

WASHINGTON CASE UPDATE

Jobsite Owner Not Entitled to Reduce Liability by Allocating Fault

From the desk of John Kreutzer: As with many other states, Washington law allocates fault among all entities that caused the claimant's damages. But when one of those entities has a nondelegable duty to maintain a safe workplace, is allocation of fault still available? Read on to find out.

Claims Pointer: In this case arising out of a workplace accident, the Washington Supreme Court held that because the jobsite owner retained sufficient control over the workplace, it had a nondelegable duty to ensure a safe workplace and was vicariously liable for breach of that duty, precluding any allocation of fault. The case is a stark reminder that where an entity is responsible for maintaining a safe workplace and retains control over the manner in which others complete their work, allocation of fault is likely unavailable.

case in point...

Afoa v. Port of Seattle, No. 75951-5-1, Washington Supreme Court (March 20, 2017)

In 2007, Brandon Afoa ("Afoa") was paralyzed when he lost control of a "pushback" vehicle on the airplane ramp at Seattle-Tacoma International Airport ("Sea-Tac"), crashing into a large piece of loading equipment that fell on him. Afoa worked for Evergreen Aviation Ground Logistics Enterprises, Inc. ("EAGLE"), which contracts with airlines to provide ground services such as moving aircraft in the ramp area. The Port of Seattle ("the Port") owns and operates the airport. The Port does not employ EAGLE or contract its services, but EAGLE must obtain a license from the Port before it can work on the premises.

Afoa sued the Port, alleging it failed to maintain safe premises and violated common law and statutory duties to maintain a safe workplace. The Port moved for summary judgment on the grounds that none of Afoa's claims were viable because neither Afoa nor EAGLE was the Port's employee. The trial court granted the motion, dismissing Afoa's claims. The Court of Appeals reversed, holding that there were genuine issues of material fact precluding summary judgment. The Supreme Court affirmed the Court of Appeals, and the matter proceeded to trial.

Afoa presented evidence at trial of the Port's control over Sea-Tac's airfield, where any

activity is subject at all times to the exclusive control and management by the Port. Afoa also presented evidence of the Port's control over the manner in which EAGLE performed ground service work through its licensing agreement, as well as control over EAGLE's conduct. The jury found that the Port controlled the manner of EAGLE's work at Sea-Tac and determined damages totaled \$40 million. The jury allocated 25 percent fault to the Port and 18.7 percent fault to each of the nonparty airlines that used EAGLE's ground services. Pursuant to the jury's fault allocation, the trial court entered judgment against the port for \$10 million. Both parties appealed. On appeal, Afoa argued that the jury should not have been permitted to allocate fault to the four nonparty airlines that used EAGLE's ground services because the Port and a nondelegable duty to maintain a safe workplace. The Port argued that it did not have a nondelegable duty, and even if it did, Washington law required allocation of fault.

The court began its analysis by noting that the Port appeared to have conceded that it had a nondelegable duty. Even without regard to that concession, however, the court recognized that under Washington law, the duty to maintain a safe workplace is nondelegable. Prior case law established that a general contractor has a nondelegable duty to ensure the safety of all workers on a job site and compliance with safety regulations under the Washington Industrial Safety and Health Act ("WISHA") for



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the protection of all employees at a worksite, including subcontractors. The policy rationale is that the general contractor's supervisory authority places it in the best position to ensure compliance with safety regulations.

The Port argued that the nondelegable duty to provide a safe workplace under WISHA applied only to general contractors, whereas the Port was a jobsite owner. The court disagreed, noting that on the first appeal, the Supreme Court had determined that the Port was closely analogous to a general contractor. Moreover, the Supreme Court previously held in another case that jobsite owners could have duties equivalent to general contractors. Thus, sophisticated jobsite owners who exercise pervasive control over safety aspects of the work have the same nondelegable duty of care to ensure WISHA compliant work conditions as general contractors.

The Port further argued that even if it had a nondelegable duty, Washington's contributory fault statute still required allocation of fault. However, the court pointed out that under Washington law, nondelegable duties involve a form of vicarious liability, and the term "nondelegable duty" is a signal that the actor will be vicariously liable for an independent contractor's tortious conduct in the course of carrying out the activity. The court explained that when it comes to a breach of common law duties arising from retained control and violations of WISHA, a jobsite owner had vicarious liability for breach of duties that are nondelegable.

For the court, allowing the Port to allocate fault to the airlines would render the vicarious liability doctrines of retained control and WISHA specific duty meaningless because the purpose of the retained control doctrine is to place the safety burden on the entity in the best position to ensure a safe working environment. The court explained that that entity should not be entitled to escape or reduce its vicarious

responsibility to a tort victim based on others whose negligence also contributed to the injury.

The court concluded that the Port had a nondelegable duty to ensure a safe workplace and safe equipment and was vicariously liable for breach of that duty. Consistent with the Port's vicarious liability, it was not entitled to proportionately reduce its liability based upon an allocation of fault to the four nonparty airlines. The jury verdict was affirmed as to the liability of the Port and reversed as to the allocation of fault, and the case was remanded for an entry of amended judgment.

View full opinion at: <https://www.courts.wa.gov/opinions/pdf/759515.pdf>

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