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CLALLAM COUNTY

No. 34267-7-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

ALEX M.M. RALSTON, JOHN M. RALSTON and GAIL T. RALSTON
Plaintiffs/Appellants

v.

PORT OF PORT ANGELES and PORT ANGELES MARINE, INC.
Defendants/Respondents

ON APPEAL FROM CLALLAM COUNTY SUPERIOR COURT
(HONORABLE CRADDOCK D. VERSER
Visiting Judge from Jefferson County)
Clallam County Superior Court No. 05-2-00644-0

APPELLANTS' REPLY BRIEF

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I. STATEMENT OF ISSUES

Port of Port Angeles identifies the issue on appeal as whether “the Port of Port Angeles . . . or Port Angeles Marine ha[d] a duty to discover an allegedly dangerous condition created by a third party and take measures to remedy the condition, or warn or otherwise protect plaintiff Alex Ralston . . . from it, where the condition did not exist on the Port’s property and was not within its control?” The Ralstons state that genuine issues of material fact exist regarding whether the dangerous condition existed on the Port’s property, and whether the Port and its agent had the right to control the work being performed on the vessel – the issue, as presented by the Port of Port Angeles, should be whether “the Port of Port Angeles . . . or Port Angeles Marine ha[d] a duty to discover an allegedly dangerous condition created by a third party and take measures to remedy the condition, or warn or otherwise protect plaintiff Alex Ralston . . . from it, where issues of fact exist concerning 1) whether the condition existed on the Port’s property, 2) whether the condition was within its control?”

II. ARGUMENT

- A. **AS AT THE VERY LEAST A GENUINE ISSUE OF MATERIAL FACT EXISTS REGARDING THE QUESTION OF WHETHER THE DANGEROUS CONDITION EXISTED**

ON THE PORT'S PROPERTY, A JURY QUESTION EXISTS REGARDING THE DUTIES SET OUT IN THE RESTATEMENT (SECOND) OF TORTS

The linchpin of respondents' argument is their claim that the ODYSSEY was not on the Port's property and, therefore, they had no duty to prevent Ralston's fall onto their dock. There are several flaws with this argument. First, the question of whether a particular party is a "possessor of land" is a question of fact that requires the court to consider the scope and control exercised by the party over the property. See, e.g., *Mesa v. Spokane World Exposition*, 18 Wash. App. 609, 612, 570 P.2d 157 (1977). The question of scope and control is one of fact. *Id.* at 612; see also *Blackman v. Federal Realty Investment Trust*, 444 Pa. Super. 411, 416, 664 A.2d 139, 142 (1995) (The question of whether a party is a "possessor" of land is a determination to be made by the trier of fact). Therefore, at minimum, a trial is necessary for the trier of fact to weigh the extent of control that respondents exercised over the ODYSSEY and the boat slip where it was moored.

Second, the dangerous condition that Ralston encountered was the absence of any scaffolding on the Port's dock to protect workers from falling. See 29 C.F.R. § 1915.73. If the dock were not present underneath the unguarded upper deck, a worker's only

risk of falling was landing in the water. Ralston was injured when he landed on the Port's dock because of the absence of any scaffolding to protect him from falling off the unguarded upper deck. Accordingly, the hazard here was the Port's failure to exercise its power of control over the ODYSSEY while it was at the Port's marina to require scaffolding on the dock to protect workers from falling onto the dock.

Expert testimony was presented to the trial court that the type of work being conducted on the ODYSSEY could not be done with reasonable safety at the marina and that the vessel should have been taken out of the water and the work done in the nearby boat yard. In opposition to summary dismissal, boat repair expert Michael K. McGlenn testified by declaration that conducting these repairs while the vessel was in the water without scaffolding on the dock posed a substantial safety concern for the workers, and that a "reasonably prudent marina owner would have exercised its control over the vessel as provided in the Berthage Agreement and the Port of Port Angeles' Rules and Regulations to require the vessel to conduct its work at the nearby boat yard where proper safety measures should have been taken." CP 240-241.

Looking at the duty owed to invitees, Professor Prosser stressed that the landowner's ability to exercise the power of control or expulsion over third-parties on the land was the basis for the duty (Prosser on Torts, 1941 ed., 643-644):

In particular, the possessor must exercise the power of control or expulsion which his occupation of the premises gives him over the conduct of a third person who may be present, to prevent injury to the visitor at his hands. He must act as a reasonable man to avoid harm from the negligence . . . of other persons who may have entered it, or even from intentional attacks on the part of such third persons. He is required to take action only when he has reason to believe, from what he has observed or from past experience, that the conduct of the other will be dangerous to the visitor; and in the ordinary case a warning will be sufficient, unless it is apparent that, because of lack of time or the character of the conduct to be expected, it will not be effective to give protection.

Id. “[T]he owner or operator of a dock or wharf is under a positive duty to maintain it in a reasonably safe condition for use.” See *Nelson v. Booth Fisheries Co.*, 165 Wash. 521, 524-525, 165 Wash. 521 (1931); *Gregg v. King County*, 80 Wash. 196, 141 Pac. 340 (1914); *Alaska Pacific Steamship Co. v. Sperry Flour Co.*, 107 Wash. 545, 182 Pac. 634, 185 Pac. 583 (1919).

Clearly, here, respondents had the power to expel the ODYSSEY from the marina at any time for violations of normal safety standards. CP 310-313. It is well established in the

common law that the voluntary assumption of a duty through affirmative conduct can give rise to liability if the undertaking is not performed with reasonable care. See, e.g., *Sado v. City of Spokane*, 22 Wn. App. 298, 301, 588 P.2d 1231 (1979); *Meneely v. S.R. Smith, Inc.*, 101 Wn. App. 845, 856, 5 P.3d 49 (2000). Moreover, agreements or contracts between parties may also create material issues of fact as to the defendant's right to control the property. See, e.g., *J.M. v. Shell Oil Co.*, 922 S.W.2d 759 (Mo. 1996) (Agreements for the operation of the station created material questions of fact as to defendant's right to control the lessee in providing security for customers of the station). Despite their power to control the activities of the ODYSSEY while at the marina, respondents failed to exercise their right of control or expulsion over the ODYSSEY so as to require scaffolding on the dock to protect workers from serious injury after landing on the Port's dock or to otherwise require the work to be done in the nearby boat yard where adequate safety precautions could be taken.

There is substantial evidence in the record that respondents were aware of the dangerous condition presented by the unguarded upper deck, exercised control over the ODYSSEY in

other respects, but failed to require the owners of the boat moored at its marina to erect scaffolding on the dock where a known hazard existed. See Appellant's Opening Brief. Despite this knowledge, respondents took no action to control the hazard on its property.

Third, even if this Court accepts that the only dangerous condition existed on the ODYSSEY, there is no dispute that the boat was on the Port's property and people working on the boat were business invitees. In Washington, tidelands and the water above tidelands, including boat slips adjacent to a dock, are considered real estate and are owned by the person or entity having title to the property. See, e.g., *Tacoma v. Smith*, 50 Wn. App. 717, 750 P.2d 647 (1988).

In *Tacoma v. Smith*, *supra*, the City of Tacoma was attempting to apply its business and occupation tax to the fees that a marina collected for the use of boat slips. However, the ordinance that allowed the city to collect the business and occupation tax exempted income derived from the rental, lease or sale of "real estate." See Tacoma City Code § 6.68.220. Holding that the boat slips adjacent to the docks at the marina were owned by the marina and qualified as "real estate", Division Two ruled that

the marina's income from the boat slips was exempted from the business and occupation tax:

For purposes of determining rights of use and access, tidelands are classified as land. *Harris v. Hylebos Indus., Inc.*, 81 Wn.2d 770, 785-86, 505 P.2d 457 (1973). Instead of being treated as navigable waters, tidelands "have been treated as land." *Harris*, 81 Wn.2d at 786. See also *Bremerton Concrete Prods. Co. v. Miller*, 49 Wn. App. 806, 745 P.2d 1338 (1987). In our judgment, the boat moorage slips with which we are here concerned, being located on and over tidelands, clearly constitute real estate.

Id. at 720. Like the boat slips in *Tacoma v. Smith, supra*, the dangerous condition presented here by the unguarded upper starboard deck of the ODYSSEY was on the Port's property. As an owner of property, the Port had a duty to Ralston and other business invitees using the property and the question of whether that duty was breached is a question of fact for the jury.

The respondents' claim that the Port did not own the property where the defect existed is even less credible given the undisputed fact that respondents were charging a fee for the ODYSSEY and other vessels in the marina to use the boat slips. The collection of fees for the use of the area is evidence of the Port's exercise of control. While they had sufficient control to collect fees for the use of the boat slip and dictate the manner in

which the vessel was painted, respondents cannot now claim that they did not have sufficient right to control the work practices of third-parties at its marina where those practices posed a direct risk to business invitees using the property. See, e.g., *Fitchett v. Buchanan*, 2 Wn. App. 965, 972, 472 P.2d 623 (1970) (“one who assumes to be the owner of real property, and who, as such, assumes to control and manage it, cannot escape liability for injuries resulting from its defective condition by showing want of title in himself”). There is no meaningful dispute that the Port owned and exercised sufficient control over the area to give rise to a legal duty to business invitees using the property.

Fourth, the fact that the dangerous condition existed on board a vessel owned by a third-party on the Port’s property does not somehow change the result. RESTATEMENT (SECOND) OF TORTS § 344 does not except the landowner from liability if the negligent or intentional acts of a third-person exist on a vehicle or boat on the landowner’s property. A landowner owes a duty to business invitees on the land even with respect to hazards created by third-parties that it does not own or control. For example, in *Alcaraz v. Vece*, 14 Cal. 4th 1149, 1156, 929 P.2d 1239 (Cal. 1997), the court used the following hypothetical to illustrate the point:

If a live power transmission line falls, creating a hazard, the possessor of the property on which the power line has fallen, who knows of the hazard, cannot escape liability for injuries to persons who enter the land and encounter the power line simply because the land possessor does not own the power line and lacks the authority to disconnect the line or remove it. A possessor of land who knows of the hazard would have a duty to erect a barrier or warn persons entering the land of the danger, whether or not the possessor of the land has the authority to eliminate the hazard.

Id. at 1156. *Cf. In re World Trade Ctr. Bombing Litig.*, 3 Misc. 3d 440, 776 N.Y.S.2d 713 (N.Y. Misc. 2004) (duty owed to protect against car bomb in vehicle on property); *Austin v. Riverside Portland Cement Co.*, 44 Cal. 2d 225, 233, 282 P.2d 69 (1955) (duty owed to warn tenant of the danger posed by use of a crane near overhead electrical lines, even though the landowner neither owned nor maintained the electrical lines).

There is no exception in RESTATEMENT (SECOND) OF TORTS § 344 for dangerous conditions presented by chattel of third persons on the landowner's property. Instead, the Restatement provides that a possessor of land is liable to members of the public while they are on the land for the "accidental, negligent, or intentionally harmful acts of third persons " and by the failure of the landowner to exercise reasonable care to (a) discover the negligent acts of third

persons that are “being done or are likely to be done”; or (b) “give adequate warning to enable the visitors to avoid the harm, or otherwise to protect them against it.” RESTATEMENT (SECOND) OF TORTS § 344. It is immaterial whether the third-party’s negligence was on a vessel, car, or other chattel owned by third-parties on the property. A duty is owed.

Respondents owed a duty to exercise reasonable care to discover the negligent conduct of third persons operating on its property that may pose a danger to business invitees. “We discern no reason not to extend the duty of business owners to invitees to keep their premises reasonably free of physically dangerous conditions in situations in which business invitees may be harmed by third persons.” *Nivens v. 7-11 Hoagy’s Corner*, 133 Wn.2d 192, 202-203, 943 P.2d 286 (1997). See, e.g., *Musgrove v. Ambrose Properties*, 87 Cal. App. 3d 44 (Cal. Ct. App. 1978) (duty owed to control bicycles at the shopping center to protect pedestrians also present on the premises); *Deerhake v. Du Quoin State Fair Asso.*, 185 Ill. App. 3d 374, 541 NE 2d 719 (Ill. App. Ct. 1989) (duty owed to prevent drag racing by third-parties on land); *Di Ossi v. Maroney*, 548 A.2d 1361 (Del. 1988) (duty owed to control under-age drinking by third-parties on land).

The term "possessor of land" has been interpreted broadly to impose a duty of care even on persons that do not hold title to the property. For example, in *Jarr v. Seeco Constr. Co.*, 35 Wn. App. 324, 327, 666 P.2d 392 (1983), a prospective purchaser brought an action against a real estate broker to recover for injuries sustained while attending an open house at an unfinished construction site. The court concluded that the real estate broker showing the property was a "possessor of land" and could be held liable for harm caused thereby under a theory of premises liability. *Id.* The court cited the Restatement, concluding, "a possessor of land is 'a person who is in occupation of land with intent to control it.'" *Id.* See also, *Orthmann v. Apple River Campground, Inc.*, 757 F.2d 909 (7th Cir. 1985) (finding that recreational association which owned "most of the land" on either side of river, but not area where plaintiff was injured, could be sued for negligence since association treated adverse property as its own); *Dumas v. Pike County, Miss.*, 642 F. Supp. 131 (S.D. Miss. 1986)(finding a duty owed where park visitor was injured on non-park property since park's property line cut through base of horseshoe bend in river and there were no signs posted along the river to advise floaters that they were leaving or re-entering park property); *Dunifon v. Iovino*, 665 N.E.2d

51 (Ind. App. 1996) (holding owners of lake cottage subject to liability for injuries to guest sustained from diving into shallow water from pier owned by cottage owners, on basis that cottage owners possessed and controlled the area adjacent to the pier and owned the instrumentality from which the plaintiff dove); *Fuhrer v. Gearhart by the Sea*, 306 Ore. 434, 760 P.2d 874 (Or. 1988) (finding that private hotel adjacent to ocean beach owned and regulated by state had affirmative duty to warn its guests and invitees of foreseeable unreasonable risks of physical harm; where the risk involves a dangerous condition off the premises, the trier of fact must decide the reasonableness of the failure to warn in all circumstances).

According to comment b to RESTATEMENT (SECOND) OF TORTS § 344, “third persons” include the actions of other business invitees, licensees, or even trespassers on the land, and “even persons outside of the land whose acts endanger the safety of the visitor.” *Id.* When he landed on the Port’s dock, Ralston was clearly on the Port’s property and was a business invitee. Under the Restatement, the Port owed Ralston a duty even with respect to persons off its land that endangered his safety. Under comment c, the rule also applies equally to acts of independent contractors and

concessionaries who are employed or “permitted to carry on activities on the land.” *Id.* Moreover, “[t]he possessor is required to exercise reasonable care, for the protection of the public who enter, to supervise the activities of the contractor and concessionaires[.]” *Id.* Despite ample notice of the dangerous condition presented by the unguarded upper deck, respondents did nothing and failed to require the vessel to conduct its construction activities at the nearby boat yard where it could be performed with adequate safety measures.

Because the Port owned the property where the dangerous conditions existed, had actual notice of the dangerous conditions, and Ralston was a business invitee, it owed a duty to Ralston and whether that duty was breached requires a finding of fact by the jury. Summary dismissal of these factual issues was error.

B. AS A GENUINE ISSUE OF MATERIAL FACT EXISTS REGARDING DEFENDANTS’ RIGHT TO CONTROL THE WORK PERFORMED ON A VESSEL, A JURY QUESTION EXISTS REGARDING THE DUTIES SET OUT IN THE RESTATEMENT (SECOND) OF TORTS

The central issue on appeal is whether the Port of Port Angeles and Port Angeles Marine had the right to control the work performed on a vessel berthed at the Port’s marina pursuant to a Berthage Agreement requiring the vessel to “at all times comply

with Federal, State, and County laws, ordinances and regulations”, Port Rules and Regulations No. 8, and a Berthage Agreement which requires the vessel owner to “to abide by and follow such rules and regulations, which are by this reference incorporated herein and made a part hereof”. CP 314-316, paragraph 12. The Agent Agreement requires Port Angeles Marine to enforce the Port’s Rules and Regulations.

The Washington Supreme Court has held that the test of control is not the actual interference with the work of the subcontractor, but the right to exercise such control. *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 331, (582 P.2d 500 (1978), citing *Fardig v. Reynolds*, 55 Wn.2d 540, 543, 348 P.2d 661 (1960). See also, *Swam v. Aetna Life Ins. Co.*, 155 Wash. 402, 407, 408, 284 P. 792 (1930). The issue before this Court is whether evidence was presented which created a genuine issue of material fact as to whether either the Port of Port Angeles and Port Angeles Marine had the right to exercise control over what the Port of Port Angeles characterizes as an “open and obvious” danger on the vessel, bearing in mind that “. . . the question of control and the scope of the invitation are factual matters.” *Mesa v. Spokane World Exposition*, *supra* at, 613.

The Port of Port Angeles Rules and Regulations contained a provision which allowed the Port to deny permission to a vessel to remain on Port premises if the vessel did not meet normal safety standards, and Faires had knowledge of the provision in March of 2004. CP 163, ll. 7-14. A primary responsibility of Port Angeles Marine, Inc. was to enforce the Port's Rules and Regulations. CP 164 ll. 18-25 to CP 165 ll. 1-3.

This Court should reject the respondents' attempt to rewrite the Port's Rules and Regulations. Faires states in his declaration that "It was my understanding that the Port rules and regulations only required Port Angeles Marine to enforce safety standards where in our opinion a vessel was hazardous to Port property or other boats or facilities." CP 46 and 131. Courts faced with questions of contract interpretation must discern the intent of the contracting parties, and may consider evidence extrinsic to the contract itself for that purpose, even when the contract terms are not themselves ambiguous. *Berg v. Hudesman*, 115 Wn.2d 657, 667-68, 801 P.2d 222 (1990). If relevant, such evidence may include the subject matter of the contract, the circumstances under which the agreement was made, the parties' conduct thereafter,

and the reasonableness of the interpretations urged by each. *Id.* Such extrinsic evidence may not, however, be used to "vary, contradict, or modify" the written terms, to show an intention independent of the contract, or to show a party's unilateral or subjective intent as to the meaning of contract words or terms. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999). Thus, extrinsic evidence is relevant only to establish the parties' mutual intent in arriving at their agreement, and may be used only to illuminate the words used in the contract, not to vary them. See, *Hearst Communs., Inc. v. Seattle Times Co.*, 120 Wn. App. 784, 791, 867 P.3d 1194 (2004). Paragraph 21 of the Port's Rules and Regulations unambiguously grants the Port and its agent the right to deny permission to a vessel to remain on the premises if it fails to comply with normal safety standards. Respondents' attempt to replace the disjunctive with the conjunctive is an attempt to "vary, contradict, or modify" the written terms of the Rules and Regulations. Per this rule, both the Port and Port Angeles Marine had the right to control the work ongoing on the vessel.

The evidence cited at pages 13 through 16 of Appellants' Opening Brief indicates that actual exercise of control by the Port

over the work being performed aboard the ODYSSEY, and the Port concedes at page 5 of Respondent's Brief that such evidence "involved the Port's exercise over its own property and over water pollution." In fact, harbormaster Faires' direction to Alex Ralston that he needed to use the vacuum machine or use a tarp and keep the dust and paint out of the water is direct evidence of the exercise of control over the manner in which the work aboard the vessel was being performed.

The Ralstons are not arguing that the Berthage Agreement, the Port's Rules and Regulations, and the Agent Agreement alone establish a duty owed to Alex Ralston, rather, these contracts and rules evidence the Port's and its agent's right to control the work being performed aboard the vessel. Once the right to control is established, a duty exists under the RESTATEMENT (SECOND) OF TORTS § 344 to protect invitees such as Alex Ralston from the harm.

The cases cited by the Port of Port Angeles at pages 13 and 14 of Respondent's brief for the proposition that the RESTATEMENT (SECOND) OF TORTS § 344 does not apply to dangerous conditions or conduct on neighboring property all hold that the existence of a

duty is dependent on the issue of control. In *Gohar v. Albany Housing Authority*, 288 A.D.2d 657, 733 N.Y.S.2d 507 (N.Y. App. Div. 2001), the plaintiff was accosted by City of Albany police when parked on a public street outside defendant's apartment complex. No evidence was presented that defendant had any right to control police activities on a public street. In *Fuhrer v. Gearhart By The Sea, Inc.* 790 Or. App. 550, 719 P.2d 1305 (Or. App. 1986), the Court stated that the defendant property owner "cannot limit or deny its guests the use of the beach, and it should not have a duty to protect them in their use from conditions not subject to its creation or control." *Id.* at 553, 1307. In *Isaacs v. Huntington Memorial Hospital*, 211 Cal. Rptr. 356, 38 Cal.3d 112, 695 P.2d 653 (Cal. Ct. App. 1985), the California Supreme Court held that "[a] defendant cannot be held liable for the defective or dangerous condition of property which it did not own, possess, or control. Where the absence of ownership, possession, or control has been unequivocally established, summary judgment is proper." *Id.* at 134 (emphasis supplied).

Minihan v. Western Washington Fair Assoc., 117 Wn. App. 881, 73 P.2d 1019 (Div. Two 2003) is distinguishable from the instant case. There, this Court posed the issue as "whether the

scope of the duty incumbent on the defendants as possessors and lessors required them to make safe or warn against dangerous conditions on adjoining, public property.” *Id.* at 892. *Minihan* involved a victim who was struck multiple times by a drunk driver on a public street outside the defendant’s property. There was no Berthage Agreement entered into between the tortfeasor and the defendant allowing the driver to operate her vehicle exclusively on defendant’s property, no rules or regulations regarding compliance with state and federal law and an agent agreement requiring defendant to enforce said rules and regulations, and no evidence that defendant was actually exercising control over the manner in which the torfeasor was operating her vehicle on the adjacent property. All of these items are present in the instant case.

C. THE PORT’S KNOWLEDGE THAT PAINTING ON THE VESSEL’S UPPER DECK WITHOUT THE BENEFIT OF FALL PROTECTION, AND KNOWLEDGE THAT A 17 YEAR-OLD WAS PRESENT WITH PAINTING MATERIALS, CREATES A GENUINE ISSUE OF MATERIAL FACT REGARDING WHETHER AN INJURY OF THIS TYPE IS FORESEEABLE

Nivens v. 7-11 Hoagy’s Corner, supra, held that the duty of a property owner to intervene arises when the harm to the invitee is foreseeable. *Id.* at 205. The Court in *Nivens* at 205 states that

foreseeability is ordinarily a question of fact, citing *Hanson v. Friend*, 118 Wn.2d 476, 483; 824 P.2d 483 (1992).

The evidence of the foreseeability of harm resulting from allowing repair and painting to be performed on the upper deck of a vessel without guardrails or fall protection is conclusively established by photographs CP 290, 334, 336, 338, which show the ongoing work being performed without the benefit of fall protection. These photographs also show the upper starboard walkway and the upper sideshell adjacent to the walkway in an unpainted condition (i.e., it still has to be prepped and painted by a person standing on the unguarded walkway). This upper starboard walkway is in the location from where Ralston fell. CP 334, 336, and 338 depict Alex Ralston standing on the starboard caprail, sanding or scraping the upper deck, without the benefit of fall protection.

Faires testified that he had an understanding in March of 2004 that having a person work on a surface such as the upper deck of the ODYSSEY as shown in CP 288 where there is no guardrail or fall protection creates a risk of harm to that person. CP 176 ll. 18-25 and CP 177 ll. 1-12.

From the above evidence, and the evidence referred in the Ralstons' opening brief, a genuine issue of material fact exists regarding the Port of Port Angeles' and Port Angeles Marine's knowledge that the ODYSSEY was being painted (both upper and lower decks) without the benefit of fall protection on the upper level, that 17 year-old Alex Ralston was involved in the painting of the vessel, and that allowing the painting to continue without elimination of the danger posed a risk of harm to workers on the upper deck. Given this foreseeability of harm, the Port of Port Angeles and Port Angeles Marine had a duty to deny San Juan Excursions, Inc. permission to remain on its property, absent installation of adequate fall protection, and to exercise reasonable care to "otherwise protect" Alex Ralston from what was a known danger on Port of Port Angeles property.

D. *KELLEY v. HOWARD S. WRIGHT CONSTR. CO.*, 90 Wn.2d. 323, 582 P.2d 500 (1978) IS CITED FOR THE PROPOSITION THAT 1) THE TEST OF CONTROL IS NOT THE ACTUAL INTERFERENCE WITH THE WORK, IT IS THE RIGHT TO EXERCISE SUCH CONTROL, AND 2) AN AFFIRMATIVE DUTY ASSUMED BY CONTRACT MAY CREATE LIABILITY TO A PERSON NOT PARTY TO THE CONTRACT

Appellants acknowledge the facts of *Kelly v. Howard S. Wright Constr. Co.*, *supra*, are distinguishable from the instant

case. However, *Kelly v. Howard S. Wright Constr. Co., supra*, along with *Fardig v. Reynolds, supra*, and *Swam v. Aetna Life Ins. Co., supra*, are cited to this Court to establish the principle that in determining whether the evidence here was sufficient to establish the degree of control that would impose upon the Port and its agent the duty to intervene, the test is not the actual interference with the work by the party by whom the duty is owed, it is the right to exercise such control which is determinative. The Ralstons contend that the Berthage Agreement, the Agent Agreement, the Rules and Regulations, and Faires' acts in directing the manner in which the project was being performed evidence that both the Port and its agent had the right to exercise control over San Juan Excursions, Inc.'s decision to allowing painting (by a 17 year-old) and other work to be done on the vessel's upper deck without the benefit of fall protection of any type. Given the evidence of the right to exercise such control, the Port and Port Angeles Marine, Inc. had a duty to intervene.

In *Kelly v. Howard S. Wright Constr. Co., supra*, the Washington Supreme Court found defendant's contract violations a basis of liability to the injured worker, stating: "Although this court has not previously ruled on this question, our past decisions

support the proposition that an affirmative duty assumed by contract may create a liability to persons not party to the contract, where failure to properly perform the duty results in injury to them. See *Sheridan v. Aetna Cas. & Sur. Co.*, 3 Wn.2d 423, 100 P.2d 1024 (1940); *Lough v. John Davis & Co.*, 30 Wash. 204, 70 P. 491 (1902).” *Id.* at 334.

Here, the Agent Agreement imposed upon Port Angeles Marine, Inc. the duty to enforce San Juan Excursions, Inc.’s contractual obligation to “comply with Federal, State, and County laws, ordinances and regulations”, CP 311, CP 316, and the breach of the agent’s duty under the Agent Agreement is, as was the case in *Kelly v. Howard S. Wright Constr. Co.*, *supra*, a basis of liability here.

E. PETERICK v. STATE, 22 Wn.App. 163, 589 P.2d 250 (1977) STANDS FOR THE PROPOSITION THAT A LESSOR’S RIGHT TO EXERCISE CONTROL OVER A LESSEE’S OPERATIONS IMPOSES A DUTY TO INTERVENE TO PROTECT THE LESSEE’S EMPLOYEES FROM HARM

Port Angeles Marine, Inc. cites *Peterick v. State*, 22 Wn.App. 163, 589 P.2d 250 (1977), for the proposition that actual control must be shown in order for a possessor of land to owe a duty to invitees. In *Peterick*, employees of a lessee operating a test site on

land owned by the State of Washington were killed in an explosion occurring at the test site. In ruling that the State had no duty to protect the decedents from harm, Division One stated:

The duty and liability of the invitor-lessor do not, as a rule, extend to matters having to do merely with the lessee's management or operation of premises which would be safe except for such management or operation, at least where the lessee is in sole actual control.

Id. at 170 (emphasis supplied). Division One went on to recite that the evidence presented indicated that both the defendant's right to inspect and the right to require compliance *after* inspection with applicable safety statutes and regulations did not reserve to the State the right to exercise day-to-day control over the employer's operations, nor did it place upon the State a duty to warn *prior* to inspection of the site. *Id.* at 172. Here, the evidence clearly sets forth the Port of Port Angeles' and Port Angeles Marine, Inc.'s right to control the work being performed while the vessel was moored at the Port of Port Angeles marina. The Rules and Regulations, the Berthage Agreement, the Agent Agreement, and Faires' actual exercise of control over the manner in which the work was being performed creates an issue of fact regarding the Port of Port Angeles' "right to control" the work being performed on the

ODYSSEY. On the basis of this evidence, the rule cited in *Peterick v. State, supra*, is inapplicable to the facts of this case.

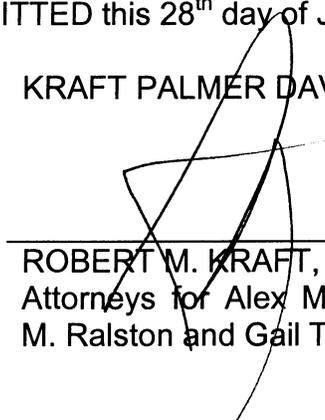
III. CONCLUSION

Appellants Ralstons ask that the trial court's granting of respondents' motions for summary judgment be reversed, and this case be remanded to the superior court for a trial on the merits.

RESPECTFULLY SUBMITTED this 28th day of June 2006.

KRAFT PALMER DAVIES, PLLC

By:



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On June 28th, 2006, I served the foregoing documents on the interested parties in this action and to Division Two of the Court of Appeals of Washington State by depositing a true copy with a messenger following ordinary business practices, addressed as follows:

1. Appellants' Reply Brief
2. Affidavit of Service

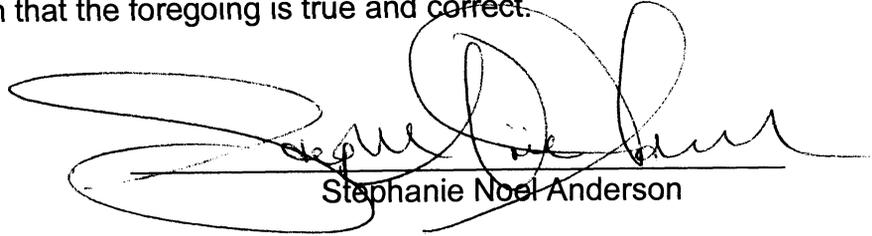
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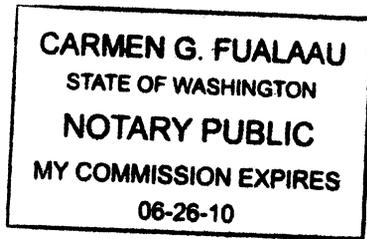
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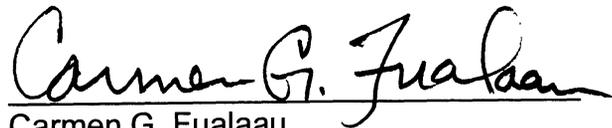
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I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.


Stephanie Noel Anderson

SUBSCRIBED and SWORN to before me this 28th day of June, 2006.




Carmen G. Fualaau

NOTARY PUBLIC in and for the State of Washington, residing at Des Moines
My commission expires 6/26/2010