Afoa v. Port of Seattle

No. 85784-9

MADSEN, C.J. (concurring/dissenting)—I cannot agree with the majority's decision to affirm the Court of Appeals on the issues of whether the Port of Seattle owed a common law duty based on retained control or a statutory duty under the Washington Industrial Safety and Health Act of 1973 (WISHA), chapter 49.17 RCW. Accordingly, I dissent on these two issues.

The common law retained control doctrine does not apply in the circumstances of this case as a matter of law. The majority erroneously concludes that this doctrine may apply, depending only on resolution of factual questions relating to the issue of the Port's retained control over the worksite. But the retained control doctrine is an exception to the general rule at common law that one who hires an independent contractor does not have a duty to protect an employee of the independent contractor from injury occurring while performing the contractor's work. Where there is no employment relationship between the defendant and an independent contractor, the general rule does not apply and neither does the retained-control exception.

The precedent relied on by the majority does not support its holding. The majority purports to follow *Kelley v. Howard S. Wright Construction Co.*, 90 Wn.2d 323, 329-34, 582 P.2d 500 (1978) and *Kamla v. Space Needle Corp*., 147 Wn.2d 114, 121, 52 P.3d 472 (2002), claiming that under these cases no employment relationship is required and whether the retained control exception applies depends only on whether a principal has retained control over the workplace. Majority at 16-17. This is both an incorrect statement of the common law retained control doctrine and an incorrect representation of the analyses and holdings in *Kelley* and *Kamla*. The majority also incorrectly says that in *Kelley* this court decided that the duty to ensure a safe workplace "must be imposed on the entity best able to prevent harm to workers." Majority at 17. No such rule of liability is found in *Kelley*.

The underlying reason for the common law rule and its exception does not justify the majority's holding. The common law general rule is justified by the fact that the employer of an independent contractor has no control over the work performance. The retained control exception permits treating the employer of the independent contractor as if it is the direct employer of the worker because when the employer of the independent contractor retains control over work performance, it has effectively reserved to itself an employer's responsibility for safety of the worker. Just as a direct employer may be liable for workplace injuries to its employees, the employer of the independent contractor who retains control over the manner in which the work is done and the operative details, and thus acts as an employer acts, may be liable for workplace injuries. This policy

underlying the no-liability rule and its exception does not apply when there is no employer-independent contractor employment relationship.

If any liability exists here based on control over the worksite itself, where no employer-independent contractor relationship exists, it must be found under some other theory. The majority's approach does not accord with either the common law or our precedent.

I also disagree with the majority's analysis of the question whether liability may exist under WISHA. Again, a central premise is that the Port must have been the equivalent of a direct employer and therefore subject to the same legal obligations that an employer has under WISHA. None of our cases support the premise that WISHA liability exists otherwise.

DISCUSSION

Retained control exception

Under the common law an employer who hires an independent contractor has no liability for injuries to employees of the independent contractor where the injuries result from the work over which the independent contractor has control. *Kelley*, 90 Wn.2d at 330; *Tauscher v. Puget Sound Power & Light Co.*, 96 Wn.2d 274, 277, 635 P.2d 426 (1981) ("one who engages an independent contractor is not liable for injuries to employees of the independent contractor resulting from the contractor's work"); *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 94-95, 549 P.2d 483 (1976). This is the common law rule set out in the *Restatement (Second) of Torts* § 409 (1965),

which states that "the *employer* of an *independent contractor* is not liable for physical harm caused to another by an act or omission of the contractor or his servants." (Emphasis added.)

This employment relationship is at the heart of the common law rule, and regardless of what the employer is called, whether an owner, general contractor, principal, or other term, it is the employment of an independent contractor, often a subcontractor, that invokes the rules applied in *Kelley*, *Kamla*, and relevant *Restatement* sections. The employer may be said to hire, employ, retain, engage, or contract with the independent contractor, but again the term used is not determinative. What is determinative as to whether the principles in *Kelley* and *Kamla* apply is whether an employer has hired an independent contractor and an employee of the independent contractor was injured during performance of the contractor's work.

The reason for the general rule of no-liability rule "is that, since the employer has no power of control over the manner in which the work is to be done by the contractor, it is to be regarded as the contractor's own enterprise, and he, rather than the employer, is the proper party to be charged with the responsibility of preventing the risk, and bearing and distributing it." Restatement (Second) of Torts § 409 cmt. b.

This common law rule has been the unvarying law in this state, and our decisional history shows that we have always applied the rule in the employer-independent contractor context, from *Ziebell v. Eclipse Lumber Co.*, 33 Wash. 591, 74 P. 680 (1903), and *Larson v. Am. Bridge Co. of New York*, 40 Wash. 224, 82 P. 294 (1905), to *Kelley*

and *Kamla*. *Larson* illustrates the general rule. There, a general contractor who had constructed tanks for the owner of a mill hired a subcontractor to erect the tanks. An iron worker who was employed by the subcontractor was injured during the work and he brought suit against the owner, who was dismissed, and the general contractor. The issue was whether the general contractor could be liable to the subcontractor's employee. The court explained that if the subcontractor was an independent contractor, the employer is not liable for the independent contractor's negligence: there is no privity between the employer and the independent contractor's injured employee; the relation of master and servant does not exist; and the doctrine of respondeat superior does not apply. The court explained the test for determining independent contractor status:

> The general test which determines the relation of independent contractor is that he shall exercise an independent employment, and represent *his employer* only as to the results of his work and not as to the means whereby it is to be accomplished. The chief consideration is that the *employer has no right of control* as to the mode of doing the work; but a reservation by the *employer* of the right to supervise the work, for the purpose of merely determining whether it is being done in accordance with the contract, does not affect the independence of the relation.

Id. at 227-28 (emphasis added). The court concluded that all of the evidence showed that the subcontractor was an independent contractor. *Id*. at 228. Therefore the general contractor that had hired the subcontractor was not liable. *Id*. No exception to this general rule of no-liability was at issue in the case.

In all of our cases, this no-liability general rule has been applied in the context of an employment relationship, which can be between a general contractor and an

independent contractor (who is generally a subcontractor), as in *Larson*, or between an owner and an independent contractor, as in *Kamla*, where a contractor was hired to install fireworks on the Space Needle. We recognized in *Kamla* that "[*e*]*mployers* are not liable for injuries incurred by independent contractors because *employers* cannot control the manner in which the independent contractor works." *Kamla*, 147 Wn.2d at 119 (emphasis added). The *Restatement* comment quoted above similarly states that the *employer* has no control over the manner in which the work is done by the independent contractor. But in all of the cases, the entity claimed to be liable had hired an independent contractor for whom the injured plaintiff performed the work.

Under the retained control exception to this common law rule, the employer of the independent contractor may be liable to an employee of the independent contractor. The common law exception exists where the employer hires an independent contractor but "retains the control of any part of the work." Restatement (Second) of Torts § 414; *Kamla*, 147 Wn.2d at 121 (the exception applies when an employer retains "the right to direct the manner in which the work is performed" (emphasis omitted)); *Kelley*, 90 Wn.2d at 330. The employer then has a duty, within the scope of the retained control, to provide a safe place of work. *Kelley*, 90 Wn.2d at 331. The right to exercise this control is the test and actual exercise of control is not required. *Id*.

Notably, this retained control is not control over the worksite, but rather "control over the operative detail of doing any part of the work." Restatement (Second) of Torts § 414 cmt. a. "[T]he employer must have retained at least some degree of control over the

manner in which the work is done." *Id*. cmt. c.

When the employer of the independent contractor retains control over part of the work, the employer "is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." *Id*. § 414.

In the same way that the employer-independent contractor relationship must always exist for the general rule to apply, this relationship also exists when the exception applies. In *Kamla*, we explained that an independent contractor is not controlled by the employer or subject to the right to control physical conduct in performance of the undertaking, but an employee's physical conduct in performance of the service is controlled by or subject to the right to control of the employer. *Kamla*, 147 Wn.2d at 119 (citing Restatement (Second) of Agency §§ 2(3), 2(2) (1958)). Because the employer cannot control the manner in which the independent contractor works, the employer is not liable, but an employer is liable for injuries to its own direct employees "precisely because the employer retains control over the manner in which the employee works." *Id*.[1]

When the employer does retain control over the manner in which a part of the independent contractor's work is performed, this retained control justifies placing potential liability on the employer of the independent contractor. The situation is analytically indistinguishable from the usual employer-employee relationship, to the

[1] This responsibility for injury to one's employee is subject to statutory control. Under the state Industrial Insurance Act, Title 51 RCW, employers accepted limited liability in exchange for sure and certain relief for injured workers. *See Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 8, 201 P.3d 1011 (2009); *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 572, 141 P.3d 1 (2006).

extent that the employer's right of control over the manner and operative details of the work determines whether there is exposure to liability. Liability is possible under the retained control exception because the situation is comparable to the usual employer-employee relationship where the employer may be liable because of the right of control.

But merely controlling the worksite or workplace safety does not bring a case within the retained control exception. Rather, it is the equivalency of the retained control in the independent contractor setting to the control an employer exerts in the employer-employee relationship that justifies liability under the exception. A landlord, owner, or licensor does not have employer-type duties resulting from the right to control unless the owner, landlords or licensor engaged the worker who is injured or engaged an independent contractor and retained control over part of the work performance, i.e., the manner of performing the work and operative details of the work. A landlord, owner, or licensor should not be subject to what is at the core an *employer*'s liability under the retained control doctrine.

Accordingly, control or the lack of control of the performance of an independent contractor's work is the critical issue underpinning both the general rule and the retained control exception addressed in *Larson*, *Kelley*, and *Kamla*, as well as in other state cases. *See, e.g.*, *Hennig v. Crosby Grp., Inc.*, 116 Wn.2d 131, 133-35, 802 P.2d 790 (1991); *Fardig v. Reynolds*, 55 Wn.2d 540, 544-45, 348 P.2d 661 (1960).[2]

[2] In *Fardig*, the court referred to "the ultimate test to be employed in determining whether a relationship is that of employer and employee or that of principal and independent contractor is to inquire whether or not the *employer* retained the right, or had the right under contract, to control the manner of doing the work and the means by which the result was to be accomplished."

Unfortunately, the majority creates liability without regard to the fact that the justification for the retained control exception does not exist in the absence of an employment relationship between the employer and an independent contractor in the first place.

Despite the majority's reliance on *Kelley* and *Kamla*, these cases do not support its new rule. In *Kelley*, we concluded that the exception applied because the general contractor had retained control. Multiple independent contractors (subcontractors) had been hired by the general contractor to perform work on a common construction site where the general contractor had "general supervisory and coordinating authority under its contract with the owner, not only for the work itself, but also for compliance with safety standards." *Kelley*, 90 Wn.2d at 331. Because the general contractor had this authority over the working conditions on the construction site where the work of multiple subcontractors had to be supervised and coordinated, which the court saw as "clearly fall[ing] within the rubric of 'control,' as an exception to the common-law rule of nonliability," the court concluded that the general contractor had a duty to see that proper safety precautions were taken in the common work areas. *Id*. at 331-32.[3]

Fardig, 55 Wn.2d at 544 (emphasis added). This statement could be somewhat confusing in that it uses the term "employer" in a context of the usual employer-employee relationship that does not involve an independent contractor situation and also in the broader context of employment of either an employee or an independent contractor. So long as it is understood that the common law rules discussed here (set out in *Restatement (Second) of Torts* §§ 409, 414) involve an owner, general contractor, or other principal *employing* an independent contractor, the confusion, if it exists, should be short-lived. The *Restatement*, as noted, uses the word "employer" rather than "principal."

[3] Two other excerptions to the no-duty rule applied in the circumstances and justified imposing a duty of care. First, the general contractor had reason to know of the peculiar risk of injury posed

Nothing in *Kelley*'s analysis suggests that one *who does not hire an independent contractor* is subject to its holding. The majority is not correct when it says that we disregarded "formalistic labels such as 'independent contractor'" in *Kelley*. Majority at 17. The court did not address the matter of "labels" and had no need to do so since the requisite employer-independent contractor(s) relationship existed in the case.

The majority is also wrong when it says that in *Kelley* we reasoned that the duty "must be imposed on the entity best able to prevent harm to workers" to ensure a safe workplace. Majority at 17. Liability was not found in *Kelley* just because the general contractor was best positioned to ensure workplace safety. Rather, in the context of the employer (general contractor)-independent contractors (subcontractors) relationships, liability could be found because of the employer-general contractor's retained supervisory and coordinating authority over the subcontractors' work in common work areas. *Kelley* did not set out a rule that *any entity* that is best placed to assure safety is under a duty to do so, regardless of whether it hired the independent contractor whose worker was injured or the degree and type of control the hiring entity retained. *Kelley* did not alter the fundamental general rule to which the retained control exception may apply.

The majority says, though, that in *Kelley* "[w]e held that the relevant inquiry is whether the principal retained control over the worksite." Majority at 17. As explained above, though, *Kelley*'s holding is more restricted than this. First, the "principal" in the case had *hired* independent contractors. Second, the principal (the general contractor)

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by the inherently dangerous nature of the work in which the employee was engaged, and second a statutory duty arose under former RCW 49.16.030.

had supervisory and coordinating authority under its contract for both the work and compliance with safety standards, and in particular had this authority in the area where several subcontractors all worked.

Control over the worksite, alone, is not the relevant question when determining whether one who hired an independent contractor has retained control and thus may be liable. It is control over the manner in which the work is performed that is critical. It is this type of control that makes the situation like that of the employer-employee relation where the employer may be responsible for injury to the worker.

This understanding of *Kelley* was confirmed in *Kamla*. We expressly relied on *Kelley* for the "retained control" doctrine as correctly stating the principle that would justify imposing liability on the employer of an independent contractor. *Kamla*, 147 Wn.2d at 119-21. *Kamla* does not support the majority. In *Kamla*, the owner of the construction site, the Seattle Space Needle, was the entity that hired the independent contractor to install a fireworks display on the Space Needle. An employee of the contractor was injured during the installation and argued that the owner had retained control over the work and so owed a common law duty of care.

The primary issue in *Kamla* was whether we would modify the retained control exception described in *Kelley* in favor of a rule that actual control, rather than the right to control, must exist. We declined to do so, explaining that this state's law conforms to the common law rule and its exception:

> "[T]he *employer* must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a

> general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to *employers*, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way."

Kamla, 147 Wn.2d at 121 (emphasis added) (quoting Restatement (Second) of Torts § 414 cmt. c). Again, the lynchpin is the kind and degree of control of the employing entity.

We concluded in *Kamla* that because the Space Needle "did not retain control over the manner in which Pyro[-Spectaculars, the independent contractor,] installed the fireworks display or completed its work," and "[a]s an independent contractor" the company that was hired "was free to do the work in its own way," the Space Needle "did not owe a common law duty of care based on retained control" and was not liable for the injuries sustained by the independent contractor's employee. *Id*. at 122. *Kamla* thus expressly sets out the interrelationship of the general no-liability rule and the retained control exception when an independent contractor is hired. It shows that the retained control exception is impossible to separate from the general rule that applies only in this context. The degree of retained control directly involves whether and the extent to which one who hires an independent contractor reserves control over work performance, and this in turn dictates whether there is exposure to liability.

Kelley and *Kamla* plainly involve only the context where an independent contractor is hired and the question is liability of the general contractor or owner to the

employee of the independent contractor that was hired to perform the work. Neither *Kelley* nor *Kamla* suggest in any way that the common law retained control exception applies outside the employment relationship between an employer and an independent contractor. Neither case suggests any broad duty arising simply because an entity might be in a good position to ensure safety.

Neither case supports the majority's conclusion that the Port had a common law duty under the retained control exception to ensure that the air operations area at the airport was a safe workplace for the injured worker. Eagle Aviation Ground Logistics Enterprise, Inc., (EAGLE) for whom Mr. Brandon Afoa worked, was an independent contractor *hired by the airlines* for support services. The Port did not hire EAGLE to perform any work and did not pay EAGLE for any work. Rather, EAGLE was required, according to the licensing contract, to pay the Port for the right to provide services to airlines. The airlines, not the Port, had contracts with and paid EAGLE for performance of services.

In short, the Port did not have an employer-independent contractor relationship with EAGLE. Accordingly, as a matter of law, the retained control exception set out in the *Restatement (Second) of Torts* and addressed in *Kelley* and *Kamla* does not apply here.

Finally, on this issue, the majority says that the fact that the Port entered a licensing agreement with EAGLE should not determine whether the retained control exception applies. I agree that what a contract is called does not control. However, while

the way that an arrangement is characterized by the defendant should not control, there must be at the least facts from which it can be concluded that the employer-independent contractor relationship exists.[4] Here, the contractual arrangement is without question not a contract to engage an independent contractor to perform work.

In summary, the majority professes to follow our precedent, but instead reads *Kelley* to state principles that do not appear in the case. The majority certainly does not apply existing law when it holds that no employer-independent contractor relationship is required for the retained control exception to apply, and the policy justification for the common law retained control exception does not support its holding. If any theory of liability based on control of the workplace could be applicable, it is *not* the common law retained control exception set out in the *Restatement (Second) of Torts* § 409 and addressed in *Kelley* and *Kamla*.

WISHA

The next issue is whether the Port of Seattle may be liable based on WISHA. I believe the majority's analysis is incomplete and to a substantial extent unconvincing. Moreover, it greatly expands the bases for liability under WISHA but without sufficient justification in WISHA law or its purposes.

[4] In this regard, I cannot agree with the majority's insinuation that the Port has written its licensing contracts to avoid being treated as EAGLE's and Afoa's employer. The majority says that "[t]he Port has structured its contracts with workers like EAGLE and Afoa such that those workers are not technically Port employees." Majority at 18. EAGLE was hired by the *airlines* to do work for the *airlines*. It is difficult to see how the Port manipulated its licensing agreement to avoid being treated as the employer, and there is nothing to support the implication that but for "technicalities" the Port would have been EAGLE's or Afoa's employer.

The relevant principles are set out in *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 788 P.2d 545 (1990), and confirmed in *Kamla*. Because the general rule that an employer must provide a safe workplace under RCW 49.17.060(1) applies only to the employer's own employees, only the obligation in RCW 49.17.060(2) is at issue. It provides that "[e]ach employer . . . [s]hall comply with the rules, regulations, and orders promulgated under this chapter." RCW 49.17.060(2). Subsection (2)'s specific duty to comply with WISHA regulations 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." *Stute*, 114 Wn.2d at 458 (citing *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 672, 709 P.2d 774 (1985)). This duty applies only when a party asserts that the employer did not follow particular WISHA rules. *Id*. at 457 (citing *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 153, 750 P.2d 1257, 756 P.2d 142 (1988)).

In *Stute*, we explained that the specific duty clause applies to employees of subcontractors, *id*. at 458, and that "[e]mployers must comply with the WISHA regulations to protect not only their direct employees but all employees on the jobsite," *id*. at 460. The court held that a general contractor has a nondelegable specific duty to ensure compliance with workplace regulations, reasoning that a "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." *Id*. at 464. Manifestly, the rule in *Goucher* and *Stute* applied to the general contractor who employed independent contractor-subcontractors and had supervisory

authority over the common workplace and concerned duties owed by a general contractor to the direct employees of an independent contractor-subcontractor. This type of liability is a per se liability where work in the common work area is concerned, the court reasoned.

Then in *Kamla*, we addressed application of RCW 49.17.060(2) to a jobsite owner. The court concluded that jobsite owners are not per se liable because nothing in WISHA imposes this duty and they are not sufficiently analogous to general contractors. As the court said:

> Although jobsite owners may have a similar degree of authority to control jobsite work conditions, they do not necessarily have a similar degree of knowledge or expertise about WISHA compliant work conditions. Jobsite owners can run the gamut from an owner/developer with the same degree of knowledge about WISHA compliant work conditions as that of a general contractor to a public corporation without any knowledge about WISHA regulations governing a specific trade. Because jobsite owners may not have knowledge about the manner in which a job should be performed or about WISHA compliant work conditions, it is unrealistic to conclude all jobsite owners necessarily control work conditions. Instead, some jobsite owners may reasonably rely on the contractors they hire to ensure WISHA compliance because those jobsite owners cannot practically instruct contractors on how to complete the work safely and properly.

Kamla, 147 Wn.2d at 124-25.

Accordingly, the court concluded, "If a jobsite owner does not retain control over the manner in which an independent contractor completes its work, the jobsite owner does not have a duty under WISHA to 'comply with the rules, regulations, and orders promulgated under [chapter 49.17 RCW].' RCW 49.17.060(2)." *Id*. at 125 (second alteration in original).

While the majority acknowledges these general principles, it then makes two substantial departures from them. First, in addressing whether the Port had sufficient control, it emphasizes the Port's control over the work area where EAGLE operated and Mr. Afoa was injured. But outside the general contractor situation, *Kamla* at the very least suggests that it is control over the *manner of performing the work* that is of paramount importance. Thus, what the majority should focus on is the extent to which the Port had any control over the manner in which Mr. Afoa performed his work, not the worksite itself. *Id*. If this kind of control existed, it would then tend to support the responsibility to make the workplace safe for EAGLE's workers.

Importantly, because the Port has no employer-independent contractor relationship with EAGLE, and instead has a licensing agreement, this case is not like *Kamla*.

However, in rejecting the Port's claim that it had only a licensing agreement and so does not have the duty to comply with WISHA in connection with Mr. Afoa's work, the majority broadly states that the specific duty does not run just to the "principal's employees, but to all workers on the worksite who may be harmed by WISHA violations." Majority at 12 (citing *Stute*, 114 Wn.2d at 460; *Goucher*, 104 Wn.2d at 671).

This is an expansion of prior law. The court preceded its statement in *Stute* that the specific duty applies to "all employees on the job site" with an extremely important qualifying sentence that refers to the "holdings that the WISHA regulations apply to employees of independent contractors as well as direct employees of an employer." *Stute*, 114 Wn.2d at 460. The court did not purport to set forth the brood rule the

majority reads into the case. Nor, factually, did *Stute* involve anything other than an employer-independent contractor setting, specifically, the general contractor-subcontractor relationship. As in *Stute*, *Kamla* also involved the issue whether the jobsite owner owed WISHA duties to an independent contractor, in this case in the form of the owner employing an independent contractor.

Prior to the majority's unjustified expansion of WISHA liability, there was no broad rule applying to all situations where a landowner with employees on the property must comply with specific duties to another employer's employees.

We should decline to expand WISHA liability in this way and instead, follow *Stute* and *Kamla* and limit liability to the employment situation—either direct employment or retained control of work performance in an employer-independent contractor situation. If the legislature concludes that jobsite owners should have greater duties under WISHA, then it can amend the statutes to make this clear.

One obvious problem that otherwise arises is that a landlord could find itself faced with colorable claims that it has violated WISHA through control of the *workplace* where this control results because of a *landlord*'s legal obligations to tenants to maintain safe common areas. WISHA is, however, a statute pertaining to workplace safety requirements, not a landlord's obligations, and the duty at issue here involves obligations of an *employer* or one so like an employer that the same duties must be imposed.

The majority unfortunately does not satisfactorily explain why an entity that has no direct or employer-independent contractor employment relationship with EAGLE or

Mr. Afoa has any specific duty under WISHA. If the fact that the Port has its own employees who work at the same area is the only basis for holding the Port to the specific duty under RCW 49.17.060(2), then an onerous obligation is imposed indeed. I do not believe that merely because a property owner has employees working on the same grounds as workers for other employers may work, a duty arose under WISHA, especially where the work proceeded under a licensing agreement that regulates the parties' responsibilities.

In addition, as we suggested in *Kamla*, jobsite owners may have little knowledge or expertise about a particular job, the dangers that might be entailed in or associated with carrying out a particular job, the necessary training and education required to safely carry out particular job duties, the use and maintenance of necessary tools, equipment, clothing and other gear, and so on.

Accordingly, even if an employer-independent contractor relationship exists and therefore WISHA duties may exist, great care must be taken to ensure than any control retained over the work actually pertains to the work performance. If a jobsite owner requires, for example, that employees of the independent contractor who work on the site enter and leave at certain hours, refrain from using noisy equipment prior to 8:00 a.m., leave a picnic area on the grounds free from clutter, return all equipment and tools to the proper storage area, and "engage in safe working practices while present," there is no basis to conclude that the owner controls the worker or work in any way sufficient to impose the specific duty under RCW 49.17.060(2). These are not the work-related duties

that put the jobsite owner in the position of the employer. And the control must be over the *work*, not simply the jobsite. An owner who bars workers from entry prior to 7:00 a.m. is certainly controlling the work site, but this is no reason to permit a claim based on WISHA.

The second major concern I have with the majority is that it does not address the specific regulations claimed to have been violated. That is, assuming that WISHA does apply, the majority fails to address any of the specific claims. Under RCW 49.17.060(2), the duty is to comply with "the rules, regulations, and orders promulgated under" WISHA. Mr. Afoa cites a number of specific WISHA violations based on alleged failures: a failure to inspect the pushback accordingly to manufacturer standards, a failure to maintain this vehicle in a safe condition, the failure of the pushback to meet design and construction requirements, the failure to remove it from service because it was not in a safe working condition, a failure to protect him from falling objects, and the failure to properly train him to operate the vehicle and to ensure he operated it at a safe speed. However, none of the Port's regulations in its licensing agreement govern vehicle maintenance except to impose a rule about where the vehicle could be maintained.

As *Kamla* teaches, the Port should not be held responsible for training Afoa when he was not the Port's employee, the Port was not engaged in providing operational services of the type provided by EAGLE, and the Port would not itself be knowledgeable in all the operational aspects of EAGLE's contracts with the airlines. There also seems to be no basis for making an owner-licensor like the Port responsible for maintenance of its

licensee's vehicles.

It seems the only WISHA regulation that the Port might have had a duty to comply with, assuming such duties exist, is a vehicle speed restriction. This is the kind of regulation that the Port was in a position to implement because it would and should apply as to all employers who might use the area. But in fact the Port did impose a 20 mph limit or slower if conditions required in areas of airplane movement, and this limit was included in the license agreement. The record shows that the Port acted to enforce this limit. I question whether the Port should be liable in this regard. Moreover, I question why the Port should be exposed to liability when it imposed this speed limit as a condition of the license granted to EAGLE, because EAGLE and Afoa violated the contractual agreement if they failed to abide by it.

Finally, I am quite concerned about the extensive federal regulatory scheme that assuredly applies to international airport operation. The Port's state obligations under WISHA, if any are owed to EAGLE and Mr. Afoa under the circumstances here, may have to be assessed in light of federal law if any conflicts arise. It is possible that determinations may have to be made about possible preemption issues. Accordingly, I believe the court should expressly acknowledge that any decisions it provides under WISHA are subject to any prevailing federal law regarding airport operations.[5]

[5] Although I agree that a duty might be owed to EAGLE and Afoa as business invitees, I am dismayed by the majority's unfortunate attribution to the Port of ignorance about the type of invitation at issue. Contrary to the majority, the Port is well aware that a social invitation is not the relevant kind of invitation at issue. *See* majority at 6 (erroneously saying that the Port has confused the meaning of "invitee" as a term of art with "social convention").

Conclusion

The majority makes it seem that all it is doing is applying existing legal principles to this case. I strongly disagree because both with respect to the common law retained control and WISHA issues the majority extends liability far beyond its existing state. We have never imposed duties under these laws when the defendant did not have either a direct employer-employee relationship to the injured worker or an employer-independent contractor relationship where the injured worker was directly employed by the independent contractor.

Among many mistakes, one of the most serious made by the majority is to blur the line between control over a worksite, which an owner or possessor of land may have, with control over the performance of the work itself. There is an important and meaningful difference, and because of the majority's lack of care in keeping the two distinct, landowners are apt to find themselves faced with liability for workers with whom they have little connection except the jobsite itself.

I would reverse the Court of Appeals determinations that a duty was owed under the common law retained control doctrine and WISHA and hold that as a matter of law no duty was owed under these theories. I agree that factual issues remain regarding potential liability under the common law duty a land possessor owes to invitees.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR:

Justice Charles W. Johnson

Justice James M. Johnson