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No. 645455

COURT OF APPEALS, DIVISION 1,
OF THE STATE OF WASHINGTON

BRANDON APELA AFOA, Appellant,

v.

PORT OF SEATTLE, Respondent.

BRIEF OF APPELLANT IN REPLY

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I. INTRODUCTION

Conceding that it explicitly retained “**exclusive control and management**” of the jobsite where Mr. Afoa was injured and that EAGLE was required “**to comply with all Port regulations,**” Br. Resp. at 13, the Port nonetheless asserts that it is not liable because the formal structure of its contracts were “leases” and “licenses” instead of subcontracts. This thin line of defense ignores the plain statutory language of RCW 49.17.020(4), as well as the protective policy underlying the applicable case law. Because a reasonable juror could find on this record that the Port retained control (and regularly exercised actual control) over all aspects of safety in the Air Operations Area (“AOA”), and that the Port was in the best position to provide for the safety of EAGLE’s employees, it was error to grant summary judgment.

II. REPLY ARGUMENT

Reversal is mandated if a reasonable juror could find that the Port retained control of the manner in which Mr. Afoa performed his work, and was in the best position to provide for his safety. *E.g.*, Stute v. PBMC, 114 Wn.2d 454, 461-64, 788 P.2d 545 (1990). Mr. Afoa presents substantial evidence that the Port not only retained this authority and control, but exercised it on a constant basis. While the Port styles its contracts with EAGLE and the Airlines as “leases” or “licenses,” artful drafting does not absolve the Port of its duties where it retains such authority or control.

a. **The Port cannot evade its duties through artful drafting.**

The Port argues that it has no duties because its contracts with the airlines and with EAGLE are merely “leases” or “licenses.” This argument must fail because (1) it ignores the language of the governing statute; (2) it is contrary to the policy of Stute and other governing cases; and (3) it elevates form over substance.

i. **The Port is Covered by WISHA**

According to the Port, “[t]he determinative issue . . . as to whether the Port owed Mr. Afoa a duty under RCW 49.17.060(2) is whether the Port was an ‘employer’ as defined in RCW 49.17.020(4). . . .” Br. Resp. at 18. The Port asserts that because its relationship with the airlines and EAGLE was not a principal-independent contractor relationship, it is not an employer under § .020(4), and therefore not liable under the Washington Industrial Safety & Health Act of 1973 (WISHA). Br. Resp. at 18-20. The Port is wrong.

RCW 49.17.020(4) defines an employer as “any person . . . or other business entity which engages in any business, industry, profession, or activity in this state and *employs one or more persons or* who contracts with one or more persons, the essence of which is the personal labor of such person or persons, and includes the state, counties, cities, and all municipal corporations. . . .” (Emphasis added). Completely ignoring the first clause of this statute, the Port argues that its contracts with the airlines and EAGLE were not for “personal labor,” and therefore the Port is not an

“employer” under § .020(4). However, the evidence is undisputed that the Port is a major employer, with approximately “22,000 airport employees.” CP 363. Because the applicable statute is written in the disjunctive – “employs one or more persons *or* . . . contracts . . . [for] personal labor . . .” – the undisputed material fact that the Port employs one or more persons makes it an “employer” under WISHA. Accordingly, on what the Port itself calls “**the determinative issue,**” it must lose.¹

The Port suggests that it is not an employer with respect to the chain of contracts leading to Mr. Afoa, but of course the statute is not so limited. The statute simply covers anyone who “employs one or more persons,” and it is not the role of this Court to rewrite it for the convenience of the Port. Furthermore, this is not even accurate in any relevant sense, since the Port employs Ramp Patrol and Port Police to enforce Port safety rules in the area where Mr. Afoa was injured. CP 349-353. A reasonable juror could find that the Port is a major employer and the owner of the jobsite where Mr. Afoa was injured, and therefore the kind of party that is in the best position to ensure that WISHA regulations are adhered to for the safety of *all employees* working on the AOA. That is all that is required to impose liability under Stute and its progeny.

¹ This also disposes of the Port’s argument that the area where Mr. Afoa was injured is not a “work place” under WISHA, RCW 49.17.020(8), because an “employer” must have control over a “work place”. Brief of Respondent at 21. (emphasis added)

ii. Stute and its Progeny Apply to this Situation

The Port argues that a duty under WISHA does not exist, because it is not a general contractor. This would undermine the policy of the case law in this area, in service to a formal distinction without any difference.

According to Stute:

[T]he specific duty clause [RCW 49.17.060(2)] is not confined to just the employer's own employees but applies to all employees who may be harmed by an employer's violation of the WISHA regulations. **This furthers the purpose of WISHA to assure safe and healthy working conditions for every person working in Washington.**

Stute v. PBMC, 114 Wn.2d 454, 458, 788 P.2d 545 (1990) (emphasis added; citation omitted). This policy of ensuring safety for all employees explains why the duty of compliance with WISHA falls on the party “in the best position to ensure compliance with safety regulations.” Id. at 463. While that party was the general contractor in Stute, in other cases it has been recognized that the owner of the property where the work is performed is the party best able to ensure compliance with safety regulations. Kinney v. Space Needle Corp., 121 Wn. App. 242, 249, 85 P.3d 918 (2004); 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, 696, 795 P.2d 1167 (1990). Thus, as this Court recently stated in Kinney:

Kinney alleges sufficient evidence to show that the [Space Needle Corporation], as jobsite owner, may have acted in a manner similar enough to a general contractor to justify imposing the same nondelegable duty of care to ensure WISHA compliant work conditions. There is at least a question of material fact whether the [Space Needle],

because of its influence over the safety aspects of the pyrotechnic job, owed Kinney a duty to ensure her safety under WISHA.

Kinney, supra, 121 Wn. App. at 249. As the declarations of Mr. Afoa and Mr. Gaoa detailed below demonstrate, that same material question of fact exists here.

iii. Reasonable Jurors Could find that the Port Retained Control and was Best Able to Ensure Mr. Afoa's Safety

It is well established that when considering questions of control, Washington courts look beyond the labels in the contracts and consider other factors to determine the relationships between the parties. *See McLean v. St. Regis Paper Co.* 6 Wn. App. 727, 732, 496 P.2d 571 (Div. 2, 1972), *quoting Carter v. King County*, 120 Wash. 536, 208 P. 5 (1922) (“The test [of control] always is: To whom is the person in question subject as to the manner in which he shall do his work?”). “Whether a right to control has been retained depends on the parties’ contract, the parties’ conduct, and other relevant factors.” Phillips v. Kaiser Aluminum, 74 Wn. App. 741, 875 P.2d 1228 (Div. 2, 1994). Division 2 describes how questions of control are resolved:

a written contract provision disclaiming control is not determinative on the question of control. The relationship of the parties, as amplified by the operating manual, the nature of the undertaking itself, and the amount of control actually exercised in performance of the undertaking, are the determinative factors.

Jackson v. Standard Oil Co. of California, 8 Wn. App. 83, 93, 505 P.2d 139, 145 (Div. 2, 1972) (emphasis added).²

“Usually the question of control or right of control is one of fact for the jury.” Baxter v. Morningside, Inc., 10 Wn. App. 893, 898, 521 P.2d 946, 949 (Div. 2, 1974). “If the evidence conflicts regarding the relationship between the parties at the time of the injury or if it is reasonably susceptible of more than one inference, then the question is one of fact for the jury.” Chapman v. Black, 49 Wn. App. 94, 99, 741 P.2d 998, 1002 (Div. 1, 1987) *citing* Massey v. Tube Art Display, Inc., 15 Wn. App. 782, 785, 551 P.2d 1387 (Div. 1, 1976) and Baxter, 10 Wn. App. at 898.

Viewing the evidence in the light most favorable to the nonmoving party, Mr. Afoa, it was reversible error to grant summary judgment on the issue of control. The undisputed material facts demonstrate that the Port retained “exclusive control and management” in its contracts with the airlines, CP 402 and required ground service contractors such as EAGLE to comply with its extensive Rules and Regulations, which govern every aspect of operation of vehicles in the AOA.³

² While some of these cases examine control questions in the context of vicarious liability rather than the context of statutory liability under Stute, the same policy and reasoning apply to both contexts.

³ The testimony of Isabel R. Safora, a lawyer for the Port, as to the meaning of the retention of control provision in the contract, CP 563-564, would not preclude a reasonable juror from finding a different meaning based on all the evidence of intent in combination with the language of the agreement, and therefore it does not avoid a material issue of disputed fact. *See* Berg v. Hudesman, 115 Wn. 2d 657, 662, 801 P.2d 222 (1990).

The record before the trial court, including the declaration of EAGLE employee Toiva Gaoa, demonstrates pervasive control by the Port over many aspects of safety of EAGLE employee's work:

- The Port patrols the AOA with Ramp Patrol and Port Police. CP 349-353.
- The Port has issued detailed Rules and Regulations governing use of the AOA. It has striped the AOA and enforces traffic regulations on all vehicles operating in the AOA. CP 291-317.
- These regulations govern operation of all vehicles used by ground service companies in the AOA, including powered industrial tractors ("PITs"). CP 291-317.
- The Port requires special testing, licensing, and issuance of identifying badges for all ground service company employees performing duties within the AOA. CP 291-317.
- The Port has divided the AOA into the "Air Movement Area" ("AMA"), which are the runways, and the "Ramp Area", which are the service and gate areas. It enforces different licensing and different rules in each area. CP 291-317 (AOA); CP 318-334 (AMA). It has different radio towers which monitor the activities of ground service contractors in each area. CP 346-348.

- Five different EAGLE managers made it clear to Mr. Gaoa that he was to do “whatever the Port said, even if it didn’t match Eagle’s manner of doing things.” CP 345.
- On two occasions, the Port, not the Airlines, told EAGLE employees when and where airplanes were to be moved. CP 345.
- Mr. Gaoa was required to memorize the “Seattle Ramp Control” radio frequencies “so that the Port could direct [his] movements” when driving a pushback. The Port is in complete control of the “Seattle Ramp Control,” unlike the “Seattle Ground Control” where the FAA is involved. CP 346.
- Mr. Gaoa would often be in “constant radio contact” with the Port when moving empty aircraft with a pushback, including while working in the ramp area, during which his “movements would be ultimately controlled by the Port’s Ramp Control Tower” by specific command of when to stop, when to proceed, and where to go. CP 349.
- Mr. Gaoa and other EAGLE employees were supervised by the Port’s “Ramp Patrol.” He reports specific instances where the Port’s Ramp Patrol would control EAGLE’s workers, including telling them where to fuel, where to unload containers, and how to tow a train of dollies. CP 349-351.
- The Port’s Ramp Patrol “will order EAGLE to move some of its equipment for [the] Port’s own reasons” including that the Port needs

the space and that the Port “is trying to cut down on clutter.” Mr. Gaoa states, “In either case, we stop the manner in which we are working and attend to the Port’s request.” CP 350-351.

- There were at least two specific instances where the Port told EAGLE employees to stop work and take equipment off the ramp due to equipment problems. Mr. Gaoa was told by the Ramp Patrol to take a deicer off the ramp because it was missing a headlight. CP 352. He observed the Port of Seattle Police tell co-worker Pisa Ierenio to take a water truck back to EAGLE to fix a broken brake light. CP 352-353.
- After repairs had been made to the pushback following Mr. Afoa’s accident, the Port’s Fire official inspected it and had the EAGLE mechanic test the brakes in his presence. Although it worked on testing, Mr. Gaoa reporting a failure of the parking brake after 30 minutes of use, but EAGLE would not fix it “because the Port had ‘OK’d’ it.” CP 354.

Mr. Afoa’s declaration expressly affirms Mr. Gaoa’s testimony, and adds another example where the Port’s Ramp Patrol found him driving a vehicle without headlights at twilight, and ordered him to stop and call EAGLE to provide an escort by a vehicle with headlights. CP 289. Finally, the Swissport tug incident demonstrates the Port’s level of control over the safety of PITs on the jobsite. In this incident, a PIT which ran out of control was ordered off service until it was repaired to the Port’s satisfaction. CP 366-370. Further, the Port suspended the driver’s badge

pending its investigation and had Swissport conduct an “emphasis briefing” on PIT inspection and maintenance. Id. The Port provided its Airport Duty Manager, who was available “24/7,” to assist Swissport in assuring “continued safe operations at the airport.” CP 367.

The Port fails to provide any evidence to refute this testimony, and offers only conclusory statements that it “did not and does not employ, manage, or supervise EAGLE or any of its employees.” CP 125-126. The Port also offers unsupported argument that the facts set forth by Mr. Afoa somehow fail to show the Port had supervisory authority or retained control of the work. But it is well established that the non-moving party’s burden may not be met by reliance on conclusory statements, argument, theory or supposition. Hiatt v. Walker Chevrolet Co., 120 Wn.2d 57, 66, 837 P.2d 618 (1992); Roger Crane & Assoc., Inc. v. Felice, 74 Wn. App. 769, 778-79, 875 P.2d 705 (1994); Marks v. Benson, 62 Wn. App. 178, 182, 813 P.2d 180 (1991). Even if the Port had offered declarations that set forth facts sufficient to meet the requirements of CR 56(e), it would not be entitled to summary judgment because genuine issues of material fact would exist.

The conclusion is inescapable that, on the central issue of retention of control over the workplace, a material issue of fact exists. Accordingly, it was error to grant summary judgment to the Port.

b. **Because the duty is nondelegable, disclaimers in the Port's contracts are not operative**

The Port points out that the Rules and Regulations disclaim responsibility for injuries to persons using airport facilities. Br. Resp. at 10. Of course this is immaterial, because (as shown above) the Port is mistaken in its arguments that no reasonable juror could find violation of the nondelegable duty of care under WISHA. The very essence of this nondelegable duty is that it **cannot be contracted away** with respect to the injured employee. Ward v. Ceco Corp., 40 Wn. App. 619, 629, 699 P.2d 814 (Div. 1 1985). Accordingly, the Port's contractual exculpatory clauses are inoperative here.

c. **Reasonable Jurors Could find violation of Specific WISHA Regulations**

Our prior briefing demonstrates that reasonable jurors could find violation at the jobsite of a number of WISHA regulations, particularly those found under Chapter 296-863 WAC, governing PITs. Br. App. at 23-24. Most significant among these are the duty to ensure that PITs protect the operator from falling objects, WAC 296-863-20025, and the duty to ensure that PITs are maintained in safe working condition, WAC 296-863-30020. Also, storage of dangerous debris in the roadways demonstrates an unsafe jobsite, in violation of WAC 296-800-11005 as well as WAC 296-863-40010.

d. **Exceeding the control shown in *Kinney*, the Port retained control of not just the premises, but the work performed.**

In the Space Needle cases of Kinney and Kamla, both this Court and the Supreme Court found a jobsite owner is not *per se* liable when it controls the premises but not the work. In Kamla, the Washington Supreme Court found no liability because the jobsite owner did not retain any control over the manner in which Pyro carried out its work:

Space Needle did not retain the right to control the manner in which Pyro and its employees completed their work; it simply hired the independent contractor and owned the jobsite where Pyro worked. We hold Space Needle is not liable under WISHA for the manner in which Pyro and its employees completed their work.

Kamla v. Space Needle Corp., 147 Wn.2d 114, 125, 52 P.3d 472 (2002). But in Kinney, a case in which “[t]he SNC's employees supervised and monitored Pyro employees on a regular basis and sometimes on a continuous basis,” Kinney v. Space Needle Corp., 121 Wn. App. 242, 245, 85 P.3d 918 (Div. 1, 2004), this Court found a material disputed question of fact as to the liability of the jobsite owner under WISHA. Id. at 247-48.

The key difference between Kinney and Kamla is active involvement of the jobsite owner in the safety aspects of the work:

It is one thing to retain a right to oversee compliance with contract provisions and a different matter to so involve oneself in the *performance* of the work as to undertake responsibility for the safety of the independent contractor's employees. . . .

Here, contrary to the evidence presented in *Kamla*, Kinney brought forth a sufficient quantum of evidence to survive summary judgment. She provided evidence from the SNC'S facility manager and building engineer stating that the SNC **retained control over the manner in which Pyro completed its work, especially in the area of safety.** Unlike *Kamla*, the evidence suggests that the SNC supplied the safety equipment and may have assumed responsibility for the safety of Pyro's employees. The SNC does not specifically rebut any of the declarations of its former employees expressly stating **they actively supervised and actually controlled all safety activities of Pyro employees,** especially those working on the antenna roof. There is sufficient evidence to raise a material question of fact.

Kinney, supra, 121 Wn. App. at 247-48 (footnote omitted; italics in original; boldface added).

Mr. Afoa's evidence makes his case more like Kinney than Kamla. Here, reasonable jurors could find that the Port actively supervised and actually controlled all safety activities of EAGLE employees, through the Ramp Patrol, Port Police, extensive Rules and Regulations governing all activities in the AOA, investigation of accidents and imposition of remedial measures, and training and licensing of EAGLE employees.

Although the Port argues it is simply a landowner that controls the premises, but not the work, the evidence presented by Mr. Afoa shows otherwise. As described above, Mr. Afoa submits declarations that show specific examples where the Port affirmatively assumed responsibility for the safety of EAGLE employees, such as when Port personnel told EAGLE employees to take unsafe equipment off the ramp, or required an escort at twilight for a vehicle without headlights. In addition to the

fencing and security, the Port's response to the Swissport tug incident shows the Port has complete control of who and what are allowed on the ramp. The declarations of Mr. Gaoa and Mr. Afoa show that EAGLE employees were supervised and monitored by the Port on a regular and sometimes continuous basis. Indeed, they were specifically instructed by their supervisors to place commands received from Port officials above whatever EAGLE's own commands or procedures specified. CP 345-348; CP 289. From this evidence, reasonable jurors may conclude that EAGLE employees were not free to do the work in their own way, that the Port retained control of not just the premises, but the manner in which the work was performed, and that the Port held the same innate supervisory authority that it would have had if it hired EAGLE directly to provide ground support services to the Airlines.

This Court should apply Kinney to find a disputed issue of material fact regarding the Port's control of the manner in which Mr. Afoa's work was performed.

e. **The Port owed Mr. Afoa the duties of a business visitor class of invitee.**

The Port argues that Mr. Afoa was a licensee, and therefore its duties to him were limited and do not give rise to liability under the theory of premises liability. Br. Resp. at 31-32. The Port is mistaken. As Mr. Afoa was on the Port's premises for purposes related to the business

dealings of the Port, he is a business visitor to whom the Port owes the duties of an invitee.

A “business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.” Restatement (Second) of Torts §332 (3) (1965); Younce v. Ferguson, 106 Wn.2d 658, 667, 724 P.2d 991 (1986).

The Port argues that Mr. Afoa could not be a business invitee because he was not “invited” onto the premises – instead, EAGLE and he applied for a license. Br. Resp. at 32. “Permission sufficient to establish invitee or licensee status can be implied from the prior conduct and statements of the property possessors or their agents. The scope of an invitation depends on what the invitee is to do on the premises, as well as on where the invitee may reasonably be foreseen to go.” Botka v. Estate of Hoerr, 105 Wn. App. 974, 983, 21 P.3d 723 (Div. 1 2001). The Port not only licensed EAGLE to perform services on the AOA, but also specifically issued a badge to Mr. Afoa authorizing him to work on the AOA. CP 290. The invitation is implied in the licensing. In light of the badge issued by the Port authorizing Mr. Afoa to carry out duties within the Ramp area of the AOA – which is where the accident occurred – a reasonable juror could find that Mr. Afoa was invited by the Port onto the relevant premises.

The Port further argues that Mr. Afoa’s presence was not for the Port’s economic benefit, but was solely for the economic benefit of Mr.

Afoa, EAGLE, and the airlines served by EAGLE. Br. Resp. at 33. “To decide an entrant’s status, ‘[t]he ultimate goal is to differentiate (1) an entry made for a business or economic purpose that benefits both entrant and occupier, from (2) an entry made for a purpose that either (a) benefits only the entrant or (b) is primarily familial or social.’” Beebe v. Moses, 113 Wn. App. 464, 467-68, 54 P.3d 188 (Div. 3 2002) (*quoting*, Thompson v. Katzer, 86 Wn. App. 280, 286, 936 P.2d 421, *rev. denied*, 133 Wn.2d 1020, 948 P.2d 387 (Div. 2 1997)). While Mr. Afoa and EAGLE may not have performed labor for the Port directly, it cannot be held as a matter of law that Mr. Afoa’s presence on the AOA was solely for his own benefit. Instead, a reasonable juror could find that it was for “a purpose directly or indirectly connected with business dealings with the” Port. Restatement, supra, § 332(3). The Port had “business dealings” with the airlines. The airlines had “business dealings” with EAGLE, and therefore with Mr. Afoa. A reasonable juror could find that Mr. Afoa was on the premises for a purpose “indirectly connected” with the Port’s business dealings. It follows that Mr. Afoa has raised a triable issue as to his status as a business invitee.

The presence on the tarmac of the broken-down loader which fell on Mr. Afoa when he collided with it is a condition of the land. Mr. Afoa testifies that “[t]he broken cargo loader that [he] collided with had been on the Port premises for well over two weeks.” CP 288. In light of the evidence of constant patrolling of the area by Port Ramp Patrol and Port

Police, this is sufficient to create a jury question on whether the Port knew or should have known that the loader created an unreasonable risk of harm, and thus breached its duties owed to an invitee under the Restatement (Second) of Torts § 343A (1965) as adopted in Washington. See Kamla, 147 Wn.2d at 126.⁴

f. **The trial Court did not abuse its discretion by denying the Port's motion for CR 11 sanctions.**

A trial court's decision on a request for CR 11 sanctions is reviewed for abuse of discretion. Wash. State Physicians Ins. Ex. & Assoc. v. Fisons Corp., 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). For all the reasons stated above and in our opening brief, Mr. Afoa's claims are well grounded in fact, and his legal arguments are warranted by existing law. Thus there is no basis to find the trial court abused its discretion in denying the Port's motion for CR 11 sanctions, and there is no basis for sanctions against Mr. Afoa under RAP 18.9.

III. CONCLUSION

Reasonable jurors could find that the Port retained control of the manner in which Mr. Afoa performed his work, and that the Port as an employer and jobsite owner was in the best position to ensure his safety.

⁴ The Port contends that Mr. Afoa has not yet "formally pleaded" that a condition of the land was a proximate cause of his injuries. Br. Resp. at 34. However, in ¶ 6 of Plaintiff's Complaint (CP 1-10), Mr. Afoa alleges he was injured as a result of the Port's negligence including failure to provide him with a place of employment free of hazards. CR 8(f) provides that "[a]ll pleadings shall be so construed as to do substantial justice" and CR 15 provides for amendments of pleadings to conform to the evidence, "even after judgment." There is no merit to this contention.

The Port also owed him the duty of an invitee on premises because Mr. Afoa was there for a purpose connected with the Port's business dealings. Mr. Afoa has raised genuine issues of material fact that these duties apply and that these duties were breached by the Port.

The determinative issue is control, not the form of the contracts between the parties. There is a question of fact to be determined by a jury as to whether the Port retained control over the manner in which Mr. Afoa performed his work and over the safety aspects of that work. There is question of fact as to whether the Port had the innate supervisory authority of a general contractor. A jury must decide if there would have been any difference in the Port's control had it hired EAGLE directly to service the Airlines.

For all these reasons and the reasons set forth in our opening brief, Mr. Afoa respectfully requests this Court reverse the trial court's summary dismissal of his claims, and remand this case for trial.

Respectfully submitted this 19th day of May, 2010.

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