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STATE OF WASHINGTON
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No. 96527-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

Plaintiffs/Petitioners,

vs.

INLAND WASHINGTON, LLC, a Washington limited liability company,
Defendant/Respondent,

and

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

Defendants.

BRIEF OF AMICUS CURIAE
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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in the right of an injured worker to obtain full recovery from a general contractor, whose supervisory authority is per se control over the worksite and who has the duty as a matter of law to provide workers with a safe place of work and to ensure compliance with safety regulations.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case concerns a general contractor's duty to ensure the safety of all workers on a multi-employer jobsite, and whether that duty was altered by this Court's decision in *Afoa v. Port of Seattle*, 191 Wn.2d 110, 421 P.3d 903 (2018) (*Afoa II*). Inland Washington (Inland) was the general contractor on a large apartment construction project. Inland hired Hilltop Concrete, Vargas' employer, on a subcontract to perform structural concrete work. Inland's subcontract with Hilltop stated that Hilltop would provide all supervision, subcontract work and equipment for its work on the jobsite, and would be responsible for all safety precautions and programs in connection with its work. Hilltop subcontracted with Ralph's Concrete Pumping, Inc. (Ralph), and Miles Sand & Gravel Co. (Miles) to provide concrete and pumping services. Vargas suffered a brain injury when he was

struck in the head by a hose connected to a concrete pumping truck. At the time of the accident, employees of Hilltop, Ralph and Miles were present. Vargas filed suit against Inland as the general contractor as well as Ralph and Miles. Among other claims, Vargas alleged that Inland: controlled the jobsite; retained the right to control the manner in which its subcontractors completed their work; failed to provide workers on the jobsite with adequate supervision and a site specific safety plan that would have allowed safe performance of their work; along with the other defendants, violated various WISHA regulations; and failed to provide a reasonably safe workplace.

In 2015, Inland moved for summary judgment dismissal, arguing that it did not violate any WISHA regulations, did not retain control over the work of the subcontractors who violated the WISHA regulations, did not retain control over the worksite, and the accident did not occur in a “common work area.” The trial court denied Inland’s motion for summary judgment, but held Inland “is not vicariously liable.” Inland Resp. Br. at 8.

In 2017, Inland filed a second motion for summary judgment. In opposition, Vargas submitted the declaration of a construction safety expert, who opined: the accident was caused either by introducing air into the concrete pumping system or a plug in the system, and either cause occurred as a result of Inland’s failure to establish an adequate safety prevention program pursuant to WAC 296-155-110; as the general contractor, Inland had a nondelegable duty for the safety of all employees on the job site. Vargas also produced evidence that Inland ordered a concrete mix that

violated WAC 296-155-682(8)(b)(xv)(C) because the size of the aggregate in the mix was too large for the concrete pumping hose. Vargas argued that pursuant to *Stute*, Inland's status as a general contractor created per se control over the jobsite and a nondelegable duty to provide a safe place of work for subcontractors' employees and to prevent violations of WISHA by its subcontractors as a matter of law. The trial court granted Inland's motion and entered an order certifying that its order granting Inland's motion for summary judgment "and the Court's affirmation of its finding that Inland ... is not vicariously liable involve a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate review of the order and finding may materially advance the ultimate termination of the litigation." See Order Granting Motion to Certify at 2, attached as Ex. 1 to Vargas Mot. for Disc. Rev.

Vargas moved for discretionary review in the Court of Appeals. The Commissioner granted review, holding that the trial court's ruling that Inland is not vicariously liable for the breaches of WISHA or other common law duties by the other defendants involves a question of law as to the scope of Inland's WISHA and common law duties and liability as the general contractor. Subsequently, the Court of Appeals issued an opinion stating that "[i]n light of the Supreme Court's decision in [*Afoa II*]...we deem review improvidently granted." *Vargas v. Inland Washington, LLC*, 5 Wn. App. 2d 1014 (2018) (brackets added).

Vargas filed a Motion for Discretionary Review in the Supreme Court, arguing that the Court of Appeals should not have denied Vargas' motion, primarily because in *Stute* the Court held that a general contractor has "per se" control over a jobsite, and the duty to protect subcontractor employees is placed upon the general contractor as a matter of law. Vargas argues that *Afoa II* does not overrule *Stute*'s holding that a general contractor has per se control over the worksite. Vargas' Motion for Discretionary Review was granted March 6, 2019.

III. ISSUES PRESENTED

- 1) Under *Stute v. P.B.M.C.*, 114 Wn.2d 454, 788 P.2d 545 (1990), do general contractors have vicarious liability for a subcontractor's breach of a WISHA safety regulation and for breach of the duty to maintain a safe workplace based on a general contractor's per se control over the workplace?
- 2) If so, did *Afoa II* overrule this general rule of workplace safety?

IV. SUMMARY OF ARGUMENT

In *Stute*, this Court imposed expansive liability on general contractors on a multi-employer worksite to ensure compliance with safety regulations and the provision of a safe place to work for all workers on the worksite. The Court placed the primary responsibility for the safety of all workers on the general contractor because the general's innate supervisory authority constitutes per se control over the worksite, and with that control the general contractor is in the best position to ensure worksite safety. The Court imposed this duty on the general contractor as a matter of law, to further the policy to assure safe working conditions and implement reasonable safeguards to prevent injuries to all workers on the worksite.

This duty necessarily includes placing vicarious liability on a general contractor for a subcontractor's failure to provide a safe workplace and to comply with safety regulations. Nothing in this Court's decision in *Afoa II* alters these general contractor duties.

V. ARGUMENT

A. Overview Of Washington Law Regarding General Contractor Liability On A Multi-Employer Jobsite.

In *Kelley v. Howard S. Wright Construction Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978), the Court held that a general contractor was liable for injuries to a subcontractor's employee. The Court held that the general contractor owed its subcontractor's employee a duty to take reasonable care to provide a safe place of work on three bases: common law, RCW 49.16.030 (now repealed and effectively replaced by RCW 49.17.060), and assumption of duties under Wright's contract with the owner. *See Kelley*, 90 Wn.2d at 330. The general rule at common law is that one who engages an independent contractor is not liable for injuries to the contractor's employees arising from their work. *See id.* An exception applies where the employer of the independent contractor (*e.g.*, a general contractor) retains control over some part of the work, in which case the general has a duty to provide a safe place of work. *See id.* at 330-31.

The test of control is the right to exercise control over the work of the subcontractor. *See Kelley*, 90 Wn.2d at 330-31; *see also Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 121, 52 P.3d 472 (2002). In *Kelley*, the Court held the general contractor's supervisory authority alone was sufficient to

establish control over the work of the subcontractor's employees and to establish the general contractor's duty to ensure that adequate safety precautions were taken. *See Kelley*, 90 Wn.2d at 331. The Court quoted from *Funk v. General Motors Corp.*, 220 N.W.2d 641 (Mich. 1974):

We regard it to be part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen.

Kelley, 90 Wn.2d at 332 (quoting *Funk*, 220 N.W.2d at 646).

In *Stute*, the employee of a subcontractor injured in a fall sued the general contractor. The trial court dismissed the claims against the general contractor on summary judgment, finding that the general contractor did not owe Stute a duty because it had not assumed a duty in its contracts with the owner or subcontractor and it had not retained authority to control the safety practices of the subcontractor. On review, this Court held that RCW 49.17.060¹ creates a twofold duty: (1) a general duty to protect only the employer's own employees; (2) a specific duty to comply with WISHA regulations, which extends to employees of independent contractors and in which case "all employees working on the premises are members of the protected class." *Stute*, 114 Wn.2d at 457.

¹ The version of RCW 49.17.060 applicable when *Stute* was decided provided:

Each employer: (1) Shall furnish to each of his employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his employees. (2) Shall comply with the rules, regulations and orders promulgated under this chapter.

The statute was amended in 2010 to add gender-neutral language, but otherwise retains the same substantive provisions.

The general contractor argued that even if *Stute* was within the class of persons protected under the statute, before an employer has a duty to take specific safety measures under WISHA, it must control the work of the subcontractor. *Id.* at 460. The Court recognized the policy reasons for placing the duty on a general contractor:

[T]he primary employer, the general contractor, has, as a matter of policy, the duty to comply with or ensure compliance with WISHA and its regulations. A general contractor's supervisory authority places the general in the best position to ensure compliance with safety regulations. For this reason, the prime responsibility for safety of all workers should rest on the general contractor.

Id. at 463 (brackets added). The Court quoted with approval statements of policy supporting placing the duty on the general contractor. "The policy behind the law of torts is more than compensation of victims. It seeks also to encourage implementation of reasonable safeguards against risks of injury." *Id.* at 461 (quoting *Funk*, 220 N.W.2d at 641). "General contractors normally have the responsibility and the means to assure that other contractors fulfill their obligations with respect to employee safety where those obligations affect the construction worksite." *Id.* at 463 (quoting *Marshall v. Knutson Constr. Co.*, 566 F.2d 596, 599 (8th Cir. 1977)).

In *Stute*, the Court set forth a general contractor's duty:

[T]o further the purposes of WISHA to assure safe and healthful working conditions for every person working in Washington, RCW 49.17.010, we hold 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...

A general contractor's supervisory authority is per se control over the workplace, and the duty is placed upon the general contractor as a matter of law. It is the general contractor's responsibility to furnish

safety equipment or to contractually require subcontractors to furnish adequate safety equipment relevant to their responsibilities.

114 Wn.2d at 464 (brackets added). The Court reversed and remanded for a determination of damages. *See id.* at 465.

In *Kamla*, the Court reiterated its holding in *Stute*: “In Washington, all general contractors have a nondelegable specific duty to ensure compliance with all WISHA regulations.” *Kamla*, 147 Wn.2d at 122 (citing *Stute*, 114 Wn.2d at 464). The Court in *Kamla* noted the public policy considerations identified in *Stute*:

We recognized a general contractor has authority to influence work conditions at a construction site. . . . Because a general contractor is in the best position, financially and structurally, to ensure WISHA compliance or provide safety equipment to workers, we place “the prime responsibility for safety of all workers... on the general contractor.”

Kamla, 147 Wn.2d at 124 (citing *Stute*, 114 Wn.2d at 461, 463.)

In *Kamla* and in *Afoa II*, the Court considered the liability of a jobsite owner, rather than a general contractor, for injuries to an independent contractor’s employee. In *Kamla*, the Court noted that in *Stute* it had imposed “expansive liability” on general contractors as a matter of policy, because a general contractor’s supervisory authority is per se control over the workplace, while jobsite owners are not per se liable under RCW 49.17.060, and do not necessarily play a role sufficiently analogous to general contractors to impose the same nondelegable duty to ensure WISHA compliance. *See Kamla*, 147 Wn.2d at 122-24.

B. Based On Their Per Se Control Over The Entire Jobsite, General Contractors Have A Duty To Ensure Compliance With WISHA

Regulations And To Maintain A Safe Workplace For The Benefit Of All Workers On The Jobsite.

1. Pursuant to *Stute*, General Contractors Are Liable For Subcontractors' Safety Violations On A Multi-Employer Jobsite.

[A] general contractor owe[s] a duty to all employees at a worksite to comply with, or ensure compliance with, safety regulations under WISHA... based upon the general contractor's "innate supervisory authority" that constitutes "per se control over the workplace"... and upon the wording of RCW 49.17.060.

Gilbert H. Moen v. Island Steel Erectors, Inc., 128 Wn.2d 745, 756, 912 P.2d 472 (1996) (brackets added) (citing *Stute*, 114 Wn.2d at 464, 457-60).

Basing the general contractor's duty on its "per se control over the workplace" necessarily imposes upon the general contractor liability for the failure to comply with safety regulations by subcontractors under the general's supervision. And because the general's supervisory authority is "per se control over the workplace," the scope of the general contractor's duty extends to every failure to comply with safety regulations by other entities under the supervision of the general that occurs on the jobsite.

The court of appeals, Division III, examined the liability of general contractors related to worksite injuries in light of *Stute* and its progeny, and concluded that a general contractor is vicariously liable for WISHA violations that occur on the jobsite. See *Millican v. N.A. Degerstrom, Inc.*, 177 Wn. App. 881, 313 P.3d 1215 (2013), *review denied*, 179 Wn.2d 1026 (2014). In *Millican* the general contractor entered into a subcontract with the employer of the decedent whose estate brought a wrongful death claim against the general contractor. The subcontract required the subcontractor

to indemnify the general contractor from any liability it suffered as a result of the subcontractor's negligence, and further provided that the subcontractor was solely responsible for the safety of its employees. *See Millican*, 177 Wn. App. at 886. The court noted that at common law, there are two categories of exceptions to the general rule that a principal is not liable for injuries caused by an independent contractor. Restatement (Second) §§ 410-415 concern direct liability, while §§ 416-429 concern vicarious liability. The court quoted from the Restatement regarding the exceptions based on vicarious liability:

The rules... do not rest upon any personal negligence of the employer. They are rules of vicarious liability, making the employer liable for the negligence of the independent contractor, irrespective of whether the employer has himself been at fault. They arise in situations in which, for reasons of policy, the employer is not permitted to shift the responsibility for the proper conduct of the work to the contractor. The liability imposed is closely analogous to that of a master for the negligence of his servant.

Millican, 177 Wn. App. at 890 (quoting Restatement (Second) Ch. 15, Topic 2, Introductory Note).

The court referenced Restatement (Second) § 424 (1965), Precautions Required by Statute or Regulation, as one of the circumstances that give rise to a general contractor's vicarious liability for a subcontractor's tortious conduct. *See Millican*, 177 Wn. App. at 890-91.² Restatement § 424 provides:

One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the

² The court noted that while § 424 has not been formally adopted in Washington, it has "been frequently discussed and relied upon." 177 Wn. App. at 891 (citation omitted).

duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.

The Court reviewed Washington law regarding a general contractor's duty of care to subcontractors' employees under *Kelley* and *Stute*. See *Millican*, 177 Wn. App. at 892-93. The Court concluded:

In Washington, then, a general contractor not only has direct liability for a breach of its common law duties arising from retained control, but when it comes to violations of WISHA, also has vicarious liability for breach of a duty that is nondelegable. A violation of WISHA by a subcontractor's employee is therefore not only chargeable to the subcontractor, it is also chargeable to a general contractor – “the primary employer,” whose supervisory authority “places the general in the best position to ensure compliance with safety regulations.”

Id., 177 Wn. App. at 893 (citing *Stute*, 114 Wn2d at 463).

The court of appeals also rejected the general contractor's argument that, based upon *Stute*, it had complied with its duty to its subcontractor's employees by including in its subcontract a provision requiring its subcontractor to be solely responsible to select safety methods and means. See *id.* at 895-97.³ The court of appeals noted *Stute*'s clear holding that the general contractor's primary nondelegable duty is to “ensure compliance” with WISHA, and stated that if the general contractor includes a contractual requirement that a subcontractor comply with WISHA, the general contractor will be vicariously liable for the subcontractor's tortious failure to comply with those safety regulations. See *id.* at 896-97.

2. Based on a general contractor's per se control over the jobsite, a general contractor should be vicariously liable for

³ The general contractor relied upon the statement in *Stute* that “[i]t is the general contractor's responsibility to furnish safety equipment or to contractually require subcontractors to furnish adequate safety equipment relevant to their responsibilities.” 114 Wn.2d at 464 (brackets and emphasis added).

injuries to employees of a subcontractor resulting from the failure to maintain a safe workplace.

A general contractor should also be vicariously liable for injuries resulting from the failure to maintain a safe workplace on the jobsite. This follows from the *per se* control of a general contractor announced in *Stute*, and the nature of the duty to maintain a safe workplace. In *Kelley*, this Court held that when an entity retains the right to control workplace safety, it has a common law duty to maintain a safe workplace. This duty is triggered when an entity "retains control over some part of the work." *Kelley*, 90 Wn.2d at 330. In such cases, the entity "has a duty, within the scope of that control, to provide a safe place of work." *Id.*

As discussed in § B.1, this Court clarified in *Stute* that a general contractor has *per se* control over the *entire jobsite*. This control over the jobsite should be sufficient to establish control over the subcontractors functioning within that space and warrant vicarious liability for their negligence. This Court made clear in *Afoa II* that vicarious liability is warranted when an entity has control over another:

There is a long-standing common law duty to provide a safe workplace in Washington, and the Port is directly liable in this case as a result; while *the Port could be vicariously liable* for the airlines' breach of their concurrent nondelegable duties *if a jury found that the Port retained control over the airlines*, the jury was not presented with the opportunity to do so.

Afoa II, 191 Wn.2d at 124 (emphasis added). Here, because control of a general contractor over the jobsite is established as a matter of law, there is

no need for a finding of control. Vicarious liability of a general contractor for the failure to maintain a safe workplace should attach as a matter of law.

3. As recognized in *Stute*, general contractors have per se control over the entire jobsite, and limiting their duty to “common areas” would conflict with *Stute* and jeopardize worksite safety.

Inland argues that the per se control and corresponding liability of a general contractor should be limited to “common work areas.” Inland Supp. Br. at 7. It offers the following formulation of what it terms “non-common work areas”: 1) subcontractor is in charge of the particular task; 2) no other subcontractors are engaged in “different” work in the “same area”; and 3) the general contractor is not onsite. Inland Supp. Br. at 7. Inland urges the Court to hold that when these factors are present, general contractors have no duty to ensure compliance with WISHA. The rule it proposes, however, would ignore the central premise of *Stute* -- that protecting worksite safety requires effective supervision and centralized control.

It is true that *Kelley* and *Stute* cited with approval the Michigan Supreme Court’s decision in *Funk v. General Motors Corp.*, *supra*, which adopted that state’s rule regarding general contractor liability, and included within its formulation the “common work area” limitation. *See Kelley*, 90 Wn.2d at 332; *Stute*, 114 Wn.2d at 461-62. However, while this Court referenced the “common work area” rule in *Kelley*, it neither examined the nature of this limitation nor squarely addressed whether it should be incorporated into Washington jurisprudence. To the extent *Kelley* suggests any approval for this restrictive rule, *Stute* appears to clarify that as to

general contractors, the duty to ensure compliance with WISHA is broad and applies for the benefit of all workers on the entire jobsite.

In *Stute*, the Court recognized that the general contractor's supervisory authority is "per se control over the *workplace*." *Stute*, 114 Wn.2d at 550 (emphasis added). It held that the public policy of ensuring worksite safety supports the rule that "prime responsibility for safety of *all workers* should rest on the general contractor." *Stute*, 114 Wn.2d at 463 (emphasis added). Significantly, the Court in *Stute* did not examine whether other subcontractors were present or performing different work in the area where the incident occurred. Because general contractors have "innate" supervisory authority, the Court held they are "in the best position to ensure compliance with safety regulations." *Id.*

Were it adopted, the common area limitation would encourage general contractors to attempt to escape liability by being absent and uninvolved with work on the jobsite. This would threaten to decentralize control and jeopardize the worksite safety considerations animating *Stute*. The Court should reject this restrictive rule, and reaffirm *Stute*'s rule that a general contractor's per se control protects all workers on the entire jobsite.⁴

⁴ The facts alleged here illustrate the complications that may arise under the common area limitation. The concrete pour that resulted in Vargas' injury was effectuated by the combined work of three subcontractors: Hilltop, which was hired to install the concrete, Ralph's, which was hired to pump the concrete into forms, and Miles, which provided the raw materials and supply truck. Vargas' injury occurred when the concrete hose violently and unexpectedly whipped, and allegedly resulted from a number of factors, including failure to require adequate clearance, faulty equipment, oversized aggregate rock and air trapped in the hose. Inland contends that it was absent at the time the accident occurred, and while employees of Ralph's and Miles were participating in various aspects of the task, only Hilltop was present at the immediate location of the pour. It submits these facts should relieve it from the responsibility to oversee safety. Yet this would be wholly at odds with

4. Holding general contractors vicariously liable for violations of WISHA should not be unduly burdensome because injured victims must still prove negligence and general contractors may contractually allocate the risk of loss.

Inland's overwrought claim that recognizing a general contractor's vicarious liability for a subcontractor's violation of a WISHA safety regulation on a multi-employer jobsite threatens "the very future of our construction industry" and would be "like a tsunami, wiping out construction across Washington," is unwarranted. *See* Inland's Supp. Br. of Resp. at 6, 17. Recognizing vicarious liability in this context does not create strict liability; an injured worker is required to prove the subcontractor's violation of the safety regulation and the subcontractor's negligence.

Further, a general contractor can protect itself from vicarious liability for subcontractor fault. The Legislature has authorized the use of indemnification provisions in construction contracts. *See* RCW 4.24.115(1)(b). An indemnification provision that complies with the statute allows a general contractor to require indemnification for damages and defense costs in workplace injury claims from a culpable subcontractor. *See Millican*, 177 Wn. App. at 893-94. Such an indemnity provision "allows contractors to allocate responsibility to purchase insurance according to their negotiated allocation of risk and potential liabilities." *Gilbert H. Moen Co.*, 128 Wn.2d at 753. In *Gilbert H. Moen*, the Court noted that the construction industry is highly structured by contractual relationships, the

this Court's recognition in *Stute* that the general contractor must bear "primary responsibility" for worksite safety "to assure safe and healthful working conditions for every person working in Washington." 114 Wn.2d at 464.

Court has historically deferred to such contractual relationships, and the allocation of responsibility for workplace injuries is consistent with this policy and has been approved by the Legislature. *Id.*, 128 Wn.2d at 764. In *Millican*, the general contractor stated such indemnity agreements are “typical” and “industry standard.” *Id.* at 894.

C. *Afoa II* Does Not Overrule *Stute*’s Holding That, As A Matter Of Law, A General Contractor Has Per Se Control Over The Entire Jobsite, And Its Duties To Prevent WISHA Violations and To Maintain A Safe Workplace Extend To All Workers On The Jobsite.

The Court of Appeals granted Vargas’ Motion for Discretionary Review to determine a question of law as to whether Inland, as a general contractor, is vicariously liable for violations of WISHA safety regulations and common law duties by subcontractors on the jobsite. *See* Ruling Granting Discretionary Review in Part at 9-10, attached as Ex. A to Inland Resp. Br. Following this Court’s decision in *Afoa II*, the Court of Appeals remanded *Vargas* to the superior court “as if review had never been granted by this court in the first instance,” deeming review improvidently granted “[i]n light of the Supreme Court’s decision in [*Afoa II*].” *Vargas*, 5 Wn. App. 2d 1014 (2018) (brackets added). This Court’s decision in *Afoa II* is not grounds for dismissing discretionary review of the issue in *Vargas* of whether a general contractor is vicariously liable for a subcontractor’s violation of a safety regulation on a multi-employer jobsite.

Initially, in *Afoa II*, the Court discussed the general contractor’s vicarious liability for a subcontractor’s violation of a safety regulation in

Millican, and found that a general contractor that attempts to delegate its jobsite safety duty to a subcontractor will be vicariously liable for that subcontractor's negligence. *See Afoa II*, 191 Wn.2d at 123-24. The Court distinguished *Millican* because in that case the general contractor delegated its responsibility to ensure WISHA compliance in its subcontract with the deceased worker's employer, whereas in *Afoa II* "[n]o delegation occurred here." *Afoa II*, 191 Wn.2d at 123. The Court held that "[a]n entity that delegates its nondelegable duty will be vicariously liable for the negligence of the entity subject to its delegation." *Id.* at 124.⁵ Here, Inland did delegate its duty to its subcontractor, Hilltop, and in accordance with *Afoa II*, Inland will be vicariously liable for the negligence of Hilltop. The Court of Appeals should not have reversed the Order Granting Discretionary Review on the question of vicarious liability in light of the decision in *Afoa II*, because the latter decision resolves the issue of vicarious liability and should require a holding on discretionary review in *Vargas* that the trial court erred in dismissing the general contractor Inland on summary judgment.

⁵ This quote from *Afoa II* is followed immediately by the statement "but an entity's nondelegable duty cannot substitute for a factual determination of vicarious liability when RCW 4.22.070(1) clearly requires apportionment to 'every entity which caused the claimant's damages.'" *Afoa II*, 191 Wn.2d at 124. A "factual determination of vicarious liability" is unnecessary with respect to a general contractor's vicarious liability for a subcontractor's negligence, because the general contractor's innate supervisory authority is "per se control over the workplace," and the general contractor has the duty to ensure its subcontractors' compliance with safety regulations "as a matter of law." *Stute*, 114 Wn.2d at 464. RCW 4.22.070(1)(a) excepts "several only" liability and permits joint liability "when a person was acting as an agent or servant of the party." The Legislature's inclusion of the term "acting as" in (1)(a) allows an interpretation of the exception to apply to an "ostensible agent" or a party "performing a task on the defendant's behalf." *See Afoa II*, 191 Wn.2d at 126 n.12. Given the innate supervisory authority of a general contractor on a multi-employer jobsite, a subcontractor on the jobsite is "acting as an agent or servant" of the general contractor with respect to ensuring compliance with jobsite safety regulations.

Secondly, because it concerned the liability of a jobsite owner rather than a general contractor, most of the other holdings in *Afoa II* are not applicable here. *Vargas* concerns the issue of whether a general contractor is vicariously liable for the failure to enforce safety regulations by subcontractors and to maintain a safe workplace, where the general contractor and subcontractors are all parties to the lawsuit. *Afoa II* concerned issues of whether a jobsite owner with a nondelegable duty could allocate fault under RCW 4.22.070 to nonparty entities, and the jobsite owner's assertion of an empty chair defense. *Afoa II*, 191 Wn.2d at 118-19.

In *Afoa II*, the Court held that the jobsite owner could have been vicariously liable for the nonparty entities' negligence if the jury had made the necessary finding of control. *Id.* at 124-25. "The jury must find that the defendant controlled another entity before the defendant is vicariously liable for that other entity's negligence. It did not here." *Id.* at 127. That finding of control was necessary because the defendant in *Afoa II* was a jobsite owner, rather than a general contractor, and jobsite owners are not per se liable for jobsite safety regulation violations because their role is not sufficiently analogous to general contractors' innate supervisory control over the jobsite. *See Kamla*, 147 Wn.2d at 123-24. In contrast, there is no need for a factual finding regarding a general contractor's control over subcontractors regarding jobsite safety regulations, because this Court has determined that general contractors have per se control over the jobsite, and a duty to enforce jobsite safety regulations and provide a safe place to work

for subcontractors' employees as a matter of law. *See Stute*, 114 Wn.2d at 463-64. A general contractor's per se control over the jobsite necessarily includes control over the subcontractors on the jobsite.

While *Afoa* concerned the liability of a jobsite owner, in *Afoa II* the Court made statements regarding the liability of a general contractor. Regarding an employer's duty to employees on a job site, the Court stated "[a] jobsite owner or general contractor will have this duty only if it maintains a sufficient degree of control over the work." *Afoa II*, 191 Wn.2d at 121. "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.* (quoting *Kelley*, 90 Wn.2d at 330).

Afoa II concerned the liability of a jobsite owner, and its pronouncements regarding the liability of a general contractor are unnecessary for the determination of the issues in *Afoa II*. As such, the reference to general contractors in *Afoa II* appears to be dicta.⁶ However, left unclarified, these statements call into question the continuing viability of the earlier holdings in *Stute*, where the Court clearly stated that a general contractor's innate supervisory authority is *per se control* over the workplace, and the general contractor has a duty *as a matter of law* to comply with or ensure compliance with WISHA and its regulations. *See Stute*, 114 Wn.2d at 463-64. In *Afoa v. Port of Seattle*, 176 Wn.2d 460, 296

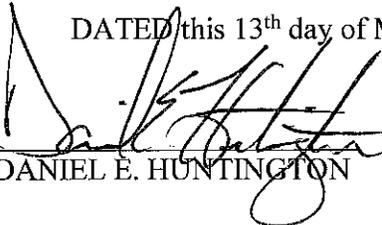
⁶ Dictum is "an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principal or application of law... not necessarily involved in the case or essential to its determination." *State ex rel. Lemon v. Langlie*, 45 Wn.2d 82, 89, 273 P.2d 464 (1954).

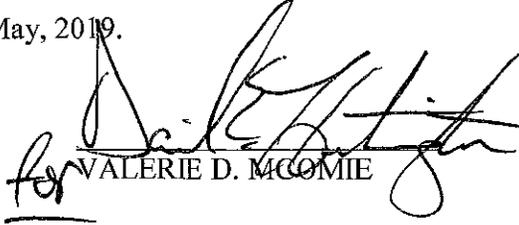
P.3d 800 (2013) (*Afoa I*), the Court stated that in *Kamla* it held that general contractors *always* have a duty to comply with WISHA regulations, and that the duty to prevent WISHA violations runs not only to the general contractor's employees, but to all workers on the jobsite. *See Afoa I*, 176 Wn.2d at 472-73 (citing *Kamla*, 147 Wn.2d at 125). Given the Court's clear statement in *Stute* that a general contractor has "per se control over the workplace," the language in the Court's opinion in *Afoa II* suggesting that a general contractor, just like a jobsite owner, only has a duty to provide a safe place of work to all employees on a job site *if* it has the right to exercise control over the jobsite is incorrect. The Court should take this opportunity to clarify that because a general contractor has per se control over the jobsite, there is no need for a determination of whether a general contractor "has the right to exercise control," as that determination has already been made as a matter of law.

VI. CONCLUSION

The Court should adopt the arguments advanced in this brief in the course of resolving the issues on review.

DATED this 13th day of May, 2019.


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On behalf of WSAJ Foundation

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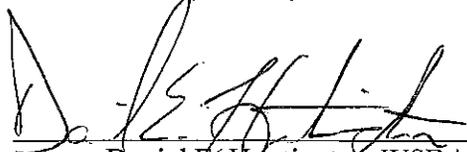
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