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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; ROSARIO CRISOSTOMO FLORES, an individual; and PATRICIA CRISOSTOMO FLORES, a minor child by and through LUCINA FLORES, her natural mother and default guardian,

Petitioners,

v.

INLAND WASHINGTON, LLC, a Washington limited liability company,

Respondent,

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;

Defendants

RESPONSE OF APPELLANTS VARGAS TO BRIEF OF AMICUS CURIAE DEPARTMENT OF LABOR AND INDUSTRIES

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TABLE OF CONTENTS

I. ARGUMENT IN REPLY TO AMICUS 1

1. L&I is justifiably concerned that the dicta in this Court's *Afoa II* decision threatens workplace safety and its ability to enforce WISHA. 1

2. Standards for issuing WISHA citations are restricted by statutes that do not apply to tort liability; the notice requirement of RCW 49.17.180 (6) does not apply in tort. 3

II. CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Afoa v. Port of Seattle (II), 191 Wn.2d 110, 421 P.3d 903 (2018) — *passim*

Express Const. Co. v. Dep't of Labor & Indus., 151 Wn. App. 589, 215 P.3d 951 (Div. 1, 2009) — 5

Kelley v. Howard S. Wright Const. Co., 90 Wn.2d 323, 582 P.2d 500 (1978) — 1, 3

Millican v. N.A. Degerstrom, Inc., 177 Wn. App. 881, 313 P.3d 1215 (Div. 3, 2013) *review denied*, 179 Wn.2d 1026, 320 P.3d 718 (2014) — 1

Potelco, Inc. v. Dep't of Labor & Indus., 191 Wn. App. 9, 34, 361 P.3d 767 (Div. 2, 2015), *review denied*, 185 Wn.2d 1023, 369 P.3d 500 (2016) — 3, 4, 5

Stute v. P.B.M.C. Inc., 114 Wn.2d 454, 788 P.2d 545 (1990) — *passim*

SuperValu Inc. v. Dep't of Labor and Indus., 158 Wn.2d 422, 144 P.3d 1160 (2006) — 4

Unpublished Cases and Board of Industrial Appeals Decisions

In re Exxel Pacific, BIIA Dec., 96 W182 (1998) — 4

Lanzce G., Douglass, Inc. v. Dep't of Labor and Indus. 6 Wn. App. 2d 1018 (Div. 3, 2018 Unpublished). — 4

Statutes

RCW 4.16.080 — 6

RCW 49.17.060 — 5

RCW 49.17.120 — 3, 5, 6

RCW 49.17.180 — 3, 4, 5

RCW 49.17.190 — 5

Washington Industrial Safety and Health Act, Chapter 49.17 RCW ("WISHA") *passim*

Other

L&I Washington Regional Directive 27.00 4

I. ARGUMENT IN REPLY TO AMICUS

In order to promote workplace safety and compliance with WISHA regulations, Washington requires that general contractors keep their jobsites under control to make sure the workplace is safe and in compliance with WISHA regulations. In 1978, this Court in Kelley found safety to be "the business of a general contractor." Kelley v. Howard S. Wright Const. Co., 90 Wn.2d 323, 332, 582 P.2d 500 (1978). In 1990, this Court in Stute found that general contractors had per se control over the work on their jobsites and owed nondelegable duties to all workers on their jobsites to ensure compliance with WISHA regulations. Stute v. P.B.M.C. Inc., 114 Wn.2d 454, 463-464, 788 P.2d 545 (1990). In 2013 in Millican, Division III of the Court of Appeals examined Stute and found that general contractors had "direct liability" for breaches of common law duties under the retained control doctrine and "vicarious liability" for breaches of nondelegable duties under WISHA. This Court did not see any need to review this decision. Millican v. N.A. Degerstrom, Inc., 177 Wn. App. 881, 893, 313 P.3d 1215, 1221 (Div. 3, 2013) *review denied*, 179 Wn. 2d 1026, 320 P.3d 718 (2014).

1. L&I is justifiably concerned that the dicta in this Court's *Afoa II* decision threatens workplace safety and its ability to enforce WISHA.

In 2018, this Court issued its opinion in Afoa II, a landowner case at Sea-Tac airport. Afoa v. Port of Seattle (II), 191 Wn.2d 110, 421 P.3d 903 (2018). Although this did not involve a general contractor on a

construction site, and the majority did not even cite Stute, the majority indicated that general contractors, as well as jobsite owners, must be shown to maintain "a sufficient degree of control over the work" to owe safe workplace duties. Id. at 121. If so, this would eliminate the *per se* control of general contractors under Stute and provide perverse incentives for general contractors to avoid liability by purposefully avoiding safety on their jobsites, resulting in more dangerous jobsites.

L&I has an interest in keeping jobsites safe and an interest in maintaining its ability to enforce WISHA. Respondents contend that mere dicta should be of no concern. However, L&I reports that this "Court's statement in Afoa II has already begun to cause safety enforcement concerns." Brief of Amicus Curiae Department of Labor and Industries in support of Appellant's Petition for Review, Page 8.

In addition to the dangerous dicta in Afoa II casting doubt on a general contractor's *per se* control, its holding that non-delegable duties are subject to apportionment under RCW 4.22.070 calls into question whether and to what extent the concept of a non-delegable duty has any legal effect. Thus the holding and the dicta of Afoa II provide much for L&I to be concerned about. The term "concurrent non-delegable duties" as coined in Afoa II, in and of itself, causes irreconcilable confusion with the singular term "nondelegable duty" as that term has been used for 30 years or more, since Stute, to ensure jobsite safety.

L&I is justifiably concerned that the dangerous dicta in Afoa II – and any ruling that would apply this in general contractor cases – would threaten L&I's ability to enforce WISHA. Appellants share this concern and agree that overturning the *per se* control of general contractors under Stute would undermine workplace safety. Overturning Stute would impair the ability of L&I to prevent injury by citing general contractors for WISHA violations in addition to preventing injured workers from recovering full compensation for injuries caused by WISHA violations on construction sites.

2. Standards for issuing WISHA citations are restricted by statutes that do not apply to tort liability; the notice requirement of RCW 49.17.180 (6) does not apply in tort.

While a general contractor's *per se* control is a common element to both WISHA citation standards and tort standards, there are also very important differences between the two standards. Standards for issuing citations are narrower and more restrictive than standards for tort liability. Specifically, L&I's authority to issue citations for WISHA violations is governed by statutory provisions that do not apply to tort liability, including RCW 49.17.120 and RCW 49.17.180. Unlike a personal injury plaintiff in a tort suit under Kelley and Stute, L&I is constrained by the citation statutes and the case law applying them, including Potelco, Inc. v. Dep't of Labor & Indus., 191 Wn. App. 9, 34, 361 P.3d 767 (Div. 2, 2015), *review denied*, 185 Wn.2d 1023, 369 P.3d 500 (2016).

L&I responds to the Amicus Brief of the Building Industry Association of Washington (BIAW) in which it attacks L&I's enforcement policies as "relying on [a] strained interpretation" of the law, "leading to increasing fines for general contractors." BIAW Amicus Brief, page 15. The BIAW devotes much of its briefing to L&I's development and implementation of enforcement policies including Washington Regional Directive 27.00 and emails from L&I's compliance manager. BIAW Amicus Brief, pages 16-17. In its argument, the BIAW relied on authority pertaining to citations as well as unpublished authority and Board of Industrial Insurance Appeals decisions pertaining to citations. BIAW Amicus Brief, page 12 (*citing* SuperValu Inc. v. Dep't of Labor and Indus., 158 Wn.2d 422, 144 P.3d 1160 (2006) *and quoting* In re Exxel Pacific, BIIA Dec., 96 W182 (1998)); Id., page 15 (*citing* Lanzce G., Douglass, Inc. v. Dep't of Labor and Indus. 6 Wn. App. 2d 1018 (Div. 3, 2018 Unpublished).

L&I also responded to the BIAW's contention that L&I seeks to impose strict liability on general contractors for WISHA violations. Again, the BIAW couched its argument in the context of WISHA citations rather than tort liability, and cited the authority discussed above in the WISHA citation context. L&I responded in kind and in the same context of WISHA citations, arguing that the notice requirement under RCW 49.17.180 as applied in Potelco demonstrated that general contractors would not be held strictly liable for WISHA citations of subcontractors:

> **In a WISHA enforcement action**, the general contractor's actual or constructive knowledge of the violation must be proven. *See* Express Const., 151 Wn. App. at 599 (general contractor could have known about the violation in the exercise of reasonable diligence). Actual or constructive knowledge is an element of a violation of WISHA: to violate WISHA a contractor must know or could have known about the violation with the exercise of reasonable diligence. RCW 49.17.180; Potelco Inc. v. Dep't of Labor & Indus., 191 Wn. App. 9, 34, 361 P.3d 767 (2015).

L&I Amicus Brief, pages 14-15 (emphasis added), citing Express Const. Co. v. Dep't of Labor & Indus., 151 Wn. App. 589, 594, 215 P.3d 951 (Div. 1, 2009).

The notice requirement is imposed under a citation statute that does not govern tort liability, and which provides for employers to be cited for serious violations "unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." RCW 49.17.180 (6). This also differs from the "willfully and knowingly" requirement for employers to be assessed with criminal penalties under RCW 49.17.190. There is no such notice requirement for vicarious liability in third party tort actions. Care must be taken to not confuse statutory requirements for WISHA citations with duties under tort to prevent injury as a result of a WISHA violation.

The statutory duty of a general contractor to enforce WISHA regulations as set forth in Stute and its progeny is based on the specific duty clause of RCW 49.17.060, and not on the statutes governing citations and enforcement. For example, RCW 49.17.120(4) provides for a statute of limitations of "after the expiration of six months following a

compliance inspection, investigation, or survey revealing any such violation" for issuing a citation. RCW 49.17.120(4). This does not apply in tort to personal injury claims, for which the statute of limitations is three years under RCW 4.16.080 (2).

II. CONCLUSION

L&I's interest in this matter is in the effect of the Court's decision on its ability to enforce WISHA, including its ability to issue citations to general contractors for WISHA violations on their jobsites. L&I is rightly concerned that Afoa II, if extended to this case, would overrule Stute by eliminating the *per se* control of general contractors over their jobsites, compromising workplace safety in Washington and impairing L&I's ability to enforce WISHA. Care must be also taken to not sow further confusion by applying statutory requirements for WISHA citations, including a notice requirement, to the legal standards for tort liability where no such requirements exist.

Respectfully submitted this 11th day of June, 2019.

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