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(Ninth Circuit No. 16-35314)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT IN

SHANNON C. ADAMSON and NICHOLAS ADAMSON,
Husband and Wife,

Plaintiffs-Appellees,

v.

PORT OF BELLINGHAM, a Washington Municipal
Corporation,

Defendant-Appellant.

PORT OF BELLINGHAM'S OPENING BRIEF

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I. INTRODUCTION

The certified question arises because long-established Washington common law distinguishes between the liability of possessors of land on the one hand, and landlords on the other. A possessor is subject to liability to all entrants on land, for injuries caused by a condition on the land. But a landlord, by virtue of having conveyed possession to its tenant, no longer owes the duty that a possessor owes.¹

This Court should answer the certified question by stating that the mere inclusion in a lease of two clauses, the first of which describes the tenant's rights in terms of "priority" rather than "exclusive" use, and the second of which provides that the landlord is assuming a duty to repair and maintain that the landlord does not have under the common law, is insufficient to deprive that landlord of the protections of the general rule of no duty and therefore no liability:

- *Priority versus exclusive use.* So long as the tenant, during the times it is exercising its use rights, has actual exclusive possession and *control* over the area being leased, the landlord should retain the protection of the general rule and have no liability to anyone injured within the area being leased, when the tenant is exercising its use rights over that area. That the tenant's use right is *labeled* a "priority" rather than an "exclusive" right should not matter. Substance, not form, should control.

¹ The *scope* of the possessor's duty depends on the entrant's status as an invitee, licensee, or trespasser. *See, e.g., Younce v. Ferguson*, 106 Wn.2d 658, 662-63, 724 P.2d 991 (1986). But the critical legal "fact," the significance of which the Port will address more fully later in this brief, is that the possessor owes a duty—whatever its scope—to *everyone* who comes on the possessor's property. A landlord does *not*.

- *Repair and Maintenance.* Nor should the additional fact of the landlord assuming a duty to repair and maintain change the outcome. Landlord assumptions of such a duty are a commonplace in commercial leases in the modern, urban world, and the assumption of such a duty does not imply that the landlord may interfere with what is otherwise the tenant's right to exclusively control how it conducts its business within the area it has leased for that business. Yet a landlord would need to be able to do precisely that to protect itself from the liability that could ensue from finding, in the inclusion of a run-of-the-mine repair-and-maintain clause, the assumption of a duty of care to the tenant and its invitees. No good purpose will be served by so radically upsetting the settled expectations of Washington commercial landlords and tenants.

II. CERTIFIED QUESTION

The United States Court of Appeals for the Ninth Circuit certified the following question to this Court:

Is party A (here, the Port) liable as a premises owner for an injury that occurs on part of a leased property used exclusively by party B (here, the Ferry) at the time of the injury, where the lease has transferred only priority usage, defined as a superior but not exclusive right to use that part of the property, to party B, but reserves the rights of party A to allow third-party use that does not interfere with party B's priority use of that part of the property, and where party A had responsibility for maintenance and repair of that part of the property?

Perhaps stated more broadly, the question of Washington law presented is whether priority use can be considered to give exclusive control, and if so in what circumstances?^[2]

The answer to the first question should be “no,” and the answer to the second question should be “yes,” and in particular under the circumstances present in this case.

In other words, the certified question asks: Does a lease under which (1) the tenant’s possession—its *control*—is exclusive during the periods when the tenant is exercising its right of possession, and (2) the landlord also assumed repair and maintenance duties but those duties do not deprive the tenant of that exclusive control, convey what Washington law considers exclusive “possession” for purposes of the general rule of nonliability of landlords for injuries caused by conditions on the leased property and which occur during the tenant’s periods of exclusive use? Under this Court’s precedents and the policies underlying those precedents, the answer to the question should be: *it does*.

III. STATEMENT OF THE CASE

A. Facts Material to the Certified Question.

The Alaska Marine Highway System (“Ferry System”) is a ferry service operated by Alaska’s Department of Transportation and Public Facilities. The Ferry System’s southernmost port of call is the Bellingham Cruise Terminal.

² *Order Certifying Question to Washington Supreme Court (“Certification Order”)* at 10.

The Port of Bellingham built the Terminal for the Ferry System's use and leased it to the Ferry System beginning in 1989. ER³ 366-419, 510. In 2009, the parties executed a new, 15-year lease to replace the original, 20-year lease. ER 510, 336-65. The 2009 lease divided the leased premises into several areas and gave the Ferry System "exclusive use" of some areas and "priority use" of others. ER 340. One area designated for "priority use" was the "Marine Facilities," which included the vehicle ramp, passenger ramp, and berth. ER 340.

The 2009 lease defined "exclusive use" to mean "sole possession and control...subject only to the terms and conditions of this Lease." ER 340. It defined "priority use" as "superior but not exclusive right of use to the identified areas." ER 340. The lease allowed the Port to "allow other uses of the priority use areas so long as such use does not unreasonably interfere with [the Ferry System's] use." ER 340.⁴

The Ferry System sends one of its vessels to the Terminal six times a month in the spring and summer and four times a month during the rest of the year. ER 781-82. The ship remains in the berth about twelve hours each visit. ER 755. The Ferry System exercises exclusive control over the Marine Facilities when it uses them; that is, when one of its vessels is in the berth. *See* ER 512, 580-81, 613, 615-17. Port employees generally do not enter the Marine Facilities while the Ferry System is using them.

³ "ER" refers to the initial excerpts of record filed by Appellant Port of Bellingham in the United States Court of Appeals for the Ninth Circuit under Ninth Circuit Rule 30-1 and transmitted by the Ninth Circuit for this Court's use.

⁴ In fact, the Port has never allowed third-party uses of the Marine Facilities. ER 510, 578.

ER 580-81, 613. If Port employees desire to enter for some reason, they have to get permission from the Ferry System. ER 582-83, 616.

Shannon Adamson, a Ferry System ship's officer, was injured in 2012 while operating the passenger ramp (part of the Marine Facilities). The passenger ramp connects to the upper deck of a vessel to facilitate safe loading and unloading of passengers. ER 755. The ramp is suspended by three-quarter inch steel cables (called "wire ropes") that are wound up or down to raise or lower the main part of the ramp, which is about 75 feet long. ER 579, 675-66, 807. Once the ramp is in position, locking pins are extended into the steel structure to hold the ramp aloft, taking the weight off the cables. ER 678, 685-86. A shorter section of ramp, called the "apron,"





pivots down to bridge the final gap between the ramp and the vessel. ER 579, 676-77, 817; *see also* ER 814 (photo of ramp structure in profile), 815 (photo of ramp showing control panel and apron in upright position).

To adjust the ramp, an operator was to raise the ramp slightly to take the weight off the locking pins, retract the

pins, move the ramp into the desired position, extend the pins back out into the steel structure, and lower the ramp slightly to transfer the weight from the cables back onto the pins. *See* ER 678-79, 887-88. Adamson attempted to lower the ramp while the locking pins were extended out into the structure. This created slack in the cables because, even though the pins prevented the ramp from lowering, nothing stopped cable from unspooling when the pins were inserted. *See* ER 692-93. Adamson then withdrew the pins, causing the ramp to drop. Unfortunately, Adamson had created enough slack that, when she withdrew the pins, the cables could not withstand the force of the ramp dropping onto them and they severed, causing the ramp to drop 15 feet until it bottomed out on the ramp's supporting structure. Adamson was seriously injured.

Adamson evidently was not trained to operate the passenger-ramp controls in a sequence that would avoid creating slack in the cables (that is, to raise the ramp to remove its weight off the pins before withdrawing them). *See* ER 685. As explained more fully below in Section IV.3(a), the risk associated with creating slack in the cables had been uncovered by a prior incident involving another Ferry System crew member. It is this risk that the Ninth Circuit refers to as a “flaw” in the passenger-ramp system.⁵

B. Procedural History.

Adamson and her husband sued the Port, seeking to recover Adamson’s damages and her husband’s related damages. ER 455-62. The District Court denied the Port’s pretrial motion for summary judgment. ER 8-21, 430-54.

The denial of summary judgment allowed Plaintiffs to advance five independent theories of liability at trial. They were able to argue that the Port was negligent based on breach of: (1) the common-law duty of care a possessor of land owes to business invitees; (2) the common-law duty of care a landlord owes to tenants using common areas (which remain in the landlord’s possession); (3) the common-law duty a landlord owes to tenants to disclose known, hidden defects existing at the commencement of the lease; (4) the statutory and common-law duties that a jobsite owner who retains control over the performance and instrumentalities of work owes to workers; and (5) the repair and maintenance duties assumed by the Port in its lease with the Ferry System. *See* ER 8-21, 50-59, 138-43.

⁵ *Certification Order* at 4.

At trial, in connection with the first theory of liability (possessor liability), the District Court instructed the jury that Adamson was the Port's business invitee. ER 138. In connection with the fifth theory of liability (assumed repair and maintenance duties), the District Court excluded extrinsic evidence offered by the Port to show that the parties did not intend that the Port had assumed a duty to eliminate the "flaw" in the ramp's design (ER 312-14, 521-23, 525-39, 643-44, 667-73) and also refused to instruct the jury in Washington's context rule of contract interpretation as established by this Court's decision in *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990). ER 268-69, 468-69, 667 (refusing to give the relevant pattern jury instructions).

The jury-verdict form did not ask the jury separately whether Plaintiffs established each of its five theories of liability; rather, it grouped them into three questions. ER 161. The first question addressed only possessor liability, asking whether the Port was negligent "with regard to the duty it owed to Ms. Adamson as a business invitee." *Id.* The second question asked whether the Port was negligent "as a landlord." *Id.* This question implicitly encompassed three of Plaintiffs' theories—common area, hidden defect, and retained control—but these theories were not separately broken out for the jury to address individually. Finally, the third question asked whether the Port was negligent "in failing to perform its promise to perform repairs under the contract." *Id.*

The jury answered each of these questions in the affirmative, found Adamson and the Ferry System not at fault, and found damages totaling

\$16,007,002. ER 162. The District Court denied the Port’s motion for judgment as a matter of law at the close of the evidence and its renewed motion for judgment as a matter of law and for a new trial after entry of judgment. ER 1-5, 100-111, 481-98. The Port appealed. ER 6-7, 36-38.

Because the verdict form did not break out each liability theory for separate determination,⁶ the Ninth Circuit will affirm the judgment if any of them is legally viable and supported by substantial evidence. *McCord v. Maguire*, 873 F.2d 1271, 1274 (9th Cir. 1989); *accord Davis v. Microsoft*, 149 Wn.2d 521, 539-40, 539 n.7, 70 P.3d 126 (2003) (citing *McCord*).

IV. ARGUMENT

A. This Court’s authority in a certified-question proceeding is limited to answering the question certified by the certifying federal court—here, the Ninth Circuit.

When this Court addresses a certified question, it “answers only the discrete question the federal court has certified.” *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 577, 964 P.2d 1173 (1998). It refrains from making “broad statements” outside the narrow question and certified record. *Ruiz-Guzman v. Amvac Chem. Corp.*, 141 Wn.2d 493, 508, 7 P.3d 795 (2000). The federal court retains jurisdiction over all matters except the certified question. *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 676, 10 P.3d 371 (2000); *Kitsap County*, 136 Wn.2d at 577.

⁶ Specifically, and as stated, the verdict form did not break out the three separate liability theories that fell under the rubric of “landlord” liability: common area, hidden defect, and retained control. The result was to create five separate “pathways” the jury could take to find liability: the individual pathways identified in verdict questions 1 (business invitee) and 3 (duty to repair and maintain), and the three pathways encompassed under verdict question no. 2 (landlord liability).

- B. In determining that the conveyance of exclusive possession to the Ferry System is material to resolving the Port’s appeal, the Ninth Circuit necessarily determined that the judgment could not be affirmed based on liability theories that are independent of the conveyance of exclusive possession to the Ferry System.**
- 1. The certified question focuses on conveyance of possession because liability of a landowner for injuries caused by a condition on its land generally is premised on the landowner’s possession of the land, and a lease conveys exclusive possession from the landowner to the tenant.**

Under the common law, the possessor of real property is subject to liability for injuries caused by a condition on the land. *Hughes v. Chehalis Sch. Dist. No. 302*, 61 Wn.2d 222, 224-25, 377 P.2d 642 (1963); *Pruitt v. Savage*, 128 Wn. App. 327, 330-31, 115 P.3d 1000 (2005) (citing RESTATEMENT (SECOND) OF TORTS § 343 (1965)). But in a landlord-tenant relationship, the landowner as landlord *conveys* exclusive possession of the premises, or part of the premises, to the tenant for a determinate period of time. *Hughes*, 61 Wn.2d at 224-25. A landlord, having surrendered possession of the leased premises, generally is not subject to liability to a tenant for injuries caused by a condition on the land. *Regan v. City of Seattle*, 76 Wn.2d 501, 504, 458 P.2d 12 (1969); *Hughes*, 61 Wn.2d at 224-25.⁷ And a landlord owes no greater duty to a tenant’s invitees than to the tenant itself. *Frobig v. Gordon*, 124 Wn.2d 732, 735, 881 P.2d 226 (1994).

⁷ See also RESTATEMENT (SECOND) OF TORTS §§ 355, 356 (1965); 5 DAVID A. THOMPSON, THOMPSON ON REAL PROPERTY § 41.09(a), at 228 (2d ed. 1998) (“The traditional rule of landlord tort immunity persists in most jurisdictions, but it is subject to a number of exceptions.”).

There are a handful of exceptions to this general rule. For example, a landlord who has conveyed exclusive possession to a tenant may still be held liable for injuries to the tenant or the tenant's invitee caused by a hidden defect that existed at the commencement of the lease. *Frobig*, 124 Wn.2d at 735-36; *Hughes*, 61 Wn.2d at 226. Hidden (or "latent") defects are those a tenant should not be expected to discover by reasonable inspection of the premises. *Hughes*, 61 Wn.2d at 225. But this and other exceptions remain grounded in the logic of the general rule of nonliability; they flow from it and are consistent with it. And in the context of commercial leases, this Court has held fast to these principles and resisted watering down a landlord's protection from liability. *See, e.g., Frobig*, 124 Wn.2d at 735-36 (refusing to adopt a "dangerous animals" exception).⁸

The sole issue before this Court is whether the lease between the Port and the Ferry System conveyed exclusive possession of the Marine Facilities to the Ferry System. Specifically, this Court is asked to state whether the existence of two facts—the grant of what a lease denominates as "priority" rather than "exclusive" use, coupled with the landlord's assumption of a duty of repair and maintenance—is sufficient to strip the landlord of the protection of the general no-duty rule, and re-impose the obligations the landlord would owe as the possessor of the property, in the

⁸ A landlord's duties to a residential tenant are greater, under the implied warranty of habitability and the Residential Landlord-Tenant Act, chapter 59.18 RCW. But those modifications of the common law do not apply in the commercial-leasing context. *See Frobig*, 124 Wn.2d at 736.

absence of a landlord-tenant relationship.⁹ Notwithstanding any suggestion from Plaintiffs that this Court should use this case as an opportunity to modify the general rule of nonliability (or the scope of any specific recognized exception to that rule), this case does not present such an opportunity. Revisiting that rule and the scope of its exceptions is outside the scope of the certified question, which plainly assumes that rule and its exceptions are in full force for the resolution of the Port's appeal. Any notion of modifying those rules is thus outside this Court's jurisdiction in this case. *Broad*, 141 Wn.2d at 676.

2. Two of Plaintiffs' five liability theories depend on the Port owing Adamson the duty of a possessor: (1) that Adamson was the Port's "business invitee"; and (2) that the ramp on which Adamson was injured was a "common area".

The legal viability of two of Plaintiffs' five independent theories of liability depends on the answer to the certified question, because they depend on the Port having remained in possession of the Marine Facilities and not having conveyed exclusive possession to the Ferry System.

First, the District Court allowed Plaintiffs to argue that the Port was negligent as a possessor of land, under common-law premises liability. The District Court determined as a matter of law that the Port's lease with the Ferry System did not convey exclusive possession to the Ferry System. ER 15-17. It further determined that the Port thus owed Adamson the duty of

⁹ The District Court, in its pre-trial summary judgment order that established the legal theories Plaintiffs would be allowed to pursue at trial, referred to this as the question of whether the Port had managed to "shed its duties under premises liability[.]" ER 17.

reasonable care owed to a business invitee and instructed the jury that Adamson was the Port's business invitee.¹⁰ ER 15-17, 138.

Second, the District Court allowed Plaintiffs to argue that the Marine Facilities were a common area—a part of the premises reserved by the Port for shared use and thus remaining in its possession. ER 19-20; *but see Geise v. Lee*, 84 Wn.2d 866, 868-69, 529 P.2d 1054 (1975) (stating the test for determining whether a part of the leased premises is a common area).

Each of these two liability theories—business invitee and common area—depended on the District Court's determination that the Port remained in possession of the Marine Facilities. If that determination was correct, then, as the Ninth Circuit recognized, the judgment would be affirmed based on Plaintiffs' possessor-liability theories. But if the Port is correct that the lease substantively conveyed exclusive possession of the Marine Facilities to the Ferry System, even if the lease did not *call* it

¹⁰ As previously stated, a possessor of land does not owe a duty of reasonable care in all circumstances. Rather, the extent of the duty owed depends on the common-law classifications of invitee, licensee, and trespasser. *Younce*, 106 Wn.2d at 662-63 (adhering to the classifications approach). Only an invitee is owed an unconditional duty of reasonable care. *Id.* at 667-68. The parties disputed whether Adamson was the Port's invitee or only the Ferry System's invitee. Only a possessor of land can have invitees. *Pruitt*, 128 Wn. App. at 330-31. But as previously stated, a possessor of land does owe *some* duty to anyone who comes upon the possessor's land—a landlord does *not*.

“exclusive possession,” then the District Court erred in allowing the jury to consider the business invitee and common-area liability theories.¹¹

3. The Plaintiffs’ remaining three theories—(1) hidden defect, (2) retained control, and (3) breach of the duty to repair and maintain—cannot sustain the judgment.

Plaintiffs’ three remaining liability theories did not depend on the Port having retained possession of the Marine Facilities. Those theories were: (1) breach of a landlord’s duty to disclose known, hidden defects existing at the commencement of the lease; (2) breach of the duty of a jobsite owner who has retained control over the manner of performance of work; and (3) breach of contractual duties to repair and maintain, assumed by the Port in the lease.

Plaintiffs argued that each of these remaining theories could independently sustain the verdict. *2d Br. on Cross-App. (9th Cir.)* at 20-21. By the fact that the Ninth Circuit asked the certified question, regarding whether the lease conveyed exclusive possession to the Ferry System, the Ninth Circuit necessarily disagrees with Plaintiffs and has determined that all

¹¹ It is clear that the Ninth Circuit has determined, without saying so expressly, that it cannot affirm based on the common-area theory of liability. A common area is a portion of the premises owned by the landlord that is reserved for common, shared use of multiple tenants. *Geise*, 84 Wn.2d at 868. Plaintiffs presented no facts that could bring the Marine Facilities within that definition. The Ferry System had exclusive possession and control of the Marine Facilities during its periodic use of those facilities. *See* ER 580-81. That the Port could use those facilities, or could allow others to use those facilities when the Ferry System was not exercising its use rights, by definition fails to establish that those facilities, including the ramp, had been reserved for common, shared use. On the other hand, it is equally clear that the Ninth Circuit has determined (again, without saying so expressly) that it could affirm based on the business-invitee theory of liability, if that theory is legally viable under the facts and circumstances of this case. Under the business-invitee theory, the Port could be found liable if it was negligent, and the Port did not dispute—and told the Ninth Circuit as much—that there was a jury question on the issue of negligence.

three of the legal theories not premised on the Port being in possession cannot sustain the judgment on the jury's verdict. The Ninth Circuit must have so concluded because, otherwise, certifying a question about possession would be a pointless exercise; the Ninth Circuit would instead simply have affirmed the judgment based on one or more of the remaining theories.

Instead, the Ninth Circuit has determined that, if the answer to the certified question is “no,” the judgment must be reversed and a new trial held on liability. As the Port will now show, the Ninth Circuit evidently has determined that the first two liability theories not premised on the Port being in possession—hidden defect and retained control—cannot sustain the judgment because the Ninth Circuit agrees with the Port that Plaintiffs failed to present the substantial evidence required to sustain the jury's verdict on either ground.¹² And as the Port will further show, the Ninth Circuit evidently has also determined that, as to the last theory—breach of contractual duties to repair and maintain—a new trial is required, because the trial court erroneously excluded evidence offered by the Port relevant to interpreting the contract and determining whether the Port breached the *intended scope* of that duty.

¹² Arguably, “retained control” could be deemed to fall within the general threshold issue of “exclusive control.” The Port has not placed the issue there, because of the way in which retained control historically has arisen under Washington law.

- (a) **The Ninth Circuit necessarily has determined, as a matter of law, that the Port did not breach its duty as a landlord to disclose known, hidden defects.**

Plaintiffs' "hidden defect" theory was based on an engineering report the Port obtained after a prior similar incident. In October 2008, four years before Adamson's accident, another Ferry System ship's officer, Chief Mate Rich Preston, misoperated the ramp the same way Adamson did. ER 679-81, 773. Like Adamson, Preston initially attempted to lower the ramp without withdrawing the pins. ER 679-81, 773, 854-55. Preston created 18 inches of slack in the cables, and when he then removed the pins, the ramp abruptly fell 18 inches, causing the ramp's apron to "bounce[] violently." ER 679-81, 773, 777-78, 854-55. Preston was not injured, but could have been had he lost his balance and been thrown against any of the nearby steel surfaces (*e.g.*, the apron, railing, or ramp itself). *See* ER 777-78, 815 (photograph). Preston reported the incident to his superiors with the Ferry System, which issued a system-wide directive to ensure ramp operators were properly trained. ER 632, 774.

After the 2008 incident, the Port retained an engineering firm, Geiger Engineers, to inspect the ramp and determine the scope of repairs needed to restore the ramp to its original condition. ER 566-67, 585-86. In a separate section of its report, entitled "Further Considerations," Geiger pointed out that the incident could have been "much worse." ER 892. Geiger stated that the cables "could conceivably have snapped" had there been 24 inches or more slack rather than 18 inches. ER 892. Geiger advised

that a “controls upgrade” to add an “interlock system of controls” could prevent a future incident by preventing the pins from being withdrawn if there was slack in the cables. ER 892.

Plaintiffs argued at trial and on appeal that the “slack risk”—the risk of a sudden drop if one misoperated the ramp by creating slack in the cables before withdrawing the pins—was a hidden defect that the Port learned of in the Geiger Report but failed to disclose to the Ferry System before the Ferry System executed a new lease in April 2009. *See* ER 17-18, 56-59; *2d Br. on Cross-App. (9th Cir.)* at 40-43. The Port sent a copy of the Geiger Report to Alaska’s Risk Management Division (as part of a request for reimbursement), but not directly to its Ferry System. ER 550-51, 622-26, 810, 848-53. Adamson argued that to satisfy its common-law disclosure duty, the Port had to send the Geiger Report to the Ferry System.

The Port maintained that Plaintiffs’ hidden-defect theory failed as a matter of law. It argued that a duty to disclose the slack risk did not arise because that so-called “defect” was known to the Ferry System when it executed the 2009 lease. ER 450-51; *Open. Br. of App. (9th Cir.)* at 39-40; *3d Br. on Cross-App.* at 18-22. The Port argued that the Ferry System had full knowledge of the slack risk when it entered into the 2009 lease because of what the Ferry System learned from the 2008 Preston incident.¹³ That incident revealed that, if an operator created slack in the cables before

¹³ *See Flannery v. Nelson*, 59 Wn.2d 120, 123-24, 366 P.2d 329 (1961) (holding that a landlord was not subject to liability for tenant’s employee’s injuries caused by defective interlock on an elevator where the tenant “had used the elevator for a month and was aware of the manner in which it functioned.”).

withdrawing the pins, once the pins were withdrawn the ramp would fall at least the distance required to take up the slack, and that this fall could be as much as “[a] few feet.” *See* ER 784-85, 854-55. The incident also revealed a risk of serious injury: Chief Mate Preston escaped injury only because he kept his balance; he could have lost his balance and been thrown against a hard steel surface. The Port argued that these comprised the material facts about the slack risk, for purposes of disclosure to the Ferry System, and that their disclosure meant the Port fulfilled its duty regarding that risk as a matter of law. *Open. Br. of App. (9th Cir.)* at 39-40; *3d Br. on Cross-App.* at 20-22.

The Port argued further that the Geiger Report was a red herring. *See Open. Br. of App. (9th Cir.)* at 40; *3d Br. on Cross-App.* at 18-22. The only additional information the Geiger Report provided was that the cables could sever with more slack. That information was not material because severance of cables was merely one pathway to injury from a risk that itself was fully disclosed. Everyone knew after the 2008 incident that, regardless of cables severing, the ramp would fall to the extent of any slack created, once the pins were withdrawn. Indeed, the ramp plainly could have fallen the same distance in Adamson’s incident (15 feet) *without severing of cables*, had she created that much slack by pressing the “down” button a bit longer before withdrawing the pins. *See* ER 681-82.

The Port on appeal sought only judgment as a matter of law on the hidden-defect issue. *See Open. Br. of App. (9th Cir.)* at 26, 40. It did not challenge the pertinent jury instruction or otherwise argue that it was

entitled to a new trial on this issue. The Ninth Circuit necessarily has determined that the Port was entitled to that judgment, or it would have affirmed based on a breach of the duty to disclose a hidden defect, instead of certifying the question it has for this Court to answer.

(b) The Ninth Circuit necessarily has determined, as a matter of law, that the Port did not retain control over the Ferry System’s work.

Plaintiffs premised their retained-control theory on this Court’s decision in *Afoa v. Port of Seattle* (“*Afoa I*”), 176 Wn.2d 460, 296 P.3d 800 (2013), drawing analogies to the facts of that case. *See* ER 12-15; *2d Br. on Cross-App.* at 38-39. In *Afoa I*, this Court reaffirmed that a jobsite owner owes statutory and common-law duties to ensure a safe workplace where it exercises “pervasive control” over the manner of performance and instrumentalities of work. 176 Wn.2d at 472, 481.¹⁴ Concluding that fact questions existed about whether the Port of Seattle retained the legally necessary pervasive control over Sea-Tac Airport to be subject to liability for injuries sustained by an airfield worker, this Court affirmed reinstatement of the plaintiff’s negligence claim against the Port of Seattle. *Id.* The evidence in question was that the Port of Seattle contractually retained “exclusive control and management” of the airfield area, enforced its own rules and regulations, and supervised and inspected the plaintiff’s employer’s work. *Id.* at 465-66.

¹⁴ *See also Afoa v. Port of Seattle* (“*Afoa II*”), _ Wn.2d _, 421 P.3d 903, 907 (2018) (reiterating this Court’s holding in *Afoa I* “that a jobsite owner who exercises pervasive control over a work site should keep that work site safe for all workers” (quoting *Afoa I*, 176 Wn.2d at 481)).

The Port distinguished the circumstances here from *Afoa I*. See *Open. Br. of App. (9th Cir.)* at 51-53; *3d Br. on Cross-App. (9th Cir.)* at 29-31. The Port had no right to control the manner of the Ferry System’s performance of work while using the Marine Facilities, nor did the Port purport to exercise such control, nor could Port employees give commands to Ferry System crew members. ER 513-14, 794-95; ASER¹⁵ 13. The Port had no say on which Ferry System employees operated the ramp or the training they received, if any. ER 547. Nor was there a common work area; Port employees entered the Marine Facilities rarely when the Ferry System was in possession, and only with permission. ER 512-14, 580-83, 613, 616-17.

As with Plaintiffs’ hidden-defect theory, the Port on appeal sought only judgment as a matter of law. *Open. Br. of App. (9th Cir.)* at 26, 53. And as with the hidden-defect theory, the Ninth Circuit necessarily determined that the Port was entitled to judgment as a matter of law, or it would have affirmed the judgment based on retained control.

(c) The issue for trial on remand to the District Court will be the scope of the Port’s contractual duty to “maintain the leased premises free of...mechanical hazards[.]”

Plaintiffs’ remaining liability theory independent of the issue of exclusive possession is breach of the contractual duties to repair and maintain assumed by the Port in the 2009 lease. A landlord has no common-

¹⁵ “ASER” refers to the supplemental excerpts of record filed by Appellant Port of Bellingham in the Ninth Circuit. See *supra* n.3.

law duty to repair or maintain leased premises. *Teglo v. Porter*, 65 Wn.2d 772, 773-74, 399 P.2d 519 (1965). But a landlord may assume such an obligation under the terms of the lease. *Id.* Plaintiffs pointed to two provisions of the 2009 lease to support their theory that the Port breached a contractual duty it had assumed under its lease with the Ferry System. *2d Br. on Cross-App. (9th Cir.)* at 45.

First, Plaintiffs cited section 4.1, which set forth a general duty to “keep[] the leased premises in good *repair* and tenantable condition.” ER 343 (emphasis added); *see 2d Br. on Cross-App. (9th Cir.)* at 45.¹⁶ The Port argued there could be no genuine dispute that the Port satisfied this duty before Adamson’s incident. Webster’s Dictionary defines “repair” as meaning “to restore by replacing a part or putting together what is torn or broken[.]” WEBSTER’S 3D NEW INT’L DICTIONARY 1923 (2002).¹⁷ The Port did that, undisputedly, after Chief Mate Preston’s incident. *See* ER 515. A “controls upgrade” as Plaintiffs argue the Port should have done after the 2008 incident is plainly not within the definition of “repair.” ER 892; *see Open. Br. of App. (9th Cir.)* at 43-45; *3d Br. on Cross-App. (9th Cir.)* at 23-24.

The second provision Plaintiffs cited was section 4.7, which required the Port to “maintain the leased premises free of structural or

¹⁶ *See also Certification Order* at 6.

¹⁷ *See also* BLACK’S LAW DICTIONARY 1490 (10th ed. 2014) (“To restore to a sound or good condition after decay, waste, injury, partial destruction, dilapidation, etc.; to fix something broken, split, or not working properly[.]”); *Prudential Ins. Co. of Am. v. L.A. Mart*, 68 F.3d 370, 373-74 (9th Cir. 1995) (rejecting an argument that a duty to repair under a lease included retrofitting and holding that “changes in existing structures are not mandated by covenants to repair.”).

mechanical hazards[.]” ER 345; *see 2d Br. on Cross-App. (9th Cir.)* at 45. The parties disputed whether the slack risk could be deemed a “mechanical hazard.” The Port maintained that a mechanical hazard can arise through wear and tear (*e.g.*, a cable worn by use or corrosion) but not through misoperation of equipment. The Port further maintained that the available extrinsic evidence confirmed its interpretation of “mechanical hazard,” as intended by the parties to the 2009 lease. *Open. Br. of App. (9th Cir.)* at 47-48; *3d Br. on Cross-App. (9th Cir.)* at 26. The Port offered extrinsic evidence that the Ferry System “operated consistent with the Port’s understanding” of the term “mechanical hazard”—for instance, by (1) not raising the slack-risk issue during negotiation of the 2009 lease (which followed the 2008 incident); (2) never subsequently asserting that the slack risk was an unmaintained mechanical hazard or demanding modification of the ramp controls;¹⁸ and (3) putting the ramp back into service after Adamson’s accident without so much as asking the Port to *consider*

¹⁸ *See* ER 344 (2009 lease, § 4.2, allowing the Ferry System to request arbitration in the event the Port failed to correct a defect). After Chief Mate Preston’s 2008 incident, the Ferry System accepted that it needed to train its own crew members to prevent future incidents. ER 550-51, 786-89, 854-55.

upgrading the controls to eliminate that risk.¹⁹ ER 312-14, 525-39, 667-73; *see Open. Br. of App. (9th Cir.)* at 47-48.²⁰

The District Court excluded the Port's extrinsic evidence and refused to instruct the jury on the context rule under *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990). ER 468-69, 521-23, 531. It gave two bases for its decision, both flawed in the Port's view. First, the District Court concluded that, as a matter of public policy, the Port could not "negotiate...around" the duty it supposedly owed to Adamson. ER 521-23. That rationale is contrary to this Court's precedents establishing a general rule of nonliability for landlords. *E.g., Hughes*, 61 Wn.2d at 224-25. Second, the District Court misinterpreted *Berg* and its progeny, incorrectly concluding that textual ambiguity must be found before extrinsic evidence may be admitted, contrary to *Berg* and its progeny. ER 523, 531, 643-44, 669. *See Berg*, 115 Wn.2d at 668.

¹⁹ *See Brown v. Hauge*, 105 Wn. App. 800, 805, 21 P.3d 716 (2001) (reasoning that the tenant's failure to ask the landlord to repair a condition was evidence that the tenant did not consider it unsafe).

²⁰ Contract interpretation is generally a question of law, but it becomes a fact question when it depends on extrinsic evidence that allows material, competing inferences. *Scott Galvanizing, Inc. v. Nw. EnviroServs., Inc.*, 120 Wn.2d 573, 582, 844 P.2d 428 (1993). Under the context rule, as set out by this Court in *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990), and refined in *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.3d 262 (2005), extrinsic evidence is admissible as an aid in ascertaining the parties' intent. *Hearst*, 154 Wn.2d at 502; *Berg*, 115 Wn.2d at 668. This is so even though the contract language appears unambiguous on its face. *Berg*, 115 Wn.2d at 668. The sole limitations are that extrinsic evidence may not be used to "vary, contradict, or modify" the written word, and evidence of a party's unilateral, subjective intent is generally irrelevant. *Hearst*, 154 Wn.2d at 503-04, 695-96 (quoting *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 693, 974 P.2d 836 (1999)). The Port contended its interpretation did not vary, contradict or modify the written terms of the 2009 lease.

The Ninth Circuit evidently concluded that a jury question existed on the issue of the intended scope of the Port's duty with respect to mechanical hazards, and that the verdict could not be upheld based on the evidence presented to the jury because that evidence was materially incomplete, due to the District Court's erroneous exclusion of evidence and refusal to instruct on the context rule.

* * * *

In sum, the Ninth Circuit has determined that, should this Court answer the certified question by concluding that the Port did not subject itself to possessor liability through the "priority use" and repair-and-maintain clauses of the Port's lease agreement with the Ferry System, the case will be remanded to the District Court for a new trial.²¹ And for the reasons just discussed, that trial will be limited to the issue of the intended scope of the Port's contractual duty with respect to repair and maintenance, and more specifically to maintaining the premises free of mechanical hazards.²²

²¹ *Certification Order* at 9.

²² The issue of damages will not be retried. The Port raised no issue on appeal pertaining to the amount of the verdict. If the jury on retrial finds liability, judgment will be entered based on the first jury's damages verdict of \$16,007,102. *See* ER 162.

- C. **This Court should answer the certified question by holding that a lease under which (1) the tenant has exclusive control over the leased premises when exercising a right of “priority use” and (2) the landlord assumes a general duty to maintain and repair that does not put the landlord in the position of exercising control over the tenant’s conduct of its affairs, does not subject the landlord to the duty of a possessor with a duty to all who enter onto the landlord’s property that has been leased to the tenant.**

A commercial lease that describes the tenant’s rights in terms of “priority” rather than “exclusive” use, and that also requires the landlord to maintain and repair the leased premises, is insufficient to render a landlord a possessor and once again subject to a possessor’s duty to all who enter onto the possessor’s land. So long as the tenant is given exclusive control over the leased premises when it chooses to exercise those rights, and so long as the landlord’s duty to repair and maintain does not compromise that control, the landlord retains the protection of general of nonliability.

1. **Most jurisdictions, including Washington, require a commercial landlord to cede exclusive control of the leased premises to the tenant for the landlord to reap the benefit of the general nonliability rule.**

Historically, lessors of real property under the common law had no liability for injuries occurring on leased premises. 3 NORMAN J. LANDAU & EDWARD C. MARTIN, PREMISES LIABILITY LAW AND PRACTICE § 9A.01, at 9A-1, 9A-4 (2004). This nonliability rule applied even if the defect existed at the tenancy’s creation or arose after the tenant took possession. *Id.* § 9A.01, at 9A-4. Washington follows this general rule of nonliability: a landlord owes no duty to a tenant or a tenant’s invitees for injuries caused by a defective condition on the leased premises that fall under the tenant’s

exclusive control. *See, e.g., Hughes*, 61 Wn.2d at 224-25; *Brown v. Hauge*, 105 Wn. App. 800, 804, 21 P.3d 716 (2001); *Sunde v. Tollett*, 2 Wn. App. 640, 642, 469 P.2d 212 (1970). Liability flows from “direct control” of the premises. *Frobig*, 124 Wn.2d at 735. Some jurisdictions have abandoned this traditional approach in favor of imposing liability based on a general duty of reasonable care. *See* 2 POWELL ON REAL PROPERTY § 16B.08[3], at 16B-224 to 227 (2002). But most jurisdictions, including Washington, have not done so.²³

Commercial tenants “often stand upon a somewhat different footing” from residential tenants. 3 LANDAU & MARTIN, *supra*, § 9A.01, at 9A-5. There are “significant differences between commercial and residential tenancies and the policy considerations appropriate to each.” *Humphrey v. Byron*, 850 N.E.2d 1044, 1048 (Mass. 2006). In many jurisdictions, including Washington, commercial landlords continue to enjoy a greater freedom from liability from injuries to persons on the leased premises because of the general nonliability rule. 3 LANDAU & MARTIN, PREMISES LIABILITY LAW AND PRACTICE § 9A.01, at 9A-6. Once a commercial landlord has surrendered exclusive control of the premises to a tenant, this Court has steadfastly applied the general nonliability rule for

²³ RESTATEMENT (SECOND) OF TORTS §§ 355, 356 (1965); 3 LANDAU & MARTIN, *supra*, § 9A.01, at 9A-4 to 4.1 (“Many jurisdictions continue to adhere to the common law immunity rule[.]”); 2 POWELL ON REAL PROPERTY, *supra*, § 16B.08[2], at 16B-155 to 158 (listing 19 jurisdictions who still follow the general nonliability approach); 5 THOMPSON ON REAL PROPERTY, *supra*, § 41.09(a), at 228 (“The traditional rule of landlord tort immunity persists in most jurisdictions[.]”). The Ninth Circuit has not asked this Court to reconsider whether Washington continues to follow the traditional approach but only to answer, within the confines of that approach, the specific question presented by the certification order.

landlords and has refused to impose a duty owed to all owed by a possessor of land. *See Frobig*, 124 Wn.2d at 735-36 (refusing to adopt a “dangerous animals” exception).

Washington’s strict nonliability rule for landlords finds its historical anchor in the “caveat emptor” principle. *See Teglo*, 65 Wn.2d at 773; *Hughes*, 61 Wn.2d at 225. This principle shields the landlord from liability for injuries resulting from defects in the leased premises. 2 POWELL ON REAL PROPERTY, *supra*, § 16B.08[1], at 16B-151. Once a landlord cedes exclusive control of the premises to the tenant, the landlord generally owes no duty for injuries caused by conditions on the land:

This placing of responsibility for the condition of the premises on the tenant carried a double disability: if the tenant were injured by the condition of the premises, he had no recourse against the landlord, and if a third party were injured, the tenant, as the party having possession *and control*, was responsible in tort for the injury resulting from the defective condition of the premises.

Id. § 16B.08[1], at 16B-151 (citing cases) (emphasis added).

And this rule makes sense: the tenant—who has exclusive control of the leased premises—“is in the best position to take steps to protect the safety of its own property.” *Enerco, Inc. v. SOS Staffing Servs., Inc.*, 52 P.3d 1272, 1274-75 (Utah 2002); *see also Gourdi v. Berkelo*, 930 P.2d 812, 816 (N.M. 1996) (“When...a landowner has relinquished the right to possession under a lease, he or she is no longer in the best position to

discover and remedy any dangerous condition—the tenant is.”)²⁴ In the commercial context, the tenant knows its day-to-day business operations better than anyone else, and the law should not incentivize landlords to meddle in the tenant’s business, particularly in a specialized industry such as maritime transportation. Liability for injury should depend on possession and control—not mere title. *Lemm v. Gould*, 425 S.W.2d 190, 198 (Mo. 1968) (“[L]iability depends upon who has possession and control, rather than upon mere ownership.”). The right to control includes the concomitant right to exclude, and these rights enable the tenant to run its business without oversight or influence, which is a key benefit to commercial tenants.

2. Neither the priority-use provision nor the assumption of the duty to maintain and repair, individually or together, is sufficient to strip a commercial landlord of the protections of the general nonliability rule unless those provisions materially interfere with the tenant’s right to exclusive control of the leased premises.

This Court must decide whether a lease under which (1) the tenant has exclusive control over the leased premises when exercising a right of “priority use” and (2) the landlord assumes a general duty to maintain and repair puts the landlord in the position of a possessor with a duty to all who enter the land.

²⁴ See also WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 57, at 351 (4th ed. 1971) (“Largely for historical reasons, the rights and liabilities arising out of the condition of land, and activities conducted upon it, have been concerned chiefly with the possession of the land, and this has continued into the present day, for the obvious reason that *the man in possession is in a position of control*, and normally best able to prevent any harm to others.” (Emphasis added.)).

While Washington law is, in the Ninth Circuit’s words, “not *entirely* settled” on this issue,²⁵ the general framework from this Court’s precedents is. When a tenant has exclusive control of leased premises when exercising a right to periodic use of the premises, the tenant is solely liable for injury to its invitees sustained during such use. And the mere fact that the landlord, like virtually any landlord in the modern world of commercial leases, assumes a general duty to repair and maintain that premises, does not change this legal reality.

- (a) **A priority-use provision that transfers exclusive control to a tenant, when the tenant exercises its use rights, does not render the landlord a possessor.**

A lease conveys a possessory interest in land. *Preugschat v. Hedges*, 41 Wn.2d 660, 663, 251 P.2d 166 (1952). *The defining feature of a tenancy is **exclusive control***: a lease gives the tenant the right to exclusive control of the premises for a definite period, which may be asserted against the world, including the landlord. *Conaway v. Time Oil Co.*, 34 Wn.2d 884, 893, 210 P.2d 1012 (1949); *Lamken v. Miller*, 181 Wash. 544, 549-51, 44 P.2d 190 (1935); *Barnett v. Lincoln*, 162 Wash. 613, 618-19, 299 P. 392 (1931). The conveyance of exclusive control of the premises is the touchstone of a tenancy. *Regan v. City of Seattle*, 76 Wn.2d 501, 504, 458 P.2d 12 (1969).

For instance, this Court in *Regan* held that, while the landlord retained general control over the leased building and had a right to enter the

²⁵ *Certification Order* at 9 (emphasis added).

building at any time, the tenant was “granted sufficient control” over the “portion of the premises in which plaintiff was injured” to establish a tenancy. 76 Wn.2d at 504-05. Similarly, Division Two held that boat owners had exclusive control of their leased boat slips even though the marina owner could switch the designated slip. *City of Tacoma v. Smith*, 50 Wn. App. 717, 720-22, 750 P.2d 647 (1988).²⁶

A tenancy exists even if the tenancy is transitory. This Court in *Hughes* held that a landlord was not liable for injuries occurring on premises within the tenant’s exclusive control, leased for only one night. A guild hosted an event for one night in part of a local school, as it had done annually for years. A guild member sued the school district after she slipped and fell in the kitchen. 61 Wn.2d at 223-24. This Court reaffirmed Washington’s general nonliability rule for landlords, under which the tenant takes the premises with all defects that are known or can be discovered by reasonable inspection:

A lessee takes the hired premises . . . in the condition and quality in which they are. The tenant takes the property as he finds it, ***with all existing defects which he knows or can ascertain by reasonable inspection***. He takes the risk of apparent defects. As between himself and his landlord, where there is no fraud or false representation or deceit, and in the absence of an express warranty or covenant to repair, there is no implied contract that the premises are suitable or fit for occupation, or for the particular use intended,

²⁶ See also *Port of Coos Bay v. Dep’t of Revenue*, 691 P.2d 100, 103 (Or. 1984) (stating that a landlord’s reservation of the right to enter the leased premises for inspection, when that right does not “materially interfere” with the tenant’s exclusive control, does not negate a tenant’s leasehold interest); *People v. Chicago Metro Car Rentals, Inc.*, 72 Ill. App. 3d 626, 28 Ill. Dec. 843, 391 N.E.2d 42, 45 (1979) (holding that a tenancy existed even though the landlord could voluntarily change the locations of the leased premises without permission and the landlord retained the right to inspect the premises).

or that they are safe for use. Any implied contract relates only to the estate, and not to the condition, of the property. In other words, in the absence of fraud or concealment on the part of the landlord, ***a rule similar to that of caveat emptor applies and throws upon the lessee the responsibility of examining as to the existence of defects in the premises and of providing against their ill effects.***

Hughes, 61 Wn.2d at 225 (emphasis added; internal citations and quotations omitted).

In *Hughes*, each leasing was for a one-time event, lasting several hours, and the guild had been leasing part of the school for this event for several years. The result in *Hughes* should have been no different had the guild entered into a lease under which it would use the school on the same date for the next ten years and the school district could lease the same premises to others, so long as those leases did not interfere with the guild's use rights. See *Homestead-Miami Speedway, LLC v. City of Miami*, 828 So.2d 411, 413 (Fla. Dist. Ct. App. 2002) (concluding that an agreement that granted exclusive use of premises for at least three days each year for fifteen years was a lease). The facts here are not materially distinguishable.

A tenancy also exists if the tenant is given exclusive rights over one part of a leased premises, and priority use rights over another. In *Barnett v. Lincoln*, 162 Wash. 613, 299 P. 392 (1931), the Port of Seattle leased warehouse and berthing space to a cannery company. Under the agreement, the cannery had exclusive-use rights to office space and “preferential”—or priority—use rights to berthing space and wharves. *Id.* at 620-21. This Court held that the parties had a lease, not a mere license, because when the cannery exercised its use rights, it had exclusive control of the facilities—

to the exclusion of all others. *Id.*; see also *Sea-Land Serv., Inc. v. County of Alameda*, 36 Cal. App. 3d 837, 842-44, 112 Cal. Rptr. 113 (1974) (holding that an agreement for “preferential use” of marine berths created a tenancy because it granted the tenant exclusive control of the leased premises during use).

What all these cases are saying really is very simple: to obtain the protection of the general nonliability rule, a landlord must transfer “exclusive control” of the leased premises to the tenant. *Regan*, 76 Wn.2d at 504. The critical issue is not control generally but control specifically “to that portion of the premises in which [the] plaintiff is injured.” *Id.* Control in the context of the duty owed by a landlord means the “authority to manage, direct, superintend, restrict or regulate” the tenant’s business on the leased premises. *Kirby v. Zlotnick*, 278 A.2d 822, 824 (Conn. 1971); see also *Ritto v. Goldberg*, 27 N.Y.2d 887, 265 N.E.2d 772, 774 (1970) (“It has been held uniformly that control is the test which measures generally the responsibility in tort of the owner of real property.”).

The lease here conveyed exclusive control of the Marine Facilities to the Ferry System. ASER 17-19. Priority use of the Marine Facilities gave the Ferry System exclusive control of the passenger ramp whenever it chose to exercise its use rights, even if that occurred only periodically.²⁷ “As a practical matter, only the Ferry [System] used the passenger ramp, and the priority use provision effectively gave the Ferry [System] exclusive

²⁷ See *Certification Order* at 9 (observing that the Ferry System “as a practical matter, has exclusive use of a part of the property for intermittent periods of time”).

control of the ramp when it was in Port—no other ship could dock at that time.”²⁸ See *Sea-Land*, 36 Cal. App. 3d at 842 (concluding that an agreement for “preferential use” of marine berths granted the tenant exclusive control during use, even though the landlord reserved the right to use the berths while the tenant was not exercising its use rights). Nobody could enter the Marine Facilities during the Ferry System’s use absent its permission. ER 582-83, 616. And the Port had no right to interfere with the Ferry System’s exercise of its use rights or to control, manage, or direct the Ferry System’s business.

Yes, the lease allowed the Port to permit other, nonconcurrent uses of the Marine Facilities by third parties when the Ferry System was not exercising its use rights, but those other uses could never interfere with the Ferry System’s use rights. ER 340.²⁹ In fact, the Port never leased the Marine Facilities to anyone other than the Ferry System. ER 510, 578. But even if the Port had, the existence of other nonconcurrent users of the Marine Facilities would be immaterial because a tenancy arises, and exclusive control still remains with the primary tenant, even if others may use a portion of the leased premises when the premises are not being used by the primary tenant. See, e.g., *Barnett*, 162 Wash. at 620-21; *Sea-Land*, 36 Cal. App. 3d at 842-44. The *label* of “priority use” of the Marine Facilities in this lease does not change the undisputed fact that the Ferry

²⁸ *Certification Order* at 8.

²⁹ See also *Certification Order* at 2, 3, 6, 10.

System had exclusive *control* of the passenger ramp whenever one of its ships was in the berth.

As evidence of the Ferry System's exclusive control, the Port needed to obtain permission to enter the premises when the Ferry System was exercising its use rights. ER 582-83, 616. The Port could not require the Ferry System to change its use, so long as the Ferry System was complying with the lease. ER 513-14, 794-95. The Ferry System was entitled to use the Marine Facilities, including the passenger ramp, as it saw fit, without any oversight, supervision, or control by the Port. The Ferry System's control of the Marine Facilities would always, as a practical matter, be exclusive vis-à-vis any other uses because only one ship could enter the berth at any given time. ER 613, 615, 635-36.³⁰ And the Port could terminate the Ferry System's lease only in the event of default not cured by the Ferry System. ER 350.

This is a matter of substantive control. The substance of this lease, while labeled "priority use," gave the Ferry System exclusive control of the leased premises, including the passenger ramp where Adamson was injured. As shown, the mere fact that a lease transfers possession for intermittent periods of time does not mean that exclusive possession was not transferred during those periods. Being granted what is labeled a priority-use right, rather than an exclusive-use right, should not matter if the tenant, when exercising its right, has exclusive control of the leased premises—the hallmark of a tenancy. The liability of a possessor should not be imposed

³⁰ See also *Certification Order* at 8.

on a landlord who has no control over the leased premises while the tenant exercises its use rights, and a third party is injured during the exercise of those rights—precisely what would happen here, should this Court answer the Ninth Circuit’s question in the affirmative.

To be sure, a landlord remains subject to liability for injuries caused by equipment remaining within the landlord’s control that is necessary to the tenant’s use of the leased premises. *Cf. Regan*, 76 Wn.2d at 504-05. But again, the Ferry System exercised exclusive control over the passenger ramp where and when Adamson was injured (including who operated the ramp and what training the operator received). *See, e.g., Lemm*, 425 S.W.2d at 198 (stating that liability requires control of the leased premises); *Craig v. A.A.R. Realty Corp.*, 576 A.2d 688, 694 (Del. Super. Ct. 1989) (stating the “well established common law principle” that “a landlord who has neither possession nor control of the leased premises is not liable for injuries to third persons.” (internal citations omitted)).

The priority-use provision gave both the Port and the Ferry System mutual benefits. *People v. Chicago Metro Car Rentals, Inc.*, 72 Ill. App. 3d 626, 28 Ill. Dec. 843, 391 N.E.2d 42, 45 (1979) (“[A] lease, by its very nature and purpose, confers benefits upon both the lessor and lessee.”). That provision guaranteed the Ferry System’s exclusive control of the Marine Facilities when the Ferry System wanted access to those facilities. *See* ER 781-82. That provision also gave the Port economic flexibility: since the Ferry System used the marine facilities only periodically, the Port could (but didn’t) arrange with other entities to maximize the economic utility of the

facilities. The priority-use provision was thus a way to benefit both parties while still granting the Ferry System the hallmarks of a tenancy: exclusive control of the premises when used by the tenant.³¹

The priority-use provision gave the Ferry System exclusive control of the leased premises when it chose to exercise its use rights under the lease, Adamson was injured when the Ferry System was exercising those rights on the part of the premises under the Ferry System's control, and the Port had no right to interfere with the exercise of those rights. Because the Ferry System had exclusive control of the leased premises under the priority-use provision, the Port should retain the protection of Washington's general nonliability rule for landlords.

(b) A commercial landlord's assumption of a general duty to maintain and repair the leased premises does not render the landlord a possessor.

Under Washington common law, a commercial landlord has no duty to maintain or repair leased premises. *Teglo*, 65 Wn.2d at 773-74; William B. Stoebuck, *The Law Between Landlord and Tenant in Washington: Part I*, 49 WASH. L. REV. 291, 358 (1974). But a landlord may assume such a duty under the terms of a lease, as one exception to the general rule of landlord nonliability. *Teglo*, 65 Wn.2d at 773-74; *see also* RESTATEMENT (SECOND) OF PROPERTY § 17.5 (1977); RESTATEMENT (SECOND) OF TORTS § 357 (1965). Before liability may be imposed, the landlord is entitled to

³¹ The Port notes that a priority-use right in a commercial lease *can* eliminate the general rule of landlord nonliability when the tenant does not have exclusive control of the leased premises while exercising its use rights. But those circumstances are plainly not present here.

notice of the defective condition and a reasonable opportunity to correct it. *Teglo*, 65 Wn.2d at 774. Because the duty arises out of the promise to repair, the contract defines the scope of the duty. *Brown*, 105 Wn. App. at 804.

The level of control sufficient to make a landlord liable as a possessor of land is not found in the landlord's mere assumption of a duty to maintain and repair, which is practically standard in modern commercial leases. *Lemm*, 425 S.W.2d at 195. "There must be *something more*—some additional fact or facts from which a jury could infer that under the agreement the tenant gave up and surrendered his right to exclusive possession and control and yielded to the landlord some degree or measure of control and dominion over the premises; some substantial evidence of a sharing of control as between landlord and tenant." *Id.* (emphasis added).

This Court has made clear that a landlord's assumption of a duty to maintain and repair is not that "something more" because "maintenance is not tantamount to asserting a right of control." *Resident Action Council v. Seattle Hous. Auth.*, 162 Wn.2d 773, 781, 174 P.3d 84 (2008). And that is the key here: exclusive control (or the lack thereof by the Port) over the leased premises.

This Court's decision in *Resident Action Council* is instructive. The city housing authority banned all signs from exterior doors in public housing. That regulation was challenged as violating residents' free speech. This Court had to determine who had control over the exterior doors: the housing authority or the tenants. This Court held that despite the housing

authority's duty to maintain the doors, the housing authority did *not* impliedly retain control over the doors. 162 Wn.2d at 780. This Court concluded that "maintenance is not tantamount to asserting a right of control." *Id.* at 781. Thus, even though the housing authority had maintenance and repair duties, the tenants still retained *actual*, exclusive control over their leased premises. *Id.* at 780-81.

Like the landlord in *Resident Action*, the Port assumed maintenance and repair duties. Yet those duties are not tantamount to a right of control over the Marine Facilities. For instance, if something structural broke in the office space to which the Ferry System was granted exclusive use, then the Port had the right to enter to make the needed repairs. But merely because a landlord assumes such a duty, and acquires the right to enter, does not mean that the landlord loses the protection of the general nonliability rule and owes a duty to all as an owner in possession. *See Port of Coos Bay*, 691 P.2d at 103.

The question before this Court is whether a landlord, merely by assuming a duty to maintain and repair acquires the right to interfere with the tenant's right to exclusive control, such as by controlling how the tenant's employees perform their work. The answer to that question should be "no." And the facts of this case should conclusively underscore why that answer should be "no."

3. The mechanical-hazards clause in the Port-Ferry System lease is not the “something more” that should render the Port in possession, because that duty also did not interfere with the Ferry System’s exclusive control of the leased premises.

Plaintiffs recognized they needed “something more” to try to strip the Port of the protection of the general rule of landlord nonliability. So Plaintiffs before the District Court pointed to the mechanical-hazards clause in the lease, which required the Port to “maintain the leased premises free of...mechanical hazards.” ER 345.

The parties disputed whether the slack risk could be deemed a “mechanical hazard.” Whether the parties intended under the 2009 lease that this clause gave rise to a duty on the part of the Port to upgrade the controls for raising and lowering the ramp so as to eliminate the slack risk is a contested issue of fact that the Ninth Circuit plainly expects will be tried on remand. But like the duty to maintain and repair, the duty to maintain the premises free of mechanical hazards cannot eliminate the protections of landlord nonliability because that duty does not interfere with the Ferry System’s exclusive control of the leased premises or otherwise grant the Port a right to control the Ferry System’s operations. In other words, the duty to maintain the premises free of mechanical hazards does not put the Port back in the possession of a possessor, owing a duty to everyone—including Ferry System employees—who come onto the facilities the Port has leased to the Ferry System, while the Ferry System is exercising its right of exclusive control over those facilities.

4. **A commercial tenant’s priority use of a portion of leased premises should be considered to give exclusive control when the tenant’s use of the premises, even if periodic, is exclusive as against the world when exercised, and the landlord may not interfere with the tenant’s use and control of the premises.**

The Ninth Circuit phrased the certified question “more broadly” by asking under what circumstances priority use will be considered to give exclusive control.³² Washington’s settled precedents answer this question, too.

As described earlier, that a commercial lease contains a priority-use right, coupled an assumed duty to maintain and repair, is insufficient to displace the general nonliability rule and render the landlord an owner in possession with a duty to all who enter the land. Whether a priority-use right and a duty to maintain and repair affect the landlord-nonliability rule depends on whether the tenant has *exclusive control in fact* of the property when it is exercising its use rights. If the landlord does not have the right to interject itself into how the tenant is conducting its business, then the traditional nonliability rule should apply. So long as the tenant when it is exercising its use rights has *actual, exclusive control* over the leased area, the landlord should not be subject to liability to anyone injured within that area, when the tenant is exercising those use rights, because during those times the landlord should owe no duty to those persons.

That the tenant’s use right is labeled a “priority” rather than an “exclusive” right should not matter. Substance, not form, should control, and here the substance is exclusive use, possession, and control.

³² *Certification Order* at 10.

V. CONCLUSION

This Court should answer the certified question by stating that the mere inclusion in a commercial lease of two clauses, the first of which describes the tenant's rights in terms of priority rather than exclusive use, and the second of which provides that the landlord assumes a duty to maintain and repair that the landlord does not have under the common law, is insufficient to deprive that landlord of the protections of the general rule of nonliability and thus impose on the landlord a duty owed to all as an owner in possession. Here, neither clause, alone or together, deprived the Ferry System of exclusive control of the leased premises. The priority-use provision *in substance* transferred exclusive control to the Ferry System each time it exercised its use rights, and the Port's assumption of the general duty to maintain and repair did not interfere with the Ferry System's exclusive control of the leased premises. The Port should retain the protection of the general nonliability rule and not be subject to any duties owed as an owner in possession.

Respectfully submitted this 25th day of September, 2018.

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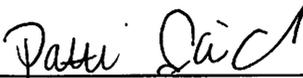
CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 15th day of September, 2018.



Patti Saiden, Legal Assistant

CARNEY BADLEY SPELLMAN

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