law and WISHA's clearly articulated policy of protecting workplace safety. See RCW 49.17.010. An employee's WISHA claim is not defeated as a matter of law merely because that employee is labeled a "licensee."

¶ 32 The dissent argues that prior to this decision "there was no broad rule applying to all situations where a landowner with employees on the property must comply with specific duties to another employer's employees." Dissent at 819. This decision does not establish any "broad rule applying to all situations." We hold only that jobsite owners must comply with WISHA regulations if they retain control over the manner and instrumentalities of work done at the

jobsite.

¶ 33 The dissent expresses concern that WISHA duties should be limited to "the employment situation," either *474 direct employment or employer-subcontractor relationships. *Id.* We have not previously so limited WISHA duties. Indeed, in our seminal decision in *Goucher*, we held that a landowner owed WISHA duties to a truck driver making a delivery to the landowner. 104 Wash.2d at 673, 709 P.2d 774. The Port operates a major airport facility, is responsible for its own employees, and allows controlled access to thousands of employees of other employers. Under these circumstances, the Port is closely analogous to a general contractor.

C. There are genuine issues of material fact whether the Port retained sufficient control over EAGLE and Afoa that it took on a duty to prevent WISHA violations.

[21] ¶ 34 The extent of the Port's control over EAGLE and Afoa is a genuine dispute over a material fact. On the summary judgment record, some facts suggest the Port retained very little control: the Port's licensing agreement disclaims any liability for EAGLE's equipment and states that all equipment is the sole responsibility of EAGLE. On the other hand, some facts suggest the Port retained substantial control. For example, the Port retains "exclusive control" over the "Airfield Area" where the accident may have taken place. CP at 274. In addition, three months before Afoa's accident, the Port responded to a similar tug/pushback brake failure incident by suspending a driver's license, requesting an "emphasis briefing" on the importance of vehicle inspections, and requiring verification of complete braking system repair before the tug/pushback could return to service. *Id.* at 366-70. Viewing the record in the light most favorable to Afoa, it is evident that reasonable minds could reach different conclusions on the question of the Port's control. There is thus a genuine factual issue best resolved in the trial court. We affirm the Court of Appeals' reversal of summary judgment on this issue.

*475 III. The Port may have had a common law duty to maintain safe common work areas, and there are triable issues of fact on this issue precluding summary judgment.

[22] ¶ 35 Under our common law safe workplace doctrine, landowners and general contractors that retain control over a work site have a duty to maintain safe common work areas. *Kelley v. Howard S. Wright Constr. Co.*, 90 Wash.2d 323, 331–32, 582 P.2d 500 (1978); *Kamla*, 147 Wash.2d at 121–22, 52 P.3d 472.

**809 [23] ¶ 36 The Port makes a novel argument that it need not comply with this rule because it is merely a licensor, not a general contractor. We reject the Port's argument, looking beyond mere labels and considering the principles and policies that underlie our doctrine. We hold that the Port may have had a duty to maintain safe common work areas and that the existence of this duty depends on factual issues best resolved at trial; accordingly, we affirm the Court of Appeals' reversal of summary judgment.

A. Landowners and general contractors that retain control over workplace safety have a common law duty to keep common work areas safe for all workers.

¶ 37 Historically, our common law workplace safety doctrine has its roots in the master-servant relationship. At common law, a “master” has a duty to its “servants” to maintain a reasonably safe place to work. *Myers v. Little Church by the Side of the Road*, 37 Wash.2d 897, 901–02, 227 P.2d 165 (1951) (citing *Nordstrom v. Spokane & Inland Empire R.R.*, 55 Wash. 521, 104 P. 809 (1909)).

¶ 38 Over time, we have expanded the doctrine beyond the narrow confines of the master-servant relationship.

¶ 39 Our seminal case in this area is *Kelley*, 90 Wash.2d at 323, 582 P.2d 500, a unanimous opinion authored by Justice Horowitz that elevates concern

for worker safety over rigid adherence *476 to formalistic labels and emphasizes this court's central role in ensuring the safety of our state's workers.

¶ 40 The facts of *Kelley* are straightforward. Defendant Howard S. Wright Construction was a general contractor hired to build the Bank of California Center in Seattle. *Id.* at 326, 582 P.2d 500. Wright contracted with H.H. Robertson to install metal decking on the building, and H.H. Robertson hired the plaintiff, Edward Kelley. *Id.* Kelley was severely injured when he fell from a slippery beam 36 feet above the ground while laying decking panel on a rainy day. *Id.* Wright had not installed a safety net or required workers to use safety lines. *Id.* Kelley sued Wright, alleging Wright violated its duty to maintain a safe workplace. *Id.* at 327, 582 P.2d 500. Wright, much like the Port here, argued that it had no duty to provide a safe workplace for Kelley because it was not his employer, i.e., there was no master-servant relationship. *Id.* at 329, 582 P.2d 500.

[24][25] ¶ 41 Wright's argument relied on the so-called “independent contractor rule.” An independent contractor is a person who “ ‘contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking.’ ” *Kamla*, 147 Wash.2d at 119, 52 P.3d 472 (quoting Restatement (Second) of Agency § 2(3) (1958)). At common law, a principal who hires an independent contractor is not liable for harm resulting from the contractor's work. *Tauscher v. Puget Sound Power & Light Co.*, 96 Wash.2d 274, 277, 635 P.2d 426 (1981). In particular, the principal has no duty to maintain a safe workplace for a contractor's employees and is not liable for their injuries. *Id.*

¶ 42 In essence, Wright asked us to limit the safe workplace duty to an employer's direct employees and not extend it to independent contractors and other workers on the work site.

¶ 43 We refused to so limit the doctrine. Instead, we imposed a safe workplace duty irrespective of the precise contractual relationship between the parties. *477 *Kelley*, 90 Wash.2d at 330, 582 P.2d 500. We held that where a principal retains control over “some part of the work,” we disregard the “independent contractor” designation and require the principal (in *Kelley*, a general contractor) to maintain safe common workplaces for all workers on the site. *Id.* Fundamentally, we reasoned that the safe workplace duty cannot be avoided by reference to formalistic labels such as “independent contractor” and that the duty must be imposed on the entity best able to prevent harm to workers. *Id.* at 331–32, 582 P.2d 500 (citing *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wash.2d 85, 549 P.2d 483 (1976)). We held that the relevant inquiry is whether the principal retained control over the work site, not **810 whether there was a direct employment relationship between the parties. *Id.*

¶ 44 We clarified the scope of *Kelley* when we analyzed its potential application to a jobsite owner that was not a general contractor in *Kamla*, 147 Wash.2d at 119–20, 52 P.3d 472. We strongly suggested that the doctrine is not strictly limited to general contractors on a construction site. *Id.* *Kamla* involved a jobsite owner, the Space Needle, hiring an independent contractor to install a fireworks display on the Space Needle. We held that if a jobsite owner like the Space Needle retained the right to control work, it could be liable under a common law safe workplace theory. *Id.* However, we also held that the Space Needle had not retained sufficient control to give rise to a common law safe workplace duty.^{FN2} *Id.* at 121–22, 52 P.3d 472.

FN2. In a similar decision issued shortly after *Kamla*, the Court of Appeals held that the Space Needle *had* retained sufficient control over a different contractor such that the Space Needle had a duty to maintain a safe workplace. *Kinney v. Space Needle*

Corp., 121 Wash.App. 242, 85 P.3d 918 (2004). *Kinney* is an application of the rule set forth in *Kamla*.

[26] ¶ 45 In short, the existence of a safe workplace duty depends on retained control over work, not on labels or contractual designations such as “independent contractor” or “general contractor.”

*478 B. The Port cannot avoid our safe workplace doctrine by referring to formalistic labels. The Port had a duty to maintain safe common areas if it retained control over the manner and instrumentalities of work done by EAGLE and Afoa.

[27] ¶ 46 The Port presents a novel argument that our well-established principles of workplace safety should not apply to it. The Port has structured its contracts with workers like EAGLE and Afoa such that those workers are not technically Port employees. Rather, the Port issues licenses to many of the independent contractors working at Sea-Tac Airport, granting them permission to work on the premises and requiring them to comply with all of the Port's safety rules and regulations. The Port argues that the *Kelley* doctrine applies only to general contractors, whereas the Port is a licensor. The Port makes this argument notwithstanding the fact that, if everything Afoa alleges is true, as we must assume on a summary judgment motion, the Port appears to exercise nearly plenary control over Sea-Tac Airport and the manner in which work is performed on the premises.

¶ 47 While the Port's argument is admittedly novel, it is unpersuasive in light of *Kelley* and *Kamla*. *Kelley* does not limit its application to a narrow variant of the employment relation. It does not require a “master” or “servant,” an “employer” or “employee,” or indeed any specific combination of contractual relationships. *See Kelley*, 90 Wash.2d at 330–31, 582 P.2d 500. Instead, *Kelley* and *Kamla* stand for the proposition that when an entity (whether a general contractor or a jobsite owner) retains control over the

manner in which work is done on a work site, that entity has a duty to keep common work areas safe because it is best able to prevent harm to workers. *See id.* at 330–31, 582 P.2d 500; *Kamla*, 147 Wash.2d at 119–21, 52 P.3d 472.

¶ 48 Calling the relationship a license does not change reality. If a jury accepts Afoa's allegations, the Port controls *479 the manner in which work is performed at Sea–Tac Airport, controls the instrumentalities of work, and controls workplace safety. The Port is the only entity with sufficient supervisory and coordinating authority to ensure safety in this complex multiemployer work site. If the Port does not keep Sea–Tac Airport safe for workers, it is difficult to imagine who will. The Port cannot absolve itself of its responsibility under the law simply by declining to “hire” contractors and instead issuing them licenses.

[28][29] ¶ 49 Indeed, as *Kelley* makes abundantly clear, the safety of workers does not depend on the formalities of contract language. Instead, our doctrine seeks to place the safety burden on the entity in the best position to ensure a safe working environment. *Kelley*, 90 Wash.2d at 331, 582 P.2d 500. Where there are multiple employers performing a variety of tasks in a complex working environment, it is essential that a **811 safe workplace duty be placed on a landlord who retains the right to control the movements of all workers on the site to ensure safety. *Id.* The policy of encouraging a safe workplace is even more urgent in a complex, modern, multiemployer work site like Sea–Tac Airport than in a simpler, more traditional master-servant arrangement.

¶ 50 We should also encourage employers to implement safeguards against injury. *See Stute*, 114 Wash.2d at 461, 788 P.2d 545. We achieve this laudable goal by placing a safe workplace duty on the entity best able to protect workers.

¶ 51 While there are many compelling policy

reasons for holding the Port liable, the Port's only defense to liability is its insistence that contractual formalities must trump workplace safety. Indeed, there is little to the Port's argument beyond the assertion that a license is different from a subcontract. The Port cannot contend that it lacks contractual privity with EAGLE because it contracts directly with EAGLE when it issues licenses. The Port is also mistaken that it does not benefit by EAGLE's services. Without *480 someone to load and unload airplanes, the airport would be pointless.^{FN3}

FN3. The dissent argues a variation of the Port's basic premise, stating repeatedly that only a general contractor or direct employer undertakes the duty of providing a safe workplace. Dissent at 813, 814, 815, 815, 816, 816–17, 817–18. We respectfully disagree because a landowner such as the Port can undertake to control a multiemployer workplace as effectively as, or even more effectively than, a general contractor. We decline to insulate such a landowner on the ground that the right of control is incorporated in a “license” rather than a subcontract.

¶ 52 In *Kelley*, we rejected an inflexible approach as inconsistent with the policy behind our workplace safety law. An inflexible approach is also inconsistent with the nature and purpose of the common law. The common law owes its glory to its ability to cope with new situations, and its principles are not mere printed fiats but living tools to be used in solving emergent problems. *Mills v. Orcas Power & Light Co.*, 56 Wash.2d 807, 819, 355 P.2d 781 (1960).

¶ 53 A more sensible approach is that taken by the Supreme Court of Alaska. In *Parker Drilling Co. v. O'Neill*, 674 P.2d 770, 776 (Alaska 1983), Alaska emphatically rejected any notion that the duty to maintain a safe workplace depends on any particular contractual relationship or label:

[T]here is a common law duty to provide a safe worksite running to whomever supplies and controls that worksite. This duty protects all workers on the site and not just the employees of the defendant. The duty is not dependent upon the existence of any particular combination of contractual relationships.

Very few jurisdictions take a contrary approach, and those that do have not considered the question in much detail.^{FN4}

FN4. Other than Alaska, no court has addressed this question squarely. A California appeals court stated that the duty to provide a safe workplace only extends to the worker's "immediate employer or those who contract for the services of the immediate employer...." *Lopez v. Univ. Partners*, 54 Cal.App.4th 1117, 1126, 63 Cal.Rptr.2d 359 (1997); see also *Waste Mgmt., Inc. v. Superior Court*, 119 Cal.App.4th 105, 110, 13 Cal.Rptr.3d 910 (2004) (citing *Lopez* for same). But the California court's statement was dicta because the court resolved the issue on factual grounds, finding that there was no retained control whatsoever. See *Lopez*, 54 Cal.App.4th at 1126, 63 Cal.Rptr.2d 359. Likewise, Louisiana and Vermont have held that, where there is no employment relation, the only duty a landowner owes comes from the law of premises liability, even if the landowner retains some control over safety or work being done on the premises. *Boycher v. Livingston Parish Sch. Bd.*, 716 So.2d 187, 190–91 (La.App.Cir.1998); *Vella v. Hartford Vt. Acquisitions, Inc.*, 2003 VT 108, 176 Vt. 151, 157, 838 A.2d 126, 131–32 (2003). We already rejected this narrow view of workplace safety in *Kelley*. None of these cases is precisely on point, nor do they contain thor-

ough discussions of the relevant issue.

[30] ¶ 54 *481 Although we find the Alaska approach attractive, we decline to adopt it wholesale, instead resolving this case on its facts. Certainly, 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. But where a licensor undertakes to control worker safety in a large, complex work site like Sea-Tac Airport and is in the best position to control safety, there is a duty to maintain safe common work **812 areas within the scope of retained control. We recognize that many aspects of this case are unique; the Port operates a highly complex multi-employer work site and is perhaps the only entity in a position to maintain worker safety. Moreover, the Port has allegedly retained substantial control over the manner in which work is done at Sea-Tac Airport. To the extent other cases arise in the future, liability should depend on similar factors. This narrow holding limits concerns raised by amici that adhering to *Kelley* raises the specter of unintended liability for municipal corporations and other licensors.

[31] ¶ 55 But this holding also recognizes what is fair: that a jobsite owner who exercises pervasive control over a work site should keep that work site safe for all workers, just as a general contractor is required to keep a construction site safe under *Kelley*, and just as a master is required to provide a safe workplace for its servants at common law.

C. If the facts Afoa alleges are true, the Port retained control over workplace safety at Sea-Tac Airport and has a common law duty to keep the workplace safe. Accordingly, summary judgment was inappropriate.

¶ 56 The parties dispute how much control the Port retained over the work done at Sea-Tac Airport. Afoa alleges *482 that the Port retains control over the "Airfield Area," and that any activity there is "subject at all times to the exclusive control and management by the Port." CP at 274. At oral argu-

ment, the Port's attorney conceded that the purpose of the Port's rules and regulations is to control the tarmac. Afoa also alleges the Port retains control through its license agreement with EAGLE, requiring EAGLE to abide by all Port rules and regulations and allowing the Port to inspect EAGLE's work. Finally, Afoa alleges the Port retains control over EAGLE by conduct. He specifically claims that the Port continuously controls the actions of EAGLE and its employees and that they are subject at all times to the Port's pervasive and overriding supervision and control.

¶ 57 Viewing this evidence in the light most favorable to Afoa, a reasonable jury could conclude that the Port had sufficiently pervasive control over EAGLE and Afoa to create a duty to maintain a safe workplace. Therefore, summary judgment was inappropriate, and we affirm the Court of Appeals' reversal of summary judgment on this issue.

CONCLUSION

¶ 58 Afoa has three potentially viable claims, each of which depends on disputed facts. The Port is wrong that the duty to keep the workplace safe depends on the formalities of contract language. To the contrary, both WISHA and our common law reject reliance on formalistic labels and place the responsibility of protecting our state's workers on the entity best able to ensure workplace safety. We affirm the Court of Appeals and remand for proceedings consistent with this opinion.

WE CONCUR: SUSAN OWENS, DEBRA L. STEPHENS, MARY E. FAIRHURST, STEVEN C. GONZÁLEZ, Justices, and JILL M. JOHANSON, Justice Pro Tem.

MADSEN, C.J. (concurring/dissenting).

¶ 59 I cannot agree with the majority's decision to affirm the Court of Appeals on the issues of whether the Port of Seattle owed a common law duty based on retained control or a statutory duty under the Washington Industrial Safety and Health Act of 1973 (WISHA), chapter 49.17 RCW. Accordingly, I

dissent on these two issues.

¶ 60 The common law retained control doctrine does not apply in the circumstances of this case as a matter of law. The majority erroneously concludes that this doctrine may apply, depending only on resolution of factual questions relating to the issue of the Port's retained control over the worksite. But the retained control doctrine is an exception to the general rule at common law that one who hires an independent contractor does not have a duty to protect an employee of the independent contractor from injury occurring while performing the contractor's work. Where there is no employment relationship **813 between the defendant and an independent contractor, the general rule does not apply and neither does the retained-control exception.

¶ 61 The precedent relied on by the majority does not support its holding. The majority purports to follow *Kelley v. Howard S. Wright Construction Co.*, 90 Wash.2d 323, 329–34, 582 P.2d 500 (1978) and *Kamla v. Space Needle Corp.*, 147 Wash.2d 114, 121, 52 P.3d 472 (2002), claiming that under these cases no employment relationship is required and whether the retained control exception applies depends only on whether a principal has retained control over the workplace. Majority at 809–10. This is both an incorrect statement of the common law retained control doctrine and an incorrect representation of the analyses and holdings in *Kelley* and *Kamla*. The majority also incorrectly says that in *Kelley* this court decided that the duty to ensure a safe workplace “must be imposed on the entity best able to prevent harm to workers.” Majority at 809. No such rule of liability is found in *Kelley*.

¶ 62 The underlying reason for the common law rule and its exception does not justify the majority's holding. The common law general rule is justified by the fact that the *484 employer of an independent contractor has no control over the work performance. The retained control exception permits treating the

employer of the independent contractor as if it is the direct employer of the worker because when the employer of the independent contractor retains control over work performance, it has effectively reserved to itself an employer's responsibility for safety of the worker. Just as a direct employer may be liable for workplace injuries to its employees, the employer of the independent contractor who retains control over the manner in which the work is done and the operative details, and thus acts as an employer acts, may be liable for workplace injuries. This policy underlying the no-liability rule and its exception does not apply when there is no employer-independent contractor employment relationship.

¶ 63 If any liability exists here based on control over the worksite itself, where no employer-independent contractor relationship exists, it must be found under some other theory. The majority's approach does not accord with either the common law or our precedent.

¶ 64 I also disagree with the majority's analysis of the question whether liability may exist under WISHA. Again, a central premise is that the Port must have been the equivalent of a direct employer and therefore subject to the same legal obligations that an employer has under WISHA. None of our cases support the premise that WISHA liability exists otherwise.

DISCUSSION

Retained control exception

¶ 65 Under the common law an employer who hires an independent contractor has no liability for injuries to employees of the independent contractor where the injuries result from the work over which the independent contractor has control. *Kelley*, 90 Wash.2d at 330, 582 P.2d 500; *485 *Tauscher v. Puget Sound Power & Light Co.*, 96 Wash.2d 274, 277, 635 P.2d 426 (1981) ("one who engages an independent contractor is not liable for injuries to employees of the independent contractor resulting from

the contractor's work"); *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wash.2d 85, 94-95, 549 P.2d 483 (1976). This is the common law rule set out in the *Restatement (Second) of Torts* § 409 (1965), which states that "the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants." (Emphasis added.)

¶ 66 This employment relationship is at the heart of the common law rule, and regardless of what the employer is called, whether an owner, general contractor, principal, or other term, it is the employment of an independent contractor, often a subcontractor, that invokes the rules applied in *Kelley*, *Kamla*, and relevant *Restatement* sections. The employer may be said to hire, employ, retain, engage, or contract with the independent contractor, but again the term used is not determinative. What is determinative as to whether the principles in *Kelley* and *Kamla* apply is whether an employer has hired an **814 independent contractor and an employee of the independent contractor was injured during performance of the contractor's work.

¶ 67 The reason for the general rule of no-liability rule "is that, since the employer has no power of control over the manner in which the work is to be done by the contractor, it is to be regarded as the contractor's own enterprise, and he, rather than the employer, is the proper party to be charged with the responsibility of preventing the risk, and bearing and distributing it." RESTATEMENT (SECOND) OF TORTS § 409 cmt. b.

¶ 68 This common law rule has been the unvarying law in this state, and our decisional history shows that we have always applied the rule in the employer-independent contractor context, from *Ziebell v. Eclipse Lumber Co.*, 33 Wash. 591, 74 P. 680 (1903), and *Larson v. Am. Bridge Co. of New York*, 40 Wash. 224, 82 P. 294 (1905), to *Kelley* *486 and *Kamla*. *Larson* illustrates the general rule. There, a general

contractor who had constructed tanks for the owner of a mill hired a subcontractor to erect the tanks. An iron worker who was employed by the subcontractor was injured during the work and he brought suit against the owner, who was dismissed, and the general contractor. The issue was whether the general contractor could be liable to the subcontractor's employee. The court explained that if the subcontractor was an independent contractor, the employer is not liable for the independent contractor's negligence: there is no privity between the employer and the independent contractor's injured employee; the relation of master and servant does not exist; and the doctrine of respondeat superior does not apply. The court explained the test for determining independent contractor status:

The general test which determines the relation of independent contractor is that he shall exercise an independent employment, and represent *his employer* only as to the results of his work and not as to the means whereby it is to be accomplished. The chief consideration is that the *employer has no right of control* as to the mode of doing the work; but a reservation by the *employer* of the right to supervise the work, for the purpose of merely determining whether it is being done in accordance with the contract, does not affect the independence of the relation.

Id. at 227–28, 82 P. 294 (emphasis added). The court concluded that all of the evidence showed that the subcontractor was an independent contractor. *Id.* at 228, 82 P. 294. Therefore the general contractor that had hired the subcontractor was not liable. *Id.* No exception to this general rule of no-liability was at issue in the case.

¶ 69 In all of our cases, this no-liability general rule has been applied in the context of an employment relationship, which can be between a general contractor and an independent contractor (who is generally a subcontractor), as in *Larson*, or between

an owner and an independent contractor, as in *Kamla*, where a contractor was hired to install *487 fireworks on the Space Needle. We recognized in *Kamla* that “[e]mployers are not liable for injuries incurred by independent contractors because *employers* cannot control the manner in which the independent contractor works.” *Kamla*, 147 Wash.2d at 119, 52 P.3d 472 (emphasis added). The *Restatement* comment quoted above similarly states that the *employer* has no control over the manner in which the work is done by the independent contractor. But in all of the cases, the entity claimed to be liable had hired an independent contractor for whom the injured plaintiff performed the work.

¶ 70 Under the retained control exception to this common law rule, the employer of the independent contractor may be liable to an employee of the independent contractor. The common law exception exists where the employer hires an independent contractor but “retains the control of any part of the work.” *Restatement (Second) of Torts* § 414; *Kamla*, 147 Wash.2d at 121, 52 P.3d 472 (the exception applies when an employer retains “the right to direct the manner in which the work is performed” (emphasis omitted)); *Kelley*, 90 Wash.2d at 330, 582 P.2d 500. The employer then has a duty, within the scope of the retained control, to provide a safe place of work. *Kelley*, 90 Wash.2d at 331, 582 P.2d 500. The right to exercise this control is the test and actual exercise of control is not required. *Id.*

**815 ¶ 71 Notably, this retained control is not control over the worksite, but rather “control over the operative detail of doing any part of the work.” *RESTATEMENT (SECOND) OF TORTS* § 414 cmt. a. “[T]he employer must have retained at least some degree of control over the manner in which the work is done.” *Id.* cmt. c.

¶ 72 When the employer of the independent contractor retains control over part of the work, the employer “is subject to liability for physical harm to

others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." *Id.* § 414.

¶ 73 *488 In the same way that the employer-independent contractor relationship must always exist for the general rule to apply, this relationship also exists when the exception applies. In *Kamla*, we explained that an independent contractor is not controlled by the employer or subject to the right to control physical conduct in performance of the undertaking, but an employee's physical conduct in performance of the service is controlled by or subject to the right to control of the employer. *Kamla*, 147 Wash.2d at 119, 52 P.3d 472 (citing RESTATEMENT (SECOND) OF AGENCY §§ 2(3), 2(2) (1958)). Because the employer cannot control the manner in which the independent contractor works, the employer is not liable, but an employer is liable for injuries to its own direct employees "precisely because the employer retains control over the manner in which the employee works." *Id.*^{FN1}

FN1. This responsibility for injury to one's employee is subject to statutory control. Under the state Industrial Insurance Act, Title 51 RCW, employers accepted limited liability in exchange for sure and certain relief for injured workers. See *Harry v. Buse Timber & Sales, Inc.*, 166 Wash.2d 1, 8, 201 P.3d 1011 (2009); *Cowlitz Stud Co. v. Clevenger*, 157 Wash.2d 569, 572, 141 P.3d 1 (2006).

¶ 74 When the employer does retain control over the manner in which a part of the independent contractor's work is performed, this retained control justifies placing potential liability on the employer of the independent contractor. The situation is analytically indistinguishable from the usual employer-employee relationship, to the extent that the employer's right of control over the manner and operative details of the work determines whether there is expo-

sure to liability. Liability is possible under the retained control exception because the situation is comparable to the usual employer-employee relationship where the employer may be liable because of the right of control.

¶ 75 But merely controlling the worksite or workplace safety does not bring a case within the retained control exception. Rather, it is the equivalency of the retained control in the independent contractor setting to the control an employer exerts in the employer-employee relationship that justifies liability under the exception. A landlord, *489 owner, or licensor does not have employer-type duties resulting from the right to control unless the owner, landlords or licensor engaged the worker who is injured or engaged an independent contractor and retained control over part of the work performance, i.e., the manner of performing the work and operative details of the work. A landlord, owner, or licensor should not be subject to what is at the core an *employer's* liability under the retained control doctrine.

¶ 76 Accordingly, control or the lack of control of the performance of an independent contractor's work is the critical issue underpinning both the general rule and the retained control exception addressed in *Larson, Kelley*, and *Kamla*, as well as in other state cases. See, e.g., *Hennig v. Crosby Grp., Inc.*, 116 Wash.2d 131, 133-35, 802 P.2d 790 (1991); *Fardig v. Reynolds*, 55 Wash.2d 540, 544-45, 348 P.2d 661 (1960).^{FN2}

FN2. In *Fardig*, the court referred to "the ultimate test to be employed in determining whether a relationship is that of employer and employee or that of principal and independent contractor is to inquire whether or not the *employer* retained the right, or had the right under contract, to control the manner of doing the work and the means by which the result was to be accomplished." *Fardig*, 55 Wash.2d at 544, 348 P.2d 661

(emphasis added). This statement could be somewhat confusing in that it uses the term “employer” in a context of the usual employer-employee relationship that does not involve an independent contractor situation and also in the broader context of employment of either an employee or an independent contractor. So long as it is understood that the common law rules discussed here (set out in *Restatement (Second) of Torts* §§ 409, 414) involve an owner, general contractor, or other principal *employing* an independent contractor, the confusion, if it exists, should be short-lived. The *Restatement*, as noted, uses the word “employer” rather than “principal.”

****816** ¶ 77 Unfortunately, the majority creates liability without regard to the fact that the justification for the retained control exception does not exist in the absence of an employment relationship between the employer and an independent contractor in the first place.

¶ 78 Despite the majority's reliance on *Kelley* and *Kamla*, these cases do not support its new rule. In *Kelley*, we concluded that the exception applied because the general contractor had retained control. Multiple independent contractors*490 (subcontractors) had been hired by the general contractor to perform work on a common construction site where the general contractor had “general supervisory and coordinating authority under its contract with the owner, not only for the work itself, but also for compliance with safety standards.” *Kelley*, 90 Wash.2d at 331, 582 P.2d 500. Because the general contractor had this authority over the working conditions on the construction site where the work of multiple subcontractors had to be supervised and coordinated, which the court saw as “clearly fall[ing] within the rubric of ‘control,’ as an exception to the common-law rule of nonliability,” the court concluded that the general contractor had a duty to see that proper safety precau-

tions were taken in the common work areas. *Id.* at 331–32, 582 P.2d 500.^{FN3}

FN3. Two other excerpts to the no-duty rule applied in the circumstances and justified imposing a duty of care. First, the general contractor had reason to know of the peculiar risk of injury posed by the inherently dangerous nature of the work in which the employee was engaged, and second a statutory duty arose under former RCW 49.16.030.

¶ 79 Nothing in *Kelley*'s analysis suggests that one *who does not hire an independent contractor* is subject to its holding. The majority is not correct when it says that we disregarded “formalistic labels such as ‘independent contractor’ ” in *Kelley*. Majority at 809. The court did not address the matter of “labels” and had no need to do so since the requisite employer-independent contractor(s) relationship existed in the case.

¶ 80 The majority is also wrong when it says that in *Kelley* we reasoned that the duty “must be imposed on the entity best able to prevent harm to workers” to ensure a safe workplace. Majority at 810. Liability was not found in *Kelley* just because the general contractor was best positioned to ensure workplace safety. Rather, in the context of the employer (general contractor)-independent contractors (subcontractors) relationships, liability could be found because of the employer-general contractor's retained supervisory and coordinating authority over the subcontractors' work in common work areas. *Kelley* did not set out a rule *491 that *any entity* that is best placed to assure safety is under a duty to do so, regardless of whether it hired the independent contractor whose worker was injured or the degree and type of control the hiring entity retained. *Kelley* did not alter the fundamental general rule to which the retained control exception may apply.

¶ 81 The majority says, though, that in *Kelley* “[w]e held that the relevant inquiry is whether the principal retained control over the worksite.” Majority at 809. As explained above, though, *Kelley*'s holding is more restricted than this. First, the “principal” in the case had *hired* independent contractors. Second, the principal (the general contractor) had supervisory and coordinating authority under its contract for both the work and compliance with safety standards, and in particular had this authority in the area where several subcontractors all worked.

¶ 82 Control over the worksite, alone, is not the relevant question when determining whether one who hired an independent contractor has retained control and thus may be liable. It is control over the manner in which the work is performed that is critical. It is this type of control that makes the situation like that of the employer-employee relation where the employer may be responsible for injury to the worker.

¶ 83 This understanding of *Kelley* was confirmed in *Kamla*. We expressly relied on **817 *Kelley* for the “retained control” doctrine as correctly stating the principle that would justify imposing liability on the employer of an independent contractor. *Kamla*, 147 Wash.2d at 119–21, 52 P.3d 472. *Kamla* does not support the majority. In *Kamla*, the owner of the construction site, the Seattle Space Needle, was the entity that hired the independent contractor to install a fireworks display on the Space Needle. An employee of the contractor was injured during the installation and argued that the owner had retained control over the work and so owed a common law duty of care.

¶ 84 *492 The primary issue in *Kamla* was whether we would modify the retained control exception described in *Kelley* in favor of a rule that actual control, rather than the right to control, must exist. We declined to do so, explaining that this state's law conforms to the common law rule and its exception:

“[T]he *employer* must have retained at least some

degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to *employers*, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.”

Kamla, 147 Wash.2d at 121, 52 P.3d 472 (emphasis added) (quoting Restatement (Second) of Torts § 414 cmt. c). Again, the lynchpin is the kind and degree of control of the employing entity.

¶ 85 We concluded in *Kamla* that because the Space Needle “did not retain control over the manner in which Pyro[–Spectaculars, the independent contractor,] installed the fireworks display or completed its work,” and “[a]s an independent contractor” the company that was hired “was free to do the work in its own way,” the Space Needle “did not owe a common law duty of care based on retained control” and was not liable for the injuries sustained by the independent contractor's employee. *Id.* at 122, 52 P.3d 472. *Kamla* thus expressly sets out the interrelationship of the general no-liability rule and the retained control exception when an independent contractor is hired. It shows that the retained control exception is impossible to separate from the general rule that applies only in this context. The degree of retained control directly involves whether and the extent to which one who hires an independent contractor reserves control *493 over work performance, and this in turn dictates whether there is exposure to liability.

¶ 86 *Kelley* and *Kamla* plainly involve only the context where an independent contractor is hired and the question is liability of the general contractor or owner to the employee of the independent contractor

that was hired to perform the work. Neither *Kelley* nor *Kamla* suggest in any way that the common law retained control exception applies outside the employment relationship between an employer and an independent contractor. Neither case suggests any broad duty arising simply because an entity might be in a good position to ensure safety.

¶ 87 Neither case supports the majority's conclusion that the Port had a common law duty under the retained control exception to ensure that the air operations area at the airport was a safe workplace for the injured worker. Eagle Aviation Ground Logistics Enterprise, Inc., (EAGLE) for whom Mr. Brandon Afoa worked, was an independent contractor *hired by the airlines* for support services. The Port did not hire EAGLE to perform any work and did not pay EAGLE for any work. Rather, EAGLE was required, according to the licensing contract, to pay the Port for the right to provide services to airlines. The airlines, not the Port, had contracts with and paid EAGLE for performance of services.

¶ 88 In short, the Port did not have an employer-independent contractor relationship with EAGLE. Accordingly, as a matter of law, the retained control exception set out in the *Restatement (Second) of Torts* and addressed in *Kelley* and *Kamla* does not apply here.

**818 ¶ 89 Finally, on this issue, the majority says that the fact that the Port entered a licensing agreement with EAGLE should not determine whether the retained control exception applies. I agree that what a contract is called does not control. However, while the way that an arrangement is characterized by the defendant should not control, there must be at the least facts from which it can be concluded *494 that the employer-independent contractor relationship exists.^{FN4} Here, the contractual arrangement is without question not a contract to engage an independent contractor to perform work.

FN4. In this regard, I cannot agree with the majority's insinuation that the Port has written its licensing contracts to avoid being treated as EAGLE's and Afoa's employer. The majority says that "[t]he Port has structured its contracts with workers like EAGLE and Afoa such that those workers are not technically Port employees." Majority at 810. EAGLE was hired by the *airlines* to do work for the *airlines*. It is difficult to see how the Port manipulated its licensing agreement to avoid being treated as the employer, and there is nothing to support the implication that but for "technicalities" the Port would have been EAGLE's or Afoa's employer.

¶ 90 In summary, the majority professes to follow our precedent, but instead reads *Kelley* to state principles that do not appear in the case. The majority certainly does not apply existing law when it holds that no employer-independent contractor relationship is required for the retained control exception to apply, and the policy justification for the common law retained control exception does not support its holding. If any theory of liability based on control of the workplace could be applicable, it is *not* the common law retained control exception set out in the *Restatement (Second) of Torts* § 409 and addressed in *Kelley* and *Kamla*.

WISHA

¶ 91 The next issue is whether the Port of Seattle may be liable based on WISHA. I believe the majority's analysis is incomplete and to a substantial extent unconvincing. Moreover, it greatly expands the bases for liability under WISHA but without sufficient justification in WISHA law or its purposes.

¶ 92 The relevant principles are set out in *Stute v. P.B.M.C., Inc.*, 114 Wash.2d 454, 788 P.2d 545 (1990), and confirmed in *Kamla*. Because the general rule that an employer must provide a safe workplace

under RCW 49.17.060(1) applies only to the employer's own employees, only the obligation in RCW 49.17.060(2) is at issue. It *495 provides that "[e]ach employer ... [s]hall comply with the rules, regulations, and orders promulgated under this chapter." RCW 49.17.060(2). Subsection (2)'s specific duty to comply with WISHA regulations is not "confined to just the employer's own employees but applies to all employees who may be harmed by an employer's violation of the WISHA regulations." *Stute*, 114 Wash.2d at 458, 788 P.2d 545 (citing *Goucher v. J.R. Simplot Co.*, 104 Wash.2d 662, 672, 709 P.2d 774 (1985)). This duty applies only when a party asserts that the employer did not follow particular WISHA rules. *Id.* at 457, 788 P.2d 545 (citing *Adkins v. Aluminum Co. of Am.*, 110 Wash.2d 128, 153, 750 P.2d 1257, 756 P.2d 142 (1988)).

¶ 93 In *Stute*, we explained that the specific duty clause applies to employees of subcontractors, *id.* at 458, 788 P.2d 545, and that "[e]mployers must comply with the WISHA regulations to protect not only their direct employees but all employees on the jobsite," *id.* at 460, 788 P.2d 545. The court held that a general contractor has a nondelegable specific duty to ensure compliance with workplace regulations, reasoning that a "general contractor should bear the primary responsibility for compliance with safety regulations because the general contractor's innate supervisory authority constitutes sufficient control over the workplace." *Id.* at 464, 788 P.2d 545. Manifestly, the rule in *Goucher* and *Stute* applied to the general contractor who employed independent contractor-subcontractors and had supervisory authority over the common workplace and concerned duties owed by a general contractor to the direct employees of an independent contractor-subcontractor. This type of liability is a per se liability where work in the common work area is concerned, the court reasoned.

¶ 94 Then in *Kamla*, we addressed application of RCW 49.17.060(2) to a jobsite owner. The court concluded that jobsite owners are **819 not per se liable

because nothing in WISHA imposes this duty and they are not sufficiently analogous to general contractors. As the court said:

Although jobsite owners may have a similar degree of authority to control jobsite work conditions, they do not necessarily*496 have a similar degree of knowledge or expertise about WISHA compliant work conditions. Jobsite owners can run the gamut from an owner/developer with the same degree of knowledge about WISHA compliant work conditions as that of a general contractor to a public corporation without any knowledge about WISHA regulations governing a specific trade. Because jobsite owners may not have knowledge about the manner in which a job should be performed or about WISHA compliant work conditions, it is unrealistic to conclude all jobsite owners necessarily control work conditions. Instead, some jobsite owners may reasonably rely on the contractors they hire to ensure WISHA compliance because those jobsite owners cannot practically instruct contractors on how to complete the work safely and properly.

Kamla, 147 Wash.2d at 124–25, 52 P.3d 472.

¶ 95 Accordingly, the court concluded, "If a jobsite owner does not retain control over the manner in which an independent contractor completes its work, the jobsite owner does not have a duty under WISHA to 'comply with the rules, regulations, and orders promulgated under [chapter 49.17 RCW].' RCW 49.17.060(2)." *Id.* at 125, 52 P.3d 472 (second alteration in original).

¶ 96 While the majority acknowledges these general principles, it then makes two substantial departures from them. First, in addressing whether the Port had sufficient control, it emphasizes the Port's control over the work area where EAGLE operated and Mr. Afoa was injured. But outside the general contractor situation, *Kamla* at the very least suggests

that it is control over the *manner of performing the work* that is of paramount importance. Thus, what the majority should focus on is the extent to which the Port had any control over the manner in which Mr. Afoa performed his work, not the worksite itself. *Id.* If this kind of control existed, it would then tend to support the responsibility to make the workplace safe for EAGLE's workers.

¶ 97 Importantly, because the Port has no employer-independent contractor relationship with EAGLE, and instead has a licensing agreement, this case is not like *Kamla*.

¶ 98 *497 However, in rejecting the Port's claim that it had only a licensing agreement and so does not have the duty to comply with WISHA in connection with Mr. Afoa's work, the majority broadly states that the specific duty does not run just to the "principal's employees, but to all workers on the worksite who may be harmed by WISHA violations." Majority at 807 (citing *Stute*, 114 Wash.2d at 460, 788 P.2d 545; *Goucher*, 104 Wash.2d at 671, 709 P.2d 774).

¶ 99 This is an expansion of prior law. The court preceded its statement in *Stute* that the specific duty applies to "all employees on the job site" with an extremely important qualifying sentence that refers to the "holdings that the WISHA regulations apply to employees of independent contractors as well as direct employees of an employer." *Stute*, 114 Wash.2d at 460, 788 P.2d 545. The court did not purport to set forth the broad rule the majority reads into the case. Nor, factually, did *Stute* involve anything other than an employer-independent contractor setting, specifically, the general contractor-subcontractor relationship. As in *Stute*, *Kamla* also involved the issue whether the jobsite owner owed WISHA duties to an independent contractor, in this case in the form of the owner employing an independent contractor.

¶ 100 Prior to the majority's unjustified expansion of WISHA liability, there was no broad rule ap-

plying to all situations where a landowner with employees on the property must comply with specific duties to another employer's employees.

¶ 101 We should decline to expand WISHA liability in this way and instead, follow *Stute* and *Kamla* and limit liability to the employment situation—either direct employment or retained control of work performance in an employer-independent contractor situation. **820 If the legislature concludes that jobsite owners should have greater duties under WISHA, then it can amend the statutes to make this clear.

¶ 102 *498 One obvious problem that otherwise arises is that a landlord could find itself faced with colorable claims that it has violated WISHA through control of the *workplace* where this control results because of a *landlord's* legal obligations to tenants to maintain safe common areas. WISHA is, however, a statute pertaining to workplace safety requirements, not a landlord's obligations, and the duty at issue here involves obligations of an *employer* or one so like an employer that the same duties must be imposed.

¶ 103 The majority unfortunately does not satisfactorily explain why an entity that has no direct or employer-independent contractor employment relationship with EAGLE or Mr. Afoa has any specific duty under WISHA. If the fact that the Port has its own employees who work at the same area is the only basis for holding the Port to the specific duty under RCW 49.17.060(2), then an onerous obligation is imposed indeed. I do not believe that merely because a property owner has employees working on the same grounds as workers for other employers may work, a duty arose under WISHA, especially where the work proceeded under a licensing agreement that regulates the parties' responsibilities.

¶ 104 In addition, as we suggested in *Kamla*, jobsite owners may have little knowledge or expertise about a particular job, the dangers that might be en-

tailed in or associated with carrying out a particular job, the necessary training and education required to safely carry out particular job duties, the use and maintenance of necessary tools, equipment, clothing and other gear, and so on.

¶ 105 Accordingly, even if an employer-independent contractor relationship exists and therefore WISHA duties may exist, great care must be taken to ensure that any control retained over the work actually pertains to the work performance. If a jobsite owner requires, for example, that employees of the independent contractor who work on the site enter and leave at certain hours, refrain from using noisy equipment prior to 8:00 a.m., leave a picnic area on *499 the grounds free from clutter, return all equipment and tools to the proper storage area, and “engage in safe working practices while present,” there is no basis to conclude that the owner controls the worker or work in any way sufficient to impose the specific duty under RCW 49.17.060(2). These are not the work-related duties that put the jobsite owner in the position of the employer. And the control must be over the *work*, not simply the jobsite. An owner who bars workers from entry prior to 7:00 a.m. is certainly controlling the work site, but this is no reason to permit a claim based on WISHA.

¶ 106 The second major concern I have with the majority is that it does not address the specific regulations claimed to have been violated. That is, assuming that WISHA does apply, the majority fails to address any of the specific claims. Under RCW 49.17.060(2), the duty is to comply with “the rules, regulations, and orders promulgated under” WISHA. Mr. Afoa cites a number of specific WISHA violations based on alleged failures: a failure to inspect the pushback accordingly to manufacturer standards, a failure to maintain this vehicle in a safe condition, the failure of the pushback to meet design and construction requirements, the failure to remove it from service because it was not in a safe working condition, a failure to protect him from falling objects, and the

failure to properly train him to operate the vehicle and to ensure he operated it at a safe speed. However, none of the Port's regulations in its licensing agreement govern vehicle maintenance except to impose a rule about where the vehicle could be maintained.

¶ 107 As *Kamla* teaches, the Port should not be held responsible for training Afoa when he was not the Port's employee, the Port was not engaged in providing operational services of the type provided by EAGLE, and the Port would not itself be knowledgeable in all the operational aspects of EAGLE's contracts with the airlines. There also seems to be no basis for making an owner-licensor like the Port responsible for maintenance of its licensee's vehicles.

¶ 108 *500 It seems the only WISHA regulation that the Port might have had a duty to **821 comply with, assuming such duties exist, is a vehicle speed restriction. This is the kind of regulation that the Port was in a position to implement because it would and should apply as to all employers who might use the area. But in fact the Port did impose a 20 mph limit or slower if conditions required in areas of airplane movement, and this limit was included in the license agreement. The record shows that the Port acted to enforce this limit. I question whether the Port should be liable in this regard. Moreover, I question why the Port should be exposed to liability when it imposed this speed limit as a condition of the license granted to EAGLE, because EAGLE and Afoa violated the contractual agreement if they failed to abide by it.

¶ 109 Finally, I am quite concerned about the extensive federal regulatory scheme that assuredly applies to international airport operation. The Port's state obligations under WISHA, if any are owed to EAGLE and Mr. Afoa under the circumstances here, may have to be assessed in light of federal law if any conflicts arise. It is possible that determinations may have to be made about possible preemption issues. Accordingly, I believe the court should expressly acknowledge that any decisions it provides under

WISHA are subject to any prevailing federal law regarding airport operations.^{FN5}

FN5. Although I agree that a duty might be owed to EAGLE and Afoa as business invitees, I am dismayed by the majority's unfortunate attribution to the Port of ignorance about the type of invitation at issue. Contrary to the majority, the Port is well aware that a social invitation is not the relevant kind of invitation at issue. *See* majority at 814 (erroneously saying that the Port has confused the meaning of "invitee" as a term of art with "social convention").

Conclusion

¶ 110 The majority makes it seem that all it is doing is applying existing legal principles to this case. I strongly disagree because both with respect to the common law *501 retained control and WISHA issues the majority extends liability far beyond its existing state. We have never imposed duties under these laws when the defendant did not have either a direct employer-employee relationship to the injured worker or an employer-independent contractor relationship where the injured worker was directly employed by the independent contractor.

¶ 111 Among many mistakes, one of the most serious made by the majority is to blur the line between control over a worksite, which an owner or possessor of land may have, with control over the performance of the work itself. There is an important and meaningful difference, and because of the majority's lack of care in keeping the two distinct, landowners are apt to find themselves faced with liability for workers with whom they have little connection except the jobsite itself.

¶ 112 I would reverse the Court of Appeals determinations that a duty was owed under the common law retained control doctrine and WISHA and hold that as a matter of law no duty was owed under these

theories. I agree that factual issues remain regarding potential liability under the common law duty a land possessor owes to invitees.

WE CONCUR: JAMES M. JOHNSON and CHARLES W. JOHNSON, Justices.

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