

FILED
SUPREME COURT
STATE OF WASHINGTON
4/26/2019 4:03 PM
BY SUSAN L. CARLSON
CLERK

No. 96527-7

Court of Appeals No. 76717-8-I
(Linked with No. 76893-0-I)

IN THE SUPREME COURT FOR
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.

SUPPLEMENTAL BRIEF OF RESPONDENT

Preg O'Donnell & Gillett, P.L.L.C.
John K. Butler
WSBA 28528
David E. Chawes
WSBA 36322
901 Fifth Avenue, Suite 3400
Seattle, WA 98164
(206) 287-1775

Masters Law Group, P.L.L.C.
Kenneth W. Masters
WSBA 22278
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033

TABLE OF CONTENTS

INTRODUCTION	1
SUPPLEMENTAL ARGUMENT.....	2
A. By accepting review here, this Court risks undermining RAP 18.8(b) and the necessary and proper barriers against improvident discretionary review.	2
B. The Court of Appeals did not abuse its discretion by dismissing discretionary review, where <i>Afoa II</i> has nothing to do with general contractors.	5
C. The plaintiffs and their <i>amicus</i> 's attempt to impose strict liability on general contractors is contrary to Washington law and threatens to disrupt Washington's construction industry, its insurance industry, and its Workers' Comp compromise.....	6
1. <i>Kelley</i> placed a specific and direct duty on general contractors to ensure worker safety <i>in common work areas</i> , a common-sense rule; but extending <i>Kelley</i> outside of common areas is dangerous.	7
2. <i>Stute</i> imposes a specific and direct duty, not vicarious or strict liability.	10
3. Practical policy considerations counsel against adopting Vargas's dangerous approach.	16
D. Inland cannot be vicariously liable for others' negligence, nor directly liable.	19
CONCLUSION.....	20

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Adkins v. Aluminum Co. of Am.</i> , 110 Wn.2d 128, 750 P.2d 1257, 756 P.2d 142 (1988).....	10
<i>Afoa v. Port of Seattle (Afoa II)</i> , 191 Wn.2d 110, 421 P.3d 903 (2018).....	<i>passim</i>
<i>Beckman v. Dep't of Soc. & Hlth. Servs.</i> , 102 Wn. App. 687, 11 P.3d 313 (2000)	3
<i>Bozung v. Condo. Builders, Inc.</i> , 42 Wn. App. 442, 711 P.2d 1090 (1985)	20
<i>Doss v. ITT Rayonier Inc.</i> , 60 Wn. App. 125, 803 P.2d 4 (1991)	5
<i>Firestone Tire & Rubber Co. v. Risjord</i> , 449 U.S. 368 (1981)	2
<i>Funk v. General Motors Corp.</i> , 220 N.W.2d 641 (Mich. 1974).....	7
<i>Hewson Constr., Inc. v. Reintree Corp.</i> , 101 Wn.2d 819, 685 P.2d 1062 (1984).....	19
<i>Kamla v. Space Needle Corp.</i> , 147 Wn.2d 114, 52 P.3d 472 (2002).....	5
<i>Kelley v. Howard S. Wright Const. Co.</i> , 90 Wn.2d 323, 582 P.2d 500 (1978).....	<i>passim</i>
<i>Matsumura v. Ellert</i> , 74 Wn.2d 362, 444 P.2d 806 (1968).....	15
<i>Millican v. N.A. Degerstrom, Inc.</i> , 177 Wn. App. 881, 313 P.3d 1215 (2013)	5, 13, 14, 15, 17, 18

<i>Minehart v. Morning Star Boys Ranch, Inc.</i> , 156 Wn. App. 457, 232 P.3d 591 (2010)	2
<i>Monk v. V.I. Water & Power Auth.</i> , 53 F.3d 1381 (3d Cir. 1995)	9
<i>Moss v. Vadman</i> , 77 Wn.2d 396, 463 P.2d 159 (1969).....	19
<i>Reichelt v. Raymark Indus., Inc.</i> , 52 Wn. App. 763, 764 P.2d 653 (1988)	3
<i>Schaefco, Inc. v. Columbia River Gorge Comm’n</i> , 121 Wn.2d 366, 849 P.2d 1225 (1993).....	3
<i>Shumway v. Payne</i> , 136 Wn.2d 383, 964 P.2d 349 (1998).....	3
<i>Stute v. P.B.M.C., Inc.</i> , 114 Wn.2d 454, 788 P.2d 545 (1990).....	<i>passim</i>
<i>Tauscher v. Puget Sound Power & Light Co.</i> , 96 Wn.2d 274, 635 P.2d 426 (1981).....	7, 9
<i>Vargas v. Inland Wash., LLC</i> , No. 76717-8-I, 2018 Wash. App. LEXIS 2123 (Sept. 17, 2018).....	5
<i>Weinert v. Bronco Nat’l Co.</i> , 58 Wn. App. 692, 795 P.2d 1167 (1990)	5, 13
<i>Wlasiuk v. Whirlpool Corp.</i> , 76 Wn. App. 250, 884 P.2d 13 (1994)	2
Statutes	
RCW 4.22.015	11
RCW 4.22.070	9, 13, 18
RCW 4.22.070(1).....	11, 12, 13
RCW 4.22.070(1)(a).....	5, 19

RCW 4.24.115	17
RCW 49.17.060	10, 11
RCW Ch. 4.22.....	11
RCW Ch. 49.17.....	11
RCW Ch. 64.24 (Washington’s Condominium Act).....	17
RCW Title 51	11
Other Authorities	
9 Moore, FED. PRAC. § 110.07 (2nd ed. 1990)	2
THE HANDBOOK ON ADDITIONAL INSUREDS, Ch. 15G (<i>Construction Wrap</i>) (ABA 2018).....	18
RAP 18.8(b).....	1, 2, 3, 4
REST. (SECOND) OF TORTS § 414 (1965).....	5
Stephen J. Dwyer, “ <i>The Confusing Standards for Discretionary Review in Washington and a Proposed Framework for Clarity</i> ,” 38 SEATTLE U. L. REV. 91 (2014).....	2
WAC 296-155	19
WAC 296-800	19
WAC 296-806	19
WAC 296-874	19
WAC 296-65	19
WAC 296-46B.....	19

INTRODUCTION

An experienced trial judge refused to turn general contractors into insurance providers for all construction workers. His decision dismissing Respondent Inland Washington, LLC (Inland) was fully in accord with Washington law. In 2018, a Court of Appeals Commissioner nonetheless improvidently granted discretionary review of a 2015 no-vicarious-liability ruling. When a panel of judges finally focused on Inland's arguments regarding improvident review, it dismissed. The trial and appellate judges were right.

Yet this Court has now improvidently granted grossly untimely discretionary review, despite the complete absence of RAP 18.8(b) extraordinary circumstances or any gross miscarriage of justice – or even an attempt to argue those factors. This grant threatens to open an enormous breach in the armature protecting our trial and appellate courts from rampant piecemeal appeals. This would be the first time this Court has directly addressed discretionary review. It is unwise – to put it mildly – to do so here. This Court should dismiss.

Afoa II has nothing to do with this case. If it did, it would open a quagmire of major policy questions that are ill considered for the first time in this Court. The potential disruption to our construction and insurance industries, and to Workers' Comp, counsels caution.

SUPPLEMENTAL ARGUMENT

A. By accepting review here, this Court risks undermining RAP 18.8(b) and the necessary and proper barriers against improvident discretionary review.

Discretionary review is rarely granted because it permits piecemeal appeals. *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591 (2010) (citation omitted); see generally Stephen J. Dwyer, “*The Confusing Standards for Discretionary Review in Washington and a Proposed Framework for Clarity*,” 38 SEATTLE U. L. REV. 91 (2014). Orderly review is best served by finality, conserving appellate effort, and eliminating interlocutory delay. *Wasiuk v. Whirlpool Corp.*, 76 Wn. App. 250, 253-54, 884 P.2d 13 (1994). This standard gives practical effect to the fundamental value of appellate deference to trial courts. *Id.* (citing *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981); 9 Moore, FED. PRAC. § 110.07 at 39 (2nd ed. 1990)).

This Court will note that the Washington cases cited above are Court of Appeals decisions. This Court has *never* directly addressed discretionary review – and for good reason. This appeal threatens to open an enormous gap in the bulwark against discretionary review embodied in the above authorities.

As this Court knows from the briefing, Judge Shapira’s 2015 no-vicarious-liability ruling is not properly before this Court. BR 12-15. As discussed there, the time for filing an NDR may be extended only in extraordinary circumstances and to prevent a gross miscarriage of justice. RAP 18.8(b). Appellate courts ordinarily hold that finality outweighs any litigant’s natural desire for more time. *Id.*

This Court *has* addressed RAP 18.8(b) – always holding the line against improvident discretionary review. “Extraordinary circumstances” exist only when “the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party’s control.” ***Reichelt v. Raymark Indus., Inc.***, 52 Wn. App. 763, 765, 764 P.2d 653 (1988); ***Shumway v. Payne***, 136 Wn.2d 383, 395, 964 P.2d 349 (1998) (citations omitted). Negligence and lack of diligence are not extraordinary circumstances. ***Beckman v. Dep’t of Soc. & Hlth. Servs.***, 102 Wn. App. 687, 695, 11 P.3d 313 (2000). The RAP 18.8(b) analysis does not require prejudice to the opposing party. ***Reichelt***, 52 Wn. App. at 766. And even where an appeal raises important – if untimely – issues, it is improper to consider them absent extraordinary circumstances and a gross miscarriage of justice. ***Schaefco, Inc. v. Columbia River Gorge Comm’n***, 121 Wn.2d 366, 368, 849 P.2d 1225 (1993).

Vargas's 2017 NDR is (a) grossly untimely as to the 2015 no-vicarious-liability ruling; (b) did not raise any extraordinary circumstance – or even address RAP 18.8(b); (c) was not properly before the Court of Appeals on discretionary review; and (d) is not properly before this Court.

Moreover, Vargas's NDR did not raise any issues regarding Inland's direct liability. The appellate court's order granting discretionary review did not accept review of the question whether the plaintiffs presented sufficient evidence of any WISHA violation. Thus, the 2017 order dismissing Inland also was not properly before the appellate court, and also is not properly before this Court.

The appropriate time for Vargas to seek appellate review of the 2015 no-vicarious-liability ruling, and of the 2017 order dismissing Inland from the lawsuit, is after all claims against the other defendants have been resolved, at trial or otherwise. And if the other defendants are found not negligent, or are otherwise dismissed with prejudice, then no factual or legal basis would exist to determine that Inland is vicariously liable for someone else's torts. Granting interlocutory review here is improvident, to put it mildly. This Court should dismiss this appeal and remand to the trial court for further proceedings. There is justice enough and time.

B. The Court of Appeals did not abuse its discretion by dismissing discretionary review, where *Afoa II* has nothing to do with general contractors.

Following on this Court's *Afoa II* decision,¹ the Court of Appeals held discretionary review improvidently granted here. *Vargas v. Inland Wash., LLC*, No. 76717-8-I, 2018 Wash. App. LEXIS 2123 (Sept. 17, 2018). This Court should dismiss, or at least affirm that decision because *Afoa II* is wholly inapposite to this case.

Afoa II plainly does not overrule any prior decisions establishing the duty of a general contractor.² Rather, *Afoa II* holds that the Port was not vicariously liable for the airlines' negligence, where the plaintiffs failed to establish any grounds for imposing joint and several liability. *Afoa II* at 115 (citing RCW 4.22.070(1)(a)). That holding is unremarkably correct, but should be irrelevant here.

In *Afoa II*, the Port was an owner, SeaTac was an employer, and the airlines were empty chairs: none of them was a general

¹ *Afoa v. Port of Seattle*, 191 Wn.2d 110, 421 P.3d 903 (2018) ("*Afoa II*").

² See, e.g., *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 788 P.2d 545 (1990); *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 123, 125, 52 P.3d 472 (2002); *Millican v. N.A. Degerstrom, Inc.*, 177 Wn. App. 881, 313 P.3d 1215 (2013); *Doss v. ITT Rayonier Inc.*, 60 Wn. App. 125, 127 n.2, 803 P.2d 4 (1991); *Weinert v. Bronco Nat'l Co.*, 58 Wn. App. 692, 695, 795 P.2d 1167 (1990); accord, *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978); REST. (SECOND) OF TORTS § 414 (1965).

contractor. By contrast, Inland was the general contractor at a large construction project, and codefendants Miles and Ralph's are not empty chairs, but rather suppliers or second-tier subcontractors to the immune entity, Hilltop – Inland's concrete subcontractor.

As to Inland's WISHA duties as a general contractor at a construction project, the Court's holding in *Afoa II* says nothing. It does not overrule or change Washington law regarding worksite safety in any respect. It has no application here.

The Court of Appeals correctly dismissed review as improvidently granted. Again, this Court should dismiss this appeal.

C. The plaintiffs and their *amicus*'s attempt to impose strict liability on general contractors is contrary to Washington law and threatens to disrupt Washington's construction industry, its insurance industry, and its Workers' Comp compromise.

It is apparent that the plaintiffs and their *amicus* (L&I) wish to impose strict liability on general contractors in Washington – an argument never raised in the trial court or the Court of Appeals. For the reasons stated *supra*, this case is no place to make such an earth-shattering decision. In fact, the *Stute* line of authority is to the contrary. And the disruption such a ruling would cause is difficult to overstate. It is not too strong to suggest that the very future of our construction industry may be at stake.

1. ***Kelley* placed a specific and direct duty on general contractors to ensure worker safety *in common work areas*, a common-sense rule; but extending *Kelley* outside of common areas is dangerous.**

Any correct analysis starts with ***Kelley***, 90 Wn.2d 323. This Court there adopted the Michigan Supreme Court’s approach, holding that a general contractor must “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.” 90 Wn.2d at 332 (emphasis added) (quoting ***Funk v. General Motors Corp.***, 220 N.W.2d 641 (Mich. 1974)). In ***Kelley***, four different contractors had recently worked in the area in question. *Id.* The general contractor thus “had a duty to see that proper safety precautions were taken in that area to provide the employees with a safe place to work.” *Id.* (emphasis added).³

The ***Kelley*** rule makes common sense. Within common work areas, general contractors must coordinate safety to ensure that

³ While ***Kelley*** may appear to recognize exceptions to the general rule that employer liability does not extend to employees of a subcontractor (e.g., inherently dangerous work), this Court has plainly held that ***Kelley*** “merely recognizes a possible exception when the owner or general contractor knows of inherent hazards of the work, and is in a position to protect against them.” ***Tauscher v. Puget Sound Power & Light Co.***, 96 Wn.2d 274, 279, 635 P.2d 426 (1981). That exception is inapplicable here.

various workers – some of whose specific work duties may *conflict* with each other – have a safe place to work. General contractors like Inland have long known of and complied with the rule that in common work areas, they must provide a safe workplace.

But extending the ***Kelley*** rule to non-common work areas – as the plaintiffs (and apparently L&I) wish to do here – is extremely dangerous. Common sense dictates that where, as here, (a) an expert in a specific job is in charge (it is undisputed that Hilltop supervisor Matt Skoog was in charge of this concrete pour); (b) no other subcontractors are engaged in different work in that same area (it is undisputed that no other subcontractors were present); and (c) the general contractor is not on site, but leaves the job to the experts, while requiring them to ensure appropriate job-specific safety protocols (again, undisputed here); then (d) the general contractor has no specific duty to insure safety in that *noncommon work area*. Otherwise, Skoog would have some other (presumably Inland) supervisor with no specific expertise (that is why Inland hired Hilltop) looking over his shoulder on the site. Allowing two safety supervisors on one job is a recipe for disaster.

Concomitantly, since the early 1980s an overwhelming majority of state high courts have held that employers are not liable

to subcontractors' employees. See, e.g., **Monk v. V.I. Water & Power Auth.**, 53 F.3d 1381, 1391 & n.28 (3d Cir. 1995) (citing numerous cases, including **Tauscher**, *supra*). Courts generally give four reasons: (1) workers' comp immunity (RCW 4.22.070) extends to the subcontractor, but not to other employers – a plainly unfair result; (2) the workers' comp system properly spreads the risk statewide, rather than focusing it on one or a few employers; (3) the subcontractor is the safety expert on a specific work site, rather than other employers, so spreading responsibility for safety may *increase* risks to employees; and (4) the known-risk exception is sufficient to prevent other employers from ignoring known risks. **Monk**, 53 F.3d at 1392-93 (citations omitted).⁴

If this Court agrees with Vargas, general contractors like Inland would have no choice: either do the work themselves (a potentially massive disruption to the current general/sub/sub-sub system of organization for large construction projects) or else interfere with their subcontractor's expert control over safety in their own noncommon work areas. Imagine a general contractor with no expertise in, for instance, installing electrical equipment, trying to tell

⁴ These and other policy considerations are discussed further *infra*.

a certified electrician how to conduct his or her business safely. **Kelley** properly avoids that dangerous scenario. This Court should uphold **Kelley**'s common-sense approach.

2. Stute imposes a specific and direct duty, not vicarious or strict liability.

After **Kelley**, and consistent with the generally accepted rule that employers are not liable to subcontractors' employees, **Stute** held that RCW 49.17.060 – the employer general safety standard – places a two-fold duty on all employers:

Subsection (1) imposes a general duty on employers to protect only the employer's own employees from recognized hazards not covered by specific safety regulations.

Subsection (2) imposes a specific duty to comply with WISHA regulations. [Paraphrasing altered; emphases added.]

114 Wn.2d at 457 (citing **Adkins v. Aluminum Co. of Am.**, 110 Wn.2d 128, 153, 750 P.2d 1257, 756 P.2d 142 (1988)). An employer's duty "depends upon which section is being invoked." *Id.*:

The employer's duty only extends to employees of independent contractors when a party asserts that the employer did not follow particular WISHA regulations. In such a case, all employees working on the premises are members of the protected class. [Emphases added; citation omitted.]

Thus, a general contractor (like all employers on the worksite) owes a *specific and direct* – not a general or vicarious – duty to comply with all WISHA regulations as to all onsite workers. 114

Wn.2d at 457-58 (citing RCW 49.17.060). Indeed, this Court has never imposed vicarious liability on employers (including general contractors) for WISHA violations committed by other actors (such as its independent contractors' employees).

Far from the seismic policy shift Vargas and their *amicus* suggest – recognizing a general contractor's *per se* responsibility for the acts or omissions of *every other actor* onsite – **Stute** recognized that RCW Ch. 49.17 assigned a *specific and direct* duty upon the general contractor (and other employers) to comply with WISHA, consistent with **Kelley**.

As this Court noted in **Afoa II** (191 Wn.2d at 122):

WISHA does not expressly provide for vicarious liability when employers are concurrently negligent . . . Nothing in chapter 49.17 RCW suggests that the legislature intended to impose joint and several liability for WISHA violations.

Rather, under RCW Ch. 4.22's basic principles of negligence and fault, fault is apportioned only among at-fault parties:

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 except entities immune from liability to the claimant under Title 51 RCW.

RCW 4.22.070(1). "Fault" is defined in RCW 4.22.015:

"Fault" includes acts or omissions, including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a

person to strict tort liability or liability on a product liability claim. The term also includes breach of warranty, unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

Thus, the fault of each party (which here could have included only the plaintiff, Inland, Ralph's, and Miles, as Hilltop is immune) must be found and apportioned. But any liability imposed upon on any defendant is joint only, not several, under RCW 4.22.070(1):

The liability of each defendant shall be several only and shall not be joint except:

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

Applying these statutes, **Afoa II** holds that to impose vicarious liability on the Port, Afoa had to prove that it exercised control – mastery – over the non-party airlines, as its agent. **Afoa II**, 191 Wn.2d at 124. Afoa failed to do so. The Port thus bore no vicarious liability for the airlines' fault as a matter of law. *Id.* at 126-127.

Similarly here, Vargas – who has the same counsel as Afoa – has failed to prove Inland's vicarious liability – its control and agency – for Hilltop. While Inland has a nondelegable duty like the Port and the airlines in **Afoa II**, Vargas failed to prove Inland's control and agency over Hilltop – or even an attempt to delegate nondelegable

duties. Just as in **Afoa II**, this Court should affirm the trial court's ruling that Inland is not a general guarantor of safety at the worksite.

Afoa II thus reaffirmed **Stute**. Anyone who bears a non-delegable duty cannot, merely by engaging an independent subcontractor, delegate their specific and direct WISHA duty:

Afoa argues the Port's nondelegable duty to provide a safe workplace under WISHA and common law made it vicariously liable for the airlines' fault. We disagree.

The jury found that Afoa's injuries were the result of both the Port and the airlines' failure to ensure a safe workplace. See generally **Weinert v. Bronco Nat'l Co.**, 58 Wn. App. 692, 795 P.2d 1167 (1990) (duty to comply with safety regulations applies to any party with supervisory authority on a jobsite). But neither has escaped its own liability by delegation to the other. [Emphasis added; footnote omitted.]

Afoa II, 191 Wn.2d at 121-22 (paragraphing altered). On the contrary, the Port did not even attempt to delegate its duty, but also did not assume the airlines' duties (*id.* at 123):

No delegation occurred here. Simply because the Port cannot delegate its responsibility does not mean it must adopt the responsibility of another.

Afoa II also limits **Millican** under RCW 4.22.070 (*id.* at 124):

Millican does not stand for the proposition that another entity cannot be separately responsible for work site safety. An entity that delegates its nondelegable duty will be vicariously liable for the negligence of the entity subject to its delegation, 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." [Emphasis added.]

But **Millican** remains the only Washington decision imposing on a general contractor vicarious liability for a subcontractor's negligence, much less for an *immune* subcontractor's negligence. 177 Wn. App. at 881. **Millican** turns the **Kelley/Stute** analysis on its head:

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. [No citation in original.] 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. at 893 (emphases added) (quoting **Stute**, 114 Wn.2d at 463). This misinterprets **Stute**. It is incorrect and harmful. This Court should not just limit **Millican**, it should *overturn Millican*.

Indeed, **Stute** makes no mention of vicarious liability. Nor does it hold general contractors chargeable for injuries caused by a subcontractor's employee's WISHA violations. 114 Wn.2d 454. Rather, **Stute** holds that a general contractor who violates WISHA safety regulations is *specifically and directly* liable to a subcontractor's employee for its own breach. *Id.*

Moreover, unlike the general contractor in **Millican**, but like the Port in **Afoa II**, Inland never asked the trial court to shift its

nondelegable duty onto Hilltop. Rather, Inland asserted that it had *fulfilled* all specific and direct WISHA duties, so it was not liable for Vargas's injuries as a matter of law. Inland's briefing to the Court of Appeals and to this Court is replete with evidence confirming that Inland complied with all WISHA regulations.⁵

Consequently, Inland cannot be liable to Vargas under any theory as a matter of law, as the trial court found. **Millican** is not only incorrect about **Stute** and harmful to both workers and general contractors, but it is also inapplicable here. Inland cannot be vicariously liable for the acts or failures to act of its immune subcontractor Hilltop, or for Ralph's or Miles, entities Hilltop hired.

As in **Afoa II**, Inland is not required to *assume* the liability of other employers. Contrary to Vargas's view that agency liability arises *per se*, "agency does not come into existence out of thin air." **Matsumura v. Ellert**, 74 Wn.2d 362, 368, 444 P2d 806 (1968). **Stute** does not support Vargas. This Court should affirm.

⁵ Further, no evidence shows that Ralph's concrete-pumping equipment, or the actions of Ralph's pump operator, represent a specific WISHA violation by Inland – or anyone else.

3. Practical policy considerations counsel against adopting Vargas’s dangerous approach.

This Court will search the briefing in vain for any discussion of the broad policy ramifications of holding general contractors strictly and/or vicariously liable. As explained *supra*, this is because none of this was raised at any time in this litigation. But it is extremely important for this Court to see the broad policy ramifications.

First, if general contractors are “*per se*” vicariously liable to a subcontractor’s employee where, as here, no evidence of specific WISHA violations was submitted, then general contractors are – as a practical matter – subject to strict liability. They likely would have no defenses because subcontractor/employers have none – other than their statutory immunity. If this Court held that the same Workers’ Comp immunity applies to general contractors, that would be fair, but it serves little purpose to go all that way to arrive back at the same place ***Kelley*** and ***Stute*** already left us: no vicarious liability.

Second, by not extending employer immunity to the general contractor, the Court could undermine the entire Workers’ Comp compromise. Substituting general contractors – who under ***Kelley*** are considered employers – in the place of subcontractors makes general contractors insurers of every worker on a project. The

experienced trial judge (Hon. Jeffery M. Ramsdell, Ret.) properly recognized that **Kelley**, **Stute**, and **Afoa II**, require no such thing. And general contractors cannot possibly withstand that sort of liability. The ripple effect could look more like a tsunami, wiping out construction across Washington.⁶

Millican compounds this problem, making a policy declaration that likely will require general contractors to extract specific contractual concessions from independent contractors in the form of an indemnity and waiver of immunity (under RCW 4.24.115). General contractors would then be required to engage in additional litigation to properly place this resuscitated liability of the immune employer right back onto the immune employer. If successful, the supposedly immune employer would be saddled with a double loss: payment of L&I premiums to the State, and payment of indemnity to the general contractor. The Workers' Comp compromise is wholly undermined.

Millican's incorrect analysis is caustic to our State's notions of

⁶ Indeed, Washington's Condominium Act, RCW Ch. 64.24 – making it practically impossible to build condos without violating its statutory warranties, guaranteeing litigation – provides a cautionary tale. Seattle is in the midst of one of the worst affordable-housing crises it has ever seen—a no-doubt unintended consequence of making liability inevitable. For this reason, bipartisan support has prompted its revision. See generally Mike Rosenberg & Jake Goldstein-Street, "Washington Condo Reform Gains Steam Amid Shortage of Affordable Homeownership Options," SEATTLE TIMES, Feb. 25, 2019, A1. But many folks have suffered in the meantime.

fairness, which place fault on those who rightfully bear responsibility – the foundation of fair fault allocation under RCW 4.22.070. **Millican** should be set aside.

Third, there is a serious question whether any general contractor could withstand such broad liability, or could obtain insurance to defray it. The lack of actual control, or even the right of control, over safety in noncommon work areas makes underwriting these incalculable, uncontrollable risks an insurer's nightmare.

Indeed, large construction projects in Washington do not generally use OCIP (Owner-Controlled Insurance Program) or CCIP (Contractor-Controlled Insurance Program) insurance policies. Sometimes called a "Wrap Up" policy, the CCIP concentrates control at the top. But there is ongoing debate on whether this improves or endangers worker safety. See, e.g., THE HANDBOOK ON ADDITIONAL INSUREDS, Ch. 15G (*Construction Wrap*) (ABA 2018) (questioning whether Wrap policies improve worker safety). As a practical matter, concentrating safety controls over *noncommon work areas* at the general contractor level – where no specific safety expertise likely exists – will endanger subcontractors' employees. Control over noncommon work areas should be concentrated at the expert level, not the general level.

Fourth, there are *many thousands* of individual WISHA obligations that govern worksites. See, e.g., WAC 296-155; -800; -806; -874; -65; -46B. A single general contractor is not in a position to police such pervasive regulations absent subcontractor vigilance. But Vargas's view could reduce such vigilance.

The policy ramifications go on and on, but this short brief cannot. Inland has encouraged *amicus* assistance to this Court, who will presumably touch on these and other policy concerns. L&I's *amicus* brief does little to assist the Court in facing these crucial risks. This Court should work cautiously here – the very concept of a safe workplace is at stake.

D. Inland cannot be vicariously liable for others' negligence, nor directly liable.

The RCW 4.22.070(1)(a) exception to proportional liability does not apply here: no evidence shows that Inland, Ralph's, and Miles, were acting in concert or as agents or servants of each other.

The burden of establishing an agency relationship is on the party asserting it exists. ***Hewson Constr., Inc. v. Reintree Corp.***, 101 Wn.2d 819, 823, 685 P.2d 1062 (1984). The traditional rules of agency apply here: "an agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control." ***Moss v. Vadman***, 77 Wn.2d 396, 402-03, 463 P.2d 159 (1969).

Afoa II, 191 Wn.2d at 126.

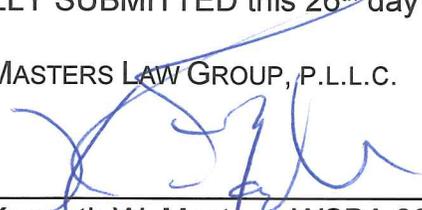
The undisputed evidence shows Inland did not control Hilltop's work, and thus did not owe a common-law duty to keep Hilltop's "non-common work area" safe for Hilltop's employees. *Kelley*, 90 Wn.2d at 330. The common work area exception does not apply, where Inland had no "right to order the work stopped or to control the order of the work or the right to inspect the progress of the work[, and even these] do not mean that the general contractor controls the method of the subcontractor's work." *Bozung v. Condo Builders, Inc.*, 42 Wn. App. 442, 446-47, 711 P.2d 1090 (1985).

CONCLUSION

The trial court was unwilling to turn the law on its head to make general contractors guarantors of every workers' safety, regardless of the right to control their work. RP 84. This Court should dismiss. If not, it should affirm.

RESPECTFULLY SUBMITTED this 26th day of April 2019.

MASTERS LAW GROUP, P.L.L.C.



Kenneth W. Masters, WSBA 22278
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033
ken@appeal-law.com
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing, **SUPPLEMENTAL BRIEF OF RESPONDENT** on the 26th day of April 2019 as follows:

Co-counsel for Respondent

Preg O'Donnel & Gillet, P.L.L.C.	___	U.S. Mail
John Butler	<u> x </u>	E-Service
David Chawes	___	Facsimile

901 – 5th Avenue, Suite 3400
Seattle, WA 98164
jbutler@pregodonnael.com
dchawes@pregodonnael.com
mallen@pregodonnael.com
mmunson@pregodonnael.com
hvanburen@pregodonnael.com

Counsel for Petitioners

Bishop Legal	___	U.S. Mail
Raymond E. S. Bishop	<u> x </u>	E-Service
Derek K. Moore	___	Facsimile

19743 – 1st Avenue South
Normandy Park, WA 98148
ray@bishoplegal.com
derek@bishoplegal.com
tara@bishoplegal.com
margarita@bishoplegal.com

Counsel for Amicus Curiae Department of Labor & Industries

Washington Attorney General's Office	___	U.S. Mail
Anastasia Sandstrom	<u> x </u>	E-Service
800 – 5 th Avenue, Suite 2000	___	Facsimile

Seattle, WA 98104
anas@atg.wa.gov

**Counsel for Defendant Miles Sand & Gravel Company
d/b/a Concrete Nor'West**

Lee Smart, P.S., Inc. _____ U.S. Mail
Steven G. Wraith x E-Service
1800 One Convention Place _____ Facsimile
701 Pike Street
Seattle, WA 98101
sgw@leesmart.com
vf@leesmart.com

Counsel for Defendant Inland Group, P.S. LLC

Aiken, St. Louis & Siljeg, P.S. _____ U.S. Mail
David P. Hansen x E-Service
801 – 2nd Avenue, Suite 1200 _____ Facsimile
Seattle, WA 98104
hansen@aiken.com

Counsel for Defendant Ralph's Concrete Pumping, Inc.

Christie Law Group, P.L.L.C. _____ U.S. Mail
Robert L. Christie x E-Service
Thomas P. Miller _____ Facsimile
2100 Westlake Avenue North, Suite 206
Seattle, WA 98109
bob@christielawgroup.com
tom@christielawgroup.com
stefanie@christielawgroup.com



Kenneth W. Masters, WSBA 22278
Attorney for Respondent

MASTERS LAW GROUP

April 26, 2019 - 4:03 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96527-7
Appellate Court Case Title: Gildardo Crisostomo Vargas, et al. v. Inland Washington, LLC, et al.
Superior Court Case Number: 13-2-32219-6

The following documents have been uploaded:

- 965277_Briefs_20190426160144SC203315_4900.pdf
This File Contains:
Briefs - Respondents Supplemental
The Original File Name was Supplemental Brief of Respondent.pdf

A copy of the uploaded files will be sent to:

- SGW@Leesmart.com
- anas@atg.wa.gov
- bob@christielawgroup.com
- dchawes@pregodonnell.com
- derek@bishoplegal.com
- hansen@aiken.com
- hvanburen@pregodonnell.com
- jbutler@pregodonnell.com
- mallen@pregodonnell.com
- margarita@bishoplegal.com
- mmunson@pregodonnell.com
- ray@bishoplegal.com
- stefanie@christielawgroup.com
- tara@bishoplegal.com
- tom@christielawgroup.com
- vf@leesmart.com

Comments:

Sender Name: Tami Cole - Email: paralegal@appeal-law.com

Filing on Behalf of: Kenneth Wendell Masters - Email: ken@appeal-law.com (Alternate Email: paralegal@appeal-law.com)

Address:
241 Madison Ave. North
Bainbridge Island, WA, 98110
Phone: (206) 780-5033

Note: The Filing Id is 20190426160144SC203315