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STATE OF WASHINGTON

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No. 34267-7-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

ALEX N.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

RESPONDENTS' BRIEF

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I. ASSIGNMENTS OF ERROR

The trial court did not err in granting the defendants' motion for summary judgment dismissing the plaintiffs' negligence claims on the grounds that defendants did not owe a legal duty to the plaintiff Alex Ralston.

II. STATEMENT OF ISSUES

1. Did the Port of Port Angeles ("Port") or Port Angeles Marine have 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 ("Ralston") from it, where the condition did not exist on the Port's property and was not within its control?

III. STATEMENT OF THE CASE

The Port owns the Port of Port Angeles Boat Haven Marina. CP at 581. Pursuant to an agency agreement in effect at the time of Ralston's accident, Port Angeles Marine was charged with the day-to-day running of the marina. *Id.* As part of this agreement, one of Port Angeles Marine's responsibilities was "to enforce such rules and regulations as the Port may prescribe for its operation." CP at 581; *see also* CP at 164-65.

The Rules in effect at the time of Ralston's accident provided in pertinent part:

8. [. . .] Lessee shall at all times comply with Federal, State and County Laws, ordinances and regulations.

21. [. . .] (8) Vessels which, in the opinion of the Port, do not meet normal safety standards or are hazardous to the Port property or other boats or facilities will be denied permission to remain on Port premises.

CP at 39-40. These Rules and Regulations are incorporated by reference into the berthage agreements between the Port and vessel owners who lease slips at the marina. CP at 561.

Roger Hoff and Linda Hoff ("Hoff") are the owners of the vessel the ODYSSEY. CP at 545; 557. Hoff owns and operates San Juan Excursions ("San Juan"), a whale watching business, and leases the ODYSSEY to San Juan for passenger service and charter in that business. CP at 545-546;557.

In March of 2004, San Juan rented a slip at the Port of Port Angeles Boat Haven Marina in order to have some repair and maintenance work performed on the ODYSSEY. CP at 547-48; 549; 560-61. The Berthage Agreement signed by Hoff required the lessee to abide by and follow the rules and regulations of the Port. CP at 561. Hoff hired two shipwrights, Peter NewDay and Roy Hamilton, as independent contractors

to perform certain structural repairs to the vessel. CP at 564-65. In addition, Hoff hired Matt Kielmeyer to paint the vessel, and hired plaintiff Alex Ralston (“Ralston”) and Alex’s cousin Matt Ralston to prep the vessel for painting. CP at 550.

On March 14, 2004, NewDay removed the guardrail from the starboard side of the upper deck of the vessel and placed the rails on the upper deck. CP at 194.¹ The two boys were warned to stay away from the starboard side of the boat. CP at 572; 575; 577. Specifically, Matt Ralston testified that Hoff warned them “that they were repairing part of the upper deck, and if we wanted to go up there, which we didn’t have need to, to be extremely careful.” CP at 572. Matt Ralston indicated that the reason Hoff told them to be extremely careful was because “they were working on the upper deck and replacing parts of it, and if we were to go up there for some odd reason, to be extremely careful because they’re working on it.” CP at 575.

The instructions given to Alex and Matt Ralston were overheard several times by shipwright Peter NewDay. CP at 597-598. Mr. NewDay

¹ Contrary to the assertion in appellant’s opening brief that “there is no dispute that people working on the upper deck of a vessel without guardrails or fall protection is unsafe, and in violation of both U.S. Coast Guard and O.S.H.A. regulations,” respondent does dispute whether the condition of the ODYSSEY was unsafe, whether Coast Guard and O.S.H.A. regulations were applicable, and if so, whether they were violated. These contentions are addressed in Part V.A.1, note 6, *infra*.

recalled, “He [Alex] was constantly reminded by Roger Hoff, ‘Don’t go on the starboard side. There’s no railings.’” CP at 597. In fact, according to NewDay, Alex Ralston received several warnings on the day of the accident to stay away from the starboard side because it was dangerous. CP at 598.

Hoff himself also testified that he gave Alex Ralston specific instructions warning him not to go over to the starboard side of the upper deck. CP at 552-53. While Hoff could not recall exactly how many times he warned Ralston to stay away from the starboard side, he was certain that he warned Ralston before Ralston went to the upper deck. CP at 553. Hoff’s warnings to Ralston were about staying away from the starboard side of the vessel, not merely about staying away from NewDay and Hamilton or not bothering them, as Ralston has attempted to characterize them in his opening brief. Appellants’ Opening Brief at pp. 18-19. To the contrary, Hoff himself and NewDay both recalled hearing Hoff warn Ralston to stay away from the starboard side. CP at 553; 597-98.

Despite these warnings, for unknown reasons Ralston left his assigned workstation and went to the starboard side of the upper deck where the railings had been removed. He fell from the vessel and landed

on the marina's dock, which is owned by the Port. CP at 158. As a result of this fall, Ralston is now a quadriplegic.

At the time of the accident, the ODYSSEY was in the exclusive dominion and control of San Juan Excursions. CP at 557. No Port of Port Angeles or Port Angeles Marine employees were ever involved in the repair and maintenance work being performed on the vessel.

Prior to the date of Ralston's accident, Charles Faires, who is President of Port Angeles Marine and Harbor Master of the Port Angeles Boat Haven, had several interactions with personnel aboard the ODYSSEY regarding activities that endangered Port property and/or created a pollution risk. In particular, Faires spoke to Hoff about using proper sanding equipment, and spoke to Hoff or NewDay about keeping the docks free of debris and work material. CP at 170-71; 174-75. Additional testimony from NewDay suggested that Faires came to the vessel to check on pollution control practices and even spoke to Alex Ralston about keeping paint and dust out of the water and off of Port property. CP at 198; 207-08. All of these instances involved the Port's exercise of control over its own property and over water pollution, not over the workplace conditions aboard the ODYSSEY.

The parties to the agency agreement presented uncontroverted evidence to the trial court that they did not intend for any of the provisions in the Rules and Regulations to create an affirmative duty on the Port or on Port Angeles Marine with regard to the conduct of private vessel owners. The Executive Director for the Port and the President of Port Angeles Marine both provided declarations stating that they did not intend for the Port or Port Angeles Marine to assume an obligation to enforce federal or state law with respect to workplace safety standards on private vessels. CP at 43; 46. They both further stated that they did not intend for the Port or Port Angeles Marine to inspect vessels moored at the Boat Haven for violations of workplace safety laws and did not conduct such inspections. CP at 43; 46-47. The parties agreed that under the Rules and Regulations, Port Angeles Marine was only required to enforce safety standards where, in its sole opinion, a vessel posed a hazard to Port property or other boats or facilities. CP at 43; 46.

The Port and Port Angeles Marine moved for summary judgment on the grounds that they did not owe a legal duty to Ralston because they had no authority over workplace safety conditions aboard the ODYSSEY. Considering the evidence in the light most favorable to Ralston, the trial

court agreed, finding no genuine issue of material fact and finding that Ralston could not prove the existence of such a duty.

IV. SUMMARY OF ARGUMENT

Ralston presented no evidence sufficient to raise an issue of material fact with respect to the issue of whether the Port or Port Angeles Marine owed him a duty of care. Under Washington law, landowners have a duty to protect business invitees from the negligent acts of third persons that occur *on their premises*. Landowners do not owe a duty of care to anyone with respect to dangerous conditions or conduct not on their property, unless the landowner caused the condition or undertook to make it safe.

The allegedly dangerous condition that contributed to Ralston's injuries was the absence of the railings on the upper deck of the vessel he was working upon at the time of his accident. This condition occurred on the ODYSSEY, property owned by Roger Hoff, not by the Port. It is undisputed that the Port did not cause this condition, nor did it undertake to remedy it. As such, it had no duty to protect Ralston from it.

Ralston argues that the agency agreement between the Port and Port Angeles Marine, coupled with the Rules and Regulations promulgated by the Port for the Boat Haven, give rise to a duty because

the Port had authority to exercise control over the working conditions aboard the ODYSSEY. The undisputed evidence presented to the trial court established that the parties to the agency agreement never intended for it to create such an obligation on the part of either the Port or Port Angeles Marine.

Ralston also argues that the Port and Port Angeles Marine in fact exercised control over the working conditions aboard the vessel by engaging in several discussions with personnel working aboard the ODYSSEY regarding pollution control practices and clean up of debris left on the dock. All such instances demonstrate that the Port and Port Angeles Marine were enforcing Port rules with respect to safety and pollution control standards *on Port property*, not on private vessels.

Moreover, because the absence of the railings constituted an open and obvious danger, the Port had no duty to warn Ralston about it or otherwise protect him from it. The Port had no reason to know or anticipate that Ralston would be working in that area of the vessel. Even Ralston's own employer did not anticipate that he would be working in that area. Given that no Port personnel were on duty at the time of Ralston's accident, they did not and could not have anticipated the risk of

harm to him and thus had no obligation to warn him or make safe the open and obvious danger.

Finally, OSHA regulations are evidence of the standard of care, not the existence of a legal duty. Neither OSHA regulations nor the testimony of expert witnesses regarding the Port's alleged violation of OSHA regulations give rise to a duty of care. In the absence of a duty, all such evidence of breach is irrelevant.

V. ARGUMENT

A. The Port Did Not Owe A Duty To Ralston With Respect To A Dangerous Condition That Was Not On The Port's Property Or Within Its Control.

1. The Port Had No Duty To Ralston Under The Restatement (Second) Of Torts § 343 Or § 344.

To prevail on a negligence claim, a plaintiff bears the burden of establishing the following four elements of a prima facie case: duty, breach, causation and damages. *Nivens v. 7-11 Hoagy's Corner*, 83 Wn. App. 33, 40, 920 P.2d 241 (Div. II, 1996), *aff'd*, 133 Wn.2d 192, 203, 943 P.2d 286 (1997). Whether a defendant owes a plaintiff a legal duty in a negligence action is a question of law. *Id.* at 41. This question is to be answered generally, without reference to the particular facts or parties in a particular case. *Id.* In the present case, the trial court correctly found that there were no genuine issues of material fact regarding whether the Port

owed a duty to Ralston, and therefore dismissed Ralston's negligence claim.

The duties of a landowner are well established under Washington law.² Washington courts have adopted Sections 343 and 344 of the Restatement (Second) of Torts. *See Nivens, supra*, 83 Wn. App. at 43. Section 343 outlines the specific duties owed by a landowner to an invitee³ with regard to the physical condition of his property. *Id.* at 41. Section 343 requires a landowner to exercise ordinary care to keep his premises in a reasonably safe condition. *See Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 49, 914 P.2d 728 (1996). This requires the landowner to discover dangerous conditions on his property through reasonable inspection and repair, and to warn invitees of a dangerous condition if it is

² As Ralston noted in his opening brief, the parties briefed the issue of whether this action is governed by Washington law or by federal maritime law to the trial court. At oral argument, the parties did indeed agree that for purposes of the issues raised in the Port's summary judgment motion, the legal analysis would be the same under either Washington law or federal maritime law. Thus, the trial court did not decide the choice of law issue, and it is not presently before this Court. The Port merely wishes to clarify that while it abandoned the choice of law issue solely for purposes of the analysis of duty, it reserves the right to litigate the issue as to other legal issues that might arise should this case be remanded for trial.

³ In its summary judgment motion, the Port maintained that Ralston was not an invitee of the Port because he was not on the Port's property at the time of his accident. In its reply brief, the Port conceded solely for purposes of summary judgment that Ralston was an invitee, and the trial court likewise accepted that Ralston was an invitee for purposes of determining whether the Port owed Ralston a duty.

not obvious. *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 139, 875 P.2d 621 (1994).

In addition to these duties regarding the physical condition of the premises, a landowner also owes a duty of care to its invitees with regard to activities being conducted on the premises. This duty is outlined in Section 344 of the Restatement (Second) of Torts, which has been adopted by the Washington Supreme Court. *See Nivens, supra*, 133 Wn.2d at 204. Section 344 requires a landowner to protect those on his land from negligent, harmful or criminal acts of third persons. Rest. (2d) Torts § 344 (1965). Section 344 states:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public *while they are upon the land* for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to

(a) discover that such acts are being done or are likely to be done, or

(b) give a warning adequate to enable the visitors to avoid the harm, or otherwise protect them against it.

Id. (emphasis added).

Like duties owed by a landowner to an invitee with regard to conditions and conduct on his property, the duties owed by a landowner

with regard to dangerous conditions or conduct *not* on his property are equally well established – in short, there are none. With the exception of Division Three’s decision in *Mesa v. Spokane World Exposition*, 18 Wn. App. 609, 570 P.2d 157 (Div. III, 1977), discussed at length *infra*, no court in Washington has found that a landowner owes any duty with regard to dangerous conditions or activities existing off of the landowner’s premises, unless the landowner himself caused the dangerous condition or undertook to make it safe. See *Minihan v. Western Washington Fair Assoc.*, 117 Wn. App. 881, 892, 73 P.2d 1019 (Div. II, 2003).

In *Minihan*, an employee working at a high school dance at a county fair brought a negligence action against the district and the fair for injuries she sustained when hit by a drunk driver while she was on adjoining public property. 117 Wn. App. at 881. Citing to Section 344 of the Restatement, the employee argued that the defendants owed her a duty to protect her against the foreseeable criminal acts of third persons on adjacent property. *Minihan*, 117 Wn. App. at 892. The court disagreed, finding that the landowners owed no duty with regard to either dangerous conduct or conditions occurring off of their premises. *Id.* at 892-93. Relying in part on Comment g, the court reasoned that Section 344 “clearly contemplates only those foreseeable, criminal acts that occur on

the possessor's land." *Id.* at 893 (emphasis added).⁴ Because the employee was on adjacent property and not the defendants' property, the defendants did not owe her a duty as an invitee. *Id.* at 892.

Washington courts are not alone in their interpretation that § 344 does not apply to dangerous conditions or conduct on neighboring property. In fact, courts throughout the country have reached the same conclusion. *See, e.g., Gohar v. Albany Housing Authority*, 288 A.D.2d 657, 733 N.Y.S.2d 507 (N.Y. App. Div. 2001) (finding housing authority had no duty to protect plaintiff leaving apartment complex from attack); *Ogozalek v. Goodfield*, 20 Pa. D&C 4th 177, 182-83 (Pa. Com. Pl. 1993) (finding no duty under § 344 where situs of plaintiff's injury was far removed from area over which defendant convenience store exercise control); *Fuhrer v. Gearhart By The Sea, Inc.*, 790 Or. App. 550, 719 P.2d 1305, 1307 (Or. App. 1986) (concluding that inn had no duty to warn guests of dangerous conditions on adjacent beach property not owned or controlled by it); *Issacs v. Huntington Memorial Hospital*, 211 Cal. Rptr. 356, 367, 38 Cal.3d 112, 695 P.2d 653 (Cal. Ct. App. 1985) (acknowledging after earlier citation to § 344 that defendant cannot be

⁴ The court also pointed out that to invoke the protections of Section 344, a person must be an invitee, which by definition requires that the person be on the inviter's premises. *Minihan*, 117 Wn. App. at 892-93.

liable for a dangerous condition on property that it does not own, control or possess).

Neither § 343 nor § 344 imposed a duty upon the Port in this case. Section 343 does not apply to the facts of this case because it only imposes a duty with respect to “conditions on the land.” Ralston did not allege any dangerous or defective conditions on the Port dock or other Port property that in any way contributed to his accident. Rather, the only dangerous condition alleged was the absence of a guardrail on the upper deck of the ODYSSEY,⁵ a condition that existed on the vessel, which was owned and controlled by Hoff and San Juan Excursions, not by the Port.

Ralston’s own brief recognizes that § 344 only creates a duty to exercise reasonable care to otherwise protect an invitee from a known danger “on the possessor’s property.” Appellants’ Opening Brief at p. 27. Ralston was not on property owned or possessed by the Port at the time he

⁵ In his opening brief, Ralston states “There is no dispute in this lawsuit that people working on the upper deck of a vessel without guardrails or fall protection is unsafe, and in violation of both U.S. Coast Guard and O.S.H.A. regulations.” Appellants’ Opening Brief at p. 11. While it is true that the trial court assumed for purposes of deciding defendants’ summary judgment motion that the removal of the guardrails on the upper deck of the ODYSSEY did constitute a dangerous condition, the Port does dispute whether this was, in fact, an unreasonably dangerous condition in light of testimony from NewDay and Hamilton that they did not consider the vessel unsafe in this condition. CP at 566-67; 617. In addition, the Port disputes whether this condition violates the Coast Guard and O.S.H.A. regulations cited by Ralston, and whether those regulations even apply to this case in light of the fact that Coast Guard regulation 46 C.F.R. § 177.900 applies only to decks accessible to passengers or crew, and Ralston was neither passenger nor crewmember.

was injured; he was aboard the ODYSSEY. Under such circumstances, § 344 does not apply and the Port did not owe a duty to Ralston pursuant to the Restatement.

The only case cited by Ralston in support of his argument for extending the reach of § 344 to impose liability on a landowner for an injury sustained on property not owned, possessed or controlled by the landowner is *Mesa v. Spokane World Exposition, supra*, 18 Wn. App. 609, 570 P.2d 157 (Div. III, 1977). As the trial court noted, *Mesa* is readily distinguishable from the present case, and demonstrates just how far afield Ralston is of established tort law in seeking to impose a duty on the Port.

Mesa involved injuries to a visitor to the Spokane Worlds Fair site. 18 Wn. App. at 611. Prior to the opening of the fair, the fair operators opened the grounds for public viewing. *Id.* Contained within the fairgrounds was a separate facility referred to as “the Center” which was not owned or possessed by the Worlds Fair operator. *Id.* Visitors to the fairgrounds were given no indication that the Center property was not open as part of the invitation to the fairgrounds or that it was possessed by anyone other than the fair operators. *Id.* at 611-12. Because it would have appeared to the invitees to the fairgrounds that the Center property was also included within the invitation, the *Mesa* court concluded that the fair

operators could be held liable for injuries to individuals on the Center property. *Id.* at 613. The court reached that conclusion because under the particular facts of the case, the injured plaintiff could have reasonably assumed that he was a business invitee of the fair operators as to the Center property, and that he was therefore entitled to presume that reasonable care had been taken to make the property safe for visitors. *Id.* Thus the question at issue in *Mesa* was whether, under those particular facts, the plaintiff could have been considered a business invitee of the fair operators who was owed a duty of care even though he was not on the fair operator's property at the time of his injury because the fair operators had failed to specifically delineate the scope of their invitation to tour the grounds. *Id.*

Mesa is therefore readily distinguishable from the present case on the basis of its unique facts. Here, the demarcation between the Port's property and that of Mr. Hoff was not ambiguous. Quite simply, the Port owned the dock, and Mr. Hoff owned the ODYSSEY. The dangerous condition to which Ralston's injury was attributable existed on the ODYSSEY. There was no evidence presented to the trial court to suggest that Ralston could reasonably have believed that he was on the Port's property while working aboard the ODYSSEY. Given that there was no

blurring of the distinction between the Port's property and Hoff's vessel, *Mesa* is simply inapplicable.

As he did during the course of the summary judgment briefing, Ralston continues to misunderstand the Port's argument and the trial court's ruling regarding the Port's duty (or, more accurately, the lack thereof) under § 344 of the Restatement. In his opening brief, Ralston states that in concluding that § 344 "does not apply" to this case, the trial court ignored cases in which courts have held that § 344 applies to maritime injuries.⁶ Appellants' Opening Brief at p. 20. The trial court did not find that § 344 "did not apply." Rather, the court applied 344 and found that the Port had no duty under the circumstances of this case because the dangerous condition did not exist on the Port's property. This conclusion had nothing to do with whether the ODYSSEY was on "land" or water, or with the fact that Ralston suffered a maritime injury. The court's decision was instead based on the fact that that Port did not own or control the property upon which the dangerous condition existed. As such, it had no duty as a landowner to remedy the condition or to warn or

⁶ Ralston made a similar statement in his opposition to the Port's summary judgment motion, stating that the Port opposed application of § 344 because the marina slip where the ODYSSEY was moored at the time of the accident was not "land," as contemplated by the Restatement. CP at 368.

otherwise protect Ralston from it.

2. **The Port Did Not Exercise Control, Nor Did It Have The Right To Exercise Control, Over Workplace Safety Conditions Aboard The ODYSSEY.**

Ralston argues that the Port and Port Angeles Marine had a duty to warn or otherwise protect him under § 344 based on the Port's Rules and Regulations and the contract provision requiring Port Angeles Marine to enforce those Rules and Regulations. In particular, Ralston relies upon Rule 8, regarding compliance with federal, state and county laws, and Rule 21(8), which states that vessels not meeting normal safety standards or which are hazardous to Port property or other boats or facilities will be denied permission to remain on Port premises. Ralston argues that the rule enforcement provisions of the agency agreement between the Port and Port Angeles Marine gave rise to an obligation to enforce workplace safety standards aboard private vessels and to take corrective action to stop violations of such standards. In making this argument, Ralston fails to even mention the uncontroverted evidence before the trial court established that it was not the intent of the parties to the agency agreement to create any such obligation, and it was not the intent of the Port in establishing its Rules and Regulations to impose any such obligation upon itself or Port Angeles Marine. The argument put forth by Ralston is just

that – argument. It is made without the benefit of one shred of evidence and in contradiction to all of the evidence before the trial court.

a. **The Legal Framework For Analyzing The Agency Agreement And The Port's Rules And Regulations.**

A court will not read ambiguity into a contract that is otherwise clear and unambiguous. *State v. Brown*, 92 Wn. App. 586, 594, 965 P.2d 1102 (Div. II, 1998). The Port maintains that the agency agreement is clear and that it created no duty to enforce workplace safety regulations. However, where a contractual ambiguity does exist, the court must attempt to discern the intent of the parties and enforce the contract as the parties intended. *Transcontinental Ins. Co. v. Washington Public Utilities Districts' Utility System*, 111 Wn.2d 452, 456-57, 760 P.2d 337 (1988). Therefore, in interpreting an ambiguous contract, a court may not impose obligations on the parties that never existed or were never intended. *King v. Bilsland*, 45 Wn. App. 797, 800, 727 P.2d 694 (Div. II, 1986); *Agnew v. Lacey Co-Ply*, 33 Wn. App. 283, 288, 654 P.2d 712 (Div. I, 1983). Rather, the parties' interpretation of an ambiguous contract provision is considered nearly conclusive evidence of their intent. *Mercer Place Condominium Ass'n v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 602, 17 P.3d 626 (Div. I, 2000) (“If there be any ambiguity in a contract,

the interpretation which the parties have placed upon it is entitled to great, if not controlling, weight in determining its meaning.”).

Ralston was not a party to any contract with the Port, and it is long established law in Washington that a non-party’s interpretation of contract language is meaningless where the actual parties to the contract agree on the meaning of its terms. *Thayer v. Brady*, 28 Wn.2d 767, 770-71, 184 P.2d 50 (1947) (enforcing parties’ interpretation of ambiguous provision of subcontract regarding painting of siding rather than interpretation of housing authority which was not a party to the subcontract).

Moreover, regarding the Port’s Rules and Regulations, deference must be given to a government agency’s own interpretation of the rules it has promulgated. RCW § 53.08.020 authorizes a Port charged with operating a moorage facility to adopt all rules necessary for rental and use of the facility, as well as procedures for enforcement of its rules. In accordance with the statutory authority granted to it under this provision, the Port promulgated Rules and Regulations effective November 1, 1998, pertaining to berthage and use of the facilities at the Port of Port Angeles Boat Haven Marina. CP at 38-40.

A government agency acting within the ambit of its administrative functions normally is best qualified to interpret its own rules, and its

interpretation is entitled to considerable deference by the courts. *Pacific Wire Works, Inc. v. Dept. of Labor & Industries*, 49 Wn. App. 229, 236, 742 P.2d 168 (Div. II, 1987).

b. **The Undisputed Evidence Presented To The Trial Court Established That The Parties To The Agency Agreement Did Not Intend To Impose An Obligation To Enforce Workplace Safety Standards Or To Enforce Federal And State Law.**

The Port's rules state in relevant part: "Lessee shall at all times comply with Federal, State, and County laws, ordinances and regulations." CP at 39. In enacting this rule, the Port's intent was not to create an affirmative obligation on the part of the Port or Port Angeles Marine to enforce federal, state or county laws or workplace safety standards with regard to the conduct of private vessel owners. Both the Executive Director of the Port and the President of Port Angeles Marine clearly stated in their declarations that they did not intend for the Port or Port Angeles Marine to assume an obligation to enforce federal or state law with respect to workplace safety standards on private vessels. CP at 43; 46. The deposition testimony of Charles Faires on this issue further supports his declaration. CP at 51-53. Moreover, the Port's interpretation of its own rule is entitled to substantial deference. Ralston presented no

evidence to dispute the stated intent of the parties on this issue, and thus there is nothing in the record that would support the contrary interpretation of Ralston, who was not a party to the agency agreement.

In addition, vessel owner Roger Hoff, who was subject to the Port's Rules and Regulations under the terms of his Berthage Agreement, stated that he did not understand the rules to require the Port to check his vessel for workplace safety violations. CP at 59.

Ralston's interpretation of the contract is not only not supported by any evidence, it is not supported by the law. A person has an inherent obligation to follow the law. The Port's rule does not impose upon the lessee any additional obligation that he does not already have under the law. Thus, in enacting this rule the Port was merely reminding lessees of their existing obligation to follow the law, regardless of any rules or regulations promulgated by the Port.

Such a reminder to follow the law does not create an obligation on the Port to enforce the law. A similar situation was presented in *Skow v. Dept. of Transportation*, 468 So.2d 422 (Fla. Dist. Ct. App. 1985), in which an employee of a contractor who was injured while working on a bridge being constructed under a contract with the Department of Transportation ("DOT") sued the DOT. The employee argued that the

DOT owed a duty to the employee to enforce the terms of the contract, which included a requirement that the general contractor comply with workplace safety. 468 So.2d at 423-24. Specifically, much like the Port's rules in this case, the contract provided that the general contractor would comply with all applicable state and federal laws governing safety equipment for its employees, and provided that the DOT had the authority to shut down the job site for the general contractor's breach of this requirement. *Id.* at 424. The court found that these contractual provisions imposed no explicit duty on the DOT to monitor, inspect or correct safety violations by the general contractor. *Id.*

At least five other jurisdictions have similarly found that a reminder to follow the rules does not create an obligation to enforce the rules. *See also Pate v. U.S. Steel Corp.*, 393 So.2d 992, 996 (Ala. 1981); *Downs v. Steel & Craft Builders, Inc.*, 358 Ill. App. 3d 201, 831 N.E.2d 92, 98-99 (Ill. App., 2005); *vacated on other grounds by* 841 N.E.2d 1133 (2006); *Kreiger v. J.E. Greiner Co., Inc.*, 282 Md. 50, 382 A.2d 1069, 1079 (Md. Ct. App. 1978); *Zavatkay v. Morin*, No. CV000082631 (Conn. Super., March 19, 2002)282 Md. 50.

As in the above cases, nothing in the Port's rule imposes a duty or obligation on the Port or Port Angeles Marine to enforce the law with

respect to workplace safety on privately owned vessels. Merely requiring a lessee to obey the law does not mean that the Port assumed an obligation to take corrective action in the event the lessee does not comply. Thus Ralston's argument in favor of a duty based on this provision of the Port's rules must fail in light of the complete absence of evidence in the record to support it and the weight of legal authority against it.

For the same reasons, Ralston's argument that the Port was required to take action with regard to workplace safety violations on Mr. Hoff's vessel by terminating his lease must also be rejected. As noted above, the Port's rules included a provision which stated "Vessels which, *in the opinion of the Port*, do not meet normal safety standards or *are hazardous to the Port property or other boats or facilities* will be denied permission to remain on Port premises." (emphasis added).

The language in this section is not ambiguous. The Executive Director of the Port, Robert McChesney, stated in his declaration that the Port rules only intended to create a right for the Port and Port Angeles Marine to enforce safety standards on a vessel if the vessel was endangering Port property or other vessels moored at the marine. CP at 43. The President of Port Angeles Marine shared this intent. CP at 46. Moreover, as the language of the provision makes clear, it is wholly

discretionary, not mandatory. By using the phrase “in the opinion of the Port,” the plain language of this rule gives the Port total discretion as to whether to deny a vessel the ability to remain on Port property because the vessel is not meeting normal safety standards. The rule in no way mandates that the Port or Port Angeles Marine deny access to vessels, but instead merely gives them the right to do so.

Even if the language of the rule could be construed to create an obligation, the intent of the Port in promulgating this rule should be given great weight. The Port never intended to deny permission to vessels for not meeting “normal safety standards” unless such conduct threatened Port property. CP at 43. Charles Faires stated that he did not inspect vessels for workplace safety violations, but was instead only concerned about safety standards if they threatened Port property or other vessels. CP at 46-47. This is consistent with Faires’ deposition testimony, in which he stated that as agent for the Port, he had no responsibility to assure that vessels met normal safety standards. CP at 53; *see also* CP at 51-52.

Ralston presented no evidence to the trial court suggesting that the parties to the agency agreement did intend, by these rules, to create an obligation to enforce workplace safety standards or federal or state workplace safety laws. In the absence of any evidence to the contrary, the

trial court correctly found that the expressed intent of the parties to the contract did not allow for an interpretation imposing such a duty. In particular, the court noted that neither the Port nor Port Angeles Marine nor any of their invitees ever believed that the Port had the “duty, obligation, authority or expertise to enforce the hundreds of workplace safety regulations which may be applicable to work conducted by its tenants aboard the moored vessels.” CP at 17.

c. **In Addition To Their Expressed Intent, The Parties’ Conduct Demonstrated That They Never Intended To Require Port Angeles Marine To Enforce Workplace Safety Standards Aboard Private Vessels.**

Considerable weight should be given to the conduct of the contracting parties in discerning their intent for purposes of interpreting a written contract. *Lehrer v. DSHS*, 101 Wn. App. 509, 514, 5 P.3d 722 (Div. III, 2000) (quoting *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990)); see also, *Federal Ins. Co. v. Americas Ins. Co.*, 258 A.D.2d 39, 44, 691 N.Y.S.2d 508 (N.Y. App. Div. 1999) (stating that “the parties’ course of performance under the contract is considered to be the ‘most persuasive evidence of the agreed intention of the parties’”). As Washington courts long ago recognized, “the practical application of the contract, when acted on by both parties, frequently provides an excellent

means of understanding the manner in which the parties intended the ambiguous language or contract to be interpreted or construed.” *Prager’s, Inc. v. Bullitt Co.*, 1 Wn. App. 575, 582, 463 P.2d 217 (Div. I, 1969); *see also, Federal Ins., supra*, 258 A.2d at 44 (noting that practical interpretation of contract by parties is deemed of great if not controlling influence).

Here, the parties’ conduct over several years prior to the date of Raiston’s accident demonstrates that they never intended to require Port Angeles Marine to enforce workplace safety standards aboard private vessels at the Port Angeles Boat Haven. The agency agreement requires Port Angeles Marine to enforce the rules and regulations promulgated by the Port. CP at 581. Since the effective date of those regulations, neither the Port nor Port Angeles Marine has ever conducted inspections for workplace safety violations aboard private vessels renting space at the marina. CP at 43; 47. This uncontroverted evidence further supports the assertion that that parties never intended to impose such an obligation under the agency agreement. Thus, if there were any ambiguity in the agency agreement or the rules incorporated therein by reference, the parties’ practical interpretation and application of the agreement should be adopted as the most persuasive evidence in the record of their intent. In

the absence of any evidence of conduct indicating a contrary intent, the trial court correctly found that the parties never intended to impose such an obligation.

d. The Port's Actions In Abating Pollution Did Not Create A Duty To Ralston.

Ralston argues that the Port and Port Angeles Marine had control over workplace safety aboard the ODYSSEY and provides numerous examples of instances in which Charles Faires allegedly exercised “control” over safety and over the work being done on the ODYSSEY. In particular, Ralston cites to an instance in which Faires told Hoff he could not sand at the marina without proper equipment. CP at 170-71. Ralston cites to another instance in which Faires told either Hoff or NewDay that it was not acceptable to have boards on the dock and that the docks must be kept clean of debris and work materials. CP at 174-75. Ralston further cites to testimony from NewDay that Faires periodically came to check on whether he and Mr. Hamilton were maintaining clean waters. CP at 198. Finally, Ralston relies on testimony from NewDay regarding an incident in which Faires allegedly told Ralston to be sure to keep paint and dust out of the water and Port property. CP at 207-08.

Even if all of these instances are viewed in the light most favorable to Ralston, as they must be on summary judgment, none of them establish that the Port or Port Angeles Marine exercise control over *workplace safety aboard the ODYSSEY*. Rather, what they show is that the Port exercised control over activities aboard the ODYSSEY that potentially endangered Port property or that might have caused pollution, precisely in conformity with the Port's Rules and Regulations.

The Port consistently maintained that the Rules and Regulations were only intended to regulate safety to the extent that Port property was endangered, and the examples cited by Ralston support that position. While the Port did get involved in the work going on aboard the ODYSSEY in each of these instances, in none of them was the Port concerned with workplace safety standards aboard the vessel. Rather, the Port was only concerned with safety on the Port's property and with the possibility of pollution. Thus, these examples do not support Ralston's contention that the Port or Port Angeles Marine exercise "control" over workplace safety aboard the ODYSSEY.

e. Ralston's Reliance Upon *Kelley v. Wright Construction* Is Misplaced.

At various points in his opening brief, Ralston relies upon *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978), in support of his argument that the Port and Port Angeles Marine had control over the working conditions aboard the ODYSSEY. Appellant's Opening Brief at 30; 37; 44. In *Kelley*, the Washington Supreme Court considered whether a general contractor on a multi-employer job site had a duty to take safety precautions for the benefit of employees of subcontractors working on the site. 90 Wn.2d at 325. The court concluded that under the facts of that case, the general contractor did owe a duty of care to employees of its subcontractor. *Id.* at 331-33. However, that conclusion was based on particular facts that are not present in this case.

First, as the trial court here pointed out, *Kelley* involved the relationship between a general contractor and a subcontractor, not a landlord-tenant relationship, which is the relationship between the Port and Port Angeles Marine and Hoff as vessel owner.⁷ *Id.* at 325. Secondly, the contract between the parties in *Kelley* specifically provided that the general contractor agreed to be responsible for all aspects of safety in connection with the work, including maintaining all reasonable safeguards

⁷ Ralston's argument regarding the Restatement (Second) of Torts § 315 appears to be a new theory advanced for the first time on appeal to respond to this distinction. That argument is addressed in detail in Section V.A.4, *infra*.

for safety and protection and appointing a safety director to assist in accident prevention. *Id.* at 327. As the above sections demonstrate, neither the agency agreement between the Port and Port Angeles Marine nor the berthage agreement between the Port and Hoff contained any such provision. In sharp contrast to the parties in *Kelley*, the parties here did not intend for the Port or Port Angeles Marine to assume any such responsibility for safety in connection with work being performed on private vessels moored at the marina. Because of these distinctions, *Kelley* is not controlling here, and does not support Ralston's claim that the Port exercised control or had the right to exercise control over workplace safety conditions aboard private vessels.

3. The Port Had No Duty To Warn Ralston Of An Open And Obvious Danger.

Even if the Port owed a duty to Ralston, it would not have had any obligation to warn him about the absence of railings on the vessel's upper deck, as this was an open and obvious danger. The Washington Supreme Court has recognized that "a landowner is not a guarantor of safety – even to an invitee." *Musci v. Graoch Associates Ltd. Partnership No. 12*, 144 Wn.2d 690, 847, 31 P.3d 684 (2001). Therefore, landowners generally have no obligation to warn invitees or to make safe open and obvious

dangers on their premises. *Id.* at 862. It is only under very limited circumstances that a landowner has a duty to protect an invitee from a known or obvious danger. *Sjogren v. Properties of the Pacific Northwest, LLC*, 118 Wn. App. 144, 149, 75 P.3d 592 (Div. II, 2003). Section 343A of the Restatement (Second) of Torts, which has been adopted by Washington courts, states “Ordinarily, [a] possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them *unless the possessor should anticipate the harm despite such knowledge or obviousness.*” Rest. 2d Torts 343A (1965) (emphasis added); *Tincani, supra*, 124 Wn.2d at 139.

In *Tincani*, the Washington Supreme Court elaborated on the circumstances in which a landowner should anticipate harm to an invitee. Citing Comment f to the Restatement, the *Tincani* court held that such circumstances include situations where the invitee’s attention may be distracted such that he or she fails to discover or forgets what is obvious, and situations where the invitee proceeds to encounter the obvious danger because the advantage in doing so reasonably outweighs the apparent risk. *Tincani*, 124 Wn.2d at 139. Thus, distraction, forgetfulness or foreseeable, reasonable advantages that outweigh the apparent risk are

factors that trigger the landowner's obligation to warn or make safe a known or obvious danger. *Id.* at 140.

In the present case, it cannot be disputed that the removal of the upper deck railings on the ODYSSEY was open and obvious. Hoff testified that he warned Ralston about the upper deck. CP at 552-53. NewDay also testified that the absence of the railings was obvious, because "if you went across the foredeck, they were obviously in your way." CP at 567. Matt Ralston testified that it was not only noticeable that the shipwrights had been working on the upper deck, but that it was also obvious that the railing had been removed. CP at 573.

Because there was no dispute that the removed railing was open and obvious, the Port would only have had a duty to warn Ralston or take action to remedy the condition if it should have anticipated the harm despite the danger's openness and obviousness.

Ralston presented no evidence to the trial court that the Port or Port Angeles Marine had any reason to anticipate harm to him because the railing had been removed. Specifically, the Port could not have anticipated the harm because it could not have known that Ralston would be working in that area. Not only did Hoff testify that he never spoke to Port personnel regarding any of the repairs he intended to do, he also

testified that he himself never anticipated that Ralston would at some point be working on the upper deck. CP at 551. In fact, the day of the accident was the first time that Hoff had ever had Ralston work on the topside of the boat. CP at 554. Hoff's testimony was further supported by that of Hamilton, who stated that he also had no expectation that anyone other than himself and NewDay would be working in that area. CP at 617-18.

Because Hoff never spoke to Port personnel about the repairs he intended to do and neither Hoff himself nor others working on the boat anticipated that Ralston would be working in that area,⁸ there is no possible way the Port could have anticipated that Ralston would be working on the upper deck and that the removed railing would harm him. While the Port did know that the shipwrights were working in that area, it had no reason to fear for their safety, because as NewDay himself testified, he was comfortable working in such a precarious position given his experience on boats.⁹

⁸ The testimony of painter Matthew Kielmeyer regarding the anticipated scope of Ralston's work is in sharp contrast with that of the other persons on the vessel, including Hoff, who, as Ralston's employer, was responsible for determining the scope of Ralston's duties. Thus, contrary to Ralston's assertion that Kielmeyer's testimony "sets the record straight" regarding the scope of Ralston's work, Kielmeyer's testimony is curiously at odds with the testimony of the other witnesses, who all agree that Ralston was not expected to be working on the upper deck.

⁹ Ralston mentions that he was only 17 years old at the time of the accident, that he had never been aboard the ODYSSEY before, and that he had very limited work

Moreover, there is no way the Port could have anticipated harm to Ralston because no Port personnel were present at the marina on the day of the accident. Both Faires and Dan Schmid, who assists in operating the boat yard, were notified of the accident at home. CP at 622-23. Hoff testified that no more than an hour went by between the time Ralston began working on the upper deck and the time he fell. CP at 553. Given this short window of time, coupled with the fact that no Port personnel were on duty, the Port had no way of knowing that Ralston was in any kind of danger, and thus had no obligation to warn him or make safe the open and obvious danger.

4. **The Port Had No Duty To Ralston Under Restatement § 315.**

a. **Ralston’s Argument Regarding The Application Of Restatement 315 Was Improperly Raised For The First Time On Appeal.**

In general, issues not raised in the trial court may not be raised on appeal. RAP 2.5(a) (“an appellate court may refuse to review any claim of error which was not raised in the trial court”); *Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844 (2005). RAP 2.5(a) does contain certain

experience, with none of it on boats. Appellant’s Opening Brief at p. 26. Again, Hoff did not provide any of this information about Ralston to Port personnel, and Port personnel had no occasion to discover it on their own. Thus, there was no way the Port could have known any of these facts or known that the removal of the railing might have posed a greater risk to Ralston because of his youth and inexperience.

exceptions to this rule, but none are applicable here.¹⁰ Moreover, while the Court has discretion under the rule to consider issues that were not raised below, the reasons for doing so are not present here, as this is not an issue of general application or broad public interest. *See Washington Appellate Practice Deskbook*, § 17.2 (1998) (discussing policy reasons for rule and reasons for discretionary exceptions). Therefore, because Ralston did not raise the issue of whether the Port had a duty under Restatement § 315, it is not properly before this Court and should not be addressed.

b. Even If Restatement 315 Were Properly Before This Court, Ralston Did Not Raise A Genuine Issue Of Material Fact Regarding The Existence Of A Duty Owed By The Port To Him Under This Provision.

The arguments Ralston puts forth under the guise of Restatement Sections 315 and 318 are yet another variation on the same theme.¹¹

¹⁰ The express exceptions to the rule are lack of trial court jurisdiction, failure to establish facts upon which relief can be granted, and manifest error affecting a constitutional right. RAP 2.5(a). In addition, Washington case law has established the following additional exceptions: application of a statute or court rule, standing, matters affecting juveniles and matters of “fundamental justice.” *Washington Appellate Practice Deskbook*, § 17.5 (collecting cases).

¹¹ Restatement § 318 applies to the “special relationship” between a possessor of land or chattels and the possessor’s licensee who has been permitted to use the land or chattels otherwise than as a servant. This section would therefore conceivably apply to a landlord-tenant relationship like the one that existed between the Port and San Juan Excursions. It would appear that Ralston has raised this new argument for the first time on appeal in an attempt to address the fact that the trial court found the *Kelley* case inapplicable to the present facts because it involved a contractor-subcontractor relationship rather than a landlord-tenant relationship. While Ralston may have now

Ralston uses the framework of these sections to argue that the Port had a duty because it had control over the workplace safety conditions aboard the ODYSSEY and because Faires, as the Port's agent, knew or should have known of the necessity and opportunity for exercising such control. As the Port has already demonstrated, Ralston failed to raise an issue of material fact regarding the Port's supposed "control" over the working conditions aboard the ODYSSEY. There is simply no evidence in the record to support such an assertion. To the contrary, the undisputed evidence in the record establishes that the parties to the agency agreement did not intend for the Port to exercise control over workplace safety conditions aboard private vessels, and nothing in the parties' conduct indicates otherwise.

Restatement 318 sets forth the following requirements for a "special relationship" that gives rise to a duty to control a third person's conduct so as to prevent harm to another:

If the actor permits a third person to use land or chattels in his possession otherwise than as a servant, he is, *if present*, under a duty to exercise reasonable care so to control the conduct of the third person as to prevent him from intentionally harming others or from so conducting himself

found the appropriate legal framework for his argument, he cannot change the fact that there is no evidence in the record to support such an argument, no matter what the label.

as to create an unreasonable risk of bodily harm to them, if the actor

(a) *knows or has reason to know that he has the ability to control the third person, and*

(b) *knows or should know of the necessity and opportunity for exercising such control.*

Restatement (Second) Torts § 318 (emphasis added). The first fundamental flaw with this argument is that it was not the Port's "land or chattels" which were used to create an unreasonable risk of harm. As has been pointed out again and again, not only by the Port but also by the trial court in its decision, the dangerous condition at issue here existed on the ODYSSEY, which was Hoff's property, not the Port's. This fact alone makes Sections 315 and 318 inapplicable.

In addition, as previously outlined, neither Faires nor any other Port personnel were present on the day of Ralston's accident. While Faires did make periodic contact with persons working aboard the ODYSSEY to ensure compliance with pollution practices and other Port rules regarding Port property, this hardly constitutes the type of presence contemplated by the Restatement. *See* Restatement (Second) Torts § 318, Comment b ("The rule stated in this Section is applicable where the possessor of a chattel or of land is present when the chattel is being used or the activity is being carried on with his permission, and when,

therefore, he has not only the ability to control the conduct of the third person as possessor, but also the opportunity to do so.”) The examples given in the comments to Restatement § 318 and discussed in the cases applying this section typically involve situations such as where the owner of a car allows another person to drive it while he is present in the car, and thus able to exercise some degree of control over the driver. *See, e.g.*, Rest. (Second) Torts § 318, Comment a; *Glass v. Freeman*, 430 Pa. 21, 240 A.2d 825 (1968).

Regarding the requirement of control, Faires did not know or have reason to know that the Port had the ability to control workplace safety conditions aboard the ODYSSEY. Faires knew just the opposite to be true. As Faires stated in his declaration, it was his understanding that neither the agency agreement nor the Port Rules and Regulations were intended to create a right or duty to inspect boats moored at the marina for violations of workplace safety laws or to enforce federal or state workplace safety laws aboard privately owned vessels moored at the marina. CP at 46. The declaration of the Executive Director of the Port was substantially similar on this point. CP at 43. The parties had no intent for the Port or Port Angeles Marine to exercise the type of control

over workplace conditions contemplated by Restatement § 318, and Ralston produced no evidence to the contrary.

With respect to whether Faires, as representative of Port Angeles Marine and the Port, knew or should have known of the necessity and opportunity for exercising control, the Port has likewise already shown that that was not the case. While Faires was aware that the upper deck railings of the ODYSSEY had been removed, he did not know and had no reason to know that Ralston would be working on the upper deck. The absence of the railings did not pose a risk to the experienced shipwrights who were working in that area, and Faires did not know or have reason to know that their absence would pose a risk to Ralston because of his inexperience. Moreover, no Port personnel were on duty at the marina on the only day Ralston was in this area – the day of his accident. Thus, the Port could not have known or had reason to know that Ralston was working on the upper deck and would not have had an opportunity to exercise control over the working conditions aboard the ODYSSEY on that day, even if it had had the authority to do so, which it did not.

Finally, even if Ralston could establish the existence of a theoretical duty by virtue of a “special relationship” under Restatement § 315 and § 318, there is no duty to warn of open and obvious dangers.

Under the analysis provided above, the absence of the upper deck railings constituted an open and obvious danger, and none of the limited exceptions requiring a property owner to warn invitees or make such a condition safe existed under the circumstances. For all of the foregoing reasons, even if Ralston had properly raised the issue of Restatement § 315 and § 318 before the trial court, he cannot establish the existence of a duty under this framework.

5. Even If Ralston Could Properly Raise Sheppard v. Horluck Without Violating RAP 10.4(h), That Unpublished Decision Supports The Port's Position, Not Ralston's.

a. RAP 10.4(h) Prohibits Citation To Unpublished Court Of Appeals Decisions.

Under the Rules of Appellate Procedure, a party may not cite as authority to this Court an unpublished opinion of the Court of Appeals. RAP 10.4(h). In his opening brief, Ralston states that the Port “relied heavily” on *Sheppard v. Horluck Transp., Inc.*, 1998 WL 180492 (Div. II, 1998), an unpublished decision issued by this Court. Appellant’s Opening Brief at p. 31. While the Port disagrees with Ralston’s contention that the Port “relied heavily” upon this decision in its briefing to the trial court,¹² the Port does acknowledge that it cited to this unpublished decision below

¹² The Port devoted only two paragraphs of its 23-page memorandum in support of its summary judgment motion and less than three pages of its 32-page reply brief to the *Sheppard* case.

because the Port could find no rule prohibiting citation to unpublished decisions at the trial court level.

The trial court made no mention of *Sheppard* in its opinion, and the Port does not rely on it in arguing that the trial court's decision should be affirmed. Nevertheless, since Ralston has raised it before this Court, the Port will address it to the extent necessary to make clear that the *Sheppard* case supports the Port's position rather than Ralston's.

In *Sheppard*, the plaintiff was injured when a swell caused by a high-speed ferry knocked her from the bow of her boat onto the Port of Brémerton's dock. 1998 WL 180492 at *2. Relying on Restatement § 344, she argued that the Port of Bremerton had a duty to warn and protect her from wakes created by the ferry. *Id.* at *3. The court disagreed, reasoning that not only was the dangerous condition not on the Port's property, but it was an obvious condition of which boaters must be constantly self-aware. *Id.* The *Sheppard* court also noted that landowners are normally liable only for injuries that are sustained on their property or on property within their control. *Id.* at *2. Because the plaintiff was on a private vessel rather than port property at the time she was injured, the Port of Bremerton was not liable.

Ralston attempts to distinguish *Sheppard* by pointing out that the Port of Bremerton had no contractual relationship with the plaintiff, nor did it have the authority to control the manner in which the ferry operated its boats. Appellant's Opening Brief at p. 31. Ralston argues that here the Port did have a contractual relationship with San Juan Excursions and did have the authority to exercise control over activities aboard the ODYSSEY. While it is true the parties did have a contractual relationship, there was absolutely no evidence in the record below that supports Ralston's interpretation of the contract. As the Port has already pointed out, all of the evidence before the trial court established that neither the agency agreement nor the berthage agreement were intended to create a duty on the part of the Port to enforce workplace safety standards aboard private vessels.

Ralston relies on testimony by Faires that the Port had full authority and control over the moorage slips at the marina in his attempt to show that here the Port exercised control over the dangerous condition, unlike the Port of Bremerton in *Sheppard*. Yet again, Ralston has failed to acknowledge the key fact upon which the outcome of this case depends: the dangerous condition existed aboard a private vessel over which the Port did not exercise control or have any authority, contractual or

otherwise, to exercise control. Yes, the Port exercised control over the marina, the slips, the docks and the floats, because these are Port property. It did not exercise control over private vessels, because these are the property of their respective owners, not the Port. This is the same distinction the *Sheppard* court relied upon in reaching its decision that the Port of Bremerton had no duty to warn or protect the plaintiff in that case. While the Port does not rely on *Sheppard* as controlling authority, it does maintain that the same principles compel the same conclusion here.

B. OSHA Regulations Do Not Create A Cause Of Action And Do Not Impose A Duty On The Port With Respect To Ralston.

The trial court did not specifically address Ralston's OSHA arguments, though it is implicit in the court's dismissal of his negligence claim that the court did not find that OSHA standards create a cause of action or give rise to a duty under the circumstances of this case. Because Ralston raises these arguments again on appeal, the Port reiterates its position that while OSHA regulations may be evidence of the standard of care, this goes to the element of breach of duty, not to the existence of duty which must first be established.¹³

¹³ The Port maintains, as it did below, that in the event Ralston were to somehow succeed in establishing that the Port owed him a duty of care, the Port is nevertheless not liable because it did not breach its duty. The Port addressed the issue of breach in its Reply Brief below in response to arguments made by Ralston on this issue. Because the

1. **OSHA Regulations Do Not Establish The Existence Of A Duty.**

As Ralston admits in his Opening Brief, “violation of OSHA minimum safety standards does not constitute negligence *per se*, or create a private right of action.” Appellant’s Opening Brief at p. 37. However, he then goes on to state that OSHA safety regulations “are evidence of a duty owed in a negligence action,” citing *Kelley, supra*, and a number of federal cases. Yet Ralston’s own parenthetical summaries of these cases indicate that they stand for the proposition that OSHA regulations are relevant to the *standard of care*, and indeed, that is what these cases hold. *See, e.g., Robertson v. Burlington Northern R. Co.*, 32 F.3d 408 (9th Cir. 1994) (OSHA standards may be admitted in FELA action as some evidence of the applicable *standard of care*); *Ries v. National R.R. Passenger Corp.*, 960 F.2d 1156 (3d Cir. 1992) (same); *Albrecht v. Baltimore & Ohio R.R. Co.*, 808 F.2d 329 (4th Cir. 1987) (same); *Jones v. Spentonbush-Red Star Co.*, 155 F.3d 587 (2d Cir. 1999) (violation of OSHA regulation admissible in Jones Act case as evidence of *negligence*).

Thus, violations of OSHA regulations are only relevant to the

only issue posed by the Port’s summary judgment motion and addressed by the trial court in its decision was the question of duty, the Port makes no arguments here regarding breach, but reserves the right to do so should this case be remanded.

extent they are evidence of breach of the appropriate standard of care where a duty already exists. OSHA regulations were not intended to create new duties or liabilities, and thus violations of OSHA safety standards do not create a cause of action. *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 7099 (5th Cir. 1981) (“[The Act] provides, therefore, that it neither enlarges or diminishes ‘common law or other statutory rights, duties or liabilities.’ 29 U.S.C. § 653(b)(4). This means that neither its express provisions nor the regulations adopted pursuant to its authority create a civil cause of action against either the plaintiff’s employer or a third party who is not the plaintiff’s employer.”).

The existence of a duty and the applicable standard of care are two different elements of a negligence action, and evidence of one is not interchangeable for evidence of the other. Here, regardless of the fact that certain OSHA regulations may be evidence of the standard of care, Ralston did not produce sufficient evidence to avoid summary judgment on the question of whether the Port owed him a duty. In the absence of a duty, evidence of the standard of care is simply irrelevant.

2. **To The Extent The Multi-Employer Doctrine Can Give Rise To A Legal Duty, The Doctrine Is Not Applicable Under The Circumstances Of This Case.**

The multi-employer doctrine Ralston relies upon to establish the existence of a duty was developed and has been utilized in the regulatory context where employers are issued citations for workplace safety violations. Its applicability in determining the existence of a legal duty for purposes of a negligence action are therefore questionable. Nevertheless, to the extent the Court considers the doctrine with respect to the existence of a duty in the present case, the Port argues that the doctrine is not applicable under the facts of this case.

The multi-employer doctrine allows an employer to be cited for an OSHA violation when it creates a safety hazard on a multi-employer worksite, regardless of whether the employees endangered by the violation are its own or those of another employer on the site. *U.S. v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 985 (7th Cir. 1999). Under this doctrine, an employer may be cited for a violation where the employer creates the hazard or where it could reasonably be expected to have prevented or abated the violation due to its supervisory authority and control over the worksite. *Bastian v. Carlton County Highway Dept.*, 555 N.W.2d 312, 317 (Minn. App. 1996). The doctrine is generally limited in its applicability to employees of the violating employer or those of other employers engaged in a common undertaking. *Pitt-Des Moines, supra*,

168 F.3d at 985. The vast majority of cases in which the doctrine is applied involve construction worksites where general contractors and subcontractors are working together. *Bastian, supra*, 555 N.W.2d at 317.

Here, the Port was not Ralston's employer, and the ODYSSEY was not the Port's worksite. Moreover, the Port was not engaged in a common undertaking with Hoff or San Juan Excursions. The Port, through Port Angeles Marine, was engaged in the business of operating the marina, while Hoff and San Juan Excursion were engaged in the repair and maintenance of Hoff's vessel in furtherance of his whale watching business. This was not a construction site. The relationship between the Port and San Juan Excursions was that the Port rented a space for San Juan Excursions to dock its vessel. Finally, it was undisputed that neither the Port nor Port Angeles Marine created the hazardous condition, and the foregoing analysis demonstrates that the Port did not have the type of supervisory authority and control over the work aboard the ODYSSEY that a general contractor typically has over a worksite it shares with subcontractors and their employees.

In addition, one of the OSHA cases cited by Ralston establishes that contractual authority alone does not create the type of supervisory authority required for liability under the multi-employer doctrine.

Bastian, 555 N.W.2d at 317 (stating that exercise of control rather than mere contractual authority is required to establish liability for OSHA violation under multi-employer doctrine). While Ralston argues that the Port's involvement in pollution control and removal of debris from the dock constitute the exercise of control, as discussed earlier, these were instances of the Port exercising control over conditions affecting Port property, not over the workplace safety conditions aboard the ODYSSEY. The evidence in the record establishes that Hoff and NewDay coordinated and directed the work aboard the vessel, not the Port. For all of the foregoing reasons, even if the multi-employer doctrine could be used to establish the existence of a duty for purposes of a negligence action, there are no facts in the record to support its applicability here.

3. **The Expert Testimony Offered By Ralston Likewise Went To The Issue Of Breach And Thus Did Not Create An Issue Of Material Fact Regarding The Question Of Duty.**

Ralston relied upon the declarations of two expert witnesses, Michael McGlenn and Richard Gleason, to establish, in his words, “a genuine issue of material fact ... regarding *whether Faires breached the standard of care* for a shipyard or marina operator by failing to require compliance with applicable OSHA regulations and industry standards.”

Appellant's Opening Brief at p. 48 (emphasis added). As Ralston's own statement makes clear, the testimony of these experts goes to the question of breach, not duty. Because Ralston failed to establish the existence of a duty, evidence regarding breach is again, simply not relevant.

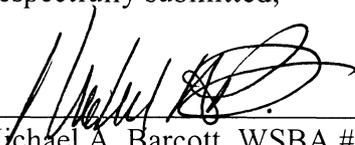
In addition, expert opinions cannot establish the existence of a duty. *See Terrell C. v. DSHS*, 120 Wn. App. 20, 30, 84 P.3d 899 (Div. I, 2004) (finding no abuse of discretion where trial court struck expert testimony submitted in opposition to motion for summary judgment on question of whether duty of care was owed, stating "legal opinions on the ultimate legal issue are not properly considered under the guise of expert testimony and a trial court errs if it considers those opinions expressed in affidavits."). The question of whether a duty exists is a legal question for the court which may not be usurped by an expert. Thus, the declarations of McGlenn and Gleason have no bearing on the issue of duty.

VI. CONCLUSION

Because Ralston failed to raise any issue of material fact in support of his arguments that the Port owed him a legal duty, the Port respectfully requests that the trial court's decision granting the Port's summary judgment motion be affirmed.

DATED this ~~26~~²⁷ day of April, 2006.

Respectfully submitted,



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