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NO. 94525-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRANDON APELA AFOA, an individual,

Respondent/Cross-Petitioner,

vs.

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

Petitioner/Cross-Respondent.

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

SUPPLEMENTAL BRIEF OF PETITIONER/CROSS-RESPONDENT

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I. STATEMENT OF THE CASE

Plaintiff/respondent/cross-petitioner Brandon Afoa was severely injured working for Evergreen Aviation Ground Logistics Enterprises, Inc. (EAGLE), a ground services provider at Seattle-Tacoma International Airport. (CP 83, 215-16) Afoa sued only defendant/petitioner/cross-respondent Port of Seattle, the airport owner, alleging it violated common law and statutory duties to maintain a safe workplace. (CP 3-10) The trial court granted the Port summary judgment. (CP 488-89) During the pendency of plaintiff's appeal (*Afoa I*), plaintiff, in a separate federal court action, unsuccessfully sued the four airlines that had contracted with EAGLE for ground services. (CP 7017-18, 7020-57, 7289-7301)

In *Afoa I* this Court ruled there were factual issues whether the Port had exercised the required control over EAGLE as an independent contractor. *Afoa v. Port of Seattle*, 176 Wn.2d 460, 296 P.3d 800 (2013). On remand, a jury found for Afoa, determining the Port had retained the requisite control over EAGLE and had been negligent and that damages totaled \$40 million. The jury allocated 25% fault to the Port, 18.7% fault to each of the four non-party airlines, and .2% fault to Afoa. (C) 4839-42) Pursuant to RCW 4.22.070, the trial court entered a \$10 million judgment against the

Port. (CP 4881-88)

The Court of Appeals held that because the Port had a nondelegable duty, it was vicariously liable for the airlines even though the jury was never asked whether the Port retained the requisite control over them. *Afoa v. Port of Seattle*, 198 Wn. App. 206, 393 P.3d 802 (2017). Thus, the Port was held liable for 99.8% of Afoa's damages. This Court will decide whether this was correct.

II. ISSUES PRESENTED

1. Whether RCW 4.22.070 requires that fault be apportioned between the Port and the nonparty airlines?

2. Whether allowing the Port to amend its affirmative defenses to identify the at-fault airlines was an abuse of discretion since plaintiff had already unsuccessfully sued them?

3. Whether the federal court judgment for the airlines is res judicata against the Port, or collaterally estops it from arguing the airlines were at fault, where the Port was not a party to or in privity with them in plaintiff's suit against them?

III. ARGUMENT

A. RCW 4.22.070 REQUIRED THE JURY TO DECIDE WHETHER TO ALLOCATE FAULT TO THE AIRLINES.

The fault allocation issue presents a question of statutory

interpretation. RCW 4.22.070, which embodies this State's public policy, see *Public Util. Dist No. 1 v. State*, 182 Wn.2d 519, 544, 342 P.3d 308 (2015); *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 419 n.5, 282 P.3d 1069 (2012), states:

In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages.... The entities whose fault shall be determined include ... entities with any other individual defense against the claimant, and entities immune from liability to the claimant.... Judgment shall be entered against each defendant... in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only

....

RCW 4.22.070(1) (emphases added). The trial court correctly interpreted the statute, instructing the jury to consider the nonparty airlines' fault. The jury found the airlines negligent and that this negligence was a proximate cause of Afoa's injuries.¹ (CP 4840-42) As a result, RCW 4.22.070(1) requires that fault be allocated to them, and that judgment entered against the Port be only for the amount of

¹ The airlines not only hired EAGLE, but trained its employees, required it to provide pushbacks (plaintiff was injured on one), to perform "in accordance with the Carrier's instructions," to do whatever the airline told EAGLE to do, and reserved the rights to inspect EAGLE's services, provide supervision therefor, perform safety audits, and typically had a safety representative present when EAGLE worked a flight to ensure it was performing up to standard. (RP 954, 979, 996, 2874, 2879, 2941, 2967-68, 3005; Exs. 322-25)

fault attributed to it. (CP 4881-82) The holding that the Port's liability could not be severable conflicts with the language of, and the Legislature's intent in enacting, RCW 4.22.070.²

Statutory construction is a question of law reviewed de novo. *Western Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000). The primary objective is "to ascertain and carry out the intent of the Legislature." *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991). A court interpreting a statute must discern and implement the Legislature's intent. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). A statute's plain language is "[t]he surest indication of legislative intent." *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *State v. Hirschfelder*, 170 Wn.2d 536, 543, 242 P.3d 876 (2010) (quoting *State, Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9–10, 43 P.3d 4 (2002)).

This Court has already held that RCW 4.22.070(1) means

² In enacting the Tort Reform Act of 1986 including RCW 4.22.070, the Legislature found that "counties, cities, and other governmental entities are faced with increased exposure to lawsuits and awards and dramatic increases in the cost of insurance coverage" which "ultimately affect the public." 1986 Wash. Laws ch. 305, § 100. The panel's interpreting RCW 4.22.070 to charge the Port with the airlines' fault is contrary to these legislative concerns.

what it says:³

The language of RCW 4.22.070(1) is clear and unambiguous: “the trier of fact *shall* determine the percentage of the total fault which is attributable to *every* entity which caused the claimant’s damages”. (Italics ours.) “Shall” is presumed mandatory. *Singleton v. Frost*, 108 Wash.2d 723, 742 P.2d 1224 (1987). . . . We hold that RCW 51.24.060(1)(f) and RCW 4.22.070 require a trier of fact to determine the percentage of total fault attributable to **every entity** which caused plaintiff’s damages.

Clark v. Pacificorp, 118 Wn.2d 167, 181, 822 P.2d 162, 170 (1991) (boldface added); see *Kottler v. State*, 136 Wn.2d 437, 443, 963 P.2d 834 (1998) (RCW 4.22.070 “requires all liability be apportioned unless a listed exception applies in which case joint and several liability is retained”).

While the Port may owe an independent nondelegable duty to plaintiff, the jury was correctly instructed the airlines also owed him independent and distinct duties. (CP 4806, 4808, 4811) See *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 756-59, 912 P.2d 472 (1996). As the carriers breached these duties, they are “entit[ies] which caused the claimant’s damages,” and the jury had to

³ The Legislature later amended RCW 4.22.070(1) to exclude allocation of fault to an immune employer. See *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 759 n.7, 912 P.2d 472 (1996). However, this Court’s interpretation of the scope of RCW 4.22.070 in the remainder of *Clark*, remains undisturbed.

include them to determine “the percentage of total fault.” RCW 4.22.070(1). Judgment against the Port had to be only in the amount of “[its] proportionate share of the claimant’s total damages.” *Id.*⁴

Common law and statutory-based nondelegable duties including RCW 49.17.060 existed before RCW 4.22.070’s enactment. *See, e.g., Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 332-33, 582 P.2d 500 (1978) (*citing* former RCW 49.16.030); *Drake v. City of Seattle*, 30 Wash. 81, 84, 70 P. 231 (1902) (city’s nondelegable duty to guard excavations); 1973 Wash. Laws ch. 80, § 6. The Legislature is thus presumed to have known of these duties when it enacted RCW 4.22.070. *See In re Adoption of T.A.W.*, 186 Wn.2d 828, 850-51, 383 P.3d 492 (2016); *In re King County*, 117 Wn.2d 77, 86, 811 P.2d 945 (1991). Yet, with exceptions to be discussed, the Legislature decided to cast the widest net possible when it mandated allocation of fault.

The Legislature has enacted two exceptions to the fault

⁴ The panel’s reliance on *Johnson v. REI*, 159 Wn. App. 939, 247 P.3d 18, *rev. denied*, 172 Wn.2d 1007 (2011) is misplaced. *Johnson* involved a claim made against a product seller and whether fault could be allocated to the product manufacturer. The Court ruled that the express terms of the product liability statute, RCW 7.72.040(2)(e), required the seller of a product with the seller’s brand name to have the same liability as the manufacturer. *Id.* at 942. Such analysis does not apply here, where there is no statute that *expressly* calls for vicarious liability.

allocation requirement: (1) master/servant or principal/agent, and (2) entities acting in concert. RCW 4.22.070(1)(a). Indeed, although under the common law, liability in a master/servant or principal/agent situation is vicarious, the Legislature has characterized a defendant's liability under both exceptions as joint and several. RCW 4.22.070(2) ("If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) ... of this section ...").

As will be discussed, neither exception applies here. But these exceptions are pertinent because they demonstrate that the Legislature decided what types of vicarious and joint and several liability to except from allocation of fault. The Legislature could have, for example, enacted an exception that expressly excepted all types of vicarious liability. See N.M.S.A. 41-3A-1C(2); Ohio R.C. 2307.22, .24(B); S.C. Code 15-38-15(C)(3)(a); T.C.A (Tenn.) 29-11-107(c). Or it could have enacted an exception expressly for nondelegable duties. See CPLR (N.Y.) 1602 (several liability statute shall "not be construed to impair, alter, limit, modify, enlarge, abrogate or restrict ... any liability arising by reason of a non-delegable duty."). It did not.

Hence, the Legislature must have intended RCW 4.22.070(1)'s broad principles to apply in cases like this under the well-recognized rule of *expressio unius est exclusio alterius*. See *In*

re Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999). By expressly listing RCW 4.22.070's exceptions, the Legislature's failure to list additional exceptions that would apply here cannot be deemed an oversight. "In such circumstances, 'the silence of the Legislature is telling' and must be given effect." *Id.*

What plaintiff essentially argues is that the Legislature made a mistake in enacting RCW 4.22.070 without excepting either nondelegable duties or all vicarious liability. He asks this Court to insert such language. This Court has made clear, however, that it will not do so. "We cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language. We assume the legislature 'means exactly what it says.'" *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

Even if the statute as written was "legislative error," it would not be proper to rewrite it. Only when "the statute is not functional without judicial correction" will this Court correct the error. *Delgado*, 148 Wn.2d at 731; see *State v. Taylor*, 97 Wn.2d 724, 728, 649 P.2d 633 (1982) (missing statutory language would simultaneously require prisoner to be committed and released). As the trial court showed, RCW 4.22.070 is functional without judicial correction. Accordingly, the Legislature's unambiguous language should be

honored: the panel's decision charging the Port with the airlines' fault should be reversed and the trial court judgment affirmed.

Moreover, the RCW 4.22.070(1)(a) exceptions do not apply. First, plaintiff failed to preserve these issues for review. He did not raise the RCW 4.22.070(1)(a) "acting in concert" exception until after the close of evidence and his RCW 4.22.070(1)(a) agency theory until after the verdict. (CP 4759-60, 4839-42, 8939-40, 9005). This was too late; this Court should not consider them. *Kee v. Wah Sing Chong*, 31 Wash. 678, 679, 72 P. 473 (1903); *U.S. Fire Ins. Co. v. Roberts & Schaefer Co.*, 37 Wn. App. 683, 688, 683 P.2d 600 (1984).

In any case, for the conduct of two or more people to qualify as "acting in concert," they must consciously band together in an **unlawful** manner. *Kottler*, 136 Wn.2d at 448-49; see, e.g., *Foster v. Carter*, 49 Wn. App. 340, 742 P.2d 1257 (1987) (boys who participated in BB gun fight had unity of purpose but did not act together against injured boy).

Here the Port and the air carriers engaged in legitimate commercial dealings: the Port and the carriers had written contracts under which the latter could use the airport for certain purposes. (Exs. 675-78) These activities do not qualify as antisocial activities necessary to constitute concerted action. *Gilbert H. Moen Co. v.*

Island Steel Erectors, Inc., 75 Wn. App. 480, 486, 878 P.2d 1246 (1994), *rev'd on other grounds*, 128 Wn.2d 745, 912 P.2d 472 (1996) (citing with approval G. Sisk, *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform*, 16 U. Puget Sound L. Rev. 1, 107 (1992)); see *Martin v. Abbott Labs.* 102 Wn.2d 581, 598, 689 P.2d 368 (1984) (parallel or imitative conduct is not concerted action).

The Port and the airlines were not in an agency relationship either. Agency presents a question of fact. *Travelers Cas. & Sur. Co. v. Washington Trust Bank*, 186 Wn.2d 921, 937, 383 P.3d 512 (2016). The jury was never asked to decide whether agency existed, nor did plaintiff propose instructions that would have asked them to do so, which is not surprising given that he failed to raise the argument until after the verdict. (CP 3063-122, 4839-42, 9005)

In any case, the Port-air carrier relationship exists through their contracts. For the carriers to be the Port's agents, mere control is insufficient, even if it existed, which the jury was not asked to decide.⁵ See, e. g., *Knapp v. Hill*, 276 Ill. App.3d 376, 657 N.E.2d

⁵ Although the jury found the Port had retained sufficient control over **EAGLE (but not the airlines)** as required by *Afoa I* (CP 4839-42), that test is not coextensive with agency principles. RESTATEMENT (SECOND) OF TORTS § 414 cmt. a (1965):

1068, 1071-72 (1995). Rather, a person must also consent that another shall act *on his behalf*. *Matsumura v. Eilert*, 74 Wn.2d 362, 368, 444 P.2d 806 (1968) (citing RESTATEMENT (SECOND) OF AGENCY § 1 (1958)); see RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (principal must manifest assent that agent shall act “on the principal’s behalf”). Following rules imposed by contract does not mean one party is acting on behalf of the other. See *Dolan v. King County*, 172 Wn.2d 299, 317, 258 P.3d 20 (2011) (prudent financial controls and careful oversight of contract compliance does not render contractor agency of government). This Court should not consider the agency exception, but if it does, should rule the exception does not apply.

The Port and the air carriers have their own nondelegable duties. But assessing whether the Port could somehow act as the principal or master of the carriers requires consideration that the Port operates Sea-Tac under 14 C.F.R. pt. 139. The Port is not an FAA-certificated carrier and cannot legally direct how the carriers conduct

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

Thus, retained control alone does not meet RCW 4.22.070(1)(a) requirements. See *Matsumura v. Eilert*, 74 Wn.2d 362, 368, 444 P.2d 806 (1968).

their operations so as to qualify as their "master" or "principal." *In the Matter of Alaska Airlines, Inc.*, FAA Order 2004-8 (Oct. 4, 2004) (carrier has sole authority and responsibility for complying with its obligations under 14 C.F.R. pt. 121 and its Operations Specifications). As such, even had plaintiff timely tried to assert the Port and the carriers were in a master/servant-principal/agent relationship, he would have failed because, as a matter of regulatory law, no such "retained control" relationship can exist.

B. PERMITTING AMENDMENT OF THE PORT'S ANSWER TO IDENTIFY AIRLINES RESPONSIBLE FOR PLAINTIFF'S INJURIES WAS NOT AN ABUSE OF DISCRETION.

The Port's answer asserted nonparties were at fault from the start. (CP 15) The Port was granted leave to amend to name the air carriers as responsible for plaintiff's injuries under CR 12(i). (CP 8062) Plaintiff claims error, arguing he was prevented from suing all at-fault entities in the same suit. Plaintiff fails to acknowledge that he alone is responsible for the procedural dilemma that prevented him from recovering for fault allocated to the airlines.

In 2009 plaintiff chose to sue only the Port in the instant action. (CP 3-10) Not until December 2010, while *Afoa I* was still on appeal, did he sue the air carriers, alleging they were negligent and violated WISHA. (CP 6921, 7020-48) That federal case was stayed until

2013, when plaintiff belatedly moved to add the Port as a defendant. (CP 6922, 7119-23) The federal court denied the motion, declaring plaintiff's four-year delay in trying to pursue all claims in a single action "the result of [plaintiff's] 'inexcusable neglect'" (CP 7122) Recognizing the problems resulting for plaintiff, the federal court explained, "Those unfortunate outcomes ... are the result of Plaintiff's decision not to name all potential tortfeasors in his initial action against the Port."⁶ (CP 7123)

Review of the trial court's ruling permitting the Port to amend its answer is limited to whether the trial court abused its considerable discretion in doing so. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). No abuse of discretion occurred.

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

⁶ The panel and Afoa characterized his action against the airlines as "precautionary." *Afoa*, 198 Wn. App. at 213. That characterization, however, cannot excuse failure to present his claims against all parties in one suit.

insufficient. *Walla v. Johnson*, 50 Wn. App. 879, 884, 751 P.2d 334 (1988). Plaintiff could not show prejudice.

Indeed, as early as 2009, the Port put plaintiff on notice it would attempt to prove that other entities were responsible for the accident. (CP 5203-04) Plaintiff filed his suit asserting the airlines were at fault while *Afoa I* was pending, years before the Port sought to amend. (CP 4693, 5332-60, 5362-73) There was no reason plaintiff could not have sued the airlines when he first sued the Port or any time before he filed his first appeal. Plaintiff's claims of prejudice and surprise thus ring hollow. The trial court's exercise of its discretion to permit the amendment should be affirmed.

C. THE FEDERAL COURT DECISION HAS NO PRECLUSIVE EFFECT AGAINST THE PORT.

Plaintiff's claim that collateral estoppel and res judicata bar allocating fault to the airlines is similarly meritless. The Port was neither a party nor in privity with the airlines in plaintiff's federal suit.

Res judicata precludes a party from relitigating issues that were, or could have been, decided in a previous action. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). For the doctrine to apply, there must be identity between the prior action and the current action with regard to the parties, the cause of action,

the subject matter, and the “quality” of the persons against whom the claim is made. *Id.* If the defendants in the two suits are different, they must be in privity for the doctrine to apply. *Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 396, 429 P.2d 207 (1967).

Collateral estoppel applies when the issues in two proceedings are identical, the earlier suit ended in final judgment, defendants in both suits are in privity, and relitigation will not work an injustice on the party to be estopped. *Christensen v. Grant Cty. Hosp. Dist No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). It is undisputed the Port was not a party to the federal suit. The issues are whether it was in privity with the air carriers therein and whether preventing fault allocation would work an injustice on it.

1. The Port and the Air Carriers Were Not in Privity.

Due process requires a party to have an opportunity to fully and fairly present its defense. *Blonder-Tongue Labs, Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329, 91 S. Ct. 1434, 28 L. E. 2d 788 (1971). The privity requirement is strictly construed. *McDanlels v. Carlson*, 108 Wn.2d 299, 306, 738 P.2d 254 (1987).

Plaintiff claims the air carriers adequately represented the Port’s interests in the federal litigation so that privity exists. Privity, however, requires more than just the party in the prior suit’s ability to

defend the issue; there must be some additional special relationship between the parties, such as between a class representative and members of a class, or between guardians and trustees. See *Taylor v. Sturgell*, 553 U.S. 880, 894-95, 128 S. Ct. 2161, 171 L. E. 2d 155 (2008); *Feature Realty, Inc. v. Kirkpatrick & Lockhart Preston Gates Ellis, LLP*, 161 Wn.2d 214, 223-25, 164 P.3d 500 (2007); *Kuhlman v. Thomas*, 78 Wn. App. 115, 121-22, 897 P.2d 365 (1995). No such relationship exists here. The Port and the airlines engaged in an arm's-length commercial transaction, *i.e.*, the airlines' contracting with the Port to use the airport. (Exs. 675-78) This is insufficient to show privity. *Cf.*, *Cater v. Taylor*, 120 W. Va. 93, 196 S.E. 558 (1938) (relationship between insurer and insured does not show privity).

In addition, the air carriers did not represent the Port's interests in the federal suit. There plaintiff claimed the air carriers were at fault; the carriers vigorously claimed they were not. (CP 7293-97). In this action, plaintiff argued the air carriers were not at fault; the Port argued, and the jury agreed, the air carriers were. (CP 3174-84, 3389-402, 4688-92, 5460-802, 5935-36, 6189-212, 8061-68, 8876-78). Thus, the carriers could not, and did not, adequately represent the Port's interests in federal court.

Plaintiff's argument that the Port was a puppet master

controlling the air carriers' defense rests on nothing but baseless speculation and wishful thinking. While the same counsel did represent the Port in this action and the air carriers in the federal action, that does not change the fact that counsel fulfilled his obligations to vigorously represent the air carriers and defend them in accordance with their wishes, as is demonstrated by summary judgment in their favor. (CP 6909) See RPC 1.2, 1.3.

The Port's trial counsel's not signing plaintiff's proposed stipulation (CP 6183-86) does not show the Port controlled the airlines' defense. The Port had no reason to sign because the stipulation would have required it to waive its defense it had not retained the required control. The airlines could not sign because plaintiff did not draft the stipulation for them to sign; they had no right to waive the Port's defense, and the stipulation as drafted was to be filed in the instant action, to which they were not parties.

That some Port employees testified in the federal case does not establish privity. (CP 6726, 6762) Plaintiff's contrary argument relies on the virtual representation doctrine, now discredited as circumventing "protections, grounded in due process." *Taylor v. Sturgell*, 553 U.S. 880, 901, 128 S. Ct. 1261, 171 L. Ed. 2d 155 (2008); see *Garcia v. Wilson*, 63 Wn. App. 516, 520-21, 820 P.2d

964 (1991) (acting as witness invokes doctrine). Even if viable, the doctrine requires, *inter alia*, that the two suits' separation have been due to manipulation or tactical maneuvering by the nonparty to the later suit. *Garcia v. Wilson*, 63 Wn. App. at 521. But the federal court found plaintiff's failure to timely join the Port therein was due to his "inexcusable neglect." (CP 7122)

Moreover, it makes no sense and would be unjust to hold the Port in privity with the airlines. Port employees presented evidence in plaintiff's suit against the airlines because they were the people with knowledge of the facts to which they testified, not because they had some special relationship with the carriers such that their testimony somehow bound the Port to the federal action outcome.

Proceeding with two separate suits always carried the risk of a disadvantageous, inconsistent result. Plaintiff's attempts to avoid that result cannot create privity where none exists.

2. Collateral Estoppel Would Be Unjust to the Port.

Collateral estoppel is also inapplicable where it would work an injustice on the party to be estopped. *Christensen*, 152 Wn.2d at 307. Applying collateral estoppel would have the effect of denying the Port its day in court to prove the accident was the fault of the air carriers, an attempt that was successful, as the jury found that the

vast majority of the blame should go to the air carriers.

Plaintiff argues that allowing the jury to allocate fault would be unjust *to him*. But the test is whether injustice will *occur to the party to be estopped—i.e.*, the Port. *Christensen*, 152 Wn.2d at 307. In any case, plaintiff asserted airline fault for years in federal court. (CP 7020-48, 7289-98) That the Port succeeded where plaintiff failed in proving this was due to plaintiff's failures. For example, in federal court he failed to cite WISHA regulations applicable to the carriers, but in this suit did not object to instructions that the carriers could be liable under WISHA. (CP 4811, 4815-25, 6864; RP 3206).

Distilled to its essence, plaintiff seeks to use his strategic error in splitting his claims into two separate suits and his failure to prove his case in federal court, as a sword against the Port to prevent it from receiving its day in court. It is not appropriate for the burden of this failure to be shifted to the Port. This Court should find that neither collateral estoppel nor res judicata apply.

IV. CONCLUSION

The Legislature has spoken. It has decided the jury "shall" determine whether to allocate fault to "every" entity that caused a claimant's damages. It has decided when joint and several liability, including vicarious liability, are excepted from allocation. This case

does not fall within those exceptions. Thus, under RCW 4.22.070 the Port cannot be liable for the airlines' fault. Nor was there any other basis for such liability. Res judicata and collateral estoppel do not apply: the Port was not in privity with the airlines, plaintiff having chosen to sue it in one suit and the airlines in another.

This Court should reverse the Court of Appeals decision on fault allocation and reinstate the trial court's judgment.

DATED this 10th day of November, 2017.

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