Washington’s Industrial Safety Regulations: The Trend Towards Greater Protection for Workers

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I. INTRODUCTION

The passage of the Washington Industrial Safety and Health Act of 1973 (WISHA)\(^1\) heralded a new era in the state’s employment law history. The Act reflected the state’s growing concern for the safety of its workers, a trend that has slowly developed in both the Washington State Legislature and the Washington Supreme Court.

At common law, employees of independent contractors were unable to obtain compensation from the employer of the independent contractor when they were injured on the job.\(^2\) Over time, the state legislature and courts whittled away at this rule. A common law exception to the rule of nonliability developed whereby the employer of the independent contractor could be held liable if the employer retained control over some part of the work.\(^3\) Washington courts later recognized an exception based on contract, where the employer of the independent contractor could create liability for itself by assuming an affirm-
ative duty regarding safety measures on the job site.\(^4\) Meanwhile, the state legislature created a statutory exception under which all employers on a job site had a duty to provide a safe workplace and to comply with all applicable safety regulations.\(^5\) The Washington Supreme Court held that this duty extended to all workers lawfully on the premises, including the employees of other contractors.\(^6\)

The passage of WISHA seemed to be another step in the evolution of Washington employment law towards greater concern for the safety of workers. Worker safety was the stated purpose of the Act,\(^7\) and the Act expressly provided\(^8\) that all safety standards enacted thereunder must equal or exceed those prescribed by the federal Occupational Safety and Health Act of 1970 (OSH Act).\(^9\)

However, all three divisions of the Washington Court of Appeals construed WISHA as placing new limits on the liability of employers for job site injuries.\(^10\) Their rulings contradicted each other, the stated purpose of WISHA, and previous case law. Adding to this confusion were Washington Supreme Court rulings that construed the same provisions of WISHA but were limited by their facts.\(^11\)

The confusion was ended, and the progress in providing greater protection for workers was restored, by the Washington Supreme Court in *Stute v. P.B.M.C., Inc.*\(^12\) There, the court held that general contractors on construction sites, because of their innate supervisory authority, as a matter of law owe a duty to all job site workers to comply with WISHA standards.\(^13\) Subsequently, the appellate divisions extended this rule to


\(^8\) *Id.*


\(^12\) 114 Wash. 2d 454, 788 P.2d 545 (1990).

\(^13\) *Id.* at 464, 788 P.2d at 550.
owner/general contractors,14 owner/developers,15 and ultimately, all job site owners.16

Although Stute appeared to resolve the issue of liability for injuries resulting from WISHA violations, there are those who question this reading of Stute and the extension of the Stute rule by the courts of appeals. A recent Division Two case17 and an article in this issue18 have expressed concern that uncertainty has been created by the Washington Supreme Court ruling in Hennig v. Crosby Group, Inc.,19 and by the Division One ruling in Kennedy v. Sea-Land Service, Inc.20 However, these rulings, as they address only the general duty created by WISHA, do not conflict with Stute and its progeny, which deal with WISHA’s specific duty clause.

This Article argues in support of the trend towards greater protection for workers through the deterrent factor of certain civil liability for WISHA violations resulting in injury. The Article begins by charting the evolution of Washington law on this issue. It then describes the current state of the law on this subject. Finally, it explains how Stute and its progeny are in line with the state’s overall trend towards greater worker protection, consistent with the legislative intent of WISHA, and beneficial to not only employees, but employers as well.

II. Evolution of the Law of Job Site Liability

A. Rule of Nonliability

The common law rule is that one who engages an independent contractor is not liable for injuries resulting from the contractor’s work.21 The reasoning behind this rule was that because of the independence of the relationship between the original contractor and the independent contractor, there was

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21. See supra note 2 and accompanying text.
no privity between the original contractor and injured persons.22 In the case of injured employees, the relation of master and servant does not exist between the original contractor and the employee.23 The independence of the independent contractor, then, is the key to the rule of nonliability.

B. Exceptions to the Rule of Nonliability

1. Common Law

Over time, Washington courts have recognized exceptions to the rule of nonliability based on common law, statute, and contractual assumption of duty.24 A common law exception exists where the employer of the independent contractor retains control over some part of the work. The employer has a duty, within the scope of that control, to provide a safe place to work.25

The test of control is not the actual interference with the work of the contractor, but the right to exercise such control.26 The employer may, however, retain some control, so long as it is less than that which is necessary to subject it to liability as a master. A reservation of the right to supervise work to determine whether it is being done in accordance with the contract is not enough to subject the employer to liability.27 For the control exception to apply, the employer must retain at least some degree of control over the manner in which the work is done.28

As independence is the key to the general rule of nonliability, it is also the key to the control exception. When the employer retains the right to control the work method, it vitiates the independence of the contractor, creating privity between itself and the employees of the contractor.29

The control exception remained constant in this state for many years.30 In 1978, however, the Washington Supreme

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23. Id.
27. Larson, 40 Wash. at 228, 82 P. at 295; RESTATEMENT (SECOND) OF TORTS § 414 cmt. c (1965).
29. See Larson, 40 Wash. at 228, 82 P. at 295.
Court heard *Kelley v. Howard S. Wright Construction, Co.* In *Kelley*, a worker employed by a subcontractor was injured on a construction project and sought to recover damages from the general contractor. The worker argued that the general contractor was under a duty to comply with Occupational Safety and Health Administration (OSHA) regulations (the worker's injuries occurred prior to the passage of WISHA), and that its negligent failure to comply resulted in his injury. The defendant argued that it owed no such duty to the worker, because he was an employee of an independent contractor.

The trial court instructed the jury in line with the plaintiff's theories of liability. The jury found the defendant negligent and the worker ten percent contributorily negligent. The defendant appealed.

On appeal, the worker argued that the defendant's duty to comply with OSHA regulations arose from any one of several exceptions to the general rule of nonliability. These exceptions were based in common law, statute, and contract.

In determining whether the common law exception of control applied, the Washington Supreme Court expanded the long-constant doctrine, holding that a general contractor's "general supervisory functions" were per se control. In so holding, the court relied on the reasoning used by the Michigan Supreme Court in the seminal case of *Funk v. General Motors Corp.* Both courts noted the real threat of injury on construction sites and reasoned that the best way to ensure that safety precautions are taken is to make the general contractor ultimately responsible because the general contractor has the authority to require such precautions. This was, essentially, the first change in Washington job site liability common law in over seventy years.


31. Id. at 325, 582 P.2d at 502.
32. Id. at 328, 582 P.2d at 504.
33. Id. at 325, 582 P.2d at 502.
34. Id. at 328, 582 P.2d at 504.
35. Id. at 325, 582 P.2d at 502.
36. Id. at 330, 582 P.2d at 505.
37. Id. at 325, 582 P.2d at 505.
38. Id.
39. Id. at 331, 582 P.2d at 505.
41. *Kelley*, 90 Wash. 2d at 331-32, 582 P.2d at 505 (citing *Funk*, 220 N.W.2d at 646).
2. Contract

Another change in Washington law was made in Kelley. This change concerned contract law, but its practical effect was in the area of job site liability. One of the worker's arguments on appeal was that the defendant, by assuming responsibility for job site safety in its contract with the job site owner, contractually assumed a duty to comply with OSHA regulations. The defendant argued that liability could not be based on the contract because the worker was not a party to it. The court disagreed, ruling that an affirmative duty assumed by contract may create a liability to persons not party to the contract, where failure to properly perform the duty results in injury to them.

The practical effect of this ruling in the job site context is that any party who assumes responsibility for job site safety in its work contract thereby assumes a duty to all workers to provide a safe workplace. Thus, the Kelley court recognized an exception to the general rule of nonliability based on contract. This was a change in the law—a change which ensured greater safety for workers.

3. Statute

A third change aimed at protecting workers from job site injuries was addressed in Kelley. This change dealt with a statutory exception to the general rule of nonliability and confirmed the court's ruling a year earlier in Bayne v. Todd Shipyards Corp.

At issue in Bayne was the construction of former Revised Code of Washington (RCW) 49.16.030. Although this statute,

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42. Id. at 333-34, 582 P.2d at 506.
43. See id. at 333, 582 P.2d at 506.
46. WASH. REV. CODE § 49.16.030 (repealed 1973) provided as follows:
For the purposes of RCW 49.16.010 through 49.16.150, it shall be the duty of every employer to furnish a place of work which shall be as safe for workmen therein as may be reasonable and practicable under the circumstances, surroundings and conditions, and to furnish and use such safety devices and safeguards and to adopt and use such practices, means, methods, operations and processes as under the circumstances, surroundings and conditions are reasonable and practical in order to render the work and place of work safe, and to comply with such standards of safety of place of work and such safety devices and safeguards and such standards and systems of education for safety as shall be from time to time prescribed for such employer by the director of
which imposed a duty on employers to adopt safety standards and maintain a safe workplace, had been in effect since 1919, it was not until Bayne that the duties the statute created were construed as extending to all employees lawfully on the premises and not merely to an employer's own employees.47

In Kelley, the court confirmed this construction.48 Kelley further held that RCW 49.16.030 created a nondelegable duty on the part of a general contractor to provide a safe workplace for employees of subcontractors.49

It is important to note that the Kelley court treated the statutory exception created by RCW 49.16.030 as a wholly separate and independent basis of duty from the common law control exception.50 An understanding of the distinction between these two exceptions made by the Kelley court is critical to a later understanding of the post-WISHA developments in Washington job site liability law.

At this stage of the discussion, the main significance of Kelley is in its confirmation of the Bayne court's extension of the statutory duty to all job site workers. In Bayne and Kelley, the Washington Supreme Court showed its growing concern for the safety of workers by expanding the scope of an existing statutory duty relating to job site liability.

Bayne, however, came too late to save RCW 49.16.030. Four years earlier, the statute had been repealed and replaced with WISHA.51 Although the legislative history of WISHA is not extensive, there is enough to indicate that the legislative intent in passing WISHA was to strengthen and centralize the regulatory powers of the state in the area of job site safety. The House Labor Committee's Report to the Speaker's Office expresses concern that "[e]xisting law as related to industrial safety and health is fragmented all over the RCWs in numerous departments and agencies."52 The Committee stated that the main purpose of the bill was "to consolidate and update the

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47. Bayne, 88 Wash. 2d at 920, 568 P.2d at 773.
48. Kelley, 90 Wash. 2d at 332-33, 582 P.2d at 506.
49. Id.
50. Id. at 334, 582 P.2d at 507.
rules and regulations of existing statute under one jurisdictional agency.\textsuperscript{53} The Committee felt that "[m]ore stringent regulatory safety powers are needed."\textsuperscript{54}

WISHA itself contains a statement of purpose.\textsuperscript{55} The statement declares that it is in the public interest to assure a safe workplace for all workers, as job site injuries impose a substantial burden not only on the injured workers, but on their employers as well, in terms of lost production and payment of benefits under the Industrial Insurance Act (RCW 51).\textsuperscript{56}

Despite the clear intent of the legislature to provide greater protection for workers with the passage of WISHA, all three divisions of the Washington Court of Appeals misconstrued the statute as abrogating the tort rights of injured workers.\textsuperscript{57} These courts were correct in ruling that WISHA removed the general duty imposed on employers by former RCW 49.16.030 to provide a safe workplace for all employees. The courts erred, however, in not recognizing a new duty to comply with safety regulations adopted under WISHA.

The provision of WISHA at issue in all three cases was RCW 49.17.060.\textsuperscript{58} In pertinent part, it provides as follows:

Each employer:
(1) Shall furnish to each of his employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his employees . . . .

\textsuperscript{53} Id.
\textsuperscript{54} Id.
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\textsuperscript{58}
(2) Shall comply with the rules, regulations, and orders promulgated under this chapter. 59

A similar administrative code was adopted a year after the passage of WISHA. It provides in part

(1) Each employer shall furnish to each of his employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his employees.

(2) Every employer shall require safety devices, furnish safeguards, and shall adopt and use practices, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe. Every employer shall do every thing reasonably necessary to protect the life and safety of employees. 60

Division One was the first appellate court to construe these provisions. 61 Because former RCW 49.16.030 had used the word "workers" in creating the general duty to provide a safe workplace, while WISHA in RCW 49.17.060(1) used the words "his employees," Division One concluded that the duty to provide a safe workplace now applied only to an employer's own employees. 62 Because RCW 49.17.060(2) used the term "safety of employees," it was construed as creating a broader duty than subsection (1). 63 However, Division One still viewed that duty as less broad than the duty imposed by former RCW 49.16.030. Under Division One's reading, the duty to comply with WISHA regulations was owed to all employees within the "zone of danger" created by a violation. 64 Employees of other contractors not within the zone of danger were not within the protected class in Division One's construction of RCW 49.17.060(2).

Division Two concurred with Division One's reading of RCW 49.17.060(1). 65 It differed, though, in its construction of subsection (2). Division Two held that the duty to comply with WISHA regulations extends to all employees. 66 However, Division Two also held that a general contractor did not owe a duty

59. Id.
62. Id. at 624, 699 P.2d at 818.
63. Id.
64. Id. at 625, 699 P.2d at 818.
66. Id.
to ensure that all subcontractors complied with WISHA regulations unless the general had the right to control the methods of the subcontractors' work.\(^{67}\) Thus, Division Two made a clean break from *Kelley*. Under *Kelley*, a general contractor owed a duty as a matter of law to ensure compliance with all applicable safety regulations because his general supervisory functions constituted per se control.\(^{68}\) Interpreting WISHA, Division Two reintroduced the common law control test to cases involving the statutory duty of a general contractor with regard to injuries resulting from safety regulation violations.

Division Two was not alone, though. Division Three gave RCW 49.17.060 essentially the same reading.\(^{69}\) Division Three construed subsection (1) of the statute as the other two divisions had.\(^{70}\) It interpreted subsection (2) largely as Division Two had, applying the control test to determine whether a general contractor could be held liable for an injury caused by a WISHA violation.\(^{71}\)

Thus, all three divisions construed WISHA as limiting the tort rights created by former RCW 49.16.030 for workers injured as a result of a safety regulation violation by an employer other than their own. Because the Division One case involved an employee of the general contractor injured by a subcontractor's WISHA violation, its ruling is easier to justify, although the zone of danger test it applied is somewhat confusing. Divisions Two and Three, however, did not have a strong legal basis for their rulings. Both rulings contravened the explicit purpose of WISHA as well as the rule of *Kelley*, which the courts should have recognized as controlling—or at least compelling—despite the change of statute.

What truly makes these cases perplexing is that both were decided after the Washington Supreme Court handed down its ruling in *Goucher v. J. R. Simplot Co.*\(^{72}\) In *Goucher*, the court ruled that RCW 49.17.060 created a two-fold duty.\(^{73}\) The first is a "general duty" to protect employees from job site hazards.\(^{74}\)

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67. *Id.* at 452, 711 P.2d at 1095.
70. *Id.* at 873, 728 P.2d at 1055.
71. *Id.* at 874-75, 728 P.2d at 1055-56.
72. 104 Wash. 2d 662, 709 P.2d 774 (1985).
73. *Id.* at 671, 709 P.2d at 779.
74. *Id.*
The second is a "specific duty" to comply with WISHA regulations. The Goucher court ruled that the general duty extends only to an employer's own employees, but that the specific duty applied to all employees on the job site.

Neither Goucher nor the later Washington Supreme Court case affirming the rule, Adkins v. Aluminum Co. of America, reached the issue of whether a general contractor owed a duty as a matter of law to ensure compliance with all applicable WISHA regulations, or whether the control test had to be satisfied before a duty was established. Neither case had the appropriate fact pattern. The Goucher court's silence on this issue allowed the courts of appeals to rule as they did.

The Washington Supreme Court ultimately addressed the issue in Stute v. P.B.M.C., Inc. In Stute, a subcontractor's employee who was injured in a fall from a roof at the job site sought damages from the general contractor. The worker claimed that the general contractor owed him a duty to provide the safety devices required by WISHA regulations and that its failure to do so resulted in his injury. The trial court, applying the control test, found that no duty was owed the worker. The worker appealed, but the Commissioner of the Court of Appeals affirmed, relying on the Division Three construction of RCW 49.17.060(2) and Washington Administrative Code (WAC) 296-155-040(2).

The worker then appealed to the Washington Supreme Court, arguing that the lower courts' analysis was in conflict with Goucher and Adkins. The defendant urged the court to adopt the approach taken by Division Two by holding that a general contractor could not be held liable for the subcontrac-

75. Id.
76. Id. at 672, 709 P.2d at 780.
77. Id.
81. Id. at 456, 788 P.2d at 546.
82. Id.
83. Id.
84. Id.
tor's WISHA violation absent a showing that it had a right to control the subcontractor's work.\textsuperscript{87}

The court agreed with the worker's arguments, explicitly overruling the Division Three approach.\textsuperscript{88} The court ruled that a general contractor's innate supervisory authority is per se control over the workplace, and the duty to comply with WISHA standards is placed on the general contractor as a matter of law.\textsuperscript{89} This duty, the court held, is owed to all employees on the job site.\textsuperscript{90}

The court's reasoning was that this rule better serves the purpose of WISHA to assure workplace safety\textsuperscript{91} because the general contractor has control over the property and working conditions and, therefore, has the greater practical opportunity and ability to ensure compliance with safety regulations.\textsuperscript{92}

This reasoning echoed the court's earlier reasoning in Kelley. In determining the scope of a general contractor's statutory duty, the Stute court employed general reasoning that was very similar to that used by the Kelley court to determine the scope of a general contractor's common law duty. That reasoning was focused on the degree of control that general contractors have at job sites. Because of this, there has been some confusion as to what exactly was done by the Stute court. At first glance, it appears that Stute applied the common law control test to determine the scope of the statutory duty.

This interpretation, however, is incorrect. What the Stute court did was use the innate supervisory authority of the general contractor as a policy reason to justify imposing the statutory duty on general contractors as a matter of law.\textsuperscript{93} Kelley, on the other hand, viewed this innate supervisory authority as the determining factor when applying the control test to general contractors.\textsuperscript{94} This difference may be subtle, but it is critical.

To understand the import of this difference, it is important to recall that the common law control exception to the general rule of nonliability and the statutory exception were declared in

\textsuperscript{88} Stute, 114 Wash. 2d at 464, 788 P.2d at 550-51.
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 460, 788 P.2d at 548.
\textsuperscript{91} Id. at 458, 788 P.2d at 547.
\textsuperscript{92} Id. at 462-63, 788 P.2d at 549-50.
\textsuperscript{93} Id. at 463, 788 P.2d at 550.
Kelley to be two wholly independent bases of liability. If one reads Stute as applying the common law control test to a determination of statutory duty, one mixes together two bases of liability that had been declared separate in Kelley. Such a reading either leaves Kelley and Stute in conflict or suggests that Stute is conceptually flawed.

Neither is correct. The Stute court never questions the Kelley analysis and, in fact, relies heavily on it. The Stute court also demonstrates its awareness of the Kelley court's separate treatment of common law duty and statutory duty. When addressing the defendant's argument that the control test should apply to the determination of statutory duty, the Stute court begins its analysis by noting that "[t]he concept of control comes from the common law exception to nonliability of an employer to independent contractors." Because the Stute court was aware of the Kelley court's distinction between common law and statutory duties, it would be unlikely to mix the two by applying the control test to determine the scope of the statutory duty. In fact, the Stute court explicitly overruled Division Three's attempt to do so.

Why did Stute use the concept of control in its analysis of the statutory duty? The Stute court borrowed the Kelley court's reasoning for a different purpose. Whereas the Kelley court saw a general contractor's innate supervisory authority as per se control sufficient to satisfy the control test and impose the common law duty as a matter of law, Stute viewed this innate supervisory authority as a policy justification to impose the statutory duty as a matter of law.

Control is, therefore, not an element of the statutory duty in Stute. Control is important in the statutory context only in that a general contractor's control over the workplace is viewed by the Washington Supreme Court as a reason to place prime responsibility for WISHA compliance on general contractors.

We have determined what Stute did not do. What, then, did Stute do? Stute is important for four reasons. First, it held that general contractors owe a duty to all job site workers to ensure compliance with all applicable WISHA regulations. Second, it affirmed that this duty is nondelegable. Third, it over-

95. Id. at 330-32, 582 P.2d at 505-06.
96. Stute, 114 Wash. 2d at 463, 788 P.2d at 550.
97. Id.
98. Id. at 464, 788 P.2d at 550-51.
ruled the lower court's attempts to erode the general contractors' statutory duty. Fourth, it clarified the subcontractor's statutory duty by holding that, because a subcontractor lacks the supervisory authority of a general contractor, the subcontractor owes a duty to comply with WISHA only in areas under its control or where it creates a dangerous condition by violating WISHA.99

The use of the word "control" by the Stute court when discussing a subcontractor's statutory duty has led many to believe that Stute applied the common law control test to the issue of statutory duty. However, the court was merely stating the obvious—that a subcontractor, lacking the general contractor's overall authority, cannot be held liable for all WISHA violations on the job site, but only for those for which it is directly responsible. The Stute court did not commit the conceptual error of applying the common law control test to an analysis of a general contractor's statutory duty.

Accordingly, Stute continued the evolution towards greater protection for workers under Washington law. Notably, the Stute court stated that the policy reasons behind the Kelley ruling on former RCW 49.16.030 had not been affected by the change in statutes.100 Thus, the Washington Supreme Court finally set the appellate courts straight—WISHA was not to be viewed as a step backwards in the protection of workers, but as a step forward.

Washington courts provided even greater protection for workers in subsequent decisions. In Husfloen v. MTA Construction, Inc.,101 Division One extended the Stute rule to cases involving general contractor/owners.102 In the court's view, a general contractor/owner was sufficiently analogous to a general contractor to justify the extension.103

In Weinert v. Bronco National Co.,104 decided the same day as Husfloen, Division One extended the rule further, this time to encompass owner/developers as well.105 The court found the position of an owner/developer to be sufficiently analogous to

99. Id. at 461, 788 P.2d at 549.
100. Id. at 464, 788 P.2d at 550.
102. Id. at 689, 794 P.2d at 861.
103. Id.
105. Id. at 696, 795 P.2d at 1170.
that of a general contractor, as an owner/developer "has the same innate overall supervisory authority and is in the best position to enforce compliance with safety regulations."106

The most recent development in Washington law on this front occurred in Doss v. ITT Rayonier, Inc.107 In Doss, Division Two extended the Stute rule to all job site owners.108 The court ruled that a job site owner's innate supervisory authority justified imposing the duty to comply with WISHA standards on all owners as a matter of law.

This case has generated a great deal of controversy, and some commentators suggest that it has been implicitly overruled by the Washington Supreme Court in Hennig v. Crosby Group, Inc.109 In later sections, this Article will address the controversy by arguing that Doss is still good law.

III. CURRENT STATE OF THE LAW OF JOB SITE LIABILITY

A. Summary of the Law

This Article will assume for now—as it will later argue—that Doss is still good law. As a rule of law, the decision completes the picture in Washington regarding statutory exceptions to the general rule of nonliability. A statutory exception to the rule of nonliability was created by the state legislature in RCW 49.17.060. WISHA created a two-fold duty.110 The first is a general duty under subsection (1) to protect employees from job site hazards.111 The second is a specific duty under subsection (2) to comply with WISHA regulations.112 The general duty extends only to an employer's own employees,113 but the specific duty applies to all employees on the job site.114

Under the specific duty clause, several types of employers owe a duty, as a matter of law, to ensure WISHA compliance by all subcontractors. This group includes general contractors,115

106. Id.
108. Id. at 128-29, 803 P.2d at 6.
111. Id.
112. Id.
113. Id. at 672-73, 709 P.2d at 780.
114. Id.
general contractor/owners,\textsuperscript{116} owner/developers,\textsuperscript{117} and all job site owners.\textsuperscript{118} In the case of subcontractors, however, the duty is limited to WISHA regulations that cover the subcontractor's work.\textsuperscript{119}

Under the general duty clause, a duty is placed on all employers to provide and maintain a safe workplace.\textsuperscript{120} This duty, however, extends only to the employer's own employees.\textsuperscript{121} Thus, there is no statutory exception under which an injured employee can sue another employer on the job site absent a WISHA violation.\textsuperscript{122}

That is not to say that if there is no WISHA violation, there is no duty owed to the employees of other contractors. As noted previously, an employer may contractually assume a duty to the employees of another contractor to maintain a safe workplace.\textsuperscript{123}

Washington courts recognize a contractual exception to the rule of nonliability when a party accepts an affirmative duty to provide safety measures in its contract.\textsuperscript{124} A general contractor contractually assuming responsibility for total job site safety thereby assumes a duty to all workers to provide a safe workplace.\textsuperscript{125}

The common law control exception, like the contractual exception, may still come into play in cases in which there is no WISHA violation. Where the employer retains at least some degree of control over the mode of another contractor's work, the employer still has a duty, within the scope of that control, to provide a safe place to work for the other contractor's employees.\textsuperscript{126}

\textsuperscript{119} \textit{Stute}, 114 Wash. 2d at 461, 788 P.2d at 549.
\textsuperscript{120} \textit{WASH. REV. CODE} § 49.17.060(1) (1992).
\textsuperscript{121} \textit{Stute}, 114 Wash. 2d at 457, 788 P.2d at 547.
\textsuperscript{122} An injured employee is also precluded from suing his own employer. \textit{WASH. REV. CODE} § 51.04.010 (1992).
\textsuperscript{123} \textit{See supra} section II.B.2.
\textsuperscript{125} \textit{Id}.
The control test is still alive in Washington law, but it is important to note that it is a common law exception to the rule of nonliability. The control test no longer applies to cases involving statutorily created duties. This is how the law on job site liability stands in Washington.

B. Hennig and Kennedy

Some commentators\textsuperscript{127} and at least one court opinion\textsuperscript{128} have suggested that the three court of appeals' decisions expanding \textit{Stute}—especially \textit{Doss}—have been eroded by the Washington Supreme Court ruling in \textit{Hennig v. Crosby Group, Inc.}\textsuperscript{129} and the Division One ruling in \textit{Kennedy v. Sea-Land Service, Inc.}\textsuperscript{130} These cases, however, are entirely consistent with \textit{Stute} and its progeny. The misconception seems to be the result of a misreading of \textit{Hennig} and the \textit{Kennedy} court's failure to distinguish the facts of its case from the facts in \textit{Doss}.

In both \textit{Hennig} and \textit{Kennedy}, an injured employee of an independent contractor sought damages from the job site owner.\textsuperscript{131} Both courts ruled that the control test had to be applied to the owner to determine whether it could be held liable.\textsuperscript{132} It is this application of the control test to job site owners that led to the misconception that \textit{Hennig} and \textit{Kennedy} were in conflict with prior law. The \textit{Kennedy} court itself perceived a conflict, stating that it was partially disagreeing with the \textit{Doss} ruling.\textsuperscript{133}

There is, however, no conflict because neither \textit{Hennig} nor \textit{Kennedy} dealt with a WISHA violation, whereas \textit{Stute} and its progeny all based their rulings on the fact that a WISHA violation was involved. This distinction is critical because if the injury is not the result of a safety regulation violation, there is no statutory exception to the rule of nonliability. Only if the worker's injury is caused by a WISHA violation does the specific duty imposed by RCW 49.17.060(2) apply. Absent a WISHA violation, the only statutory exception is the general duty

\textsuperscript{127} Duff, supra note 18, at 371.
\textsuperscript{129} 116 Wash. 2d 131, 802 P.2d 790 (1991).
\textsuperscript{131} Hennig, 116 Wash. 2d at 133, 802 P.2d at 791; Kennedy, 62 Wash. App. at 841, 816 P.2d at 76.
\textsuperscript{132} Hennig, 116 Wash. 2d at 134, 802 P.2d at 792; Kennedy, 62 Wash. App. at 854, 816 P.2d at 83.
\textsuperscript{133} Kennedy, 62 Wash. App. at 854, 816 P.2d at 83.
imposed by RCW 49.17.060(1). This duty, however, extends only to an employer's own employees. Thus, an employee of an independent contractor could not maintain an action against the job site owner based on this statutory exception.

*Hennig* and *Kennedy* are not applying the same law as the *Stute* line of cases. The *Stute* cases applied a statutory exception to the rule of nonliability. In *Hennig* and *Kennedy*, there was no statutory exception to apply, nor was there an exception based on contract. Both courts, then, took the proper course of action and looked to a common law exception—the control test. Because *Hennig* and *Kennedy* were not decided under the same exception, they are not in conflict with the earlier cases.

The circumstances surrounding the *Hennig* decision indicate that the Washington Supreme Court, and the attorneys arguing the case, understood the distinction between *Hennig* and the *Stute* cases. *Hennig* did not overrule *Doss*, and in fact did not even cite the case. A search of the appellate record reveals that the three parties involved in the appeal wrote six separate briefs to the court, and not one mentions *Doss* or *Stute*. *Stute* is not cited in the court's opinion, indicating that the *Hennig* court understood that it was dealing with a different issue of law.

Particularly compelling is the fact that five months after *Hennig* was decided, the Washington Supreme Court denied the petition for review that had been submitted in the *Doss* case.134 It is possible to argue that *Hennig* did not overrule *Doss* because *Hennig* and *Doss* were decided in the same month. However, if the Washington Supreme Court had felt that the *Doss* holding conflicted with its holding in *Hennig*, it presumably would have taken the opportunity to reverse *Doss*. The court allowed *Doss* to stand, however, indicating that the court perceived no conflict between the two decisions.

Therefore, *Doss* is still good law. Job site owners still owe a duty, as a matter of law, to ensure that all contractors comply with WISHA.

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IV. CONTINUING EVOLUTION OF THE LAW OF JOB
SITE LIABILITY

A. The Place of Stute and Its Progeny in the Evolution

The *Stute* line of cases represent the latest step in the
evolution of Washington job site liability law. These cases
reflect the growing awareness of lawmakers of the public inter-
est in protecting the safety and health of the state’s workforce.
By holding both general contractors and job site owners responsi-
ble for injuries resulting from violations of safety regulations,
Washington courts have ensured greater compliance. This is
clearly consonant with the historical trend of job site liability
law.

Moreover, the *Stute* cases are consistent with the theories
underlying the common law rules upon which they are built.
The basis of the general rule of nonliability is the independence
of the relationship between the employer and the independent
contractor. The theory underlying the common law control
exception is that this independence is vitiated once the
employer assumes the right to control the method of the
independent contractor’s work. What the *Stute* cases reflect
is that in the modern workplace, this independence no longer
exists as it once did, especially in the context of construction
work. The work is so interconnected, and the various contrac-
tors are so interdependent on safety issues, that to rely on the
lack of privity between the employee of a subcontractor and the
general contractor or owner places form over substance.

Arguments to the contrary generally look to the common
law control exception as if it were some oasis in the desert of
nonliability and as if injured workers who did not fit within it
were simply out of luck. These arguments, however, ignore the
fact that the control exception is merely one of several excep-
tions to nonliability. There are others. Further, the statu-
tory exception exists apart from the control exception. The
court in *Stute* rejected the attempt to use a control analysis to
limit the scope of the general contractor’s statutory duty.

136. Id.; RESTATEMENT (SECOND) OF TORTS § 414 cmt. c (1965).
137. An employer can be held liable for its own negligence. Tauscher v. Puget
can also be held liable for negligent hiring. *Id.* Another exception exists for inherently
dangerous work. Kelley v. Howard S. Wright Constr. Co., 90 Wash. 2d 323, 332, 582
Under *Stute*, the common law control analysis does not limit a general contractor's statutory duty because the general contractor's status and authority warrant placing the duty on it as a matter of law. Thus, *Stute* shifted the inquiry from the existence of a duty to a breach of that duty. That shift in focus is a significant step towards providing greater protection for workers.

**B. Stute and the Legislative Intent Behind WISHA**

The *Stute* cases were not carving out new common law exceptions, but were interpreting statutory exceptions created in WISHA. Thus, the *Stute* cases’ consistency with common law precedent, while it bolsters their reasoning, is not necessary. *Stute* and its progeny were interpreting a statute that had chosen worker safety over common law concepts. In creating exceptions to the general rule of nonliability, the legislature was, in effect, stating that worker safety took precedence over such ancient and elusive common law concepts such as privity, independence of the relationship, and even control. In constructing these statutes as imposing a nondelegable duty on all owners and general contractors to comply with safety regulations, the *Stute* cases were in conformity with the legislative intent behind WISHA.

In WISHA, the legislature expressly voiced concern "that personal injuries and illnesses arising out of conditions of employment impose a substantial burden upon employers and employees in terms of lost production, wage loss, medical expenses, and payment of benefits under the industrial insurance act." 139 By enacting WISHA, the legislature hoped to "assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington." 140

Worker safety was the primary concern of the legislature. To assure worker safety, the legislature gave power to the Washington Department of Labor and Industries to enact safety standards. For these standards to have the intended effect, employer compliance is necessary. The primary concern of the *Stute*, *Husfloen*, *Weinert*, and *Doss* courts was to ensure such

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140. Id.
compliance.\textsuperscript{141} The courts felt that the best way to ensure compliance was to impose civil liability for injuries resulting from WISHA violations on employers with innate supervisory authority.\textsuperscript{142} It was the belief of the courts that employers with such authority have the opportunity to ensure compliance on the part of all subcontractors.\textsuperscript{143} Thus, the \textit{Stute} decisions, by giving practical effect to the standards promulgated under WISHA, further the stated purpose of the statute.\textsuperscript{144}

The legislative history reveals that, in addition to strengthening safety standards, the legislature was concerned with consolidating them.\textsuperscript{145} Prior to WISHA, safety standards were "fragmented all over the RCWs in numerous departments and agencies."\textsuperscript{146} The legislature sought to "consolidate and update the rules and regulations under one jurisdictional agency."\textsuperscript{147}

In so doing, the legislature sought greater efficiency in the enforcement of safety standards. The \textit{Stute} cases are in line with this intent because they rejected the use of the piecemeal control test to determine statutory duty in favor of the more certain innate supervisory authority approach. With the control test, the degree of control is the determinative factor. Under that approach, every case must be dealt with individually, as the degree of control will vary from party to party, case to case. As the court of appeals' decisions show, the result is inconsistent rules of liability, uncertainty, and injustice.

There is clearly more certainty under the innate supervisory authority approach. Tidious case-by-case application is no longer necessary because a general contractor or owner knows it is liable as a matter of law. This furthers the stated purpose of WISHA because general contractors and owners, knowing they can be held liable for injuries resulting from WISHA viola-

\textsuperscript{142} \textit{Stute}, 114 Wash. 2d at 461, 788 P.2d at 549.
\textsuperscript{143} \textit{Id.} at 462, 788 P.2d at 550.
\textsuperscript{144} See \textit{id.} at 464, 788 P.2d at 550. The above-cited cases also have the effect of protecting the workers' compensation fund. If a third-party defendant is found liable for a job site injury, the fund is partially repaid. It is sound public policy that those who are responsible for harm to injured workers bear the cost of compensating those workers and repaying the fund.
\textsuperscript{145} \textit{Report to Speaker's Office}, \textit{supra} note 52, at 1.
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{Id.}
tions, will presumably protect their interests by demanding and inspecting for compliance from all subcontractors.

The enhanced certainty also addresses the legislature’s call for consolidation and efficiency. The *Stute* approach is more efficient, more economical, and easier in application. By eliminating the piecemeal approach of the nebulous control test in most cases, the *Stute* approach furthers the legislative purpose of ensuring greater efficiency in safety standard enforcement.

The declared purpose of WISHA is to “create, maintain, continue, and enhance the industrial safety and health program of the state, which program shall equal or exceed the standards prescribed by the [OSH Act].”148 These words further emphasize the intent of the legislature to provide greater protection for workers. The gravity with which the legislature apparently viewed the safety question more than justifies the approach taken by the *Stute* cases to ensure WISHA compliance. The legislature hoped to ensure worker safety by any reasonable means of accomplishing this goal.

Because the state legislature chose to adopt standards that exceed those of the federal government, opponents of the *Stute* rules are precluded from arguing that the new Washington approach is invalid because it goes beyond the approach taken by the federal courts. The federal courts construe the OSH Act. Washington courts address a more stringent regulatory scheme. Thus, the limits of the federal court rules are irrelevant. The intent of the state legislature was to go a step further.

In addressing the arguments of those opposed to the *Stute* scheme, it is important to note that some commentators do not argue with the *Stute* ruling as it applies to general contractors in the *Stute* case itself, but are opposed to the extension of the *Stute* ruling to job site owners in *Doss*, to owner/developers in *Weinert*, and to owner/general contractors in *Husfloen*.149 Two points about legislative intent must be addressed specifically to those commentators.

One is that the WISHA definition of "employer" is comprehensive enough to include owners as well as general contractors.150 The statute does not differentiate between different

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types of employers. Thus, the duties imposed by RCW 49.17.060 apply equally to all types of employers. If the legislature had meant for job site owners to be less accountable, it could have separately defined owners or general contractors. It did not. The duties it imposed, therefore, must be applied uniformly.

The second point is that the administrative rules adopted pursuant to WISHA impose upon all employers the duty to "do every thing reasonably necessary to protect the life and safety of employees." Note that this code refers to employees in general, as RCW 49.17.060(2) does. Thus, the duty extends to all employees. If job site owners were not held accountable for all injuries resulting from WISHA violations, this provision would have no practical effect on them. Owners who are not general contractors often have none of their own employees on the job site because every worker is employed by one of the contractors. Under the control test, some job site owners would not have to take any steps to ensure worker safety. In effect, they would be getting a free ride merely by turning a blind eye to safety issues and passing the responsibility to the general contractor. Surely, this is not the result the legislature sought when it adopted WISHA. Moreover, this result would render WAC 295-155-040(4)(c) utterly meaningless as regards to those owners who ignored safety measures. This would violate the most basic rules of statutory construction. The extension of the *Stute* rule to job site owners is consistent with legislative intent and is necessary to give full practical effect to WAC 296-155-040(4)(c).

The extension of the *Stute* rule beyond general contractors thus furthers the policies underlying WISHA. In fact, the stated purpose of WISHA and the legislative history behind its enactment indicate that its purposes are fully served only if all

151. *Id.*


153. *Id.*

154. See Lutheran Day Care v. Snohomish County, 119 Wash. 2d 91, 102-03, 829 P.2d 746, 751 (1992) (holding that statutes in derogation of common law should be strictly construed and that statutes should not be interpreted in such a manner as to render any portion thereof meaningless, superfluous, or questionable), cert. denied, 113 S. Ct. 1044 (1993); Estate of O'Brien v. Robinson, 109 Wash. 2d 913, 918, 749 P.2d 154, 157 (1988) (holding that a statute is construed in such a manner as to avoid rendering meaningless a word or portion thereof); Addleman v. Board of Prison Terms & Paroles, 107 Wash. 2d 503, 509, 730 P.2d 1327, 1331 (1986) (emphasizing legislative intent, relation of statute to other provisions, and interpreting a statute so as not to render any portion meaningless, superfluous, or questionable).
job site owners owe the statutory duty as a matter of law. The rulings of Stute and all its progeny should remain good law.

C. The Benefits of the Stute Rule to Employers and Employees

In passing WISHA, the legislature sought to benefit employers as well as employees.\textsuperscript{155} Both Stute itself and the court of appeals cases expanding its ruling fit this balanced approach because the reasoning behind these cases and the practical effects gained by the rulings seek to benefit employers as well as employees.

In making this argument, it is necessary to first argue that the reasoning underlying Stute applies with equal force to the situations that existed in Husfloen, Weinert, and Doss. Those who agree with the Stute ruling, but not with the cases that expanded it, should note that the Stute court did not expressly limit its rule to general contractors. Nothing in the court's language indicates that it viewed the rule this narrowly.

In fact, the reasoning used by the Stute court indicated that the rule could be expanded when the public policy of protecting workers called for it. The court imposed the duty as a matter of law on general contractors because, as a practical matter, general contractors have both the opportunity and the ability to ensure safety regulation compliance from all of the subcontractors. The general contractor can include the cost of assuring a safe workplace in its bid to the owners. It can also require that subcontractors include the cost of safety in their bids. Placing the prime responsibility for safety on the general contractor furthers the purpose of WISHA to protect all workers.\textsuperscript{156}

This reasoning applies with equal force to job site owners. As the owner of the property where the work is being done, the job site owner has the legal authority to ensure compliance. As the party who controls the purse strings, the owner has the practical authority to ensure WISHA compliance. The job site owner can and should insist that all of the contractors observe the state standards. The owner can require safety provisions in the prime contract and in each subcontract. The owner can require that each contractor include the cost of safety in its bid. The owner can fire or withhold payment from a contractor who does not comply. This authority gives the owner both the oppor-

\textsuperscript{155} WASH. REV. CODE § 49.17.010 (1992).
tunity and the ability to ensure compliance. The role of the job site owner is analogous to that of the general contractor in the context of the Stute court's reasoning.

Moreover, the Stute court was concerned that at least one party on each work site be responsible for job site safety. In Stute, this responsibility was placed on the general contractor. In many cases, however, there is no general contractor. This is especially true outside of the construction context, but even in construction there has been a recent trend towards hiring "construction managers," rather than general contractors. On some sites, as in Husfloen, the owner is the general contractor. On other sites, such as in Weinert, the owner is a land developer who hires subcontractors, but no general contractor. In some situations, as in Doss, a subcontractor is hired to perform some specific maintenance or repair task on a site that had been previously constructed, and there is no general contractor. In situations such as these, the purposes of WISHA—as viewed by Stute—can be furthered only by placing responsibility for safety as a matter of law on a party other than the general contractor.

Job site owners are the only logical and practical choice. There is always a job site owner. The owner always has authority. The owner, if he can afford to hire subcontractors, presumably has the monetary resources. The owner signs the contracts and the checks, and therefore can insist on safety standard compliance. With general contractors nonexistent in many contexts, imposing liability on owners as a matter of law is the best way to assure that every worker in the state has the benefit of the protection of the WISHA standards. Someone must be responsible, and job site owners are, as a practical matter, the best choice. The reasoning of Stute, easily extends to, and in fact may best apply to, job site owners.

The approach taken by the Stute line of cases should not be viewed with hostility by owners and general contractors. It serves to benefit employers as well as employees. Greater worker safety benefits everyone. Employee injuries cost employers dearly, in terms of lost production and payment of premiums under the Industrial Insurance Act. With responsibility for safety placed with certainty on at least one party on the job site, safety regulations are more likely to be met, which

157. Id. at 463-64, 788 P.2d at 550.
will save all employers from the costs associated with employee injuries.

Employers also benefit, as do injured employees, from the certainty that the *Stute* approach brings to the law of job site liability. In the modern work world, the control test is an inefficient white elephant. Its piecemeal approach results in higher court costs and confusion on the part of owners and contractors as to their potential liability. Under the control test, an employer does not know for certain what actions would subject it to liability. Anticipating potential liability for any job would be impossible. Under the *Stute* approach, general contractors and owners know they are responsible for WISHA compliance, and subcontractors know they are responsible in their work area. The parties can figure their potential liability and prepare for it. This will save employers from unexpected liabilities.

It will also save employers and injured employees the expense and inconvenience of a lengthy lawsuit. With liability more certain, injured employees will know which parties to pursue and which not to pursue. Cases will settle faster. Fewer appeals will be necessary. The costs of defending lawsuits should actually go down for employers under the new scheme.

The *Stute* approach also spreads responsibility better than the control test. This is especially true when the expansion of the *Stute* rule to job site owners is taken into account. The approach of the *Stute* line of cases makes a greater number of parties potentially liable for job site injuries. Owners and general contractors are liable for certain, and the subcontractor whose WISHA violation resulted in the injury is liable as well. This spreads the costs of the injury out among a greater number of parties, thereby reducing the burden on employers, making it easier for the employee to make a full recovery, and better ensuring reimbursement of the state workers’ compensation fund. With more parties potentially liable, there should also be greater compliance with safety standards. Injuries are thereby reduced, which in turn reduces the overall cost of industrial insurance premiums for all employers.

Expanding the *Stute* rule to job site owners also reduces the burden on general contractors. Were general contractors solely responsible for safety, the costs for liability insurance would be unfairly weighted against them. Contractors might become reluctant to be general contractors.
Moreover, owners could shrug off responsibility by intentionally abdicating control over safety. Such apathy is not what the legislature sought when it enacted WISHA. Owners should be encouraged to become more, not less, involved in the safety of the jobs they initiate.

Taking this point to its logical conclusion, owners could, given the out allowed them by the control test, undertake projects with no accountability whatsoever. This is unfair to society in general. Those reaping the benefits of the state’s workforce could ignore the safety of those workers and receive benefits without sharing the risk. The less aggressively an owner pursued safety, the less it would be exposed to risk. Surely, fairness demands that the owner who is less concerned with safety should face greater risks.

Making owners liable also indirectly forces contractors to be more responsible about safety. Knowing they are legally accountable, owners will make WISHA compliance an issue when they hire contractors. Contractors with better safety records will get more jobs. Again, everybody benefits.

Some commentators argue that the *Stute* approach is unfair because of the recent erosion of indemnification rights by the courts. This argument, however, ignores the fact that while the courts were reducing these contract rights, the state legislature was compensating by creating greater contribution rights among tortfeasors. Thus, if the injured worker makes only one responsible party a defendant to a lawsuit, that party can seek contribution from the other responsible parties even if indemnification is not allowed. The *Stute* approach remains balanced, even in the face of disappearing indemnification rights.

This balance is a plus. The legislature did not mention the fair and equitable distribution of liability as a goal of WISHA. WISHA is for the safety of workers, not for the protection of employer’s rights as to one another when that safety breaks down. The balance of the *Stute* approach was not called for by the legislature and is, therefore, a bonus to employers.

As a final word on the issue of fairness, some have expressed concern that job site owners who are less sophisticated or less wealthy will be hurt by the extension of the *Stute* approach.  

159. Duff, supra note 18, at 374-75.  
161. Id.
rule to them. However, if owners have little money and no insurance, it is doubtful that an injured worker will pursue them aggressively as defendants. Moreover, it is sound policy to make all who wish to profit from the labor of workers responsible for providing a safe workplace for those workers. It does not further safety to grant impecunious and ignorant owners relief from the duty to ensure WISHA compliance.

In addition to being more fair than the control test, the Stute approach will have a greater practical impact. Under the control test, defendants would attempt to make fine semantic distinctions about their roles on the job site in an attempt to escape liability. General contractors would portray themselves as “construction managers” to escape liability. Owner/developers and owner/general contractors would claim to be simple owners, physically absent from the job site and therefore not in control of worker safety.

Such semantic quibbling reveals the true problem with the control test—it is an unnecessary waste of court time and therefore counterproductive to the general goal of judicial economy. Its piecemeal approach practically precludes the quick resolution of any job site injury. The greater certainty of the Stute approach eliminates this problem.

It should be pointed out as a final note that the control test and the Stute approach are more similar in terms of application than opponents of the Stute approach would like to admit. The difference is semantic, with “innate supervisory authority” taking the place of “right to control” as the term of art. What is authority if not the right to control? In application, they are basically the same. The Stute line of cases acknowledges that, as a practical matter, general contractors and owners do and should always have the right and responsibility to control the safety aspects of a job.

In terms of practical effect, however, authority and control are very different. The piecemeal control test creates more uncertainty than it does safety. Only by holding the parties in charge accountable for injuries resulting from WISHA violations is there any practical way we can expect an improvement in the frequency with which those standards are observed.

V. Conclusion

The history of job site liability in Washington has been that of a slow, but constant, evolution towards a greater recognition
that the safety of workers is crucial to the welfare of the state as a whole. The rule of *Stute* and its expansion by the courts of appeals is merely the most recent step in that evolution. The *Stute* approach is a good rule of law. It serves to benefit both employers and employees, it is fair and balanced, and it is consonant with the purposes of WISHA.