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**DAMNED IF YOU DO, DAMNED IF YOU DON'T: THE
EXPANSION OF TORT LIABILITY TO AIRPORT
OWNERS AND OPERATORS WHO REGULATE
AIRLINE AND VENDOR OPERATIONS**

CARYN GERAGHTY JORGENSEN*
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TRADITIONAL CONCEPTS recognizing a distinction between employees and independent contractors provided a degree of certainty and predictability when assessing potential liability for injuries occurring at a multiple-employer workplace. If a worker was injured on the worksite, workers' compensation systems provided benefits to cover medical expenses and lost wages. In exchange for contributing to the workers' compensation system, employers were immunized from tort liability to their employees. Likewise, historically, a general contractor was not liable for injuries sustained by the employee of an indepen-

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dent contractor unless that general contractor's active negligence contributed to cause the injury. This doctrine is commonly referred to as the "independent contractor doctrine." The concept of "retained control" has eroded the independent contractor doctrine—exposing general contractors at multiple-employer worksites to liability for injuries to the employees of independent contractors.

Courts have expanded the retained control exception beyond the field of construction site accidents and applied it to assess liability of airport owners and operators for injuries to employees of airport lessees and licensed vendors. Liability based on control has particular significance in the context of airports, because federal law mandates that airport operators exercise a great deal of control over terminals, airfields, and runways. Airports must establish, implement, and train all persons with access to secured areas, runways, and taxiways regarding movement and operation in those areas. Under the retained control exception, airport owners potentially are exposed to tort liability merely by exercising control mandated by federal law. Courts should account for this federally mandated control when analyzing the policies behind this theory of liability.

The risk of exposure to airport owners and operators is mitigated through broadly written indemnity provisions in vendor license agreements and airport leases. The result of these indemnity provisions, however, is that workers' compensation immunity effectively is destroyed. The legally immune employer and its liability policy respond to the injured employee's tort claim, thus reducing (if not eliminating) the industry cost-savings of the workers' compensation system. This result was neither intended by the workers' compensation system nor, apparently, anticipated by the gradual but persistent erosion of the independent contractor doctrine.

Legislation expressly preempting state law retained control principles could reinstate the predictability and certainty of the workers' compensation system in the context of Part 139 airport operations. Airport owners and operators would remain liable under premises liability theories or if their own employees' negligence caused injury, but they would be protected from suit by employees of vendors and lessees who are injured by lapses in their own employer's safety programs. Such a system would place responsibility for worksite injuries in the hands of those responsible for and in the best position to ameliorate the risk—

the employers of the injured employees—as our workers’ compensation system originally contemplated.

I. THE INTERPLAY AMONG WORKERS’ COMPENSATION,
THE INDEPENDENT CONTRACTOR DOCTRINE,
AND THE RETAINED CONTROL
EXCEPTION IN RECOVERY FOR
WORK-RELATED INJURIES

Workers’ compensation provides compensation for injury, disability, or death resulting from work-related accidents. It is fundamentally distinct from tort liability in that it provides benefits regardless of fault.¹ Injured workers need only prove a nexus between their injuries and their employment to receive cash wage benefits and medical care.² The “underlying premise” of workers’ compensation “is that the costs of industrial accidents . . . should, like other costs of doing business, be borne by the enterprise that engendered them.”³ This policy is meant to motivate employers to make workplaces safer,⁴ while providing workers with “swift and certain compensation.”⁵ The quid pro quo for swift and certain compensation is the relinquishment of remedies available at common law.⁶ “As a general rule, an employee injured in the course of employment is limited to the remedies available under a state’s workers’ compensation act.”⁷ Exclusivity prevents “double recovery” against an employer for “a workers’ compensation award and a tort judgment.”⁸

This was no “great sacrifice” at the time of enactment as most workers were previously left uncompensated for workplace injuries by the early 20th century common law system.⁹ But the number of covered workers and the effectiveness of legal remedies have increased dramatically since that time. As of 2007, workers’ compensation systems covered ninety-four percent of the United States’ wage and salary workers, and some form of work-

¹ LEX K. LARSON & ARTHUR LARSON, *WORKERS’ COMPENSATION LAW: CASES, MATERIALS, AND TEXT* § 1.04 (4th ed. 2008).

² *Id.* § 1.03.

³ Joseph H. King, Jr., *The Exclusiveness of an Employee’s Workers’ Compensation Remedy Against His Employer*, 55 TENN. L. REV. 405, 406 (1988).

⁴ 82 AM. JUR. 2D *Workers’ Compensation* § 14 (2016).

⁵ Note, *Exceptions to the Exclusive Remedy Requirements of Workers’ Compensation Statutes*, 96 HARV. L. REV. 1641, 1643 (1983) [hereinafter *Exceptions*].

⁶ *Id.*

⁷ 82 AM. JUR. 2D *Workers’ Compensation* § 54 (2016).

⁸ *Id.* § 56.

⁹ *Exceptions*, *supra* note 5, at 1641.

ers' compensation legislation has been enacted in all fifty states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.¹⁰ In addition, the present tort system has largely reduced common law bars to recovery, developed new theories of recovery for injured workers, and provided increased availability of public assistance and legal representation.¹¹ Employees are increasingly "questioning the terms by which they ceded their common law rights" and searching for ways to pierce the exclusive remedy rule of workers' compensation.¹² Unlike when workers' compensation statutes were enacted, employees now can pursue much bigger recoveries via tort remedies against third parties.¹³

Generally, courts have been unwilling to erode workers' compensation immunity by judicial action and instead have awaited legislative reform.¹⁴ But workers' compensation only limits actions by employees against their direct employers.¹⁵ To the extent an injury is attributable to a third party, workers are "not constrained by the exclusive remedy rule."¹⁶ Workers are allowed—and even encouraged—to pursue legal remedies against parties with whom they have no employment relationship under the theory that the industry should not bear the cost of an injury for which it is not responsible.¹⁷ Because workers' compensation is awarded regardless of fault, workers may still accept benefits from their employers prior to bringing suit against a third party.¹⁸ Employers (or their workers' compensation insurers, including state-administered systems) are then entitled to subrogation from successful plaintiffs to prevent double recovery.¹⁹

¹⁰ SOC. SEC. ADMIN., SOC. SEC. OFFICE OF POLICY, 67 SOC. SEC. BULL. NO. 1, RECENT TRENDS IN WORKERS' COMPENSATION (2007).

¹¹ *Exceptions*, *supra* note 5, at 1645.

¹² *Id.* at 1641; *see* King, *supra* note 3, at 408.

¹³ Donald T. DeCarlo & Martin Minkowitz, *Workers' Compensation and Employers' Liability Law: National Developments and Trends*, 25 TORT & INS. L.J. 521, 522 (1990).

¹⁴ *Exceptions*, *supra* note 5, at 1641.

¹⁵ 82 AM. JUR. 2D *Workers' Compensation* § 64 (2016).

¹⁶ *Exceptions*, *supra* note 5, at 1643 n.13.

¹⁷ *See* 82 AM. JUR. 2D *Workers' Compensation* § 86 (2016).

¹⁸ *Exceptions*, *supra* note 5, at 1643 n.13.

¹⁹ *Id.*

A. TRADITIONALLY, ENTITIES HIRING AN INDEPENDENT CONTRACTOR WERE NOT LIABLE IN TORT FOR INJURIES TO EMPLOYEES OF THE INDEPENDENT CONTRACTOR

The classification of an individual as either an employee or an independent contractor is a hotbed of litigation.²⁰ There is no bright-line rule for determining whether an individual is an independent contractor or an employee.²¹ Many jurisdictions employ a multi-factor test that analyzes the “extent of control” the employer “exercise[s] over the detail of the work,” whether the employer provides the tools, instrumentalities, and place of work, and whether the employed contractor “is engaged in a distinct occupation or business.”²² The degree of control retained by the independent contractor’s hirer has become the most important factor in classifying the individual worker,²³ and it is at the heart of all legal definitions of independent contractor.²⁴ Workers’ compensation immunity has no application to an independent contractor because a contractor is not an “employee” within the meaning of workers’ compensation.²⁵ Independent contractors are, therefore, allowed to pursue tort remedies against their hirers.

An independent contractor may be free from the limits of workers’ compensation, but the common law still limits the independent contractor’s ability to sue the overall employer, typically a job-site owner or general contractor. The general rule is

²⁰ Fredric Leffler, Senior Counsel, Proskauer Rose LLP, Presentation at the American Bar Association Labor and Employment Law Section Wage & Hour Boot Camp: Misclassifying Workers as Independent Contractors 1 (Nov. 2–5, 2011), http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ac2011/083.authcheckdam.pdf [<https://perma.cc/V5UA-U9UH>].

²¹ 41 AM. JUR. 2D *Independent Contractors* §§ 5, 8–9 (2016).

²² *Id.* § 5.

²³ *Id.* §§ 5, 8–9.

²⁴ See RESTATEMENT (SECOND) OF AGENCY § 2 (AM. LAW INST. 1958) (an independent contractor is one “who is not controlled by the other nor subject to the other’s right to control.”); *Independent Contractor*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“[o]ne who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it.”); 41 AM. JUR. 2D *Independent Contractors* § 1 (2016) (“one who, in exercising an independent employment, contracts to do certain work according to his or her own methods, without being subject to the control of the employer, except as to the product or result of the work.”).

²⁵ RESTATEMENT (SECOND) OF AGENCY § 2 cmt. d, § 3 cmt. a (AM. LAW INST. 1958); see LARSON & LARSON, *supra* note 1, at § 1.01.

that an overall employer who hires an independent contractor is not liable for harm caused by an “act or omission of the contractor.”²⁶ The independent contractor controls the manner in which the work is completed, so the contractor, rather than the overall employer, is the “proper party” to be charged with preventing and bearing the risk of harm.²⁷ The injured worker still receives workers’ compensation available from his direct employer, the independent contractor. “[W]hen the person injured by negligently performed contracted work is one of the contractor’s own employees, the injury is already compensable under the workers’ compensation scheme[,] and therefore the [law] should provide no tort remedy, for those same injuries, against the person who hired the independent contractor.”²⁸ Allowing suit against the overall employer “would illogically and unfairly subject the hiring person, who did nothing to create the risk that caused the injury, to greater liability than that faced by the independent contractor whose negligence caused the employee’s injury” because the independent contractor, not the hirer, would be shielded from tort liability.²⁹ The independent contractor doctrine protected against this illogical result by shielding the overall employer from liability for the contractor’s employees’ workplace injuries.

B. THE RETAINED CONTROL EXCEPTION CONTINUES TO ERODE THE INDEPENDENT CONTRACTOR DOCTRINE, BECOMING, IN SOME INSTANCES, THE “RULE” ITSELF

Unlike workers’ compensation immunity, a creature of statute that judges have been reticent to erode by judicial action,³⁰ the common law independent contractor doctrine has been whit-

²⁶ RESTATEMENT (SECOND) OF TORTS § 409 (AM. LAW INST. 1965); *see, e.g.*, *Privette v. Superior Court*, 854 P.2d 721, 730 (Cal. 1993) (declining to apply California’s peculiar risk doctrine to impose liability on property owner for injuries to the negligent independent contractor’s own employees because such application would conflict with California’s system of worker’s compensation).

²⁷ RESTATEMENT (SECOND) OF TORTS § 409 cmt. b (AM. LAW INST. 1965); *see, e.g.*, *SeaBright Ins. Co. v. US Airways, Inc.*, 258 P.3d 737, 738 (Cal. 2011) (“By hiring an independent contractor, the hirer implicitly delegates to the contractor any tort law duty it owes to the contractor’s employees to ensure the safety of the specific workplace that is the subject of the contract. That implicit delegation includes any tort law duty the hirer owes to the contractor’s employees to comply with applicable statutory or regulatory safety requirements.”).

²⁸ *Privette*, 854 P.2d at 726.

²⁹ *Toland v. Sunland Housing Group, Inc.*, 955 P.2d 504, 506 (Cal. 1998).

³⁰ *Exceptions*, *supra* note 5, at 1641.

tled away, expanding third party liability for workplace injuries. The independent contractor doctrine “is now primarily important as a preamble to the catalog of its exceptions.”³¹ The rule generally applies only “where no good reason is found for departing from it.”³²

The retained control exception is perhaps the most often invoked exception under the independent contractor doctrine. Most states applying the exception do so in reliance on the Restatement (Second) of Torts § 414: “One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care”³³ This exception seeks to place the risk of loss on the party that controls, at some level sufficient under state common law, the safety of the work and the jobsite.³⁴ After all, it is the delegation of control to the independent contractor that absolves landowners and general contractors in the first place.³⁵ If, instead of delegating control, the landowner or general contractor continues to exercise control, then liability may attach.³⁶

The retained control exception developed in the construction industry to place responsibility on general contractors for overall project safety where projects often involve multiple independent contractors. “We regard it to be part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers in common work areas [that] create a high degree of risk”³⁷ Landowners, on the other hand, ordinarily are not liable.³⁸ “In contrast with a general contractor, the owner typically is not a professional builder. Most owners visit the construction site only casually and are not knowledgeable concerning safety measures.”³⁹ A landowner may be held liable only where the owner “exercised an unusually

³¹ RESTATEMENT (SECOND) OF TORTS § 409 cmt. b (AM. LAW INST. 1965) (quoting *Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co.*, 201 N.W. 226 (Minn. 1937)).

³² *Id.*

³³ *Id.* § 414.

³⁴ *See id.*

³⁵ *See* 41 AM. JUR. 2D *Independent Contractors* § 27 (2016).

³⁶ *See, e.g., Funk v. Gen. Motors Corp.*, 220 N.W.2d 641, 645–49 (Mich. 1974).

³⁷ *Id.* at 646.

³⁸ *Id.*

³⁹ *Id.*

high degree of control over the construction project”⁴⁰ Thus, courts should require substantial control before subjecting a landowner to liability under this exception.

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 [that] 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.”⁴¹

The Restatement provides that one who retains “control” is liable to “others” for physical harm.⁴² But not all courts are willing to accept that “others” refers to employees of independent contractors. In *King v. Shelby Rural Electric Cooperative Corp.*,⁴³ a Kentucky case, the court noted:

Nothing in the discussions of Sections 413, 414, 416, and 427 of the Restatement, Torts 2d[] indicates that an employee of an independent contractor is within the class of “others” protected by those sections. All of the illustrations set out in the Restatement refer to liability of the employer of an independent contractor to third parties other than employees of the independent contractor.⁴⁴

For liability to attach to an owner or general contractor under the retained control exception, some courts require an additional finding that the negligent exercise of that control affirmatively contributed to the cause of injury.⁴⁵ In *Hooker v. Department of Transportation*, the California Supreme Court further elaborated on its *Privette-Toland* line of cases, holding:

⁴⁰ *Id.* at 647; see *Ormsby v. Capital Welding, Inc.*, 684 N.W.2d 320, 325–27 (Mich. 2004) (clarifying *Funk* and holding that under Michigan law, the retained control exception is a subset of the “common work area doctrine” under which a property owner could be liable for an independent contractor’s employee injury if the “owner acts in a ‘superintending capacity and has knowledge of high degrees of risk faced by construction workers’”).

⁴¹ RESTATEMENT (SECOND) OF TORTS § 414 cmt. c (AM. LAW INST. 1965).

⁴² *Id.* § 414.

⁴³ 502 S.W.2d 659 (Ky. 1973).

⁴⁴ *Id.* at 662 (discussing tentative draft language of comments under the Restatement (Second) of Torts, Chapter 15, “when the Sections in this Chapter speak of liability to ‘another’ or ‘others,’ or to ‘third persons,’ it is to be understood that the employees of the contractor, as well as those of the defendant himself, are not included”); see RESTATEMENT (SECOND) OF TORTS § 15 (AM. LAW INST., Tentative Draft No. 7 1965).

⁴⁵ *Hooker v. Dep’t of Transp.*, 38 P.3d 1081, 1082–83 (Cal. 2002).

[A] hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but . . . a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries.⁴⁶

Under California's application of the retained control exception, it is not enough to have the right to control the work.⁴⁷ The "hirer" of an independent contractor must also have actually exercised its control over the work in a way that contributed to cause the independent contractor's employee's injuries.⁴⁸

Some courts have declined to expand the application of the retained control exception beyond the construction site context.⁴⁹ For instance, in *Paquette v. Motor Auction Group*, a Michigan Court of Appeals affirmed summary judgment and declined to extend the retained control exception to a vehicle auction house.⁵⁰ The plaintiff was injured during an auto auction when an independent contractor auctioneer closed a commercial garage door on him.⁵¹ The court declined to recognize a legal duty owed by the auction house to supervise and train the independent contractor auctioneer.⁵² The court further declined to extend the retained control exception beyond the construction industry context, holding that "[t]here is no support in the case law for plaintiffs' argument that the retained control doctrine applies outside the context of construction sites, particularly given its goal of ensuring safe working conditions."⁵³ Several courts, however, have analyzed the retained control exception in multiple-employer work environments outside of the construction context.⁵⁴

⁴⁶ *Id.* at 1083.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Paquette v. Motor Auction Grp.*, No. 270979, 2007 Mich. App. LEXIS 898, at *9 (Mich. Ct. App. Apr. 3, 2007).

⁵⁰ *Id.*

⁵¹ *Id.* at *3.

⁵² *Id.* at *4–5.

⁵³ *Id.* at *9.

⁵⁴ *See, e.g.*, *Adamson v. Port of Bellingham*, No. C14-1804 MJP, 2016 U.S. Dist. LEXIS 11774 (W.D. Wash. 2016); *Easler v. Delta Air Lines, Inc.*, 820 F. Supp. 2d 251 (D. Mass. 2011); *Harmon v. United States*, 8 F. Supp. 2d 757 (N.D. Ill. 1998); *Oxford v. United States*, 779 F. Supp. 1230 (D. Ariz. 1991); *Appiah v. Hall*, 962 A.2d 1046 (Md. Ct. Spec. App. 2008).

II. COURTS HAVE APPLIED THE CONCEPT OF RETAINED CONTROL TO EVALUATE LIABILITY OF AIRPORT OWNERS FOR INDEPENDENT CONTRACTOR EMPLOYEE INJURIES

Airport liability traditionally rests in theories of premises liability.⁵⁵ Those traveling through or working at (but not for) airports are business invitees to whom a duty of care is owed.⁵⁶ Generally, however, an airport's tort liability arises directly out of a condition on the premises or by conduct of airport authority employees.⁵⁷ The Restatement (Second) of Torts § 414 provides a mechanism for courts to expand airport liability to employees of independent contractors under retained control theories, even outside the construction context.⁵⁸

In *Harmon v. United States*, the United States hired the plaintiff's employer to provide aircraft fuel delivery at the Glenview Naval Air Station.⁵⁹ The plaintiff, an employee of a fueling contractor, sued the airport owner, the United States, after he was hit by a blast of air from a jet engine while preparing to refuel an aircraft.⁶⁰ The U.S. military set the procedures for aircraft fueling while U.S. Navy personnel supervised.⁶¹ Navy personnel were "responsible for signaling to the air crew to shut down the jet engines" and then signaling to the fuel truck to enter the area for fueling.⁶² The United States moved for summary judgment on multiple grounds, including the independent contractor doctrine.⁶³ The U.S. District Court for the Northern District of Illinois denied summary judgment, applying Restatement § 414 under Illinois state law: "the United States cannot dispute that it had the requisite degree of control for this section to apply[] since the entire air station, and the refueling operations in particular, were under the supervision of Navy personnel."⁶⁴

In another application of retained control concepts, an airport owner was protected by sovereign immunity upon a finding

⁵⁵ See *Afoa v. Port of Seattle*, 296 P.3d 800, 804–05 (2013).

⁵⁶ See *id.* at 805.

⁵⁷ See 8A AM. JUR. 2D *Aviation* §§ 101, 137 (2016).

⁵⁸ See RESTATEMENT (SECOND) OF TORTS § 414 cmt. c (AM. LAW INST. 1965).

⁵⁹ *Harmon*, 8 F. Supp. 2d at 759.

⁶⁰ *Id.* at 759–60.

⁶¹ *Id.* at 759.

⁶² *Id.*

⁶³ *Id.* at 760–61.

⁶⁴ *Id.* at 763 (applying RESTATEMENT (SECOND) OF TORTS § 414 (AM. LAW INST. 1965)).

of lack of control over the injury-causing instrumentality in *City of Houston v. Ranjel*.⁶⁵ Houston retained a third-party operator, Johnson Controls, to operate the airport's Automated People Mover system (APM).⁶⁶ Following expansion of the system but while construction punch-list items remained open, two employees of subcontractors involved in the expansion project were severely injured, one fatally, when they were struck by a newly operational line.⁶⁷ Plaintiffs alleged the City of Houston, as airport owner, was negligent for failing "to establish and/or communicate safety requirements regarding the APM system" and failing "to implement adequate safeguards to prevent incidents from occurring, such as the subject incident."⁶⁸

In reversing the trial court's denial of Houston's plea to jurisdiction based on governmental immunity, the court of appeals held that because Houston did not operate or control the operation of the APM system, there was no waiver of governmental immunity under the Texas Tort Claims Act.⁶⁹ Although Houston could permit reductions in the numbers of trains operated at a particular time and shut down the system altogether via its main electrical systems, the court found that Houston "had no ability to directly affect the daily operation" of the system.⁷⁰ Johnson Controls had authority to enact and implement its own site policies and procedures without interference by the airport, though the airport did provide a representative to "participate in the formulation of policies related to accessing the APM guideway."⁷¹ Personnel of other entities requiring access to the APM guideway required permission from both Houston and Johnson Controls with the airport providing written guidelines to such personnel before granting access.⁷² Johnson Controls was responsible for ensuring personnel understood the guidelines and escorting personnel to the worksite.⁷³ On the day of the accident, no Houston employees were regularly working in the Control Center and Houston "had no ability or contractual

⁶⁵ 407 S.W.3d 880, 883 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

⁶⁶ *Id.*

⁶⁷ *Id.* at 884.

⁶⁸ *Id.*

⁶⁹ *Id.* at 883.

⁷⁰ *Id.* at 885.

⁷¹ *Id.*

⁷² *Id.* at 886.

⁷³ *Id.*

authority to control directly the operation or use of the APM trains.”⁷⁴

The Texas Court of Appeals emphasized the distinction between an employee and independent contractor:

An independent contractor is one who, in pursuit of an independent business, undertakes specific work for another using his own means and methods without submitting to the control of the other person as to the details of the work. Conversely, an employer controls not only the end sought to be accomplished, but also the manner and means by which the end result is obtained. In determining whether a person qualifies as an employee or is instead an independent contractor, the focus is on who has the right to control the details of the work. A “possibility” of control is not evidence of a right to control.⁷⁵

Under Texas law, right to control can be established via contractual provisions or, in the absence of express contractual provisions, “actual control over the manner in which the work is performed.”⁷⁶

The Massachusetts Appeals Court affirmed summary judgment for the airport owner in *McNamara v. Massachusetts Port Authority*.⁷⁷ The airport owner, Massachusetts Port Authority (Massport), hired an independent contractor, Suburban, to provide bus service for employees between the airport and designated parking areas for employees.⁷⁸ One of the bus’s steering mechanisms malfunctioned, injuring the plaintiff, an employee of the independent contractor bus service.⁷⁹

The summary judgment materials established the following undisputed facts: (1) Suburban’s bus operation proposal to Massport had provided that Suburban would be responsible for all bus maintenance and repair; (2) the agreements between Massport and Suburban stated that Suburban was to be an independent contractor; (3) the agreements placed the obligations of bus maintenance and repair on Suburban; (4) Suburban, not Massport, selected and owned the employee buses; (5) McNamara was employed by Suburban and not Massport; and (6) at no time did Massport or any of its employees undertake to operate,

⁷⁴ *Id.* at 886, 889–90.

⁷⁵ *Id.* at 890 (citations omitted) (citing *EPGT Tex. Pipeline, L.P. v. Harris Cty. Flood Control Dist.*, 176 S.W.3d 330, 336 (Tex. App.—Houston [1st Dist.] 2004, pet. dism’d).

⁷⁶ *Id.*

⁷⁷ 573 N.E.2d 510 (Mass. App. Ct. 1991).

⁷⁸ *Id.* at 511.

⁷⁹ *Id.*

maintain[,] or make repairs on any of the employee buses, or supervise anyone at Suburban regarding such activities. Furthermore, nothing in the submitted materials revealed that Massport knew or should have known of any problems or complaints concerning the maintenance, repair[,] or mechanical condition of any of the employee buses, including the bus driven by McNamara, prior to her accident.

Massport was properly entitled on that record to judgment as a matter of law.⁸⁰

In affirming summary judgment, the appeals court held that the plaintiff “failed to show that Massport owed her any duty giving rise to tort liability.”⁸¹ Applying Section 414, the court explained that McNamara’s potential liability “depend[ed] on whether Massport retained sufficient control over Suburban’s bus maintenance and repair work.”⁸² The appeals court found the following contract provision insufficient to confer on Massport the requisite control over Suburban’s maintenance and repair of its buses:

Any vehicle and equipment of the service, which in the opinion of [Massport] or its designee fails to meet the requirements herein, shall immediately upon [Massport’s] direction, be removed from the service and a substitute vehicle shall be immediately provided by [Massport]. The vehicle and/or equipment removed shall not be returned to service until the condition complained of and any other deficient condition has been corrected.⁸³

In another Massachusetts case, *Peters v. Haymarket Leasing, Inc.*,⁸⁴ the appeals court held that although Massport controlled access to and movement of taxis at Logan International Airport, in the absence of a contractual relationship between the authority and the taxi operator, Section 414 did not apply.⁸⁵

We assume for present purposes that the authority, desirous of getting people into and out of the airport, realizes a benefit from the availability of a class, i.e., taxi drivers, that conducts operations at that location. We acknowledge also that the authority exercises a modicum of control over those drivers by means of the taxi pool procedure. These factors fall considerably short of cre-

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 511–12 (footnote omitted).

⁸³ *Id.* at 512.

⁸⁴ 835 N.E.2d 628 (Mass. App. Ct. 2005).

⁸⁵ *Id.* at 638.

ating a contractual relationship between Fenelus and the authority. The authority did not deal with Fenelus or his representative; the terms were mandated, not negotiated; and Fenelus was free to provide the authority no service at all. We fail to see how there was a mutuality of obligation where one of the “contracting” parties was never required to do anything.⁸⁶

The rationale in *Peters* suggests that airport operators should mandate rules and regulations for operation on airport property but avoid contractual relationships with business entities operating thereon. *Peters* raises the question of whether, had Massport elected to issue licenses to taxi operators for the privilege of picking up passengers at Logan, the result in that case would have been different. Such a different result did occur across the country in Washington state.⁸⁷

III. THE WASHINGTON STATE SUPREME COURT EXPANDED THE RETAINED CONTROL EXCEPTION BEYOND THE INDEPENDENT CONTRACTOR RELATIONSHIP TO HOLD AIRPORT OWNERS LIABLE FOR INJURIES TO EMPLOYEES OF LICENSED VENDORS

In 2013, the Washington State Supreme Court affirmed the reversal of summary judgment in favor of an airport owner applying the retained control exception to a licensed vendor relationship in *Afoa v. Port of Seattle*.⁸⁸ The plaintiff sued the Port of Seattle (the Port), the owner of Seattle-Tacoma International Airport (Sea-Tac Airport), after losing control of his tug (allegedly due to a mechanical failure) and crashing into a large piece of equipment.⁸⁹ The plaintiff was an employee of a vendor licensed by the airport to provide ground services to lessee airlines.⁹⁰ The vendor, therefore, was not an independent contractor of the Port. Rather, it was an independent contractor ground service provider working for a number of airline lessees of the Port.⁹¹ The Port moved for summary judgment, arguing that it had merely licensed the vendor to work on the premises, so it could not be held liable as an employer or as a “general contractor” under the common law safe workplace doctrine,

⁸⁶ *Id.*

⁸⁷ *Afoa v. Port of Seattle*, 296 P.3d 800 (Wash. 2013).

⁸⁸ *Id.* at 803.

⁸⁹ *Id.* at 804.

⁹⁰ *Id.*

⁹¹ *Id.* at 803–04.

and it did not owe Washington Industrial and Safety Health Act (WISHA) duties to vendors' employees.⁹²

The court disregarded as irrelevant the precise nature of the relationship between the Port and plaintiff's employer.⁹³ Instead, the court analyzed the degree of control that the Port exercised over the area where the plaintiff was injured and the equipment utilized to find issues of fact as to whether, based on retained control, the Port owed plaintiff both a common law duty of care and WISHA duties.⁹⁴ The Port's lease agreement with the airlines granted the "airlines use of the Airfield Area 'subject at all times to the exclusive control and management by the Port.'"⁹⁵ The license agreement "require[d the vendor] to abide by all [of the] Port rules and regulations and allow[] the Port to inspect [the vendor's] work."⁹⁶ The Port conceded "at oral argument . . . that the purpose of [these] rules and regulations [was] to control the tarmac."⁹⁷ Finally, the plaintiff alleged that the Port continuously controlled and supervised the vendor's employees, including tug brake maintenance following a similar incident three months before the subject accident.⁹⁸ "Viewing this evidence in the light most favorable to Afoa, a reasonable jury could conclude that the Port had sufficiently pervasive control over [the vendor and employee] to create a duty to maintain a safe workplace."⁹⁹

We recognize that many aspects of this case are unique; the Port operates a highly complex, multi[-]employer work[]site and is perhaps the only entity in a position to maintain worker safety. Moreover, the Port has allegedly retained substantial control over the manner in which work is done at Sea-Tac Airport. To the extent other cases arise in the future, liability should depend on similar factors. This narrow holding limits concerns raised by amici that adhering to *Kelley* raises the specter of unintended liability for municipal corporations and other licensors.

But this holding also recognizes what is fair: that a jobsite owner who exercises pervasive control over a work[]site should keep that work[]site safe for all workers, just as a general contractor is required to keep a construction site safe under *Kelley*, and just as

⁹² *Id.*

⁹³ *Id.* at 809.

⁹⁴ *Id.* at 806–12.

⁹⁵ *Id.* at 804.

⁹⁶ *Id.*

⁹⁷ *Id.* at 812.

⁹⁸ *Id.* at 808.

⁹⁹ *Id.* at 812.

a master is required to provide a safe workplace for its servants at common law.¹⁰⁰

The court further explained that if a jobsite owner retained sufficient control over a multi-employer worksite to give rise to a duty of care owed to another's employees, then the jobsite owner also would have a duty to comply with WISHA regulations that "extend[ed] to all workers on the jobsite that may be harmed by WISHA violations."¹⁰¹ More specifically, the court endorsed a "specific duty to prevent WISHA violations" by others over whom the Port is found to retain control.¹⁰²

The court acknowledged its decision was extending the common law related to "workplace safety law" but satisfied itself that policies supporting worker safety justified the extension.¹⁰³ "The common law owes its glory to its ability to cope with new situations, and its principles are not mere printed fiats but living tools to be used in solving emergent problems."¹⁰⁴ In identifying the specific policy the court intended to advance, the court explained:

If a jury accepts Afoa's allegations [of retained control], the Port controls the manner in which work is performed at Sea-Tac Airport, controls the instrumentalities of work, and controls workplace safety. The Port is the only entity with sufficient supervisory and coordinating authority to ensure safety in this complex, multi[-]employer work[]site. If the Port does not keep Sea-Tac Airport safe for workers, it is difficult to imagine who will.¹⁰⁵

In finding a policy-based, common law duty extending to all employees at a worksite, the court also relied upon the proposition that "very few jurisdictions take a contrary approach and those that do have not considered the question in much detail."¹⁰⁶ Specifically, the court identified the states of California, Louisiana, and Vermont as states in which "the duty to provide a safe workplace extends only to the worker's 'immediate em-

¹⁰⁰ *Id.* (citing *Kelley v. Howard S. Wright Constr. Co.*, 582 P.2d 500 (Wash. 1978)).

¹⁰¹ *Id.* at 807.

¹⁰² *Id.* at 807-08.

¹⁰³ *Id.* at 811.

¹⁰⁴ *Id.* (citing *Mills v. Orcas Power & Light Co.*, 355 P.2d 781, 788 (Wash. 1960)).

¹⁰⁵ *Id.* at 810.

¹⁰⁶ *Id.* at 811.

ployer or those who contract for the services of the immediate employer.’”¹⁰⁷

Although the Washington Supreme Court is correct in recognizing that California restricts the scope of duties owed in common worksites, it is not accurate to suggest that California has “not considered the question in much detail.”¹⁰⁸ In *Seabright v. US Airways*, the California Supreme Court held that “[b]y hiring an independent contractor, the hirer implicitly delegates to the contractor any tort law duty it owes to the contractor’s employees to ensure the safety of the specific workplace that is the subject of the contract.”¹⁰⁹ US Airways, under a permit with the San Francisco International Airport, was responsible for the maintenance of a baggage conveyor owned by the airport but operated by US Airways.¹¹⁰ The conveyor lacked safeguards required by California Division of Occupational Safety and Health (Cal-OSHA) regulations.¹¹¹ Plaintiff, the employee of US Airways’ maintenance contractor, who was injured due to the lack of the required safeguards, asserted that US Airways’ breach of Cal-OSHA regulations was a breach of a duty owed to him.¹¹² The California Supreme Court held:

When in this case defendant US Airways hired independent contractor Aubry to maintain and repair the conveyor, US Airways presumptively delegated to Aubry any tort law duty of care the airline had under Cal-OSHA and its regulations to ensure workplace safety for the benefit of Aubry’s employees. The delegation—which . . . is implied as an incident of an independent contractor’s hiring—included a duty to identify the absence of the safety guards required by Cal-OSHA regulations and to take reasonable steps to address that hazard.¹¹³

Whereas the *Afoa* court imposed upon the Port a duty to ensure WISHA compliance by vendor-licensees to the extent it retained control over airport operations,¹¹⁴ the *Seabright* court held that US Airways presumptively delegated these duties to the indepen-

¹⁰⁷ *Id.* at 812 n.4 (quoting *Lopez v. Univ. Partners*, 63 Cal. Rptr. 2d 359, 365 (Cal. Ct. App. 1997)).

¹⁰⁸ *Id.* at 811; see *SeaBright Ins. Co. v. US Airways, Inc.*, 258 P.3d 737 (Cal. 2011).

¹⁰⁹ *SeaBright*, 258 P.3d at 738.

¹¹⁰ *Id.* at 739.

¹¹¹ *Id.*

¹¹² *Id.* at 740.

¹¹³ *Id.* at 744.

¹¹⁴ *Afoa v. Port of Seattle*, 296 P.3d 800, 807 (Wash. 2013).

dent contractor.¹¹⁵ While the Washington Supreme Court concluded that the Port was in the best, if not exclusive, position to ensure worker safety at the airport,¹¹⁶ California put more stake in the validity of its worker's compensation system: "workers' compensation guarantees compensation for injured workers, 'spreads the risk created by the performance of dangerous work to those who . . . benefit from such work,' and 'encourages industrial safety.'"¹¹⁷

Also, in comparison to the Washington Supreme Court, the Massachusetts Appeals Court declined to recognize an assumed duty on the part of Massport by virtue of its control and imposition of a speed limit on the taxi holding area at Logan International Airport.¹¹⁸

We conclude that there was no separate duty, either imposed by law or voluntarily assumed, by which the authority became an insurer of the plaintiff against the negligent acts of others in the taxi pool. That the authority posted speed limits as a means of controlling operations within the taxi pool did not, on this record, constitute assumption of a legal duty to enforce the restrictions in the interest of the plaintiff.¹¹⁹

Judge Madsen's dissent in *Afoa* would have reached a decision aligned (though under slightly different analyses) with the California and Massachusetts courts.¹²⁰ The dissent recognized the distinction between an independent contractor relationship and the precise relationship between the Port and vendors licensed to work on the airport premises but not directly working for or retained by the Port and explained: "[w]here there is no employment relationship between the defendant and an independent contractor, the general rule does not apply and neither does the retained[] control exception."¹²¹

This policy underlying the no-liability rule [independent contractor doctrine] and its exception [retained control exception] does not apply when there is no employer-independent contractor employment relationship. . . .

¹¹⁵ *SeaBright*, 258 P.3d at 741, 744.

¹¹⁶ *Afoa*, 296 P.3d at 810.

¹¹⁷ *SeaBright*, 258 P.3d at 745 (quoting *Privette v. Superior Court*, 854 P.2d 721, 730 (Cal. 1993)).

¹¹⁸ *Peters v. Haymarket Leasing, Inc.*, 835 N.E.2d 628, 630–32, 638–39 (Mass. App. Ct. 2005).

¹¹⁹ *Id.* at 637.

¹²⁰ *Afoa*, 296 P.3d 800, 812–13 (Madsen, J., dissenting).

¹²¹ *Id.*

[A] central premise [of WISHA obligations] is that the Port must have been the equivalent of a direct employer and therefore subject to the same legal obligations that an employer has under WISHA. None of our cases support the premise that WISHA liability exists otherwise. . . .

[I]t is the equivalency of the retained control in the independent contractor setting to the control an employer exerts in the employer-employee relationship that justifies liability under the exception. A landlord, owner, or licensor does not have employer-type duties resulting from the right to control unless the owner, landlords, or licensor engaged the worker who is injured or engaged an independent contractor and retained control over part of the work performance, i.e., the manner of performing the work and operative details of the work. A landlord, owner, or licensor should not be subject to what is at the core an *employer's* liability under the retained control doctrine.¹²²

The dissent further emphasized that, under the retained control exception, what matters is “control over the manner in which the work is performed” not “over the worksite, alone.”¹²³

The dissent admonished that the expansion of WISHA obligations beyond the independent contractor, or retained control relationship, described as “an onerous obligation,” should be left to the legislature, not the courts.¹²⁴ Consequently, the dissent insists on application of the general principles within the confines of an independent contractor relationship, a conclusion that stands to prevail as the majority rule unless other states follow the *Afoa* example.¹²⁵

IV. IN HIGHLY REGULATED INDUSTRIES SUCH AS AVIATION, AIRPORT OWNERS HAVE NO CHOICE BUT TO EXERCISE SUPERVISION AND CONTROL OVER VENDORS AND LESSEES—EXPOSING AIRPORT OWNERS TO TORT LIABILITY FOR THE OPERATOR'S NEGLIGENCE UNDER THE *AFOA* RATIONALE

What the majority in *Afoa* fails to account for is that federal aviation regulations impose extensive regulations on airport owners. The Federal Aviation Administration (FAA) requires

¹²² *Id.* at 813, 815.

¹²³ *Id.* at 816.

¹²⁴ *Id.* at 819–20.

¹²⁵ *Id.* at 817–18. Note, however, that the dissent would entertain application of the retained control exception in the case of airlines and their independent contractor service providers. *See id.* at 817.

that all airports limit access to runways, taxiways, and other areas of the airport used for landing of aircraft.¹²⁶ More importantly, the FAA requires that airports establish, implement, and annually train all persons regarding movement *and operation* in these areas.¹²⁷ Thus, airport owners are legally obligated to implement procedures for and annually train the employees of licensed vendors and lessees operating on the airfield.

It is this federally regulated control that was central to the court's justification for imposing liability in *Afoa*.¹²⁸ The court relied on the fact that the airfield was subject at all times to the control and management of the owner.¹²⁹ The licensed vendor was required to abide by the Port's rules and regulations and the owner supervised the vendor or lessee's employees while they were in the airfield area.¹³⁰ All of these indicia of control reflect the airport's federal regulatory obligations, as the FAA requires control and supervision of the airfield and workers operating on it.¹³¹ Yet the *Afoa* court did not acknowledge that as compared to an independent contractor-employment relationship, the Port had no option but to impose such control. In other words, control was not a matter of contractual choice.¹³² The contractual choice to delegate or not delegate responsibility for worksite safety, a fundamental premise running through cases evaluating the independent contractor doctrine, is wholly absent from the relationship between a federally certificated Part 139 airport operator and vendors permitted to work on the airfield.

The inescapable overlay of federally regulated control of the airfield militates for a finding of less control, not more.

[T]o the extent that the government regulation of a particular occupation is more extensive, the control by a putative employer becomes less extensive because the employer cannot evade the law either and in requiring compliance with the law he is not

¹²⁶ 14 C.F.R. §§ 139.329, 139.335 (2016); see E. Tazewell Ellett et al., *FAA Regulation of Airports*, in AVIATION REGULATION IN THE UNITED STATES 297, 306 (David Heffernan & Brent Connor eds., 2014); see also 8A AM. JUR. 2D *Aviation* §§ 14–16 (2016).

¹²⁷ See, e.g., 14 C.F.R. §§ 139.329, 139.303.

¹²⁸ See *Afoa*, 296 P.3d at 808 (majority opinion).

¹²⁹ *Id.* at 808.

¹³⁰ *Id.* at 810, 812.

¹³¹ See, e.g., 14 C.F.R. §§ 139.329, 139.303.

¹³² *Afoa*, 296 P.3d at 810, 812.

controlling the [worker]. It is the law that controls the [worker].¹³³

This analysis, distinguishing between control imposed by regulation as opposed to control imposed by contract or employment status, often is discussed in the context of classifying an individual as either an employee or independent contractor in National Labor Relations Board cases. In that context, courts require pervasive control beyond government regulations to find the individual was an employee.¹³⁴

It is especially crucial for courts to analyze the nature of federally mandated control in the context of the independent contractor doctrine because far less control is required to find liability under the retained control exception than is required to establish an employment relationship.¹³⁵ If the control mandated by federal regulations is sufficient to meet this lower standard, as the *Afoa* court concluded, airport owners may face boundless tort liability, unrestrained by the workers' compensation system.

V. THE CURRENT PRACTICE OF PROTECTION-BY-
INDEMNIFICATION DESTROYS WORKERS'
COMPENSATION IMMUNITY AND FEDERAL LEGISLATION
ULTIMATELY MAY BE REQUIRED TO AVOID IMPOSING
LIABILITY ON AIRPORT OWNERS FOR THE NEGLIGENCE
OF VENDORS AND LESSEES

The risk of exposure to airport owners and operators is mitigated through broadly written indemnity provisions in vendor license agreements and airport leases. The result of these indemnity provisions, however, is that workers' compensation immunity, effectively, is destroyed. The legally immune employer and its liability policy respond to the employee's tort claim, thus reducing (if not eliminating) the intended industry cost-savings of the workers' compensation system. This result was neither intended by the workers' compensation system nor, apparently, anticipated by the gradual but persistent erosion of the independent contractor doctrine. Yet it is so pervasive a practice as to have become the norm.

¹³³ Democratic Union Org. Comm. v. Nat'l Labor Relations Bd. [NLRB], 603 F.2d 862, 875 (D.C. Cir. 1978).

¹³⁴ See, e.g., *Air Transit, Inc. v. NLRB*, 679 F.2d 1095, 1100 (4th Cir. 1982); *SIDA of Hawaii, Inc. v. NLRB*, 512 F.2d 354, 359 (9th Cir. 1975).

¹³⁵ See 41 AM. JUR. 2D *Independent Contractors* §§ 8, 27.

The prevalence of contractual indemnity agreements reinforces the impact of permitting recovery against the entity that hired the injured worker's employer as an independent contractor. To satisfy its contractual indemnity and insurance obligations, the independent contractor "must provide two kinds of coverage to accommodate the same risk,"¹³⁶ thereby ameliorating the reduction in insurance costs anticipated by workers' compensation immunity. The Fourth District Court of Appeal of California highlighted this very problem in the context of an independent contractor relationship:

In conjunction with *Privette's* point about societal interest, to make the person who hires an independent contractor liable for the workplace injuries of the latter's employees merely because of an indemnification agreement is to make both the hirer and the independent contractor pay for the *same risk twice* in the form of insurance premiums [that] must provide two kinds of coverage to accommodate the same risk. That is, the person who hires an independent contractor must not only pay a price [that] covers the independent contractor's *workers' compensation* insurance costs, but must also have to pay a cost [that] covers the independent contractor's *liability* insurance costs for the contractual liability the independent contractor will have assumed for the tort liability of the general contractor A corollary of the same-risk-twice point is that varying a result otherwise dictated by the *Privette* decision because of the existence of express indemnification would denude subcontractors of the protection of the exclusive remedy provisions of the workers' compensation laws. General contractors require express indemnification clauses in almost all subcontracts in the construction industry. If general contractors were liable to subcontractors' employees for injuries caused by subcontractor negligence, subcontractors would have to pay twice for workplace injuries—once in workers' compensation premiums, and once in liability insurance premiums.¹³⁷

In the absence of either legislation or further development of common law protections to land owners, airport owners must continue to ensure that the indemnification provisions in their lease agreements and vendor licenses are enforceable and protected by sufficient levels of insurance coverage. In many states, an indemnification provision is not enforceable against an employer for claims arising out of an employee's injuries unless the

¹³⁶ *Redfeather v. Chevron USA, Inc.*, 67 Cal. Rptr. 2d 159, 161 (Cal. Ct. App. 1997) (footnote omitted).

¹³⁷ *Id.*

employer specifically and expressly waives its immunity under the state's workers' compensation statute.¹³⁸ Such indemnification provisions, if enforceable under state law, generally are meaningful only to the extent sufficient liability coverage is required by contract. The insurance provisions should not only require coverage for the indemnification obligation, but also require the lessee or vendor to name the airport as an additional insured on its liability policy, conferring the rights of an insured on the airport owner.

If the rationale of the Washington Supreme Court in *Afoa* takes hold in other states and the prevailing practice of protection-through-indemnification becomes unwieldy or too expensive, federal legislation may be required. Federal legislation could reinstate the predictability and certainty of workers' compensation systems, while still holding Part 139 airport owners and operators responsible for the safety of their own employees and business invitees. If, merely by following federal regulations requiring extensive control of air fields, airport owners are subject to independent liability to a vendor or lessee's employee under the retained control exception, liability insurance premiums for indemnifying vendors and lessees, not to mention the airports, undoubtedly will increase. Federal legislation could preempt the application of judicially created doctrines such as "retained control," reducing the possibility that exercising control required by FAA regulations will subject the airport owner to separate and additional liability to vendor and lessee employees. Any such legislation would not immunize airport owners from liability for their own employees' negligence or under theories of premises liability. It would, however, inoculate airport owners from liability for the failings of licensed vendor and lessee operators on the airfield.

¹³⁸ See, e.g., *Goodyear Tire & Rubber Co. v. J.M. Tull Metals Co.*, 629 So. 2d 633, 638 (Ala. 1993); *Snare v. Ebensburg Power Co.*, 637 A.2d 296, 299 (Pa. Super. Ct. 1993); *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 912 P.2d 472, 476-77 (Wash. 1996).