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**SUPREME COURT OF THE STATE OF WASHINGTON**

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GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; ROSARIO CRISOSTOMO FLORES, an individual; and PATRICIA CRISOSTOMO FLORES, a minor child by and through LUCINA FLORES, her natural mother and default guardian,

Appellants,

v.

INLAND WASHINGTON, LLC, a Washington limited liability company, and INLAND GROUP P.S., LLC, a Washington limited liability company, RALPH'S CONCRETE PUMPING, INC., a Washington corporation, and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation,

Respondents.

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**BRIEF OF AMICUS CURIAE  
DEPARTMENT OF LABOR & INDUSTRIES**

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## I. INTRODUCTION

The duty of general contractors to enforce workplace safety rules is critical for the safety of Washington workers. For decades, this Court has held that general contractors have “per se” control over jobsites and are responsible for the safety of all workers, including subcontractor employees, because general contractors are in the best position to ensure safety. Based on dicta in a case that did not address general contractor responsibilities, the Court of Appeals abandoned this rule, risking the safety of Washington workers. This risks general contractors believing they are no longer responsible for jobsite safety unless they exercise direct control, encouraging them to take a hands-off approach to safety on the jobsite. This Court should take review to correct this dangerous trend.

## II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Department of Labor and Industries (L&I) is the state agency charged with creating and enforcing the safety and health standards under the Washington Industrial Safety and Health Act (WISHA). RCW 49.17.040; *SuperValu, Inc. v. Dep’t of Labor & Indus.*, 158 Wn.2d 422, 425, 144 P.3d 1160 (2006). As the WISHA enforcement agency, L&I must strive to ensure “safe and healthful working conditions for every man and woman working in the state of Washington.” *See* RCW 49.17.010.

L&I thus has a vital interest in the application of WISHA to general contractors.

### **III. SPECIFIC ISSUES ADDRESSED BY AMICUS CURIAE**

Did this Court's decision in *Afoa II* overrule longstanding Washington law about a general contractor's per se control of its worksite and responsibility under WISHA to maintain a safe workplace for all employees working there?

### **IV. BACKGROUND**

#### **A. General Contractors Must Enforce Safety Regulations for All Workers at Their Jobsites**

RCW 49.17.060(2) requires all employers to follow the safety regulations adopted under WISHA. L&I may cite an employer for failing to comply with WISHA regulations, including general contractors when subcontractors at their jobsites violate a safety standard. RCW 49.17.120(1); WAC 296-155-100(1)(a). "It is the responsibility of management to establish, supervise, and enforce, in a manner which is effective in practice . . . [a] safe and healthful working environment." WAC 296-155-100(1)(a). 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 industrial safety and health program of the state." RCW 49.17.010; *Afoa v.*

*Port of Seattle*, 176 Wn.2d 460, 470, 296 P.3d 800 (2013) (*Afoa I*). The Court construes WISHA statutes and regulations “liberally to achieve their purpose of providing safe working conditions for workers in Washington.” *Frank Coluccio Constr. Co. v. Dep’t of Labor & Indus.*, 181 Wn. App. 25, 36, 329 P.3d 91 (2014). The Court gives substantial weight to the Department’s interpretation of WISHA. *Id.*

**B. The Jobsite Vargas Worked at Had Several WISHA Violations**

On May 23, 2013, Vargas suffered a brain injury when a highly pressurized concrete hose struck him in the head. App. at 180. His direct employer was Hilltop Concrete Construction, Inc., who is immune under RCW Title 51 and not a party to this action. Inland Washington, LLC, was the general contractor.

This case concerns allegations of violations of WISHA regulations, and Inland’s responsibility for the violations. This includes an allegation that Vargas and other Hilltop employees were in the “danger zone” when concrete pumping started, in violation of the safety procedures set forth in the pump track manufacturer’s manual. App. at 377-78, 390. WAC 296-155-682(8)(c)(iii)(F) requires a pump operator to follow safety manuals when operating a pump. This case also includes an allegation that the project had no site-specific safety plan that addressed the hazards involved

with pump hoses or how to prevent hose injuries. App. at 450; *see* WAC 296-155-110.

Vargas and his spouse and children brought suit in King County Superior Court against Inland and two subcontractors. Inland moved for summary judgment, arguing that although it was the general contractor, it did not retain control over the work area and thus owed no duty to Vargas. App. at 49-53. Vargas argued that this position conflicted with the *per se* control of general contractors established in *Stute v. P.B.M.C. Inc.*, 114 Wn.2d 454, 788 P.2d 545 (1990). App. at 77-79. Nevertheless, the superior court granted Inland's summary judgment motion and dismissed it from the lawsuit. App. at 18-19.

The Court of Appeals originally granted interlocutory review. But then it issued an unpublished opinion stating, without elaboration, that review was "improvidently granted" given this Court's decision in *Afoa v. Port of Seattle*, 191 Wn.2d 110, 421 P.3d 903 (2018) ("*Afoa I*"). App. at 516-18.

Vargas filed a motion for discretionary review under RAP 13.5.

## V. ARGUMENT

This case will allow the Court to correct a misstatement in *Afoa II* and ensure that general contractors continue to provide safe workplaces for all employees at their jobsites.

**A. Language in *Afoa II* Threatens Enforcement of Important Safety Provisions**

A comment in dicta has threatened the enforcement of workplace safety rules under WISHA. In *Afoa II*, the Court said “A jobsite owner or *general contractor* will have [a duty of care to all workers on a jobsite] only if it maintains a sufficient degree of control over the work.” *Afoa v. Port of Seattle*, 191 Wn. 2d 110, 121, 421 P.3d 903 (2018) (emphasis added). The Court in *Afoa II* was not addressing a general contractor’s liability, and thus the statement including general contractors was dicta. And that dicta conflated the tests for general contractors and jobsite owners.

Washington courts have long held that general contractors need not directly control a subcontractor’s work to be liable for workplace safety violations involving the subcontractor’s employees. In *Stute*, the Court rejected claims that a general contractor must directly control a workplace to be liable under WISHA. In that case, as Inland does now, the general contractor argued that an employer must control a subcontractor’s work before it has a duty to take particular safety measures under WISHA. *Stute*, 114 Wn.2d at 460.

The Court flatly rejected this argument, holding, “A general contractor’s supervisory authority is per se control over the workplace,

and the duty [to protect subcontractor employees] is placed upon the general contractor as a matter of law.” *Stute*, 114 Wn.2d at 464. It explained the reason for the rule: “the 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.*

More than a decade later, the Court considered whether to apply this per se rule to jobsite owners. In *Kamla v. Space Needle Corporation*, it declined to do so. 147 Wn.2d 114, 124-25, 52 P.3d 472 (2002). The Court noted that, “[a]lthough jobsite owners may have a similar degree of authority to control jobsite work conditions, they do not necessarily have a similar degree of knowledge or expertise about WISHA compliant work conditions.” *Id.* at 124. Thus, the Court held, “[i]f 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 . . .” *Id.* at 125.

*Afoa I* involved Brandon Afoa’s claim that the Port of Seattle owed him a duty as a jobsite owner. *Afoa*, 176 Wn.2d at 464. Reaffirming its views in *Kamla* and *Stute*, the Court explained 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.” *Afoa*, 176 Wn.2d at 472. Instead, “jobsite owners have a duty to comply with WISHA only if they retain control over the manner in which contractors complete their work.” *Id.* The Court remanded to the superior court to determine the Port’s level of control. *Id.* at 482.

On remand, the role of four airlines added as “empty chairs” was debated. *Afoa v. Port of Seattle*, 191 Wn.2d 110, 122, 124, 421 P.3d 909 (2018) (*Afoa II*). After the jury found the Port and the airlines each partially liable, the Port sought to allocate fault under RCW 4.22.030. *Afoa* resisted, arguing that the Port had a nondelegable duty for worker safety and so was jointly and severally liable.

In *Afoa II*, the Court rejected *Afoa*’s argument that the Port’s nondelegable duty to provide a safe workplace under WISHA made it vicariously liable for the airlines’ fault. But in explaining its decision, the Court misstated the law around general contractors and jobsite owners:

Under some circumstances, jobsite owners may have a duty of care analogous to that of an employer or general contractor. *See Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 123, 125, 52 P.3d 472 (2002); *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 334, 582 P.2d 500 (1978). *A jobsite owner or general contractor will have this duty only if it maintains a sufficient degree of control over the work.* *Kamla*, 147 Wn.2d at 123 (quoting *Doss v. ITT Rayonier Inc.*, 60 Wn. App. 125, 127 n.2, 803 P.2d 4 (1991)). If the duty exists, it is nondelegable. *Kelley*, 90 Wn.2d at 334. If the general contractor—or by extension,

jobsite owner—has the right to exercise control, it also “has a duty, within the scope of that control, to provide a safe place of work.” *Id.* at 330; *accord* Restatement (Second) of Torts § 414 (Am. Law Inst. 1965).

*Afoa II*, 191 Wn.2d at 121 (emphasis added).

The Court’s dicta about a general contractor’s duty to subcontractor employees is contrary to its decision in *Stute*.<sup>1</sup> It is also contrary to its earlier recognition in *Afoa I* and other cases about the distinction between jobsite owners and general contractors. *See Afoa*, 176 Wn.2d at 472. Other than this comment in dicta, the Court has shown no intent to overrule *Stute*, either in *Afoa II* or elsewhere. Nevertheless, the Court’s statement has apparently led to some confusion, as evidenced by the procedural history of this case. The Court should grant review to clear up this confusion.

**B. General Contractors’ Duties Under WISHA Are Critical to Protecting Workers**

The Court’s statement in *Afoa II* has already begun to cause safety enforcement concerns. A general contractor’s duty under WISHA protects workers in Washington. This Court imposed that duty because general

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<sup>1</sup> The Court’s statement about general contractors was dicta because the case before it did not involve a general contractor. Statements made in passing and not directly related to the holding are not binding on the lower courts. *Ass’n of Wash. Bus. v. Dep’t of Revenue*, 155 Wn.2d 430, 442 n.11, 120 P.3d 46 (2005). Even so, it appears the Court of Appeals followed the dicta when deciding to reverse its opinion on whether to grant interlocutory review.

contractors have “the greater practical opportunity and ability to insure compliance with safety standards.” *Stute*, 114 Wn.2d at 462. L&I’s ability to cite general contractors for failing to protect their subcontractor employees has proved an important and effective enforcement tool. Subcontractors are often small, unsophisticated companies, while general contractors are in the business of managing work sites. This gives them special responsibilities over safety.

Here, the general contractor essentially claimed it must directly control its subcontractors’ work before it is responsible under WISHA. Resp’t’s Br. 31. But were the Court to accept this argument, it would motivate general contractors to look the other way about safety. Perversely, an absentee contractor with little oversight of its workplace would escape liability for safety violations where a more diligent contractor would not.

Inland’s position undermines the safety of workers in Washington. In the almost three decades since this Court’s decision in *Stute*, the Department has observed a profound change in the level of enforcement of safety by general contractors at multi-employer worksites. This change has resulted in lower injury rates at multi-employer worksites since 1990. The Department urges the Court to reaffirm its decision in *Stute*, and correct the *Afoa II* misstatement.

## VI. CONCLUSION

This Court should reaffirm decades of case law protecting workers and stop general contractors from abandoning their responsibilities for safety.

RESPECTFULLY SUBMITTED this 26th day of December, 2018.

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**SUPREME COURT OF THE STATE OF WASHINGTON**

GILDARDO CRISOSTOMO VARGAS,  
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WILLIAM DUSSAULT, his Litigation  
Guardian ad Litem; LUCINA FLORES,  
an individual; ROSARIO  
CRISOSTOMO FLORES, an individual;  
and PATRICIA CRISOSTOMO  
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LUCINA FLORES, her natural mother  
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Respondents.

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The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department's Brief of Amicus Curiae and this Certificate of Service in the below described manner:

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