COMMENTS

Job Site Safety in Washington: Requiring Actual Control When Imposing Statutory Duties on Job Site Owners

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I. INTRODUCTION

A typical construction project can bring together various actors, including the job site owner, general contractor, subcontractor, and the employees of each. In addition to familiar common law duties, such as the duties owed to invitees, licensees, or trespassers, federal and state agencies have enacted

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1. The Washington Department of Labor and Industries (Labor and Industries) defines a contractor as follows:

A "contractor" is any person, firm, or corporation who or which, in the pursuit of an independent business undertakes to, or offers to undertake, or submits a bid to, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish, for another, any building, highway, road, railroad, excavation or other structure, project, development, or improvement attached to real estate or to do any part thereof.

DIVISION OF INDUS. SAFETY AND HEALTH, DEPT OF LABOR AND INDUS., WISHA REGIONAL DIRECTIVE 3 (Sept. 29, 1993) (Draft No. 12). Labor and Industries defines a general contractor as follows:

A "General Contractor" is a contractor whose business operations require the use of any unrelated building trades or crafts whose work the contractor shall superintend or do in whole or in part. The terms "general contractor" and "builder" are synonymous. The term "general contractor" shall include a prime contractor, that is, a contractor that has the prime or overall responsibility to superintend other general or subcontractors.

Id. Labor and Industries defines a subcontractor as "any contractor, including a specialty contractor, that is subordinate to a general or prime contractor." Id.

numerous complicated statutes and regulations that require safe and reasonable working conditions on the job site. The combination of the various job site actors and the numerous common law and statutory regulations provide an injured employee or employee's estate with several potential sources of compensation for the employee's injuries or death.

The situation in Washington State is no exception to the above scenario. Although workers' compensation statutes limit the amount of compensation that an injured employee may recover from his or her immediate employer,\(^3\) Washington expressly permits an injured employee or employee's estate to bring an action against a third person.\(^4\) Within the construction context, this third person may be a subcontractor, a general contractor, or even a job site owner.\(^5\)

In Stute v. P.B.M.C., Inc.,\(^6\) the Washington Supreme Court imposed liability for job site safety on general contractors on the presumption that general contractors possess "innate supervisory authority" over the job site.\(^7\) The court found this innate supervisory authority to constitute per se control over the job site and to justify placing the duty to comply with statutory safety regulations on the general contractor as a matter of law.\(^8\) The court did, however, limit the applicability of the presumption of innate supervisory authority. It held that defendants who fit within the statutory definition of employer but lack supervisory authority, must have actual control of the dangerous condition to be held liable.\(^9\)

Following Stute, the Washington Court of Appeals, relying on unique factual circumstances where general contractors and developers were also the job site owners, extended liability for

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4. Id. § 51.24.030(1) ("If a third person, not in a worker's same employ, is or may become liable to pay damages on account of a worker's injury for which benefits and compensation are provided under this title, the injured worker or beneficiary may elect to seek damages from the third person.").

5. Although this Comment focuses on the construction context, liability for job site safety has been extended to job site owners in other contexts as well. See, e.g., Doss v. ITT Rayonier, Inc., 60 Wash. App. 125, 803 P.2d 4 (holding a job site owner liable for the death of an independent contractor's employee while cleaning the owner's boiler), review denied, 116 Wash. 2d 1034, 813 P.2d 583 (1991).


7. Id. at 464, 788 P.2d at 550.

8. Id.

9. Id. at 461, 788 P.2d at 549.
job site safety to job site owners. Rather than employing a case-by-case actual control analysis, the court of appeals based their decisions on the mistaken presumption that job site owners, like general contractors, possess innate supervisory authority that constitutes per se control over the job site.

In contrast to the appellate courts' reliance on the mistaken presumption that a job site owner has innate supervisory authority, the Washington Supreme Court in *Hennig v. Crosby Group, Inc.* reaffirmed Stute's requirement that actual control over the job site be found before a court can impose liability for job site safety on a defendant other than a general contractor. In *Hennig*, the court looked to the degree of control actually retained by the job site owner instead of presuming innate supervisory authority. The injured employee in *Hennig*, however, relied exclusively on common law theories of liability and failed to assert a statutory violation. The subject of this Comment is whether the actual control requirement in *Hennig* should also be employed to find liability in cases involving asserted statutory violations.

This Comment argues that Washington courts should employ the same case-by-case control analysis used to impose the common law duty to provide a safe workplace to impose similar statutory duties on a job site owner. Part II of this Comment briefly identifies the possible sources of a job site owner's duties, including common law, contract, and statute. Part III explains the current status of job site owner liability in Washington. This Part carefully distinguishes between the Washington Supreme Court's consistent use of an actual control requirement for job site owners, and the Washington Court of Appeals' misconceived presumption of a job site owners' innate supervisory authority. Finally, Part IV explains why it is criti-

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11. Sollitt, 67 Wash. App. at 473 n.4, 836 P.2d at 833 n.4; see also Doss, 60 Wash. App. at 125, 803 P.2d at 4; Weinert, 58 Wash. App. at 692, 795 P.2d at 1167; Husfloen, 58 Wash. App. at 686, 794 P.2d at 859.


13. Id. at 133-34, 802 P.2d at 791-92.

14. The job site owner did not (1) actively supervise employees, (2) furnish the materials or equipment that the employees used, (3) have superior knowledge that the materials were defective, or (4) affirmatively contribute to the risk of injury on the job site. *Id.* at 134, 802 P.2d at 792.
ical that a court find actual control before imposing statutory duties on job site owners.

II. SOURCES OF JOB SITE OWNERS' DUTIES

In the construction context, the job site owner traditionally contracts with an independent general contractor or one or more independent subcontractors.\(^{15}\) Under common law, an employer who contracts with an independent contractor is generally not liable for the injuries to the independent contractor or its employees.\(^{16}\) Exceptions to this general rule of employer nonliability stem from common law, contract, and statute.\(^{17}\)

A. Common Law Exceptions to Employer Nonliability

Under common law, there are several exceptions to employer nonliability under which an employer can be held liable for its own negligence.\(^{18}\) For example, where there is a foreseeable risk of harm to others, an employer has a duty to exercise reasonable care in selecting a competent, experienced, and careful independent contractor with the proper equip-

\(^{15}\) In addition to the employer-independent contractor relationship that exists between a job site owner and a general contractor or subcontractor(s), a general contractor will typically contract with one or more independent subcontractors for specific tasks on the job site. Furthermore, many of these "first-tier" subcontractors will contract with one or more "second-tier" independent subcontractors. Finally, each general contractor and first-tier or second-tier subcontractor may have several employees.

Many of the cases cited throughout this Comment focus on the general contractor's liability for injuries sustained by the employees of a first-tier or second-tier subcontractor. Each exception to the general rule of employer nonliability applies equally to each of the employer-independent contractor relationships found on a typical job site: (1) the job site owner who contracts with independent general contractors and independent subcontractors, (2) the general contractor who contracts with one or more first-tier subcontractors, and (3) the first-tier subcontractor who contracts with one or more second-tier subcontractors. See Kelley v. Howard S. Wright Constr. Co., 90 Wash. 2d 323, 325, 582 P.2d 500, 502 (1978) (general contractor and independent subcontractor); Doss, 60 Wash. App. at 126, 803 P.2d 5 (job site owner and independent contractor).


\(^{17}\) Kelley, 90 Wash. 2d at 330, 582 P.2d at 505; Kennedy, 62 Wash. App. at 855, 816 P.2d at 83; PROSSER, supra note 16, § 71, at 511.

ment. Similarly, where an employer gives directions for the work, or furnishes equipment for the work, the employer must exercise reasonable care to protect others. Finally, where the employer retains control over a part of the work of the independent contractor, the employer has a duty to provide a safe workplace within the scope of the employer’s control.

In Washington, the proper control inquiry is not whether the employer actually interfered with the independent contractor’s work, but whether the employer retained control over or had the right to control the manner and means of doing the work. However, retaining the right merely to inspect and supervise to ensure the proper completion of a contract does not constitute a sufficient degree of control to impose a duty to provide a safe workplace.

The policies behind these common law exceptions focus on the employer’s primary role in the enterprise. The independent contractor’s work personally benefits the employer. Also, the employer may contract with an independent contractor who is financially responsible and able to indemnify the employer. Furthermore, the employer is in the best position to bear the cost of the insurance necessary to allocate risk.

B. Contractual Exceptions to Employer Nonliability

Contractual provisions provide a second exception to the general rule of employer nonliability. A contract may impose affirmative duties on the employer to provide a safe work-

19. Id. at 218, 635 P.2d at 433; RESTATEMENT (SECOND) OF TORTS § 411 (1965); PROSSER, supra note 16, § 71, at 510.
20. Amann v. City of Tacoma, 170 Wash. 296, 312, 16 P.2d 601, 607 (1932); RESTATEMENT (SECOND) OF TORTS § 410 (1965); PROSSER, supra note 16, § 71, at 510.
25. PROSSER, supra note 16, § 71, at 509.
26. Id.
27. Id.
place.\textsuperscript{29} For example, the employer's liability in \textit{Kelley v. Howard S. Wright Construction Co.},\textsuperscript{30} was predicated in part on the employer's contract, wherein the employer (1) assumed responsibility for initiating, maintaining, and supervising all safety precautions and programs in connection with the work on the job site; (2) agreed to comply with all applicable safety regulations; and (3) agreed to maintain reasonable safeguards.\textsuperscript{31}

\textbf{C. Statutory Exceptions to Employer Nonliability}

Statutorily imposed duties provide the final exception to the general rule of employer nonliability. In Washington, employers owe a duty to comply or to ensure compliance with applicable safety regulations to all employees on the job site, including an independent contractor's employees.\textsuperscript{32} However, Washington courts have limited this exception of nonliability to employers who retain control over some portion of the job site.\textsuperscript{33}

When the Occupational Safety and Health Act of 1970 (OSH Act)\textsuperscript{34} was enacted, responsibility for the enforcement of occupational safety and health standards in private workplaces was generally removed from state jurisdiction.\textsuperscript{35} Acting in

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\textsuperscript{29} \textit{Kelley}, 90 Wash. 2d at 334, 582 P.2d at 507; see also Smith v. United States, 497 F.2d 500 (5th Cir. 1974) (holding that the employer (general contractor) contractually assumed affirmative duties for safety that rendered him liable to an independent contractor's (subcontractor's) employee); Presser v. Siesel Constr. Co., 119 N.W.2d 405 (Wis. 1963) (holding that the employer (general contractor) contractually assumed affirmative duties that required compliance with a safety manual). \textit{But see} West v. Morrison-Knudsen Co., 451 F.2d 493 (9th Cir. 1971) (holding that a tort action against the employer (general contractor) could not be based on contractual obligations).

\textsuperscript{30} 90 Wash. 2d 323, 582 P.2d 500 (1978).

\textsuperscript{31} Id. at 330, 582 P.2d at 506.


\textsuperscript{33} \textit{See}, \textit{e.g.}, \textit{id.} at 463, 788 P.2d at 550 (holding that a general contractor's supervisory authority constitutes sufficient control over the workplace to impose a statutory duty to ensure compliance with safety regulations and that parties who fit the statutory definition of employer but lack supervisory authority, must have control to be held liable). Some commentators argue that Washington's statutes alone are an exception to employer nonliability regardless of the amount of control the employer actually retains. \textit{Stephen L. Bulzomi & John L. Messina, Jr., Washington's Industrial Safety Regulations: The Trend Towards Greater Protection for Workers, 17 U. Puget Sound L. Rev. 315} (1994). This conclusion, however, completely ignores the purpose of part two of the \textit{Stute} decision. \textit{See infra} notes 80-82 and accompanying text. Furthermore, from these commentators' perspective, given WISHA's broad definition of "employer," every property owner in Washington, including private homeowners, could be required to comply with statutory safety regulations. \textit{See infra} note 82.

\textsuperscript{34} 29 U.S.C. §§ 651-678 (1988).

\end{footnotesize}
response to a 1970 House Report, 36 Congress passed the OSH Act "to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."37

Under the OSH Act, Congress placed the responsibility for employee safety directly on the employer.38 Nearly every employer, with the exception of the federal government, must comply with safety and health standards promulgated under the Act.39 Where no standards apply, an employer must provide its employees with a place of employment free from recognized hazards that are likely to cause death or serious injury.40 An employer who fails to comply with the Act is subject to enforcement proceedings initiated by the Occupational Safety and Health Administration (OSHA).41 Once an OSHA inspector has determined that a violation exists, the Secretary of Health and Human Services may issue a citation and proposed penalty.42 The employer may accept the proposed penalty as a fine,

36. The House Report found as follows:
The on-the-job health and safety crises is the worst problem confronting American workers, because each year as a result of their jobs over 14,500 workers die. In only four years' time, as many people have died because of their employment as have been killed in almost a decade of American involvement in Vietnam. Over two million workers are disabled annually through job related accidents.

The economic impact of occupational accidents and diseases is overwhelming. Over $1.5 billion is wasted on lost wages, and the annual loss to the Gross National Product is over $8 billion. Ten times as many days are lost from job-related disabilities as from strikes, and days lost productivity through accidents and illnesses are ten times greater than the loss from strikes.

The Committee recognizes the enormity of the problems of occupational safety and health, and its hearings disclosed that the problems seem to be getting worse, not better.


38. Id. § 654(a). Section 654(a) provides that "[e]ach employer (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees; (2) shall comply with occupational safety and health standards promulgated under this chapter." Id.

39. Id. § 652(5).

40. Id. § 654(a)(1); Brennan v. Butler Lime & Cement Co., 520 F.2d 1011 (7th Cir. 1975).


or contest the citation. If the employer chooses to accept the proposed fine, it must abate the hazard within the abatement period specified in the citation.

Despite the OSH Act's intention to preempt state jurisdiction over occupational safety and health issues, the Act expressly allows states to submit plans to develop and enforce state health and safety standards. Washington submitted such a plan, and on June 7, 1973, the State enacted the Washington Industrial Safety and Health Act of 1973 (WISHA) to replace the OSH Act in administering occupational safety and health in the State of Washington.

WISHA was enacted to "create, maintain, continue, and enhance" an industrial safety and health program of the state equal to, or exceeding, the standards promulgated under the OSH Act. Application of WISHA is conditioned on the existence of an employer-employee relationship in any private or public job site within the state. The only job sites excluded are those under the exclusive jurisdiction of the federal government. The Washington Department of Labor and Industries, acting through the Director of Labor and Industries, is the sole agency responsible for the administration of WISHA's provisions.

Like its federal counterpart, WISHA contains both general safety and health standards that apply to a wide range of industries, and specific standards promulgated for specific indus-

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43. Id.
44. Id.
45. Id. § 667.
49. Id. § 49.17.030.
50. Id. § 49.17.020(3), (7).
51. Id. §§ 49.17.020(2), .270.
52. WASH. REV. CODE § 49.17.060(1) (1992) provides as follows:
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: PROVIDED, That no citation or order assessing a penalty shall be issued to any employer solely under the authority of this subsection except where no applicable rule or regulation has been adopted by the department
tries. The specific safety and health standards are adopted pursuant to the provisions of the Washington Administrative Procedure Act and WISHA.

WISHA often impacts negligence actions brought by an injured employee against defendants other than his or her immediate employer. The violation of a WISHA health or safety standard may be considered by a court as evidence of an employer's negligence. Although WISHA is expressly limited to an employer-employee relationship, the courts have had difficulty defining the scope of WISHA's protections.

In attempting to further WISHA's purposes, the courts have interpreted WISHA's general and specific safety and health standards differently. The general health and safety standard, which requires an employer to protect "his emplo-

covering the unsafe or unhealthful condition of employment at the workplace. . . .

53. Id. § 49.17.060(2). Each employer "shall comply with the rules and regulations, and orders promulgated under this chapter." Id.
54. Id. § 34.05.
55. Id. § 49.17.040.
56. Id. § 5.40.050 ("A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence . . . "); see also Doss v. ITT Rayonier, Inc., 60 Wash. App. 125, 129-30, 803 P.2d 4, 7 ("The practical effect of RCW 5.40.050 is to eliminate what might be called the 'strict liability' character of statutory violations under the old negligence per se doctrine, but to allow a jury to weigh the violation, along with other relevant factors, in reaching its ultimate determination of liability."). review denied, 116 Wash. 2d 1034, 813 P.2d 583 (1991).

Furthermore, under WISHA's broad language, several actors on a job site may fall within the statutory definition of "employer." Stute v. P.B.M.C., Inc., 114 Wash. 2d 454, 463, 788 P.2d 545, 550 (1990). WASH. REV. CODE § 49.17.020(3) (1992) defines an employer as follows:

any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees or who contracts with one or more persons, the essence of which is the personal labor of such person or persons and includes the state, counties, cities, and all municipal corporations, public corporations, political subdivisions of the state, and charitable organizations: PROVIDED, That any person, partnership, or business entity not having employees, and who is covered by the industrial insurance act shall be considered both an employer and an employee.

ees” from recognized hazards not covered by specific regulations, protects only an employer’s immediate employees.60 In contrast, WISHA’s specific safety and health regulations61 protect all employees working on a job site who may be harmed by an employer’s violation of the WISHA regulations.62 Thus, an employer’s liability depends on which safety standard is invoked. Where an independent contractor’s injured employee asserts that an employer failed to comply with specific WISHA regulations, the employer may be held liable.63

Whether the employer is actually held liable, however, turns on whether the employer has retained control over the independent contractor’s work.64 Thus, to find a statutory exception to the general rule of employer nonliability, it is critical to assess the amount of the employer’s control.

III. CURRENT STATUS OF JOB SITE OWNER LIABILITY

A. The Washington Supreme Court 1978-1990

Common law, contractual, and statutory exceptions to employer nonliability were used by the Washington Supreme Court in Kelley v. Howard S. Wright Construction Co.65 In Kelley, a subcontractor’s employee brought a negligence action against the general contractor for injuries sustained from falling twenty-nine feet onto a concrete floor.66 The employee alleged that the general contractor was negligent in failing to provide a safety net, which, he claimed, was required by an OSHA safety regulation.67 The general contractor’s contract with the job site owner provided that the general contractor would assume sole responsibility for supervising and coordinat-

60. Stute, 114 Wash. 2d at 457, 788 P.2d at 547; Adkins v. Aluminum Co. of America, 110 Wash. 2d 128, 152, 750 P.2d 1257, 1271 (1988).
62. Stute, 114 Wash. 2d at 457, 788 P.2d at 547; Adkins, 110 Wash. 2d at 152, 750 P.2d at 1271; Goucher, 104 Wash. 2d at 672, 709 P.2d at 774.
63. Stute, 114 Wash. 2d at 457, 788 P.2d at 547.
64. Id. at 464, 788 P.2d at 550. The WISHA control requirement stems from the common law retained control exception of employer nonliability to independent contractors and their employees. Id. at 460, 788 P.2d at 548; see supra notes 22-24 and accompanying text.
65. 90 Wash. 2d 323, 582 P.2d 500 (1978).
66. Id. at 327, 582 P.2d at 503.
67. “Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.” 29 C.F.R. § 1926.105(a) (1992).
ing all aspects of the work.\textsuperscript{68} Furthermore, the general contractor "agreed to be responsible for 'initiating, maintaining and supervising all safety precautions and programs in connection with the work' and to 'erect and maintain as required by existing conditions and progress of the work, all reasonable safeguards for safety and protection.'\textsuperscript{69}

Although the court acknowledged the general rule of employer nonliability for the injuries to employees of independent contractors, the court concluded that the general contractor owed a duty to the subcontractor's employees to "provide a reasonably safe workplace and reasonable safety equipment."\textsuperscript{70} The general contractor's failure to comply with its common law, contractual, and statutory duty to provide a reasonably safe place of work and reasonable safety equipment established a basis for liability to the injured employee.\textsuperscript{71}

According to the Kelley court, the general contractor's general supervisory functions under its contract with the job site owner constituted sufficient control over the injured employee's workplace to justify finding an exception to the general rule of nonliability.\textsuperscript{72} The general contractor's right to require the use of safety precautions or to halt dangerous work in adverse weather conditions was sufficient to establish the general contractor's control.\textsuperscript{73}

In part two of its opinion, the Kelley court held that the general contractor's authority over the employee's workplace and voluntary contractual assumption of the duty to comply with safety regulations required that the general contractor comply with OSHA safety regulations.\textsuperscript{74} The general contrac-

\textsuperscript{68} Kelley, 90 Wash. 2d at 327, 582 P.2d at 503.

\textsuperscript{69} Id. The employee's direct employer (subcontractor) contractually agreed with the general contractor to assume responsibility for any statutory violations. Id. Unfortunately, the case provides no information as to the role or conduct of the job site owner.

\textsuperscript{70} Id. at 334, 582 P.2d at 507.

\textsuperscript{71} Id.

\textsuperscript{72} Id. at 331, 582 P.2d at 505.

\textsuperscript{73} Id. The general contractor's contract with the construction site owner provided two alternative bases for finding an exception. First, the contract evidenced the general contractor's retained supervisory and coordinating authority, which provided a basis for the common law retained control exception. Id. at 330-331, 582 P.2d at 506. Second, the contract itself provided a means from which the injured employee could claim an exception to the general rule as a third party beneficiary. Id. 333-34, 582 P.2d at 506-507.

\textsuperscript{74} Id. at 331, 334, 582 P.2d at 505, 506. Whether the OSH Act mandate of employer compliance with OSHA regulations applies to general contractors when the persons affected are the subcontractor's employees is uncertain. See Brennan v. Gilles
tor's violation of the OSHA regulation constituted negligence per se.\footnote{75}

Twelve years after \textit{Kelley}, the Washington Supreme Court made it much easier for injured employees of independent contractors to establish the requisite degree of control to find a statutory exception to employer nonliability. In \textit{Stute v. P.B.M.C., Inc.},\footnote{76} a subcontractor's employee sustained injuries after he slipped and fell three stories while installing gutters on a rain-soaked roof.\footnote{77} The employee brought suit against the general contractor alleging that the general contractor owed him a duty to provide safety devices required under WISHA.\footnote{78}

The Washington Supreme Court agreed and held that employers must comply with WISHA regulations to protect all employees on a job site, even the employees of an independent contractor.\footnote{79} The \textit{Stute} court, however, was not finished.

In part two of its opinion, the court held that where both the subcontractor and general contractor fit the statutory definition of employer, "the primary employer, the general contractor, has, as a matter of policy, the duty to comply with or ensure compliance with WISHA and its regulations."\footnote{80} The court found a general contractor's innate supervisory authority to constitute per se control over the workplace, and therefore placed the duty to comply with WISHA regulations on the general contractor as a matter of law.\footnote{81} The court further held that parties other than a general contractor who fit the statutory

\footnotesize{\textit{& Cotting, Inc.}, 504 F.2d 1255 (4th Cir. 1974) (holding that a general contractor does not bear joint responsibility with a subcontractor for compliance with OSHA regulations). \textit{But see} Brennan v. OSHRC, 513 F.2d 1032 (2nd Cir. 1975) (holding that the employer who has control over the work area in which a hazard exists is responsible for complying with OSHA regulations); Anning-Johnson Co. v. OSHRC, 516 F.2d 1081 (7th Cir. 1975) (applying a similar control test).

75. \textit{Kelley}, 90 Wash. 2d at 336, 582 P.2d at 508. The court's decision was made prior to Washington's enactment of RCW 5.40.050, which eliminated strict liability for statutory violations. \textit{See supra} note 56.


77. Id. at 456, 788 P.2d at 546.

78. Id.

79. Id. at 457, 788 P.2d at 547.

80. Id. at 463, 788 P.2d at 550 ("A general contractor's supervisory authority places the general [contractor] in the best position to ensure compliance with safety regulations. For this reason, the prime responsibility for safety of all workers should rest on the general contractor."); \textit{see also} Marshall v. Knutson Constr. Co., 566 F.2d 596 (8th Cir. 1977) (recognizing that "[g]eneral contractors normally have the responsibility and means to assure that other contractors fulfill their obligations with respect to employee safety where those obligations affect the construction worksite").

81. \textit{Stute}, 114 Wash. 2d at 464, 788 P.2d at 550-51.}
definition of employer but lack supervisory authority, must have control of, or create, the dangerous condition to be held liable.\textsuperscript{82}

Based on the supreme court's decisions in \textit{Kelley} and \textit{Stute}, a court must find that the employer of an independent contractor retained control over some portion of the independent contractor's work before the court can find a statutory exception to the general rule of employer nonliability. Although WISHA's regulations provide protection to the employees of independent contractors, a court still must find that the employer retained control over the independent contractor before the employer has a duty to comply or ensure compliance with WISHA regulations. What is necessary to prove control, however, may differ depending on the identity of the employer. With respect to general contractors, the general contractor's innate supervisory authority constitutes per se control and, therefore, justifies finding an exception to the general rule of employer nonliability. The general contractor need not have actual control. In contrast, parties other than general contractors who lack supervisory authority must have control of the dangerous condition to be held liable.

\textbf{B. Washington Court of Appeals' Decisions Following Stute}

Within months after the supreme court's decision in \textit{Stute}, the court of appeals began applying the \textit{Stute} presumption of innate supervisory authority to defendants other than general contractors. In \textit{Husfloen v. MTA Construction, Inc.},\textsuperscript{83} the Division One Court of Appeals imposed the duty of ensuring compliance with WISHA regulations on both a general contractor/job site owner and a subcontractor.\textsuperscript{84} The general contractor/job

\textsuperscript{82} \textit{Id.} at 461, 788 P.2d at 549. This interpretation is further supported by the Washington Court of Appeals' decision of \textit{Kennedy v. Sea-Land Serv., Inc.}, 62 Wash. App. 839, 854, 816 P.2d 75, 83 (1991). In \textit{Kennedy}, the court limited WISHA's application to employers other than general contractors "who exercise the requisite degree of control over the work of the independent contractor." \textit{Id.} The court recognized that under WISHA's broad definition of employer, an inexperienced widow employing a contractor could be held responsible for complying with WISHA's detailed regulations: An inexperienced widow employing a contractor to build a house is not to be expected to have the same information, or to make the same inquiries, as to whether the work to be done is likely to create a peculiar risk of physical harm to others, or to require special precautions, as a real estate development company employing a contractor to build the same house.\textsuperscript{83} \textit{Id.} (quoting Aceves v. Regal Pale Brewing Co., 595 P.2d 619, 622 (Cal. 1979)).


\textsuperscript{84} \textit{Id.} at 692, 794 P.2d at 862.
site owner contracted with a subcontractor who hired an independent subcontracting firm to pump concrete.\textsuperscript{85} Husfloen, an employee of the independent pumping firm, was electrocuted after extending a concrete pumping boom into a 7200 volt power line.\textsuperscript{86} The employee's estate sued the subcontractor and the general contractor/job site owner alleging that both were negligent in allowing or instructing the employee to operate the boom within ten feet of the power line.\textsuperscript{87}

The \textit{Husfloen} court held that under \textit{Stute}, the general contractor/job site owner had a duty to comply or ensure compliance with WISHA regulations because the general contractor/job site owner occupied the same role as the pure general contractor occupied in \textit{Stute}.\textsuperscript{88} Furthermore, the court held that the subcontractor owed a duty to the employee because the subcontractor was in a better position to ensure compliance with WISHA regulations than the general contractor/job site owner.\textsuperscript{89}

On the same day \textit{Husfloen} was decided, the Division One Court of Appeals employed the presumption of innate supervisory authority to impose liability on a developer/job site owner in \textit{Weinert v. Bronco National Co.}\textsuperscript{90} In \textit{Weinert}, the injured employee fell off defective scaffolding, which had been brought on the job site and erected by the employee's immediate employer, an independent siding company hired by a subcontractor.\textsuperscript{91} The employee sued the developer/job site owner and the subcontractor, asserting that both had committed several WISHA violations.\textsuperscript{92}

\textsuperscript{85} Id. at 687, 794 P.2d at 860.

\textsuperscript{86} Id.

\textsuperscript{87} Id. at 688, 794 P.2d at 860. The WISHA regulation, applicable at the time of the accident, prohibited work to be performed or equipment operated within 10 feet of an overhead wire. \textit{Id.}

\textsuperscript{88} Id. at 689, 794 P.2d at 861.

\textsuperscript{89} Id. at 690, 794 P.2d at 861. The subcontractor alone selected the pumping firm, contacted the firm, and supervised the actual pouring of the concrete. The general contractor/job site owner did not have a representative at the job site on the day the accident occurred. \textit{Id.}


\textsuperscript{91} At the trial level, there was no direct evidence that the developer/job site owner or the subcontractor erected the scaffolding or knew of the alleged defects in the scaffolding. \textit{Id.} at 693, 795 P.2d at 1168.

\textsuperscript{92} Id. at 694-95, 795 P.2d at 1169. The specific regulations allegedly violated, WAC 296-155-485, relating to scaffolding, and WAC 296-155-480, relating to ladders, require nearly 18 pages of technical text.
Reversing the trial court's dismissal of the employee's complaint, the appellate court concluded that the presumption of innate supervisory authority enunciated in *Stute* applied equally to a developer/job site owner.93 Like the pure general contractor in *Stute*, the developer/job site owner in *Weinert* possessed the same innate supervisory authority and was, therefore, in the best position to enforce compliance with WISHA regulations.94

Furthermore, the court held that under *Stute*, the subcontractor also owed the employee a duty to enforce applicable safety regulations.95 The court found that the subcontractor maintained the same innate supervisory authority over the independent siding company's work as the developer/job site owner maintained over the entire job site.96 However, unlike the developer/job site owner who had broad supervisory responsibilities, the subcontractor had only limited supervisory authority that required that the subcontractor's duties be limited to the scope of its contract with the developer/job site owner.97

Six months after the *Weinert* decision, the Division Two Court of Appeals applied the presumption of innate supervisory authority to a pure job site owner outside of the construction context. In *Doss v. ITT Rayonier, Inc.*,98 an independent contractor's employee was killed while cleaning a boiler at the owner's mill.99 The employee's representative brought a wrongful death action against the owner alleging that the owner owed the employee a duty to comply with WISHA regulations.100

Relying on *Stute* and *Weinert*, the court concluded that there was no significant difference between the present job site owner-independent contractor relationship and the general con-
tractor-subcontractor relationships in previous decisions. Like the general contractor and subcontractor in Stute, both the owner and independent contractor in Doss met the statutory definition of employer. The Doss court held that the owner's innate supervisory authority that gave him control over the workplace justified the court's finding that the owner owed a duty to the employee to comply with WISHA regulations.

After reviewing Husfloen, Weinert, and Doss, it appears that any employer in a supervisory position analogous to a general contractor, including a job site owner, is presumed to have innate supervisory authority over the job site. Relying on an employer's innate supervisory authority as per se control, a court can impose on all employers, including job site owners, a duty owed to all job site employees to comply or ensure compliance with WISHA regulations.

The problem with the above analysis is that the innate supervisory authority presumption becomes increasingly difficult to justify outside the limited general contractor context. In reality, the further removed an employer is from the job site and its corresponding responsibilities, the less likely it is that the employer will have the expertise necessary to comply or ensure compliance with detailed WISHA regulations. For example, it is unreasonable to expect a job site owner to comply with or even understand WISHA's detailed and technical scaffolding regulations. Even the court of appeals has recognized that, contrary to statements made in Stute, subcontractors may be in a better position to comply or ensure compliance with

102. Id.
103. Id. The only reference to the job site owner and its role was that the job site owner's supervisor kept a close watch on the independent contractor's work. Id. at 127, 803 P.2d at 5.
106. See supra note 80.
WISHA regulations than a general contractor/job site owner\textsuperscript{107} or a developer/job site owner.\textsuperscript{108}

C. The Supreme Court After Doss

In \textit{Hennig v. Crosby Group},\textsuperscript{109} decided three days after \textit{Doss}, the Washington Supreme Court reaffirmed the necessity of finding actual control before imposing liability on defendants other than general contractors.\textsuperscript{110} In \textit{Hennig}, an employee of an independent contractor was permanently injured while working on the job site owner's pier.\textsuperscript{111} The employee brought an action against his immediate employer and the pier owner, but he failed to assert a WISHA violation.\textsuperscript{112}

Citing the general rule that the employer of an independent contractor is not liable for the injuries to the independent contractor's employees, the \textit{Hennig} court conducted an inquiry into the amount of control the job site owner actually retained over the independent contractor's work.\textsuperscript{113} The court concluded that the job site owner's right to oversee compliance with contract provisions did not constitute sufficient control over the independent contractor's work to place the job site owner within the exception to employer nonliability.\textsuperscript{114}

Although \textit{Hennig} did not involve a WISHA violation, the supreme court's decision reaffirms the need to find actual control to impose liability on defendants other than general contractors. The supreme court's refusal in \textit{Hennig} to rely on the presumption of innate supervisory authority to find an exception to the general rule of nonliability contradicts the previous appellate court decisions in \textit{Husfloen, Weinert}, and \textit{Doss}. The supreme court's refusal can be interpreted two ways. Perhaps a court may only rely on the presumption of innate supervisory


\textsuperscript{108} Weinert, 58 Wash. App. at 697, 795 P.2d at 1170.


\textsuperscript{110} \textit{Id.} at 134, 802 P.2d at 791-92.

\textsuperscript{111} \textit{Id.} at 132-33, 802 P.2d at 791.

\textsuperscript{112} \textit{Id.} at 133, 802 P.2d at 791.

\textsuperscript{113} \textit{Id.} at 134, 802 P.2d at 792.

\textsuperscript{114} \textit{Id.} The contract between the job site owner and independent contractor assigned to the independent contractor the sole responsibility for supervising job site safety and required the independent contractor to comply with applicable state and federal safety regulations. \textit{Id.} The court found further support for its decision because the owner (1) did not supervise the independent contractor's employees, (2) had no superior knowledge that the injured employees' equipment may be defective, and (3) did nothing to affirmatively increase the risk. \textit{Id.}
authority when a plaintiff has alleged violations of specific WISHA regulations.115 Alternatively, a job site owner's role is not sufficiently analogous to that of a general contractor to automatically impose liability under the same rule of law.

The first interpretation is problematic. The presumption of innate supervisory authority was originally adopted under circumstances where the defendant, in fact, had control over the job site.116 Under these limited circumstances, the presumption is justified by the defendant's supervisory role on the job site, not the legal nature of the duty involved. WISHA regulations provide the standard of care owed once control is established.117 Within the general contractor context, Stute held that "[a] general contractor's [innate] supervisory authority is per se control over the workplace."118 Stute merely established the exception to employer nonliability; the scope of the general contractor's duty could have been premised on common law or WISHA.119

Because application of the Stute presumption is based on the defendant's role and not on whether common law or statutory violations are alleged, the Hennig court must have concluded that the role of a job site owner is not sufficiently analogous to the role of a general contractor to justify extending liability under the same rule of law. Under this latter interpretation, the court of appeals' reliance on a job site owner's innate supervisory authority is misplaced. Rather, Hennig correctly requires that a court conduct a case-by-case inquiry into the amount of control actually retained by a job site owner before imposing liability.120

115. If in fact the presumption of innate supervisory authority is only appropriate under WISHA, it follows that the retained control exception found in Hennig applies only to common law duties. This conclusion would appear to contradict part two of the Stute decision. See supra notes 80-82 and accompanying text.


117. See id. at 464, 788 P.2d at 550 ("[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.") (emphasis added).

118. Id. (emphasis added).


120. See also id. at 855, 816 P.2d at 83 (holding eight months after Hennig that a job site lessee would have the same duty of care as a general contractor under Kelley only if it retained the requisite amount of control over the work).
IV. THE NECESSITY OF ACTUAL CONTROL

Hennig's requirement that an owner retain control over some portion of the job site before a court may recognize a statutory exception to employer nonliability is sound for several reasons. First, the presumption that an employer has innate supervisory authority should only apply where the presumption is justified. Although a job site owner's role is sometimes similar to the role of a general contractor, blind reliance on the analogy is wrong. Second, it is nearly impossible for a job site owner to insure against liability through indemnification. Finally, both federal and state applications of similar health and safety statutes require an employer other than an employee's immediate employer to retain control before the employer has a duty to comply or ensure compliance with safety regulations.

A. The Job Site Owner

Extending potential liability to a job site owner places the owner in an awkward and difficult position. To avoid liability, the owner must aggressively implement and monitor safety programs. To effectively monitor job site safety, the job site owner must involve itself with the construction activities on a daily basis. However, an owner's primary purpose in contracting with a general contractor to manage a job site is to avoid this type of daily involvement.

Furthermore, it is doubtful that a job site owner has the necessary manpower, expertise, or knowledge to comply or ensure compliance with technical safety regulations. This is especially true, for example, in the case of a private homeowner who hires an independent contractor to reroof his or her home. Arguably, any private homeowner could fall within WISHA's broad definition of employer. Under the appellate courts' analysis, the private homeowner would then be required to ensure that the roofer complied with any applicable WISHA regulations.

Finally, the confusion associated with the job site owner's activities on the job site may provide a basis for the general contractor to bring an action against the owner for breach of contract, or the owner's personal negligence.

121. See supra note 82.
122. Edwards Contracting Co. v. Port of Tacoma, 83 Wash. 2d 7, 13, 514 P.2d 1381, 1385 (1973) ("In every construction contract there is an implied term that the owner... will not hinder or delay the contract...").
B. Indemnification

Any effort by a job site owner to avoid liability through indemnification is also filled with pitfalls. Over recent years, Washington’s laws regarding indemnification contracts have changed drastically. These changes make indemnification contracts almost impossible.

Under common law, a general contractor could require a subcontractor to insure against claims made by the subcontractor’s employees. Subcontractors could be required to defend and indemnify general contractors for claims brought by subcontractor’s employees, even if the employees’ injuries were caused by the general contractor’s negligence. General contractors’ indemnification rights, however, began to disappear in Jones v. Strom Construction Co. In Jones, the Washington Supreme Court held that a general contractor could not be indemnified by a subcontractor for injuries caused by the general contractor’s negligence. The rule was later codified at RCW 4.24.115.

Indemnification rights were limited further in Brown v. Prime Construction Co. The Brown court held that a subcontractor’s agreement to indemnify the general contractor for injury claims from the subcontractor’s own employees disfavorably circumvents the subcontractor’s industrial insurance immunity. Additionally, the court stated that for an indemnification agreement to be enforceable, the agreement must

123. See supra notes 18-21 and accompanying text.
124. See, e.g., Tucci & Sons, Inc. v. Madsen, Inc., 1 Wash. App. 1035, 467 P.2d 386 (1970) (holding that neither statute prohibiting employers or workmen from exempting themselves from the Workmens’ Compensation Act precluded enforcement of the subcontractor’s agreement that obligated it to indemnify the general contractor).
125. 84 Wash. 2d 518, 527 P.2d 1115 (1974).
126. Id. at 522, 527 P.2d at 1118-19.
127. WASH. REV. CODE § 4.24.115(1) (1992) provides as follows: A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of, any building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estate, including moving and demolition in connection therewith, purporting to indemnify against liability for damages arising out of bodily injury to persons or damage to property: (1) Caused by or resulting from the sole negligence of the indemnitee, his agents or employees is against public policy and is void and unenforceable. . . .
129. Id. at 239-40, 684 P.2d at 75. The Industrial Insurance Act, WASH. REV. CODE § 51 (1992), reflects a strong public policy towards limiting employers’ liability for their employee’s job related injuries. Brown, 102 Wash. 2d at 238, 684 P.2d at 75.
clearly state (1) that the subcontractor expressly waives its workers' compensation immunity, or (2) that the subcontractor expressly assumes potential liability for its own employees' actions.\textsuperscript{130} This rule was also codified.\textsuperscript{131}

Despite the \textit{Brown} ruling and the enactment of statutory law, many form indemnification agreements have failed to change in response to the decision.\textsuperscript{132} Moreover, even inserting a provision meeting the \textit{Brown} requirements does not yet guarantee indemnification. It appears that RCW 4.24.115(1) limits the effectiveness of an indemnification agreement that apportions liability between a job site owner and a general contractor, even if based on the owner's passive negligence.\textsuperscript{133} Finally, it is unclear whether the duty to provide a safe job site is nondelegable.\textsuperscript{134}

\textbf{C. Federal and State Control Requirements}

Other jurisdictions have experienced similar difficulty in deciding whether to extend liability for job site safety beyond an employee's immediate employer. Unfortunately, the federal approach to job site safety under the OSH Act provides no real guidance. Both federal and state applications of OSHA requirements\textsuperscript{135} have resulted in divergent decisions on whether the employer's duty to comply or ensure compliance with OSHA...

\textsuperscript{In general, RCW 51.04.010 grants tort immunity to employers and, in exchange, gives employees sure and certain relief for any job related injury. Indemnity provisions operate to circumvent the Act's provisions by allowing employers to be ultimately liable for tort damages resulting from an employee's job related injury. Thus, indemnity provisions, in effect, waive the Industrial Insurance Act's immunity.}

\textsuperscript{Id.}

\textsuperscript{130} \textit{Brown}, 102 Wash. 2d at 239-40, 684 P.2d at 75.


\textsuperscript{132} \textit{John A. Manix, Construction Site Injuries to Subcontractors Employees: The Dramatic Expansion of Liability for General Contractors} 2-49 (1992) (on file with \textit{University of Puget Sound Law Review}).

\textsuperscript{133} See generally \textit{id.}; John W. Rankin, Jr., Indemnity, Apportionment and Insurance and the Construction Site Injury Claim, in \textit{Public Procurement and Private Construction Law} (April 1992). Passive negligence in this context refers to liability imposed on a job site owner for failing to provide a safe workplace when there is no finding of negligent conduct by the owner.

\textsuperscript{134} See \textit{Kelley v. Howard S. Wright Constr. Co.}, 90 Wash. 2d 323, 333, 582 P.2d 500, 506 (1978) (holding that the general contractor had a nondelegable duty of care to employees of the subcontractor under the general contractor's contract with the owner). \textit{But see Stute v. P.B.M.C., Inc.}, 114 Wash. 2d 454, 464, 788 P.2d 545, 551 (1990) (holding that a general contractor has the responsibility "to furnish safety equipment or to contractually require subcontractors to furnish safety equipment") (emphasis added).

\textsuperscript{135} See \textit{supra} note 38.
safety regulations extends beyond the employer's immediate employees.\textsuperscript{136} Despite these contrasting decisions, every court has held that the employer must retain or exercise a requisite amount of actual control over some portion of the job site for liability to be imposed.\textsuperscript{137} Applying OSHA standards, the courts have never relied on an employer's innate supervisory authority to justify extending the duty.\textsuperscript{138} Moreover, the OSH Act's general and specific duty clauses have not been interpreted as expanding job site owner responsibilities.\textsuperscript{139}

Like Washington, several other states have enacted occupational safety and health statutes similar to the OSH Act that require employers to provide employees with a safe workplace and to comply with specific safety regulations.\textsuperscript{140} State court

\textsuperscript{136} See Teal v. E.I. DuPont de Nemours & Co., 728 F.2d 799 (6th Cir. 1984) (holding that the general duty clause (29 U.S.C. \textsection 654(a)(1)) imposes a duty of reasonable care on every employer to protect its direct employees from recognized hazards regardless of the employer's amount of control, and that the specific duty clause (29 U.S.C. \textsection 654 (a)(2)) protects all employees on the job site, including an independent contractor's employees, if the employer retains or exercises the requisite amount of control over the job site and has the opportunity to comply with OSHA regulations). But see Melerine v. Avondale Shipyards, Inc., 659 F.2d 706 (5th Cir. 1981) (holding that the OSH Act's general and specific clauses only regulate an employer's obligation to provide safe work conditions for its immediate employees).

\textsuperscript{137} See, e.g., Teal, 728 F.2d at 804.

\textsuperscript{138} Whether Washington's recognition of a general contractor's innate supervisory authority in \textit{State} would apply to the OSH Act remains uncertain. See \textit{Kelley}, 90 Wash. 2d at 335, 582 P.2d at 506 (requiring that the general contractor control the work area in which the hazard exists before imposing the duty to comply with OSHA regulations).

\textsuperscript{139} Cochran v. International Harvester Co., 408 F. Supp. 598 (W.D. Ky. 1975) (holding that the OSH Act does not provide a basis for recovery by an independent contractor's injured employee against the job site owner who did not employ the injured employee).

decisions interpreting these statutes have approached extending liability for job site safety beyond an employee's immediate employer in a variety of ways. Absent specific statutory mandate, however, retaining control over some portion of the job site or specific employee is critical before a court will extend the duty to comply with safety regulations beyond the employee's immediate employer. To date, Washington is the only state that has abandoned a case-by-case control inquiry and ruled as a matter of law that a general contractor's innate supervisory authority justifies finding an exception to employer nonliability and imposing a duty owed to all employees to comply with statutory safety regulations.

V. CONCLUSION: FUTURE APPLICATIONS OF THE CONTROL REQUIREMENT

Whether the standard of care owed by an employer to an independent contractor's employees is based on common law, contract, or statute, a court must find an exception to the gen-


141. See, e.g., Proctor & Gamble Co. v. Staples, 551 So. 2d 949 (Ala. 1989) (holding that the statutory duty to provide a safe workplace is imposed upon the one who has control or custody of the employment or place of employment); Ernest W. Hahn, Inc. v. Sunshield Insulation Co., 137 Cal. Rptr. 732 (Ct. App. 1977) (holding that a general contractor who is in control of the premises where work is being done by a subcontractor's employees is an employer subject to a statutory nondelegable duty to provide a safe place of employment and to comply with safety regulations); Phillips v. United Eng'rs & Constructors, Inc., 500 N.E.2d 1265 (Ind. Ct. App. 1986) (holding that the owner/contractor did not owe a duty to the independent contractor's employee because the owner did not retain control of the means and methods by which the contractors engaged in their work); Murphy v. Stuart M. Smith, Inc., 455 A.2d 69 (Md. Ct. Spec. App. 1983) (recognizing three circumstances where the duty to provide a safe job site has been applied to someone other than the employee's direct employer: (1) where the local jurisdiction's statute specifically requires that the employer maintain a safe job site for all employees; (2) where the employer voluntarily assumes a duty for the benefit of persons other than its own employees; and (3) where an owner or employer creates the safety regulation violation or has actual control and substantial control over the work area); Flores v. Metro Machinery Rigging, Inc., 783 P.2d 1024 (Oreg. Ct. App. 1989) (holding that under the state health and safety statute, an employer must have control over or responsibility for the employee's work before the employer has a duty to provide a safe workplace).

142. See, e.g., Smith v. Hooker Chemical & Plastics Corp., 521 N.E.2d 431 (N.Y. App. Div. 1982) (holding that an owner or contractor who violates the applicable labor law specifically requiring that all owners and contractors provide safety devices is strictly liable for injuries caused by its failure to supply safety devices regardless of its control).
eral rule of employer nonliability before imposing a duty to provide a safe workplace on the independent contractor's employer. Under common law and WISHA, an employer's retention of control over some portion of the job site or the injured employee's work will provide such an exception.¹⁴³

Within the construction context, a general contractor is presumed to have innate supervisory authority that constitutes per se control and justifies placing the duty to comply with WISHA safety regulations on the general contractor as a matter of law.¹⁴⁴ Defendants who fit within WISHA's definition of employer but lack supervisory authority, must have actual control of the dangerous condition to be held liable.¹⁴⁵

The justification behind the presumption of a general contractor's innate supervisory authority fails to support its application to a job site owner. The traditional nonparticipatory role of a job site owner requires the court to resolve the issue of an owner's liability on a case-by-case control inquiry.¹⁴⁶ Only when the owner retains actual control over some portion of the job site or work of an independent contractor or independent contractor's injured employee may the court impose statutory duties to provide a safe workplace.

Despite Washington's unprecedented willingness to impose liability for job site safety on a general contractor as a matter of law, the Washington Supreme Court has refused to apply the same rule of law to job site owners. This refusal was recently reaffirmed in Hennig.¹⁴⁷ However, the decision in Hennig left unresolved the issue of whether the duty to comply with WISHA regulations may be imposed because of a job site owner's presumed innate supervisory authority. Whether Hennig applies to circumstances where a job site owner allegedly violates a WISHA regulation will remain unanswered until the Washington Supreme Court is faced with such a claim.

Because the presumption of innate supervisory authority adopted in Stute merely satisfies the retained control exception to the general rule of employer nonliability, it is applicable whether the alleged duty to provide a safe workplace is based on common law or statute. The supreme court's refusal to

¹⁴³ See supra notes 22-24 and accompanying text.
¹⁴⁴ See supra notes 80-82 and accompanying text.
¹⁴⁵ See supra note 82 and accompanying text.
¹⁴⁶ See supra part IV.
¹⁴⁷ See supra part III.C.
apply the presumption in Hennig was not because the employer failed to assert that the job site owner violated an applicable WISHA regulation. Rather, the court refused to apply the presumption because a job site owner's role is not sufficiently analogous to that of a general contractor to justify the presumption that the job site owner maintains innate supervisory authority. Under these circumstances, the court must inquire into the amount of control the job site owner actually retains over the job site or injured employee's work before imposing liability.