Define Your Relationships and Watch Your Level of Control

An analysis of concurrent nondelegable duties under Afoa v. Port of Seattle

On July 19, 2018, the Washington Supreme Court issued its long-awaited decision in *Afoa v. Port of Seattle*, 421 P.3d 903 (2018) ("*Afoa II*"). In a 5-4 decision, the Court ruled that a concurrent nondelegable duty under the Washington Industrial Safety and Health Act ("WISHA") to provide a safe workplace, alone, is not sufficient to create a basis for vicarious liability. Rather, parties must prove one of the exceptions under RCW 4.22.070 for vicarious liability to apply (*i.e.*, agency relationship, master-servant, acting-in-concert, etc.).

As many of you may know, this was not the first time our Supreme Court had an opportunity to acquaint itself with *Afoa*'s facts. Plaintiff Brandon Apela Afoa was a baggage handler for an independent contractor, Evergreen Aviation Ground Logistics Enterprise Inc. ("EAGLE"), that subcontracted with the Port of Seattle to perform services at Sea-Tac International Airport. Several airlines also contracted separately with EAGLE to perform services at the Airport.

Afoa severely injured himself while performing services at the Airport in his employment with EAGLE. He filed suit against the Port of Seattle in state court alleging the Port violated its nondelegable duties under WISHA. In that initial suit, the Port successfully defeated Afoa's claims on summary judgment as the trial court held that Afoa was not the Port's employee. This summary judgment resulted in the first appeal to the Supreme Court, endearingly referred to as *Afoa I*. In *Afoa I*, the Court ruled that a job site owner who exercises control over a worksite should be held to the same standard as a general contractor meaning that the owner possesses a nondelegable duty to provide a safe workplace. The Court determined that the Port was a job site owner who exercised control over the worksite. The summary judgment was reversed and remanded.

While *Afoa I* was on appeal, Afoa pursued claims against four airlines for his injuries and damages; these claims were removed

to federal court. The federal case was stayed while *Afoa I* was on appeal. Once *Afoa I* was reversed and remanded, Afoa attempted to add the Port as a party to the federal case to no avail. The claims against the airlines ultimately were dismissed on summary judgment, and Afoa did not appeal that decision.

Back in state court, Afoa and the Port returned to litigation. The Port amended its answer and named the four airlines as empty chairs in its affirmative defense for apportioning fault. At trial, while the jury was asked to determine whether the Port was in control of EAGLE's work and owed a duty to Afoa, the jury was not asked to determine the relationship between the Port and the airlines.

Ultimately, the jury concluded that the Port did control EAGLE's work thereby owing Afoa a duty. The jury returned a verdict of $40 million dollars in damages and apportioned 0.2 percent fault to Afoa; 25 percent fault to the Port; and, the remaining fault to the four airlines. The question before the Court was whether the jury's verdict warranted an application of vicarious liability for the Port and the four airlines in order to impose joint and several liability.

In order to determine this issue, the Court had to determine the relationship between vicarious liability and the nondelegable duty. In reviewing the statutory scheme, WISHA, and the common law, the Court determined none clearly articulated that a concurrent nondelegable duty equated to vicarious liability:

WISHA does not expressly provide for vicarious liability when employers are concurrently negligent…WISHA requires employers to "comply with the rules, regulations, and orders promulgated under this chapter." RCW 49.17.060(2). Nothing in chapter 49.17 RCW suggests that the legislature intended to impose joint and several liability for WISHA violations. At the same time, liability for breach of a nondelegable duty does not undermine the fault allocation under RCW 4.22.070… Principles of common law survive RCW 4.22.070, but 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.

Afoa v. Port of Seattle, 421 P.3d at 910. One of the key rulings in *Afoa II* is that a violation of WISHA does not give cause for vicarious liability. Thus, one employer's breach of a concurrent nondelegable duty does not make another vicariously liable for that breach. Rather, an injured party will need to prove that some relationship existed that allows for vicarious liability.

On the basis of the *Afoa II* decision, it is likely that parties will see an increase in pleadings, discovery, and other tactics seeking to prove an exception based on agency or other type of relationship under RCW 4.22.070(1)(a) which would provide for joint and several liability.

Of course, there is *another* way that a general contractor or job site owner could be held vicariously liable for the negligence of another, which the Court only discussed briefly in its *Afoa II* opinion. If a general contractor delegates *away* its nondelegable duty, then it will be vicariously liable for the negligence of the entity to which the duty was delegated.

One may question how such a result could be possible. Read *Millican v. N.A. Degerstrom, Inc.*, 177 Wn. App. 881, 313 P.3d 1215 (2013). The short version: a general contractor essentially argued that it could not be liable because it contracted the duty of safety to its subcontractor. The court responded by reasoning that, if a contractor attempts to delegate away its *non*delegable duty, then the contractor will be vicariously liable for the negligence of the subcontractor because a contractor cannot escape liability for a nondelegable duty by delegation.

Aside from this latter scenario, an injured party must prove one of the exceptions under RCW 4.22.070 for the application of joint and several liability, and thereby vicarious liability, which is a question of fact for the jury to determine.

General contractors and jobsite owners must not lose sight of the importance of the level of control they may or may not have over the scope of a contractor’s work.

Thus, general contractors and job site owners must remember to establish well-defined relationships between themselves and their respective contractors. More importantly, general contractors and job site owners must not lose sight of the importance of the level of control they may or may not have over the scope of a contractor’s work. It is this right to exercise control over a contractor’s work that includes the concurrent nondelegable duty to provide a safe place to work. And now, with *Afoa II*, this nondelegable duty no longer assumes vicarious liability applies unless the duty is delegated to another or an exception under RCW 4.22.070 for joint and several liability exists.