Risk Management Bulletin # 77
May, 2017

The Curious Case of Brandon Afoa

By Adam Rosenberg
Williams, Kastner & Gibbs PLLC

What's worse than being on the losing end of a $10 million verdict? Probably appealing it and ending up with a $40 million verdict. This past March, in *Afoa v. Port of Seattle*, 75951-5-L, 2017 WL 1049671 (Wash. Ct. App. Mar. 20, 2017), Division 1 of the Washington State Court of Appeals did just that – and in the process, announced principles that local government may consider taking to heart.

Brandon Afoa worked for a company called EAGLE. EAGLE provided ground services at SeaTac Airport, which is operated by the Port of Seattle. In 2007, while driving a "pushback," Afoa lost control, crashed into a large piece of loading equipment, and was left paralyzed.

Acknowledging that he could not sue his own employer under Title 51, Afoa initiated an action against the Port – alleging that *it* failed to maintain a safe workplace under the common law and WISHA. The Port pointed to four airlines that used EAGLE's ground services as potentially at-fault parties; though, they were never made part of the lawsuit. The fighting issue in the case was to what extent the Port exerted control over the premises (which gave rise to a duty of care). Afoa presented evidence that the Port was a bit of a micromanager. It required all licensees, like EAGLE, to "comply with all Port rules." It retained the right to issue additional instructions. It retained the right to "red-tag" motorized equipment. And there was testimony that it operated the gates "like a ringmaster runs a circus." The jury concluded that Afoa's damages were $40 million. Of that, it apportioned 25% of the fault to the Port and 18.7% to each of the four airlines, respectively.

On appeal, there were two issues. The first, generally speaking, was whether the Port was properly held liable. Citing various case law—including the procedural history of this case, which included a prior trip to the state supreme court—the Court of Appeals affirmed. It articulated the legal standard this way:

> The employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. *There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.*

WA cities Insurance Authority

Afoa v. Port of Seattle, 75951-5-L, 2017 WL 1049671, at *7 (Wash. Ct. App. Mar. 20, 2017) (citing Comment c to the Restatement (Second) of Torts § 414) (emphasis added). Given the evidence of pervasive control and management—of both the "manner of work" and "maintenance of instrumentalities"—by the Port, a duty arose and liability was affirmed.

The second issue was the apportionment of fault to the airlines. Under prior case law, "general contractors" have a "nondelegable duty to ensure compliance with safety regulations under WISHA for the protection of all employees at the work site." And, given that a sophisticated jobsite owner, who chooses to exercise pervasive control over the site, *is* akin to a general contractor, the court held the Port to that standard. As such, the Port could not apportion (*i.e.*, delegate) its nondelegable duty to the airlines who utilized EAGLE's services. The 75% portion of the verdict allocated to the airlines was therefore *re*allocated back onto the Port.

So what is a well-meaning government agency to do? Most important, be very judicious about exercising control over the way workers do their work—both in the context of permitting and public works projects. The retention of a right to stop work or imposition of certain, external standards seems permissible. But reserving a right (even if un-used) to dictate *how* work is performed, or imposing a set of safety rules, could very well carry with it a nondelegable duty to ensure workplace safety. An agency might even consider contractual language confirming this limitation. Furthermore, the agency should make sure insurance and indemnity are in place. Local government can—and should—insist that a suitable liability policy is procured as a condition of permitting the project. Riskier projects should involve more insurance and stronger indemnity, such that the risk of *Afoa* liability can be shifted away from the taxpayers, and onto a commercial insurer, should the worst occur.

At the end of the day, this case presents a classic "no good deed goes unpunished" scenario. By involving itself in the safety of its site, the Port of Seattle paid a heavy price. Conscientious government will steer clear, do so only with the utmost care, or at a minimum, maintain and enforce strong risk transfer mechanisms.

© Copyright May, 2017 by Washington Cities Insurance Authority. All rights reserved. This material was prepared by Washington Cities Insurance Authority (WCIA) for the exclusive use of its employees and staff and WCIA-member cities and entities. No part of this material may be reproduced in any form whatsoever, incorporated into any information retrieval system, electronic or mechanical, or distributed to third parties, without the express, written permission of WCIA, the copyright holder. All inquiries should be addressed to: Robin Aronson, Risk Services Manager, Washington Cities Insurance Authority, P.O. Box 88030, Tukwila, WA 98138 (206) 687-7900