The Modification of Washington's Nondelegable Duty Doctrine in a Post-*Afoa II* State

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ABSTRACT

Under the nondelegable duty doctrine, a person or entity who has a duty to provide specified safeguards or precautions for the safety of others and who maintains a right of control over workplace safety is subject to liability for harm caused by the failure of a sub-contractor to provide such safeguards or precautions. This doctrine is based on the policy that the party with the greatest power over work conditions is in the best position to implement safety measures across a complex and layered worksite. This doctrine has existed in Washington State for decades until the recent Washington Supreme Court decision *Afoa v. Port of Seattle*, when the court was faced with determining whether the duty survived Washington's tort reform statutes abrogating joint and several liability. While the court ultimately concluded that the nondelegable duty doctrine does not survive Washington's tort reform statute absent an additional finding of agency, this Note provides a thorough analysis into the court's reasoning, compares the reasoning with other jurisdictions faced with similar issues, and concludes that *Afoa v. Port of Seattle* was wrongly decided. The nondelegable duty doctrine should have been found to survive Washington's tort reform legislation because it is rooted in principles of agency; therefore, an explicit additional finding of agency by a trier of fact is redundant and will have lasting consequences on workplace safety in complex worksites.

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INTRODUCTION

In Washington State, multiemployer worksites, such as airports and construction sites, are vast productions with multiple layers of employees. As with any complex worksite with multiple moving parts and players, safety is an obvious concern. But who should face liability for workplace injuries? For decades in Washington, the party with the right of control over work conditions was said to have a nondelegable duty[1] to provide a safe workplace.[2] This meant that the duty to provide a safe workplace could not be delegated to any other party, and the duty holder is liable for any injuries that take place as a result of failing to adhere to proper safety measures.[3] In many cases, this ended up being the property owner or general contractor. The policy behind this doctrine was that the party with the greatest power over work conditions was in the best position to implement safety measures across a complex and layered worksite. However, in a recent decision by the Washington Supreme Court, *Afoa v. Port of Seattle*, the court changed the rule on nondelegable duties by holding that, absent an additional finding of agency, the nondelegable duty doctrine is inconsistent with Washington's tort reform statute abrogating joint and several liability in most contexts.[4]

The case that caused this change in law began in 2007, when Brandon Afoa was severely injured during the course of his employment at Seattle–Tacoma International Airport (Sea–Tac Airport).[5] Afoa instituted a third-party recovery action against the Port of Seattle (Port), the owner of the premises where he was injured, but not against his direct employer.[6] The Port asserted an "empty chair defense," arguing that the airlines that contracted with Afoa's employer shared fault for Afoa's injuries.[7] After trial, the jury found that the Port retained a right of control over Afoa's work conditions, giving rise to a nondelegable duty, and it assessed liability of 0.2% to the plaintiff, 25% to the Port, and 74.8% split equally between the four airlines. Both parties appealed.[8] At the court of appeals,

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1. Some authorities spell this word as "non-delegable." While some quotations within this article use this spelling, the author will consistently use the spelling "nondelegable."

2. *See* Henning v. Crosby Group, Inc., 802 P.2d 790 (Wash. 1991); Stute v. PB.M.C., Inc., 788 P.2d 545 (Wash. 1990); George Sollitt Corp. v. Howard Chapman Plumbing & Heating Inc., 836 P.2d 851 (Wash. Ct. App. 1992); Doss v. ITT Ravonier Inc., 803 P.2d 4 (Wash. Ct. App. 1991); Gregory J. Duff, *Job Site Safety in Washington: Requiring Actual Control When Imposing Statutory Duties on Job Site Owners*, 17 PUGET SOUND L. REV. 355, 355–57 (1994).

3. RESTATEMENT (SECOND) OF TORTS § 424 cmt. a (AM. LAW INST. 1965).

4. Afoa v. Port of Seattle (*Afoa II*), 421 P.3d 903, 915 (Wash. 2018).

5. *Id.* at 906–07.

6. *Id.*

7. *Id.* at 908.

8. *Id.* at 909. It is noteworthy that, had the jury not assessed 0.2% liability to Mr. Afoa, he would have been able to recover the full verdict against the Port under Revised Code of Washington section

the court reversed the allocation of liability, concluding that because the jury had specifically concluded that the Port retained a right of control over Afoa's work conditions, it had a nondelegable duty to maintain a safe workspace, and its fault could not be allocated to the four airlines.[9]

However, in a subsequent appeal[10] to the Washington Supreme Court, decided in July 2018, the court held that the court of appeals' ruling was inconsistent with Revised Code of Washington section 4.22.070(1)(a), which abolished joint and several liability for concurrent negligence.[11] Therefore, the court held that the Port was not vicariously liable for the fault of the airlines, despite its nondelegable duty status; it was only required to pay damages for its allocated liability.[12] In order to find the Port vicariously liable, the plaintiff had to establish a principal–agent relationship in accordance with the statute. Although this is a question of fact for the jury to decide, the plaintiff failed to make any agency arguments until after the verdict, waiving his opportunity to raise this issue on appeal.[13] A strong dissent pointed out a major problem with this ruling—that a nondelegable duty would now essentially be delegable, thus defeating the purpose of a nondelegable duty designation and erasing decades of precedent of protecting injured workers in this context.[14]

The crux of the *Afoa* litigation is whether the traditional nondelegable duty doctrine was eliminated through Washington State's tort reform measures. Specifically, whether the enactment of Revised Code of Washington section 4.22.070 eliminated or changed the nondelegable duty doctrine. This Note tackles this inquiry in four parts. Part I discusses the litigation history of the *Afoa* cases and the competing majority and dissenting opinions. Part II reviews the history of Washington State tort reform and the nondelegable duty doctrine. Part III provides a comparative analysis of other jurisdictions and how they have addressed similar conflicts between nondelegable duties and tort reform statutes. Part IV concludes the article with the opinion that the nondelegable duty doctrine is compatible with Washington's tort reform statute because, just as vicarious liability arises from agency relationships, the nondelegable duty doctrine similarly arises from agency relationships.

4.22.070(1)(b), which allows for joint and several liability when the Plaintiff has no fault. Therefore, because he was assessed 0.2% liability, he ultimately lost 74.8% of his verdict. Respondent Brandon Afoa's Motion for Reconsideration at 25, *Afoa II*, 421 P.3d 903 (2018) (No. 94525-0). For more information on joint and several liability, see REV. CODE WASH. § 4.22.070(1)(b) (1993).

9. *Afoa II*, 421 P.3d at 909.

10. *Id.*

11. *Id.* at 910.

12. *Id.* at 915.

13. *Id.* at 911.

14. *Id.* at 915 (Stephens, J., dissenting).

Therefore, the ultimate result of *Afoa II* is a complete change of the nondelegable duty doctrine, and it creates additional, unnecessary obstacles for injured workers to obtain justice and relief that are contrary to public policy.

I. LITIGATION HISTORY OF *AFOA*

In 2007, Brandon Afoa was injured during the course of his employment while working at Sea–Tac Airport.[15] Afoa's employer was Evergreen Aviation Ground Logistics Enterprises Inc. (EAGLE), which contracts with airlines to provide ground services, such as loading and unloading.[16] Afoa was driving a "pushback" vehicle on an airline ramp toward gate S-16 when he lost control of the vehicle and crashed into a large piece of loading equipment that then fell on him.[17] The loss of control of the vehicle was allegedly due to a mechanical failure, and the collision rendered Afoa paralyzed.[18] He obtained some recovery through Washington's Workers' Compensation system, and he also brought a third-party action to obtain relief from the wrongful parties.[19]

A. Afoa I

In 2009, Afoa sued the Port, which owns and operates Sea–Tac Airport, on the basis that it failed to maintain a safe premises, it violated common law, and it breached statutory duties to maintain a safe workplace.[20] Afoa sought recovery based on three theories: (1) as a business invitee; (2) for breach of safety regulations under the Washington Industrial Safety and Health Act of 1973 (WISHA), chapter 49.17 of the Revised Code of Washington; and (3) the duty of a general contractor to maintain a safe common area for any employee of subcontractors.[21]

Afoa alleged that the Port controlled the manner in which he performed his work at Sea–Tac Airport; therefore, it should be liable despite the fact that the Port was not his direct employer.[22] In support of this theory, Afoa claimed the following:

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15. Afoa v. Port of Seattle, 393 P.3d 802, 806 (Wash. Ct. App. 2017).

16. Afoa v. Port of Seattle (*Afoa I*), 296 P.3d 800, 804 (Wash. 2013).

17. *Id.*

18. *Id.*

19. Washington's legislature provides for third-party actions if a third party is liable. REV. CODE. WASH. § 51.24.030(1) (1995). "The Legislature evidences a strong policy in favor of actions against third parties by assigning the cause of action to the Department of Labor and Industries if the workman elects not to bring a third party suit." Evans v. Thompson, 879 P.2d 938, 939 (Wash. 1994).

20. *Afoa I*, 296 P.3d at 804.

21. *Id.* at 803.

22. *Id.* at 804.

> First, he claims the Port retains control over the "Airfield Area" (where the accident allegedly took place) in its lease agreement with the airlines, which grants the airlines use of the Airfield Area "subject at all times to the exclusive control and management by the Port." . . . Second, Afoa claims the Port retains control through its license agreement with EAGLE, which requires EAGLE to abide by all Port rules and regulations and allows the Port to inspect EAGLE's work. The agreement also disclaims liability for accidents and equipment malfunctions. Finally, Afoa claims the Port retains control over EAGLE by the Port's conduct. He specifically claims that the Port continuously controls and supervises the actions of EAGLE and its employees and that the Port previously asserted control over tug/pushback brake maintenance following an incident that was similar to, and three months before, Afoa's accident.[23]

In 2013, the Washington Supreme Court reversed a grant of summary judgment for the Port.[24] The court held that there were genuine issues of material fact as to preclude a grant of summary judgment, and the case could proceed. Specifically, it held that Afoa's premises liability claim was potentially viable because Afoa was a business invitee.[25] The court also held that Afoa may have a potentially viable WISHA claim because jobsite owners have a statutory duty to prevent WISHA violations if they retain control over work done on a jobsite.[26] Such a duty does not depend on the existence of a direct employment agreement.[27] Furthermore, the court held that there were genuine issues of material fact as to whether the Port retained sufficient control over EAGLE and Afoa that it acquired the duty to prevent WISHA violations.[28] Finally, the court held that the Port may have had a duty to maintain safe common work areas under the common law safe workplace doctrine, which states that landowners and general contractors that retain control over a work site have a duty to maintain safe common work areas.[29] The case was remanded to superior court for further proceedings where it progressed to trial and subsequent appeals, entitled *Afoa II*.

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23. *Id.* (internal citations omitted).

24. *Id.* at 803.

25. *Afoa I*, 296 P.3d at 804–05.

26. *Id.* at 806.

27. *Id.* at 807.

28. *Id.* at 808.

29. The common law safe workplace doctrine will be referred to in this Note as the nondelegable duty doctrine. *See id.* at 808 (citing Kelley v. Howard S. Wright Constr. Co., 582 P.2d 500, 505–06 (Wash. 1978); Kamla v. Space Needle Corp., 52 P.3d 472, 475–76 (Wash. 2002)).

B. Afoa II

At trial, a jury rendered a verdict in favor of Afoa and assessed his damages at $40 million.[30] The jury found that the Port retained control over EAGLE's work, which gave rise to a nondelegable duty.[31] However, the Port asserted an empty chair defense, which allowed the jury to allocate damages to the non-party airlines that used EAGLE's services under comparative negligence standards.[32] The jury allocated 25% fault to the Port and 18.7% fault to each of the airlines, resulting in a judgment against the Port for only $10 million of the $40 million assessed damages. Both parties appealed.[33]

The Port's appeal focused on the phrasing of question 1 in the special verdict form, which asked the jury whether the Port retained a right to control the manner in which EAGLE "performed its work or maintained its equipment used to provide ground work support."[34] Afoa's appeal argued that the jury should have been precluded from allocating fault to the four airlines because the Port had a nondelegable duty to maintain a safe workplace.[35] The court of appeals held that the special verdict question 1 was not erroneous because both the common law theory of retained control and the WISHA "specific" duty standard depend on control over the manner of work done on a worksite.[36] The court of appeals also concluded that the Port had a nondelegable duty to ensure a safe workplace, including safe equipment, and as such, it was vicariously liable for any breach of that duty.[37] The Supreme Court of Washington granted review of the case to address the issue of allocation of fault to the nonparty airlines and Afoa's contingent issues concerning the Port's assertion of an empty chair defense.[38]

In its review of the case, the Washington Supreme Court reasoned that the Tort Reform Act of 1986 abrogated the common law rule of joint and several liability, and that Revised Code of Washington section 4.22.070 requires all liability to be apportioned unless a listed exception

30. Afoa v. Port of Seattle, 393 P.3d 802, 808 (Wash. Ct. App. 2017).

31. *Afoa II*, 421 P.3d 903, 916 (Wash. 2018) (Stephens, J., dissenting); Special Verdict Form at 1, Afoa v. Port of Seattle, No. 09-2-06657-4 (Wash. Super. Ct., Mar. 31, 2015), 2015 WL 1911587.

32. In 2010, Afoa filed a separate suit against the four airlines that used EAGLE's ground services. That lawsuit was removed to federal court and then dismissed after the court denied Afoa's motion to add the Port of Seattle. The federal court concluded that Afoa failed to show the airlines were at fault and granted the airlines summary judgment in February and June 2014. *Afoa*, 393 P.3d at 806.

33. *Id.*

34. *Id.*; Special Verdict Form, *supra* note 31, at 1.

35. *Afoa*, 393 P.3d at 808.

36. *Id.*

37. *Id.*

38. *Afoa II*, 421 P.3d 903, 915 (Wash. 2018).

applies.[39] Common law vicarious liability is one of the statute's exceptions, but the court stated that it would only apply if the jury made the necessary finding of control, which did not happen in this case.[40]

The court reasoned that while principles of common law survive Revised Code of Washington section 4.22.070, there is no clearly established common law right to hold tortfeasors with a nondelegable duty vicariously liable for another entity's breach of the same duty.[41] The court admitted that no delegation occurred here. In addition, simply because the Port cannot delegate its responsibility does not mean it must adopt the responsibility of another.[42] There is a common law duty to provide a safe workplace in Washington, which is why the Port was directly liable in this case; however, the Port could only be vicariously liable for the airlines' breach of their nondelegable duties if a jury found that the Port retained control *over the airlines*.[43] The jury was not presented with this specific question.[44] The jury only found that the Port retained control over EAGLE.[45]

For these reasons, the court concluded that a nondelegable duty does not supersede fault allocation under Revised Code of Washington section 4.22.070, and the jury did not find facts that would justify applying the statute's agency exception.[46] A party is only responsible for the fault of another person where both were acting in concert or when a person was acting as an agent or servant of the other party.[47] Because the jury did not directly answer the question of agency, no exception applied. The Washington Supreme Court, in a 5–4 ruling, reversed the court of appeals' decision and reinstated the trial court's apportioned award.[48]

At this point, the majority's reasoning seems relatively sound: the Port cannot be responsible for another entity's concurrent liability unless the Port retained control over the other entities, such that the airlines were acting as agents or servants of the Port. Because the jury did not directly address the *amount* of control the Port had over the *airlines*, there was no finding that the airlines were agents or servants of the Port. Therefore, the Port's "nondelegable duty" is limited to its apportioned liability. This is

39. *Id.* at 908.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 915.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*

consistent with the policy reasons supporting the Tort Reform Act and the goal of assessing liability based on a party's apportioned negligence.[49]

However, while trying to understand the majority's reasoning, the purpose of the application of the nondelegable duty designation remains unclear. If the Port has a nondelegable duty to maintain a safe workplace, which the trial court essentially found, the majority's reasoning renders that designation obsolete because the Port's nondelegable duty as a jobsite owner at a multiemployer site is apportioned—or *delegated*—to the airlines. In Justice Debra Stephens's dissenting opinion, she astutely points out that "[t]he majority's contrary holding renders the nondelegable duty doctrine meaningless."[50] While the implications of this holding are not yet known, it is clear that some change or modification of the rule took place, whether intentional or not. The result is either an elimination of the nondelegable duty doctrine altogether or a revision of the doctrine's elements.

C. Afoa II *Dissent*

The dissent struggled to grapple with the majority's reasoning. In a perplexed opinion, the dissent pointed out that "the majority's recognition that [Revised Code of Washington section] 4.22.070(1)(a) preserves joint and several liability when a defendant owes a nondelegable duty should end the matter."[51] If the Port is not held vicariously liable for the safety breaches that caused Afoa's injuries, then the Port's duty is no longer nondelegable; it becomes something else.[52]

Under the common law safe workplace doctrine, if the employer retains control over some part of the independent contractor's work, the employer owes a nondelegable duty within the scope of that control to provide a reasonably safe workplace.[53] The origin of the common law safe workplace doctrine is rooted in "master–servant" agency principles, but over time, the courts have expanded the doctrine beyond simply a master-servant relationship.[54] In another Washington Supreme Court case,[55] the court held that the existence of a safe workplace duty depends on retained control over work, not on labels or contractual designations such as

49. Tegman v. Accident & Med. Investigations, Inc., 75 P.3d 497, 506 (Wash. 2003) (Chambers, J., dissenting) (citing Godfrey v. State, 530 P.2d 630, 633 (Wash. 1975)).

50. *Afoa II*, 421 P.3d at 915 (Stephens, J., dissenting).

51. *Id.*

52. *Id.*

53. *Id.* at 916 (citing Stute v. P.B.M.C., Inc., 788 P.2d 545, 548 (Wash. 1990); Kennedy v. Sea-land Serv., Inc., 816 P.2d 75, 81 (Wash. Ct. App. 1991); RESTATEMENT (SECOND) OF TORTS § 414 (AM. LAW INST. 1965)).

54. *Afoa II*, 421 P.3d at 915 (Stephens, J., dissenting).

55. Kamla v. Space Needle Corp., 52 P.3d 472 (Wash. 2002).

independent contractor or general contractor.[56] Indeed, the court held that when an entity retains control over the manner in which work is done on a worksite, that entity has a duty to keep common work areas safe because it is in the best position to prevent harm to workers.[57] For example, "[w]here a licensor undertakes to control worker safety in a large, complex work site like Sea–Tac Airport and is in the best position to control safety, there is a duty to maintain safe common work areas within the scope of retained control."[58] These principles, as held in *Afoa I* and consistently throughout Washington jurisprudence, support the conclusion that the Port owed a nondelegable duty to maintain safe common work areas.

The dissent further concluded that the Port owed a statutory nondelegable duty to ensure WISHA compliance. In *Afoa I*, the court confirmed that jobsite owners have a duty to comply with WISHA only if they retain control over the manner in which contractors complete their work, and if a jobsite owner retains control over the manner and instrumentalities of work being done on the jobsites, the owner has a nondelegable duty to all workers on the jobsite to comply with WISHA regulations.[59] The *Afoa I* court held that if the jury determined the Port retained a right to control the manner in which Afoa's employer performed its work or maintained safe conditions, the Port owed a nondelegable specific duty under WISHA.[60]

Liability under the WISHA specific nondelegable duty doctrine results in vicarious liability because a control party, such as the Port, bears the primary responsibility for compliance with safety regulations. [61] Similarly, on construction sites, the general contractor's supervisory authority places it in the best position to ensure WISHA compliance for the safety of all workers; therefore, the general contractor is considered the primary employer and has, as a matter of policy, the duty to comply with or ensure compliance with WISHA.[62] According to Justice Stephens, Afoa met his burden to establish the Port's common law and statutory nondelegable duty by proving to the jury that the Port retained a right of control over worksite safety conditions, including safe maintenance of the vehicle he was driving when he was injured.[63]

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56. *Afoa II*, 421 P.3d at 915 (Stephens, J., dissenting) (citing *Afoa I*, 296 P.3d 800, 817 (Wash. 2013)).

57. *Id.* (citing *Afoa I*, 296 P.3d at 804).

58. *Id.* at 918.

59. *Id.*

60. *Id.*

61. *Id.* at 916 (citing Stute v. P.B.M.C., Inc., 788 P.2d 545, 551 (Wash. 1990)).

62. *Id.* at 919.

63. *Id.* at 915.

The jury's verdict found that the Port retained the right to control the manner in which Afoa's employer, EAGLE, performed its work and maintained its equipment. The jury also found that the combined negligence of the Port, the nonparty airlines, and Afoa proximately caused Afoa's injuries.[64] The jury answered "yes" to question 1 on the specific verdict form which asked the jury whether the Port retained a right to control the manner in which Afoa's employer, EAGLE, performed its work or maintained its equipment used to provide ground support work for the non-party air carriers.[65] Therefore, Justice Stephens argues, the verdict is dispositive of three things: "(1) the Port retained a right of control to ensure compliance with safety standards in the workplace, (2) the Port therefore owed a nondelegable common law and WISHA specific duty to Afoa, and, as a result, (3) the Port is directly and vicariously liable for Afoa's injuries."[66] The dissent concluded as follows:

> [T]he Port's control over the work site is sufficiently analogous to that of a general contractor to support the nondelegable duty theory of vicarious liability. As a result, the Port, no less than a general contractor, is not only directly liable for its own negligence but also vicariously liable for safety breaches of others.[67]

In rejecting the majority's theory of multiple nondelegable duties, the dissent points out that there is no jury finding that the *airlines* retained control over Afoa's work conditions, only a finding that the Port retained control.[68] The fact that there may be concurrent duties at a multiemployer worksite is unremarkable because the Port's workplace safety duty is seen as prime or primary.[69] Only the Port, not the airlines, is analogous to a general contractor because "[t]he Port operates a major airport facility, is responsible for its own employees, and allows controlled access to thousands of employees of other employers."[70] The Port owed a common law and statutory specific duty to maintain workplace safety without regard to whether others at the worksite, including the airlines, also owed a duty.[71]

The dissent next addressed the majority's argument that Revised Code of Washington section 4.22.070 abrogated vicarious liability in this situation. Even after the enactment of the statute, joint and several liability

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64. *Id.*
65. *Id.*
66. *Id.* at 920.
67. *Id.* at 921.
68. *Id.* at 922.
69. *Id.* (citing Gilbert H. Moen Co. v. Island Steel Erectors, Inc., 912 P.2d 472, 479 (Wash. 1996)).
70. *Id.* at 919 (citing *Afoa I*, 296 P.3d 800, 814 (Wash. 2013)).
71. *Id.*

remains appropriate in certain situations. As stated within the statute, "[a] party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party."[72] Therefore, this case becomes an issue of statutory interpretation and whether the phrase "acting as an agent or servant" encompasses the historical development of agency law beyond the initial master–servant context to include the nondelegable duty.[73] The majority rejected the Port's argument that the statute should be read to preserve joint and several liability only in master–servant or principal–agent relationships; however, it held that, in order to invoke joint and several liability premised on the nondelegable duty to provide a safe workplace, there must be proof of a direct agency relationship.[74] The dissent rejected this interpretation because vicarious liability under the nondelegable duty doctrine arises from the same principles as vicarious liability in traditional agency relationships.[75] Therefore, the nondelegable duty doctrine—as a form of vicarious liability recognized in agency law—is encompassed within the traditional joint and several liability retained in Revised Code of Washington section 4.22.070(1)(a).[76]

The dissent concluded with a warning of the devastating effects of the majority's holding: its interpretation of Revised Code of Washington section 4.22.070(1)(a) essentially destroys the workplace safety doctrine and will result in general contractors and jobsite owners passing off liability to subcontractors and others who commit safety breaches; this is a step backward from Washington's recognition that the nondelegable duty doctrine is intended to "place the safety burden on the entity in the best position to ensure a safe working environment."[77]

II. HISTORY OF WASHINGTON STATE TORT REFORM AND NONDELEGABLE DUTIES

This section provides a brief historical overview of Washington State law as it pertains to the issues addressed in the *Afoa* litigation, as well as

72. *Id.* at 915 (majority opinion) (quoting WASH. REV. CODE § 4.22.070(1)(a) (1993)).

73. *Id.*

74. *Id.*

75. *Id.* at 923 (Stephens, J., dissenting) (citing RESTATEMENT (SECOND) OF TORTS ch. 15, topic 2, intro. note at 394 (AM. LAW INST. 1965) (nondelegability rules, which arise out of some relation toward the public or the particular plaintiff, "are rules of vicarious liability, making the employer liable for the negligence of the independent contractor, irrespective of whether the employer has himself been at fault")).

76. *Id.*

77. *Id.* at 924.

the compatibility of Washington's Tort Reform Act with the nondelegable duty doctrine.

A. Washington State's Tort Reform Act

In the 1980s, a sweep of tort reform took place across the United States, fueled primarily by a crisis in the cost and availability of liability insurance.[78] Public polls showed that very few Americans supported the underlying premise of joint and several liability, and many state legislatures passed legislation in response.[79] Many Americans considered tort reform essential to reduce the debilitating financial consequences to a single, and perhaps undeserving, defendant when other defendants are unable to afford a judgment. In the 1980s, multiple states adopted tort reform legislation introducing comparative negligence standards and abrogating joint and several liability.[80] In 1986, Washington State's legislature passed the Tort Reform Act with the same objectives.

The preamble to Washington's Tort Reform Act states that its purpose, in part, is to "enact further reforms in order to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance."[81] In essence, the goal of Washington's Tort Reform statute was to create a comparative negligence system with the purpose of providing greater fairness to defendants and providing a "more complete, workable and effective remedy" for the injured plaintiff.[82] The Washington Supreme Court described the catalyst for the statute's enactment, noting that "[t]he legislature specifically noted

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78. Marco de Sae Silva, *Constitutional Challenges to Washington's Limit on Noneconomic Damages in Cases of Personal Injury and Death*, 63 WASH. L. REV. 653, 655–56 (1988).

> A[n] . . . insurance crisis arose in the mid-1980's. During that period, the cost of liability insurance increased not only for health care providers but also for day care centers, architects, commercial fishermen, and other businesses and professions. Many businesses and local governments found liability insurance difficult to obtain. In Washington State, a legislative committee formed to study the crisis found that it had been caused by a combination of poor management practices in the insurance industry and rising litigation costs and awards.
>
> Washington was one of a number of states to respond to the crisis by enacting tort reform legislation . . . .

Id.; *see also* Stewart A. Estes, *The Short Happy Life of Litigation Between Tortfeasors: Contribution, Indemnification and Subrogation After Washington's Tort Reform Acts*, 21 SEATTLE U. L. REV. 69, 75 (1997); Kathryn T. Hicks, *The Case for Reform: An Economic Analysis of Joint and Several Liability After Comparative Negligence*, 17 CAP. U. L. REV. 187, 197–98 (1988).

79. Estes, *supra* note 78, at 75–76; Hicks, *supra* note 78, at 197.

80. *See* COLO. REV. STAT. § 13.211.5 (1986); IND. CODE ANN. § 34-4-33-5(b) (repealed 1998); N.H. REV. STAT. ANN. § 507:7-a (repealed 1986); OHIO REV. CODE ANN. § 2315.19(2) (West 2004); UTAH CODE ANN. § 78-27-38 (West 1953) (renumbered as § 78B-5-808); 1986 Wyo. Sess. Laws 30.

81. 1986 Wash. Sess. Laws 1354.

82. Tegman v. Accident & Med. Investigations, Inc., 75 P.3d 497, 506 (Wash. 2003) (Chambers, J., dissenting) (citing Godfrey v. State, 530 P.2d 630, 633 (Wash. 1975)).

the escalating costs to governmental entities through increased exposure to lawsuits, awards, and increased costs of insurance coverage, as well as increases in costs in professional liability insurance for physicians and other health care providers, and other professionals."[83] The Act furthered the reforms, which had begun with the adoption of comparative negligence in 1973, by abolishing joint and several liability in most situations.[84]

Revised Code of Washington section 4.22.070 of the Tort Reform Act of 1986 is "the centerpiece of the 1986 amendatory package."[85] The pertinent portion of this legislation reads, "In all actions involving fault of more than one entity,[86] the trier of fact shall determine the percentage of the *total fault* which is attributable to every entity which caused the claimant's damages . . . ," the sum of which shall total 100%.[87] This provision codified a comparative negligence standard and abolished joint and several liability as to multiple defendants, except under certain circumstances.[88] Indeed, the Washington Supreme Court has explicitly stated that "the legislature left no doubt as to its intent—proportionate liability 'has now become the rule.'"[89]

The legislative text of Revised Code of Washington section 4.22.070(1)(a) includes three exceptions to the abolition of joint and several liability: (1) where the negligent parties were acting in concert or where there was a master–servant or principal–agent relationship; (2) in cases involving hazardous waste, tortious interference with business, and unmarked fungible goods such as asbestos; and (3) where the plaintiff is fault-free and judgment has been entered against two or more defendants.[90] The first exception is the focus of this Note because the nondelegable duty doctrine is a form of vicarious liability, and they are both forms of an

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83. *Tegman*, 75 P.3d at 499.

84. *Id.* (citing Kottler v. State, 963 P.2d 834, 838 (Wash. 1998)).

85. *Id.*

86. For more information on the term entity, see Cornelius J. Peck, *Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability*, 62 WASH. L. REV. 233, 243 (1987) ("Despite the importance of what is an 'entity' in this section of the 1986 Tort Reform Act, the statute does not contain a definition of 'entity.' It is apparent from the words used that the term means more than defendant and also more than potential defendants with a defense to liability to the plaintiff. It will include employers with an immunity from suit by injured employees, parents with a defense to a suit by children, spouses, and unidentified persons, bodies, and association. Apparently, although the lack of a definition makes it less than certain, an 'entity' must be a juridicial being capable of fault, and does not include inanimate objects or forces of nature.").

87. WASH. REV. CODE § 4.22.070(1)(a) (1993) (emphasis added).

88. *Id.*

89. *Afoa II*, 421 P.3d 903, 915 (Wash. 2018) (citing Kottler v. State, 963 P.2d 834, 838 (Wash. 1998)).

90. WASH. REV. CODE § 4.22.070(1)(a) (1993); WASH. REV. CODE § 4.22.070(3)(a)–(c) (1993); *Kottler*, 963 P.2d at 839.

agency relationship. Therefore, the nondelegable duty doctrine is encompassed within the first exception, and it is the means to which Afoa could have obtained joint and several relief from the Port.

B. Principles of Agency

Because of the significance of the principal–agent relationship or master–servant relationship,[91] Revised Code of Washington section 4.22.070(1)(a) allows for joint and several liability by holding the principal responsible for the fault of the agent and the master responsible for the fault of the servant.[92] An agent can be defined as "a person employed to perform services in the affairs of another under an express or implied agreement, and who . . . is subject to the other's control or right of control."[93] "In contrast, an independent contractor may be defined as one who contractually undertakes to perform services for another, but who is neither controlled by the other nor subject to the other's right to control."[94]

Whether an agency relationship exists is determined by the trier of fact. If the inference is clear that there is or is not a master–servant relationship, the court decides the issue; otherwise, the jury determines the question after instruction by the court as to the matters of fact to be considered.[95]

The trier of fact considers multiple factors when assessing whether a party is an agent or an independent contractor, including:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;

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91. RESTATEMENT (SECOND) OF AGENCY § 220 cmt. g (AM. LAW INST. 1958).

> The word servant has retained its early significance in cases involving the liability of the master to third persons and the common law liability of master and servant. However, in statutes dealing with various aspects of the relation between the two parties, the word "employee" has largely displaced "servant." In general, this word is synonymous with servant. Under the usual Employers' Liability Acts and the Workmen's Compensation Acts the tests given in this Section for the existence of the relation of master and servant are valid. Beyond this there is little uniformity of decision. Under the existing regulations and decisions involving the Federal Labor Relations Act, there is little, if any, distinction between employee and servant as here used.

Id.

92. Gregory C. Sick, *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform*, 16 U. PUGET SOUND L. REV. 1, 109 (1992).

93. Chapman v. Black, 741 P.2d 998, 1001 (Wash. Ct. App. 1987).

94. *Id.*

95. RESTATEMENT (SECOND) OF AGENCY § 220 cmt. c (AM. LAW INST. 1958).

> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
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> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant; and
>
> (j) whether the principal is or is not in business.[96]

The factors are of varying importance and all factors need not be present. However, all factors relate directly or indirectly to "the crucial factor of control or right of control resident in the employer or principal."[97] The test of control is not about whether the principal actually interferes with the work of the agent, but whether the principal holds the right to exercise such control over the agent.[98] As discussed below, the nondelegable duty doctrine creates a form of agency relationship.[99] Because in *Afoa* the trier of fact—the jury—found that the Port retained a right of control over Afoa's work conditions, a nondelegable duty and an agency relationship were created.

C. The Nondelegable Duty Doctrine

The history of the nondelegable duty doctrine reflects a policy-based expansion of the traditional vicarious liability principles recognized in the "master–servant" relationship in agency law.[100] As a general rule in Washington State, a principal is not liable for injuries caused by an independent contractor whose services the principal engages.[101] However, there is an exception at common law which subjects the principal to liability for its contractor's tortious conduct even if the principal exercised

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96. *Id.*; *Chapman*, 741 P.2d at 1001.
97. O.E. Hollingbery v. Dunn, 411 P.2d 431, 435–436 (Wash. 1966).
98. Kelley v. Howard S. Wright Const. Co., 582 P.2d 500, 505 (Wash. 1978).
99. *See infra* Section II(C).
100. *Afoa II*, 421 P.3d 903, 915 (Wash. 2018) (Stephens, J., dissenting).
101. Stout v. Warren, 290 P.3d 972, 976 (Wash. 2012).

reasonable care.[102] This exception gives rise to vicarious liability and is nondelegable.[103] The Restatement explains this doctrine as follows:

> The [rules] . . . do not rest upon any personal negligence of the employer. They are rules of vicarious liability, making the employer liable for the negligence of the independent contractor, irrespective of whether the employer has himself been at fault. They arise in situations in which, for reasons of policy, the employer is not permitted to shift the responsibility for the proper conduct of the work to the contractor. The liability imposed is closely analogous to that of a master for the negligence of his servant.[104]

The statement commonly made in such cases is that the employer is under a duty that he is not free to delegate to the contractor. Such a "non-delegable duty" requires the person upon whom it is imposed to answer for it that care is exercised by anyone, even though he be an independent contractor, to whom the performance of the duty is entrusted.[105]

A nondelegable duty can be created by statute or administrative regulation.[106] Specifically, a party who, under a statute or administrative regulation, has a duty to provide "specified safeguards or precautions for the safety of others is subject to liability of the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions."[107] In such cases, the employer cannot delegate his duty to provide such safeguards or precautions to an independent contractor.[108]

D. Washington's Regulations Giving Rise to a Nondelegable Duty

In Washington, a general contractor, as well as an owner-developer, has a nondelegable duty to enforce applicable state and federal safety regulations where the contractor or owner exercises authority over the safety of the workplace.[109] In 1973, the Washington State Legislature passed the Washington Industrial Safety and Health Act (WISHA).[110] The purpose of this Act was to "create, maintain, continue, and enhance the industrial safety and health program of the state" and "to assure, insofar as may reasonably be possible, safe and healthful working conditions for

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102. Millican v. N.A. Degerstrom, Inc., 313 P.3d 1215, 1219 (Wash. Ct. App. 2013).

103. *Id.*

104. *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 416–29 (AM. LAW INST. 1965)).

105. *Millican*, 313 P.3d at 1220.

106. RESTATEMENT (SECOND) OF TORTS § 424 (AM. LAW INST. 1965).

107. *Id.*

108. *Id.* § 424 cmt. a.

109. 16 DAVID K. DEWOLD & KELLER W. ALLEN, WASHINGTON PRACTICE SERIES, TORT LAW AND PRACTICE § 4:15 (4th ed. 2018).

110. Washington Industrial Safety and Health Act (WISHA), 1973 Wash. Sess. Laws 212.

every man and woman working in the state of Washington . . . ."[111] The Act was explicitly created in the public interest and for the welfare of Washington citizens.[112] The pertinent section of WISHA reads as follows:

> Each employer:
>
> (1) Shall furnish to each of his or her employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his or her 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 covering the unsafe or unhealthful condition of employment at the workplace; and
>
> (2) Shall comply with the rules, regulations, and orders promulgated under this chapter.[113]

There is a clear public policy against allowing general contractors to delegate or otherwise avoid their responsibility to maintain a safe jobsite for all workers. In the construction site scenario, the general contractor is believed to bear the primary responsibility for compliance with safety regulations because the general contractor's innate supervisory authority constitutes sufficient control over the workplace.[114] While courts have allowed for general contractors or worksite owners to contract away this nondelegable status with an indemnification addendum,[115] absent such indemnification agreement, liability flows to those who are in a position to control the actual implementation of safety standards in the workplace.[116] The statute created a nondelegable duty on the part of a general contractor to provide a safe place of work for employees of subcontractors on the jobsite; this duty extended to providing reasonable safety equipment where necessary.[117]

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111. WASH. REV. CODE § 49.17.010 (1973).

112. *Id.*

113. WASH. REV. CODE § 49.17.060 (2010).

114. Gilbert H. Moen Co. v. Island Steel Erectors, Inc., 878 P.2d 1246, 1250 (Wash. Ct. App. 1994) (citing Stute v. P.B.M.C., Inc., 788 P.2d 545, 550 (Wash. 1990)), *rev'd en banc*, 912 P.2d 472 (Wash. 1996).

115. Gilbert H. Moen Co. v. Island Steel Erectors, Inc., 912 P.2d 472, 482 (Wash. 1996) ("This court has historically deferred to such contractual relationships in lieu of adopting new tort principles in this field. The allocation of responsibility for workplace injuries by contract is consistent with this historical policy and was expressly approved by the Legislature . . . . The 1986 Tort Reform Act does not compel another conclusion.").

116. Cano-Garcia v. King Cty., 277 P.3d 34, 40 (Wash. Ct. App. 2012).

117. Kelley v. Howard S. Wright Const. Co., 582 P.2d 500, 506 (Wash. 1978) (this case analyzed WASH. REV. CODE § 49.16.030, which has since been repealed and replaced with WASH. REV. CODE § 49.17.060).

Furthermore, under Washington's regulations, each employer is required to furnish to each of their employees "a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to their employees."[118] In addition, every employer shall "require safety devices, furnish safeguards for employees, and adopt and use practices, methods, operations, and processes that are reasonably adequate to render such employment and place of employment safe."[119] Every employer shall "do everything reasonably necessary to protect the life and safety of employees."[120]

Under Washington's statutes and regulations, principals have a nondelegable duty to provide workplace safety when they exert a right of control over an agent. In the *Afoa* case, the jury found that the Port, not the airlines, retained a right of control over Afoa's work conditions;[121] therefore, the Port retained a right to control the manner in which Afoa's employer, EAGLE, performed its work or maintained the equipment used to provide ground support work for the non-party air carriers.[122] This established an agency relationship and a duty that is applicable to the nondelegable duty doctrine.

An agency relationship is formed, and vicarious liability is imposed, when a principal exerts a right of control over its agent; this is one of the exceptions to Revised Code of Washington section 4.22.070's abolition of joint and several liability. The nondelegable duty doctrine, as a form of agency, should similarly apply as an exception to the statute. Because the nondelegable duty doctrine is rooted in a vicarious liability and agency analysis, a finding of an agency relationship triggers joint and several liability to the principal. Since the Port has a nondelegable duty to provide a safe worksite pursuant to Washington's statutes and regulations and common law, it is subject to joint and several liability as an agency exception to Revised Code of Washington section 4.22.070. It should not be permitted to delegate its liability.

III. OTHER JURISDICTIONS' CONCLUSIONS RELATING TO NONDELEGABLE DUTIES AND THEIR RESILIENCE IN LIGHT OF TORT REFORM

Other jurisdictions have faced a similar dilemma in determining whether their respective tort reform measures affected the longstanding

118. WASH. ADMIN. CODE § 296-155-040 (2016).
119. *Id.*
120. *Id.*
121. *Afoa II*, 421 P.3d 903, 909 (Wash. 2018).
122. *Id.* at 915, 922 (Stephens, J., dissenting).

nondelegable duty doctrine and have reached different results.[123] While none of these cases are entirely analogous to *Afoa II*, they provide helpful insight on how courts in other jurisdictions have addressed similar issues relating to nondelegable duties and tort reform legislation that abrogated joint and several liability in certain instances. They also demonstrate how other jurisdictions determine if the nondelegable duty doctrine can be salvaged with a finding of multiple, concurrent nondelegable duties.

A. Arizona

In 2000, the Arizona Supreme Court ruled on a strikingly similar issue yet rendered the opposite ruling than *Afoa II*. In a wrongful death action against the city of Phoenix, the city conceded that it had a nondelegable duty to maintain its highways in a reasonably safe condition but argued that the legislative abolition of joint and several liability changed the rule on nondelegable duties.[124] The city named Arizona Public Service (APS), an independent contractor, as a non-party at fault because APS was obligated to operate and maintain streetlights pursuant to a contract between APS and the city.[125] There was conflicting evidence on whether the streetlight was on at the time of the accident, which would possibly result in some fault on the part of the independent contractor when the plaintiff was hit and killed by an automobile while crossing a street.[126]

Similar to Washington's statute, the Arizona statute at issue limited joint and several liability to situations where persons are acting in concert or where the other person was acting as an agent or servant of the party.[127] Because there was no finding that APS was a servant or an agent of the city, the city claimed it could not be vicariously liable for the acts of APS.[128]

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123. *See generally* Wiggs v. City of Phoenix, 10 P.3d 625 (Ariz. 2000); SeaBright Ins. Co. v. US Airways, Inc., 258 P.3d 737 (Cal. 2011); Srithong v. Total Inv. Co., 28 Cal. Rptr. 2d 672 (Cal. Ct. App. 1994); Archambault v. Soneco/Ne., Inc., 946 A.2d 839 (Conn. 2008); Gazo v. City of Stamford, 765 A.2d 505 (Conn. 2001).

124. *Wiggs*, 10 P.3d at 627–28.

125. *Id.* at 626.

126. *Id.*

127. *Id.*

> The liability of each defendant is several only and is not joint, except that a party is responsible for the fault of another person, or for payment of the proportionate share of another person, if any of the following applies: 1. Both the party and the other person were acting in concert. 2. The other person was acting as an agent or servant of the party. 3. The party's liability for the fault of another person arises out of a duty created by the federal employers' liability act, 45 United States Code section 51.

ARIZ. REV. STAT. ANN. § 12-2506(D) (2001).

128. *Wiggs*, 10 P.3d at 628.

In its analysis, the Arizona Supreme Court noted the policy behind the nondelegable duty doctrine is "premised on the principle that certain duties of the employer are of such importance that he may not escape liability merely by delegating performance to another."[129]

Although there was no explicit finding that the independent contractor was a servant or an agent of the city, the court rejected that this finding was necessary to find an agency relationship.[130] In response to the city's argument, the court astutely noted, "[H]ow can it be that one can admit to the existence of a non-delegable duty, but then disclaim liability for the non-performance of that duty? The concepts are mutually exclusive."[131]

Second, the court noted numerous examples of when an independent contractor is considered an agent. Because APS contracted to act on the city's behalf to maintain the streetlights, APS was the city's agent for the performance of that nondelegable duty.[132] Where there is a nondelegable duty, principals are held liable for the negligence of agents whether the agents were an employees or independent contractors.[133]

The court ultimately held that when an employer has a nondelegable duty, the vicarious liability of that employer is unaffected by Arizona's comparative negligence statute because the one with whom the principal contracts to perform that duty is, as a matter of law, always an agent for purposes of applying the doctrine of vicarious liability.[134]

Following the Arizona Supreme Court's analysis, because APS was the city's agent for the performance of the nondelegable duty to maintain the streetlights, the airlines are similarly the Port of Seattle's agent for the performance of the nondelegable duty to enforce applicable state and federal safety regulations.[135] Because the jury expressly found that the Port exercised control over the safety of the workplace, a determination of agency should be encompassed within that finding. Because the Arizona court found that the nondelegable duty doctrine survives Arizona's comparative negligence statute when there is an inherent agency relationship found, a similar interpretation should have been used in *Afoa.*

B. California

In 1994, California's appellate court squarely addressed the issue of whether California's Tort Reform Statute, which abrogated joint and

129. *Id.* at 627.
130. *Id.* at 628.
131. *Id.*
132. *Id.*
133. *Id.* (citing Maloney v. Rath, 445 P.2d 513, 515 (Cal. 1968)).
134. *Id.* at 629.
135. DEWOLD & ALLEN, *supra* note 109.

several liability, applies where a defendant's liability is based on a nondelegable duty.[136] In *Srithong*, the plaintiff filed a personal injury complaint against Total Investment Company (Total), the owner and manager of a mini-mall, and Modern Roofing Company (Modern), a subcontractor of Total, who was hired to repair leaks on the roof of the building.[137] When the Modern employees were mopping tar on the roof, some substance seeped through the building and fell on the plaintiff, causing burns and scarring.[138] The trial court found Modern to be 95% at fault and Total to be 5% at fault. Total moved to reduce its responsible share of noneconomic damages to 5% under the California's Tort Reform Statute, commonly known as Proposition 51, and the court granted the motion.[139] The plaintiff appealed.

Proposition 51 stated in pertinent part:

> (a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.[140]

While a person who hires an independent contractor is generally not liable to third parties for injuries caused by the contractor's negligence in performing the work, the nondelegable duty doctrine is an exception.[141] Under this doctrine, a landlord cannot escape liability for failure to maintain property in a safe condition by delegating such duty to an independent contractor.[142] In support, the court explained:

> [T]he duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition.[143]

In *Srithong*, the court found the nondelegable duty rule advances the same purposes as other forms of vicarious liability: to insure that there will

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136. Srithong v. Total Inv. Co., 28 Cal. Rptr. 2d 672, 673 (Cal. Ct. App. 1994).
137. *Id.*
138. *Id.*
139. *Id.* at 674.
140. CAL. CIV. CODE § 1431.2 (West 1986); *id.* at 676.
141. *Srithong*, 28 Cal. Rptr. 2d at 674.
142. *Id.*
143. *Id.* (citing Brown v. George Pepperdine Found., 143 P.2d 929, 930 (Cal. 1943)).

be a financially responsible defendant available to compensate for the negligent harms caused by that defendant's activity and to assure that when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused the harm.[144]

The court found a distinction between joint and several liability and vicarious liability, reasoning that the California statute addresses the doctrine of joint and several liability, not vicarious tort liability, which is not based on principles of comparative fault. The court noted, "Unlike the doctrine of joint and several liability, vicarious liability is a matter of status or relationship, not fault. Thus, where vicarious liability is involved, there is no fault to apportion."[145] The nondelegable duty doctrine is a form of vicarious liability, so the California statute is inapplicable.[146] The court held that because the statute did not abrogate vicarious tort liability, Proposition 51 did not apply, and Total was fully liable for Modern's negligence.[147]

However, in another case in 2011, the Supreme Court of California held that duties of care under the California Occupational Safety and Health Act (Cal-OSHA) are automatically delegated when a party hires an independent contractor.[148] The court focused on the definition of "employer" that applied to California's workplace safety laws to support its conclusion that employees of independent contractors are not considered to be the hirer's own employees.[149] After 1971, the California Legislature's definition of the term "employer" became much more narrow.[150] Because of the scope of who is considered an employee, the court reasoned that defendant US Airways owed its own employees a duty to provide a safe workplace, but employees of an independent contractor, like Aubry, are not considered to be the hirer's own employees.[151]

The California Supreme Court concluded that when US Airways hired the independent contractor, Lloyd W. Aubry Co. (Aubry),[152] it delegated any duty it owed to Aubry's employees to comply with the safety requirements of Cal-OSHA.[153] Ultimately, the court made the broad

144. *Id.* at 675 (citing Maloney v. Rath, 445 P.2d 513, 515 (Cal. 1968)).

145. *Id.* at 676 (internal citations omitted).

146. *Id.* at 673.

147. *Id.* at 676.

148. SeaBright Ins. Co. v. US Airways, Inc., 258 P.3d 737, 741 (Cal. 2011).

149. *Id.* at 745; *see also* CAL. LAB. CODE § 6304 (1972).

150. *Seabright Ins. Co.*, 258 P.3d at 740.

151. *Id.* at 745.

152. By chance, the author found this case during her research, which coincidently included Lloyd W. Aubry Co.'s employee as a party. Lloyd W. Aubry was the author's grandfather, and he was the founder of Lloyd W. Aubry Co.; however, he had since sold his company prior to this case and was not involved in this litigation.

153. *Seabright Ins. Co*., 258 P.3d at 745.

conclusion that the delegation of any duty is implied as an incident of an independent contractor's hiring, and it includes a duty to identify the absence of the safety guards required by Cal-OSHA regulations and to take reasonable steps to address that hazard.[154] Therefore, when US Airways hired independent contractor Aubry to maintain and repair a conveyor belt, US Airways presumptively delegated to Aubry any tort law duty of care under Cal-OSHA.

The concurrence found an issue with the majority's conclusion, noting that the majority failed to address the specific question posed on appeal and instead adopted a rule broader than any party had proposed—that an employer's duties under the Cal-OSHA and the regulations issued under its authority are delegable and, moreover, are presumptively delegated to independent contractors.[155] Essentially, the concurrence—which reads more like a dissent—took issue with the majority's analysis. While the majority stated there was no clear legislative intent on this issue,[156] the concurrence responded with the following argument:

> [N]ondelegability is the clear, unavoidable import of section 6400, subdivision (b), which confirms that Cal–OSHA authorizes the Division of Occupational Safety & Health (DOSH) to issue citations to employers at multiemployer worksites when an employee has been exposed to a hazard . . . "regardless of whether their own employees were exposed to the hazard."[157]

The concurrence also noted that the 1999 amendments to the statutes addressing multiemployer worksites left no doubt that the legislature understood and intended that any employer's Cal-OSHA duties would extend not only to the employer's own employees but *also those of other employers*.[158]

In sum, the concurrence was not satisfied with the majority's analysis that the legislature intended to treat duties created by Cal-OSHA statutes and rules as delegable and presumptively delegated whenever an entity who holds such duty hires an independent contractor.[159] Such a rule that "threatens an erosive effect on workplace safety" should have more solid grounding in legislative intent than a statutory definition of an employer.[160]

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154. *Id.* at 744.
155. *Id.* at 747 (Werdegar, J., concurring).
156. *Id.* at 739 n.1 (majority opinion).
157. *Id.* at 747 (Werdegar, J., concurring).
158. *Id.* at 748 (emphasis added).
159. *Id.* at 749.
160. *Id.*

These California cases demonstrate how some courts have addressed the nondelegable duty doctrine's viability in light of tort reform measures. The *Srithong* court made a notable point that the nondelegable duty rule advances the same purposes of other vicarious liability to ensure that a financially responsible defendant will be available to compensate an injured party.[161] Furthermore, because vicarious liability is a matter of status or relationship, not fault, it is similar to the nondelegable duty doctrine, which is based on the relationship between the parties and the amount of control one party exerts over the other. This conclusion supports the contention that the nondelegable duty doctrine should not be eliminated or modified from tort reform statutes abolishing joint and several liability. The *Afoa II* court could have reached a similar conclusion by determining that because the jury found that the Port maintained control over Afoa's work conditions, an agency relationship was formed with the airlines, resulting in a form of vicarious liability.

The *Afoa II* court does not go as far as *Seabright* in concluding that statutory and regulatory duties to provide a safe workplace are automatically delegated when an independent contractor is hired. Instead, the court attempts to preserve the nondelegable duty doctrine only when the agency has been expressly found by the trier of fact. However, the court's disposition of the case rendered the same result for Brandon Afoa as the *Seabright* court did and essentially changed the rule of nondelegable duties. Now, plaintiffs are required to prove an additional element of agency, which, before *Afoa II,* was inherent in the doctrine itself when a right of control was maintained over an employee or independent contractor.

C. Connecticut

Connecticut courts have also addressed similar issues pertaining to concurrent nondelegable duties, which the *Afoa II* court found to be entirely possible. In *Gazo*, the plaintiff filed suit after suffering bodily injury when he slipped and fell on an icy and snowy sidewalk in the city of Stamford, Connecticut.[162] In his suit, the plaintiff alleged that Rednick and Chase Bank owed him a duty to keep the sidewalk clear of ice and snow and that their failure to do so caused his injuries.[163] Chase Bank proceeded to file an apportionment complaint against Pierni, who was contracted to perform ice and snow removal services for Chase Bank.[164]

161. Srithong v. Total Inv. Co., 28 Cal. Reptr. 2d 672, 727 (Cal. Ct. App. 1994).
162. Gazo v. City of Stamford, 765 A.2d 505, 507 (Conn. 2001).
163. *Id.*
164. *Id.* at 507, 510.

The court concluded that although Chase Bank had a nondelegable duty to keep its premises safe, the nondelegable duty doctrine does not preclude the plaintiff from being able to sue an independent contractor for its negligence.[165] It is not a necessary implication of the nondelegable duty doctrine that the contractor to whom the performance of the duty has been assigned may not, under appropriate circumstances, also owe the same duty to an injured party by their breach.[166] This case essentially holds that concurrent nondelegable duties are possible and consistent with the historical framework of the doctrine. Even though the performance of the duty had been *delegated* to Pierni, it was consistent with the *nondelegable* duty doctrine to hold both parties liable.[167] The significance of the name of the doctrine appears to be overlooked by the court in making this point. Although there was a nondelegable duty, that duty is not exclusive and can be *delegated* to others who have comparable liability.[168]

In *Archambault*, the court concluded that the proper analysis in asserting the nondelegable duty doctrine requires a finding of which entity was truly in control, and it may not always be the general contractor.[169] Although the general contractor, Konover, had overall responsibility for safety on the worksite—or he was the "controlling employer" under OSHA—that did not mean that he had an nondelegable duty to provide a safe worksite that precluded the jury from considering its subcontractor's negligence.[170] In a fact-sensitive analysis, the court noted that the evidence showed the general contractor did not retain direct work over the subcontractor's work, over the subcontractor's employees, or over the manner in which the work was to be performed. Further, the general contractor did not assume direct control over, or interfere with, the subcontractor's responsibility to perform their work safely.[171] Indeed, there was an explicit provision in the subcontractor agreement that the subcontractor "assumed the entire responsibility and liability for all work, supervision, labor and materials"[172] and that it agreed to accept liability for any loss, damage, or destruction from any cause other than the general contractor's sole negligence.[173] Because of these facts, the court held that

165. *Id.* at 511.
166. *Id.* at 512.
167. *Id.*
168. Archambault v. Soneco/Ne., Inc., 946 A.2d 839, 860–61 (Conn. 2008).
169. *Id.* at 861.
170. *Id.*
171. *Id.*
172. *Id.* at 857.
173. *Id.*

the general contractor did not have a nondelegable duty to ensure a safe worksite, and both parties could be comparatively negligent.[174]

Concurrent nondelegable duties make little sense when looking at the plain language of the name. While there can conceivably be a difference between a concurrent duty and delegated duty, the overlap is not distinct enough because of the relationship between the parties. When a general contractor, for example, hires an independent contractor, under the *Gazo* reasoning, the general contractor has delegated that duty and both parties now owe concurrent nondelegable duties. This appears to be a similar analysis that the *Afoa II* court used, but its clarity is nonetheless lacking because it ignores the significance that a general contractor owes a primary duty.

In *Archambault*, while the court made a proper analysis of determining which party truly exerted a right of control over workplace safety, its result is distinguishable from *Afoa* because there is no indication of any contract provisions, or indemnification addendums, which would expressly delegate any such duty. As stated previously, absent such indemnification agreement, liability should flow to those who are in a position to control the actual implementation of safety standards in the workplace.[175] The jury in *Afoa* expressly found that the Port retained control over EAGLE's work, which gave rise to a nondelegable duty—this should end the matter.[176]

IV. CONCLUSION

A. The Nondelegable Duty Doctrine is Consistent with Principles of Agency Within Vicarious Liability and is Compatible with Washington's Tort Reform Statute.

The Washington Court of Appeals and the *Afoa II* dissent provide the most compelling analysis of the nondelegable duty doctrine and how it is consistent with vicarious liability. Vicarious liability is rooted in and arises from the same principles of agency principles; therefore, it is redundant to require the trier of fact to make an additional finding of agency. The defining element in the agency relationship is the principal's right of control over the agent.[177] As such, because the trier of fact found that the Port of Seattle exercised control over EAGLE, Afoa's direct employer, its

174. *See id.*

175. Cano-Garcia v. King Cty., 277 P.3d 34, 40 (Wash. Ct. App. 2012).

176. *Afoa II*, 421 P.3d 903, 916 (Wash. 2018) (Stephens, J., dissenting); Special Verdict Form at 1, Afoa v. Port of Seattle, No. 09-2-06657-4, 2015 WL 1911587 (Wash. Super. Ct., Mar. 31, 2015).

177. Chapman v. Black, 741 P.2d 998, 1001 (Wash. Ct. App. 1987); *see also* Gregory C. Sick, *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform*, 16 PUGET SOUND L. REV. 1, 110 (1992).

nondelegable duty status should end the matter. A nondelegable duty, with an inherent finding of agency, is encompassed within the traditional joint and several liability situations retained in Revised Code of Washington section 4.22.070(1)(a).[178] Therefore, the Port should have been found joint and severally liable for Afoa's injuries. By requiring an additional jury finding of agency, the court has modified the long-standing nondelegable duty doctrine.

Furthermore, concurrent nondelegable duties should not absolve the primary duty-holder from joint and several liability. The fact that there may be concurrent duties at a multiemployer worksite is unremarkable because the Port's workplace safety duty is seen as prime or primary.[179] Because the Port is seen as the primary nondelegable duty-holder, allowing for comparative liability renders a delegation of its duty. If a nondelegable duty-holder is not entitled to delegate its duty, this delegation transcends logic. This is the essence of the majority's understanding of concurrent liability which reaches absurd results in the context of the history and policy behind nondelegable duties. In addition, there was no express finding by the jury that the airlines retained control over EAGLE, so there is no support for the finding of its concurrent nondelegable duty. The jury only found that the Port had a nondelegable duty. However, even if it did make that finding, the Port's prime nondelegable duty should require it to be joint and severally liable. As the dissent in *Afoa II* pointed out, the Port owed a common law and statutory specific duty to maintain workplace safety without regard to whether others at the worksite, including the airlines, also owed a duty.[180]

B. Policy Implications of the Afoa II *Holding*

While there are conflicting views on the impact of this litigation, if the Washington Court of Appeals holding had been upheld, a possible result would be that airports would be required to be constantly involved in all aspects of the operations of an airline's contractors and subcontractors.[181] While this could be viewed of as a negative and tedious consequence, in reality, this would be a positive, policy-driven outcome because it would result in the most care and attention to ensure workplace safety and WISHA compliance.

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178. *See supra* Part II.

179. *Afoa II*, 421 P.3d at 915 (Stephens, J., dissenting) (citing Gilbert H. Moen Co. v. Island Steel Erectors, Inc., 912 P.2d 472, 470 (Wash. 1996)).

180. *Id.* at 919.

181. Mark Dombroff, *Ten Years Later and $30 Million Less: Seatac is Not Vicariously Liable*, LEXOLOGY (July 20, 2018), https://www.lexology.com/library/detail.aspx?g=54118e90-a74a-4abb-ae0d-61078949c05d [https://perma.cc/BK99-4G4T].

The implications for the *Afoa II* majority's holding could possibly result in devastating consequences for workplace safety. The doctrine of nondelegable duties existed for decades based on the policy reason that the person or entity in the best position to prevent harm to its business invitees and workers—even independent contractors—should bear the burden of compensating for any harm. The policy behind the nondelegable duty doctrine incentivizes large employers to do everything within their power to ensure workplace safety.

After *Afoa II*, a devastating consequence results: employers will no longer have this incentive. With this new rule in place, employers will not take their role in preventing workplace safety as seriously because it is now state law that they will not be jointly and severally liable absent an additional finding of agency. With no incentives in place backed up by current law, employers are likely to cut costs on workplace safety where they are able, distance themselves from subcontractors to avoid any possible finding of agency, and shift liability to the subcontractors.

This will have a devastating residual effect on workplace safety and put the brunt of implementing workplace safety policy on those who lack the resources, power, and effectiveness to protect workers. Smaller independent contractors are the most likely to cut corners on safety, resulting in injury and death, and they are the most likely to be insolvent and fail to maintain liability insurance.[182] Another possible outcome of this case is that large entities, such as the Port of Seattle and other large general contractors on construction sites, will reduce their safety activities because the less involved they are in protecting worker safety, the less exposure they have to a jury's apportionment of responsibility.[183] This possibility leads to a direct impact on workplace safety conditions. When the general contractor or jobsite owner is not held ultimately responsible for safety at its worksites, there is a very real possibility of "chaos ensu[ing]" because "[e]verybody does their own thing."[184] As noted in *Seabright*, the *Afoa II* majority's holding "threatens an erosive effect on workplace safety."[185]

The Port of Seattle has the greatest resources to fully ensure workplace safety. It is the largest entity with the greatest ability to finance workplace safety measures, and it is the most likely to maintain its liability insurance. Consistent with previous findings of the purpose of the nondelegable duty doctrine, the Port should bear the primary responsibility for compliance with safety regulations because the general contractor's

182. Respondent Brandon Afoa's Motion for Reconsideration at 15, *Afoa II*, 421 P.3d 903 (2018) (No. 94525-0).

183. *Id.* at 15–16.

184. *Id.* at 16.

185. SeaBright Ins. Co. v. US Airways, Inc., 258 P.3d 737, 749 (Cal. 2011).

innate supervisory authority constitutes sufficient control over the workplace.[186]

*C. The Future of Washington State Post-*Afoa II

The majority in *Afoa II* completely changed the rule on nondelegable duties as it was known among Washington workers and employers. The majority's harsh and perhaps inadvertent holding will have devastating consequences on injured workers, not least of whom was Brandon Afoa himself. While a simple holding conceivably resulted—that there must be an explicit finding of an agency relationship in order for there to be joint and several liability—jobsite owners will likely respond to this conclusion and change their control over jobsites. While in a perfect world safety is everyone's priority, I am concerned that this holding will reduce incentives to control workplace safety measures, and it will distance jobsite owners from taking any actions that could result in a separate finding of agency. With the entity in the greatest position to ensure workplace safety taking steps backwards, a likely consequence will be increased workplace injuries. If a general contractor or property owner is able to seamlessly delegate such duties to subcontractors, less equipped entities will be tasked with greater responsibility.

For now, the rule appears to be that in litigation with multiemployer worksites, injured plaintiffs should take care to identify every jobsite owner and independent contractor at every level and ensure the trier of fact explicitly finds an agency relationship between the nondelegable duty holder and any possible lower level contractor or employee involved. While the true impact of this holding is not yet known, advocates of workplace safety and supporters of injured workers should be attentive of any possible negative impacts on workplace safety, which may take form in a comparative analysis of how jobsite owners relinquish any control over workplace safety, any objective worsening of safety measures, and any documented increase in injuries on multiemployer worksites in the coming years.

186. Stute v. P.B.M.C., Inc., 788 P.2d 545, 550 (Wash. 1990).