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Washington Court Finds Port District Liable for Worker's Severe Injuries at Airport and Rejects Federal Aviation Preemption Defense

Transportation Legal Update

The Washington Court of Appeals recently affirmed a \$40 million verdict in favor of a worker seriously injured at SeaTac International Airport while performing ground services for a contractor on the airplane ramp. The decision, *Afoa v. Port of Seattle*, 2017 WL 1049671 (Mar. 20, 2017), highlights the serious risks and potential liability that may be faced by airport operators for defective vehicles and equipment used by airport contractors. The decision also continued a recent trend in Washington of limiting the defense of implied federal aviation preemption.

Case Background

The long-running *Afoa* case arose out of a tragic accident in 2007. While driving a "pushback" vehicle on the airplane ramp at SeaTac Airport, Plaintiff Brandon Afoa lost control of the vehicle as a result of an alleged failure of the brakes and steering. The vehicle struck a large piece of loading equipment, which fell on Mr. Afoa and rendered him paralyzed. He was not an employee of the Port of Seattle (Port), which owns and

operates SeaTac Airport, but instead worked for a contractor that provided ground services to airlines.

In 2009, Mr. Afoa sued the Port, alleging it failed to maintain safe premises and violated certain nondelegable duties to maintain a safe workplace. The trial court initially dismissed the claims against the Port, but the Washington Supreme Court reversed that decision in *Afoa v. Port of Seattle*, 176 Wn.2d 460, 296 P.3d 800 (2013), and remanded the case back for trial on the merits. Mr. Afoa presented evidence regarding the Port's alleged control over the airport and the manner in which the contractor performed ground service work. The jury agreed with him, and entered a \$40 million compensatory damages verdict. Under Washington's proportionate fault system, the jury allocated 25 percent fault for the accident to the Port, allocated 0.2 percent fault to Mr. Afoa and allocated the remaining 74.8 percent fault to four non-party airlines. Both parties appealed.

The Court Finds Sufficient Evidence of Retained Control to Impose Liability

In a decision written by Chief Judge James R. Verellen, the Washington Court of Appeals rejected the Port's challenge to the verdict. See *Afoa v. Port of Seattle*, 2017 WL 1049671, at *9 (Mar. 20, 2017). The *Afoa* decision recognized the limitation that a jobsite owner — like the Port at the SeaTac Airport — is only liable for a worker's injuries if it retains, but fails to exercise, pervasive control over the work done on the jobsite. This is a highly fact-based determination, and the potential for liability depends on whether a jobsite owner retains sufficient control at the site. The court explained, however, that control over the manner of work can encompass control over the maintenance of instrumentalities used in performing that work. In other words, "a jobsite owner's control over maintaining instrumentalities is merely part of its control over the manner of work being performed on the jobsite." *Id.* at *4.

Although the Port argued that the verdict had to be overturned because Mr. Afoa had not shown sufficient evidence that the Port retained authority to control how maintenance was actually conducted for the vehicle — as distinguished from whether maintenance was performed — the court found substantial evidence to support the verdict. In particular, the court pointed to evidence presented at trial about the Port's authority

over the work of moving aircraft equipment on the ramp, including the suitability and safety of equipment. The court emphasized that “the Port had the authority to red tag or impound any defective motorized equipment, require the equipment be fixed and prohibit use of that equipment until adequately repaired.” *Id.* at *8. *Afoa* concluded that this evidence showed the Port had “absolute control” over the use of the pushback vehicle in the performance of the contractor’s work and, in turn, had control over the contractor’s manner of work in using the vehicle.

In upholding the jury’s finding of liability, the Court of Appeals in *Afoa* also concluded that, on the facts of this case, the Port could not allocate fault to the four non-party airlines that had used the contractor’s ground services because the Port had a nondelegable duty to maintain a safe workplace. The court therefore remanded the case to the trial court to reverse the allocation of 74.8 percent fault to the airlines and to enter an amended judgment, which presumably will allocate the majority of the \$40 million verdict to the Port.

The Court Rejects a Federal Aviation Preemption Defense

In addition, the *Afoa* court concluded that the defense of implied federal aviation preemption did not protect the Port from liability. The Supremacy Clause of the U.S. Constitution empowers Congress to override state-by-state regulation with uniform national rules. State laws that interfere with federal law are preempted, either expressly or implicitly. The Federal Aviation Act does not include an express preemption provision, but courts have long held that some areas of aviation regulation impliedly preempt state law. Implied preemption can arise either (1) via field preemption when federal law so thoroughly occupies a legislative field as to create a reasonable inference that Congress left no room for states to supplement it, or (2) via conflict preemption where a state law actually conflicts with federal law or stands as an obstacle to the accomplishment of the full federal purposes and objectives. *Montalvo v. Spirit Airlines*, 508 F.3d 464, 470 (9th Cir. 2007).

Afoa first determined that conflict preemption did not bar Mr. Afoa from using federal standards to prove the Port’s level of control for purposes of state tort law. The Port argued that it should not be penalized for doing what federal law requires. The court, however, reasoned that conflict preemption did not apply: “While federal law may require that the Port

maintain control over the work site, state law does not penalize that control. Instead, state law imposes certain worker safety standards. The tort action does not penalize the Port for exercising control to the extent such control is a byproduct of federal regulation; rather, it holds the Port accountable for doing it poorly.” *Afoa*, 2017 WL 1049671, at *9.

Afoa also rejected the defense of field preemption on the facts of this case. Looking to the Washington Supreme Court’s recent decision on field preemption in *Estate of Becker v. Avco Corporation*, 387 P.3d 1066 (2017), *Afoa* concluded that, although airports like SeaTac Airport are subject to many federal aviation regulations, the relevant subject area in dispute was not pervasively regulated and was therefore not preempted by federal law. Instead, the court found that “there is no pervasive federal regulation of the use of safe equipment in performing the work of moving aircraft on the airplane ramp.” *Afoa*, 2017 WL 1049671, at * 10. The court observed, however, that other areas of the airport were subject to greater federal regulation or control by the Federal Aviation Administration, which suggests that preemption could potentially apply to those areas.

In the wake of *Afoa*, there is an inherent risk of potential exposure for airport and other transportation facility owners in Washington due to a jobsite owner’s potentially nondelegable duty to ensure safe operations and safe equipment by on-site contractors. To the extent the *Afoa* decision is not overturned, some jobsite owners may be faced with a hard choice between exercising increased control over work performed on site to impose stricter safety requirements that could potentially establish fault if an accident were to occur, or relinquishing more responsibility to tenants or contractors to avoid a finding of retained control.