

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2/12/2019 12:06 PM  
BY SUSAN L. CARLSON  
CLERK

No. 96187-5

---

SUPREME COURT  
OF THE STATE OF WASHINGTON

---

SHANNON C. ADAMSON and NICHOLAS ADAMSON,  
husband and wife,

Respondents,

v.

PORT OF BELLINGHAM,  
a Washington Municipal Corporation

Appellant.

---

RESPONDENTS' ANSWER TO AMICI BRIEFS

---

James P. Jacobsen WSBA #16331  
Joseph Stacey, WSBA #12840  
Stacey & Jacobsen LLP  
4039 21<sup>st</sup> Ave W., Suite 401  
Seattle, WA 98199-1252  
(206) 282-3100

Philip A. Talmadge, WSBA #6973  
Talmadge/Fitzpatrick/Tribe  
2775 Harbor Avenue SW  
Third Floor, Suite C  
Seattle, WA 98126  
(206) 574-6661

Attorneys for Respondents Adamson

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	ii-iii
A. INTRODUCTION .....	1
B. STATEMENT OF THE CASE.....	2
C. ARGUMENT .....	4
(1) <u>The Issues Before the Court</u> .....	4
(2) <u>The Port and Its Allies Are Wrong When They Assert that Washington Recognizes a General Rule of Premises Owner Immunity from Liability Merely Because the Premises Are Leased</u> .....	5
(3) <u>The Port’s Duty As a Landlord</u> .....	15
(a) <u>The Port Retained a Duty to Shannon as to the Passenger Ramp by Contract</u> .....	15
(b) <u>The Port Owed a Duty to Shannon with Regard to a Latent Defect in the Passenger Ramp</u> .....	17
(c) <u>The Port Owed Shannon a Duty of Care as to the Passenger Ramp, a Common Area in the Terminal</u> .....	17
(d) <u>The Port Owed a Duty of Care to Shannon as the Owner of a Multi-Employer Worksite</u> .....	18
D. CONCLUSION.....	23

## TABLE OF AUTHORITIES

Page

### Table of Cases

#### Washington Cases

<i>Adamson v. Port of Bellingham</i> , 907 F.3d 1122 (9th Cir. 2018) .....	13
<i>Afoa v. Port of Seattle</i> , 176 Wn.2d 460, 296 P.3d 800 (2013) ....	7, 8, 19, 22
<i>Afoa v. Port of Seattle</i> , 191 Wn.2d 110, 421 P.3d 903 (2018) .....	8, 22, 23
<i>Barnett v. Lincoln</i> , 162 Wash. 613, 299 Pac. 392 (1913) .....	12
<i>Brady v. Autozone Stores, Inc.</i> , 188 Wn.2d 576, 397 P.3d 120 (2017).....	5
<i>Carlsen v. Global Client Solutions, LLC</i> , 171 Wn.2d 486, 256 P.3d 321 (2011).....	5
<i>Estep v. Security Savings &amp; Loan Soc.</i> , 192 Wash. 432, 73 P.2d 740 (1937).....	10
<i>Frobigh v. Gordon</i> , 124 Wn.2d 732, 881 P.2d 226 (1994).....	10
<i>Goucher v. J.R. Simplot Co.</i> , 104 Wn.2d 662, 709 P.2d 774 (1985) ...	20, 23
<i>Kelly v. Howard S. Wright Constr. Co.</i> , 90 Wn.2d 323, 582 P.2d 500 (1978).....	7
<i>Martinez Melgoza &amp; Assoc., Inc. v. Dep't of Labor &amp; Indus.</i> , 125 Wn. App. 843, 106 P.3d 776, review denied, 155 Wn.2d 1015 (2005) .....	21
<i>McCutcheon v. United Homes Corp.</i> , 79 Wn.2d 443, 486 P.2d 1093 (1971).....	8
<i>Meshner v. Osborne</i> , 75 Wash. 439, 134 Pac. 1092 (1913) .....	10
<i>Regan v. City of Seattle</i> , 76 Wn.2d 501, 458 P.2d 12 (1969) .....	9, 10, 16
<i>Rossiter v. Moore</i> , 59 Wn.2d 722, 370 P.2d 250 (1962) .....	10
<i>Spokane Research &amp; Defense Fund v. City of Spokane</i> , 155 Wn.2d 89, 117 P.3d 1117 (2005).....	11
<i>Stute v. P.B.M.C., Inc.</i> , 114 Wn.2d 454, 788 P.2d 545 (1990) .....	20-21, 23
<i>Teglo v. Porter</i> , 65 Wn.2d 772, 399 P.2d 519 (1965).....	9
<i>Ward v. Ceco Corp.</i> , 40 Wn. App. 619, 699 P.2d 814, review denied, 104 Wn.2d 1004 (1985).....	21, 23

#### Federal Cases

<i>Kermarec v. Compagnie Generale Transatlantique</i> , 358 U.S. 625, 79 S. Ct. 406, 31 L. Ed. 2d 550 (1959).....	13
--	----

Statutes

RCW 2.60.030(2).....5

Rules and Regulations

RAP 9.11.....11

Other Authorities

<https://portofseattle.nextrequest.com/documents/222300>.....13  
*Restatement (Second) of Torts* § 343 .....5, 14, 15  
*Restatement (Second) of Torts* § 343A .....5, 14, 15  
*Restatement (Second) of Torts* § 357 .....9  
*Restatement (Second) of Torts* § 360 .....9  
*Restatement (Third) of Torts* § 49.....14

A. INTRODUCTION

Rather than respond individually to the *amici* briefs of the Washington State Labor Council (“WSLC”), the Inland Boatmen’s Union of the Pacific (“IBU”), the Washington State Association for Justice Foundation (“WSAJF”), the International Council of Shopping Centers, et al. (“ICSC”), or the Washington Public Ports Association (“WPPA”), Shannon Adamson will respond to those *amici* briefs in this single answering brief.

As the Court is well aware, Shannon was a crew member of the Alaska ferry, M/V COLUMBIA, and she was severely injured when the Port of Bellingham’s (“Port”) passenger ramp that connected her vessel to the Port’s Bellingham Cruise Terminal (“Terminal”) collapsed. The Port leased a portion of the Terminal to Shannon’s employer, the Alaska Marine Highway System (“AMHS”). The Port had been aware of the ramp collapse hazard since 2008 but took no steps to remedy that hazard or to tell persons working on or near the ramp, like Shannon, of its specific danger. The Port was responsible by contract and by law for the repair of the passenger ramp and the remediation of any mechanical or structural defects in it. The Port could have prevented Shannon’s catastrophic injuries by the expenditure of only a few dollars and a small amount of an electrician’s time.

The *amici* briefs confirm that once this Court analyzes the three

distinct duty sources that were before the jury, it should conclude that the Port owed Shannon a duty as a premises owner, the premises owner of a multi-employer worksite when it created the workplace hazard that injured Shannon, and a landlord with regard to the ramp. The Court should answer the Ninth Circuit's certified questions YES and NO.

#### B. STATEMENT OF THE CASE

Certain facts in this case are important for the Court's analysis, despite the efforts of the Port and its allies, ICSC and WPPA, to obfuscate them. It is beyond dispute that:

- The Port and AMHS entered into a lease agreement for a portion of the Port's large Terminal (ER 336-65);
- The lease gave AMHS only a small physical portion of the overall Terminal facility for limited periods of time (ER 340 (§1.2); resp'ts br. at 4 n.3);
- At that, AMHS had only "priority," not "exclusive," use of a small physical portion of the overall Terminal, the passenger ramp and other marine facilities (ER 340); the Port retained the use of most of the physical portions of the Terminal at all times, and it controlled the portion of the Terminal leased to AMHS when its ships were not berthed there (resp'ts br. at 5-6);
- By the lease's terms, the Port had the *sole* responsibility to keep the ramp in "good repair" (ER 343 (§4.1));
- The Port agreed to avoid "Accident Hazards" by maintaining the premises free of "structural or

mechanical hazards” (ER 345 (§4.7));

- The Port had the right to enter the leased premises at “all reasonable times” to effectuate its lease-related obligations (ER 348 (§5.1(8)));
- The Port had an obligation to create an operations manual for the ramp and to require its operation in accordance with that manual, but it never created such a manual (ER 344 (§4.5));
- The public used the ramp (resp’ts br. at 6);
- The Port’s own employees, AMHS employees, and Port or AMHS contractors used/or operated the ramp at various times; Port contractors repaired or maintained it (resp’ts br. at 6);
- The Port knew the ramp was dangerous from the Geiger Report (resp’ts br. at 9-10);
- The Port never told AMHS’s operational staff or crews that the ramp was hazardous (resp’ts br. at 10-11);
- The Port knew that the interlocking of the ramp’s controls would have prevented a ramp collapse (ER 892), but chose not to interlock the ramp controls (SER 109-14);
- Interlocking the ramp controls was easy and inexpensive, costing only a few dollars and a few minutes of an electrician’s time (resp’ts br. at 9-10);
- Shannon Adamson was injured because the ramp controls were not interlocked and the ramp collapsed (SER 285-96, 321);
- The jury determined that both Shannon and AMHS were fault-free (ER 161-62).

C. ARGUMENT

As the Adamsons have argued, and as confirmed by the WSAJF, IBU, and WSLC *amicus* briefs, there are multiple duties the Port owed to Shannon that it breached upon which the jury's verdict may be sustained – the Port's common law premises owner's duty to an invitee, its duty under the AMHS lease as a landlord for its obligations it chose to retain to repair/maintain the premises free of structural or mechanical defects, its duty as a landlord with respect to a common area or a latent defect on the premises, or its duty as the owner of a multi-employer worksite to maintain a safe work setting, particularly where it created the hazard that injured a worker. Contrary to the Port's wishful thinking, the Adamsons do not *concede* that these duty questions do not bear on the Ninth Circuit's certified questions. Reply br. at 6.

(1) The Issues Before the Court

The Port and its *amici* allies hope to persuade this Court that the Ninth Circuit's certified questions compel it to accept only the facts set forth in the Ninth Circuit's order as true, reply br. at 5-6, and to ignore most of the *multiple* bases upon which it owed Shannon Adamson a duty – as a premises owner for latent defects on the premises or in a common area, as a premises owner with multiple employers on its presence who created the hazardous condition that injured Shannon, or as a landlord that reserved to

itself the exclusive responsibility for the repair of the premises and the maintenance of the structural and mechanical integrity of the ramp at issue. Reply br. at 6-13. The Port is wrong. This Court is entitled to review the entire record as to the facts here,<sup>1</sup> and *all* of the duty issues discussed in the Adamson’s respondent brief are before this Court in addressing the Ninth Circuit’s certified questions. As the IBU cogently notes in its brief at 6-7, the certified question as to “exclusivity” bears on all of the duty-related arguments advanced by the Adamsons, and those duty issues are properly before this Court, the Port’s speculation about what the Ninth Circuit panel has decided notwithstanding.

(2) The Port and Its Allies Are Wrong When They Assert that Washington Recognizes a General Rule of Premises Owner Immunity from Liability Merely Because the Premises Are Leased

The general principle in Washington law is that a premises owner has responsibility for its premises under the principles of the *Restatement (Second) of Torts* §§ 343, 343A. Resp’ts br. at 16-23. There are certain exceptions to those general principles that benefit premises owners when they lease their premises, but those *exceptions* to the general rule are a far

---

<sup>1</sup> As for the facts on review, this Court considers the certified question not in the abstract, but based on the *entire* certified record from the Ninth Circuit. RCW 2.60.030(2); *Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 256 P.3d 321 (2011). This includes *all* excerpts of record from the Ninth Circuit. *Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 579 n.1, 397 P.3d 120 (2017).

cry from the Port's contention that landlords generally enjoy an immunity from liability merely by leasing their premises. The WSAJF amicus brief is particularly apt on this point.

WSAJF's brief confirms the point articulated by the Adamsons, resp'ts br. at 8-10, that the general principles of premises liability apply to a landlord as a possessor of land, not the Port's archaic *caveat emptor* or "landlord nonliability" notions. WSAJF br. at 6-7, 8-14. The IBU also effectively argues in its brief at 7-8 that there is no "general rule of landlord nonliability" in Washington. Such a "rule," to the extent it exists in modern Washington law, is at best a vestigial aspect of the English common law's tribute to landowners that this Court should fully reject once and for all. Critically, as the WSAJF observes in its brief at 9-10, to the extent the notion of *caveat emptor* applies, it only applies to contracts and not torts. Applying this archaic principle would be particularly pernicious in the tort setting. Third parties, like Shannon, invited onto a public premises cannot take steps to "beware" of hazards that the premises owner creates. A prospective buyer may be able to "beware" and live up to the admonition of *caveat emptor*, but certainly not a worker like Shannon using the passenger ramp that the Port agreed to repair and maintain free of structural or mechanical defects. Unbeknownst to Shannon (or AMHS's operating staff for that matter), the Port deliberately chose not to interlock the controls on

the passenger ramp and avoid Shannon's devastating injuries. *Caveat emptor* has no place in this setting.

Ultimately, the Port asks this Court to establish a stunted duty for a premises owner by which such an owner can foist all responsibility for premises hazards, even ones it created or agreed contractually to address, upon a lessee of the premises. But the Port's articulation of its so-called role of "landlord nonliability" duty is flatly inconsistent with Washington law and positively harmful.

This Court in *Afoa v. Port of Seattle*, 176 Wn.2d 460, 296 P.3d 800 (2013) ("*Afoa I*"), established a more practical sense of a premises owner's duty. The *Afoa I* court discussed at length the common law duty to maintain safe common work areas adopted in *Kelly v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978). *Id.* at 475-77. The Court rejected the proposition that a general contractor could absolve itself of workplace safety responsibilities merely by entering into a contract with a subcontractor. It is no different for a premises owner who leases its premises to another with regard to hazardous instrumentalities on those premises – merely leasing the premises does not absolve the premises owner of responsibility. Rather, the *Afoa I* court specifically rejected the notion that the labels attached by the parties to various relationships invariably control the outcome of a case, but rather the substance of the parties'

relationships is critical. *Id.* at 468, 477-81. Thus, the key question when multiple entities and their employees use the premises is: who is in the best position to ensure the safety of invitees on Port premises, like Shannon, or the public generally in connection with the passenger ramp, the instrumentality of her harm? *Id.* at 478-79.<sup>2</sup> Here, Shannon certainly couldn't interlock the ramp controls. Nor could AMHS's operational staff, as they did not know of the need for interlocking the controls, and had no right to make such a change to the ramp under the lease's terms. Ultimately, only the Port could address the mechanical and structural safety of the ramp, and it owed a duty of care to Shannon accordingly.

The Port's continued effort to beat the dead horse argument of *caveat emptor*, essentially a rule of landlord immunity, reply br. at 19-24, is not the law of Washington where this Court in numerous landlord liability cases established numerous circumstances in which landlord *are* liable. *E.g., McCutcheon v. United Homes Corp.*, 79 Wn.2d 443, 486 P.2d 1093

---

<sup>2</sup> As the Court observed: "... the safety of workers does not depend on the formalities of contract language. Instead, our doctrine seeks to place the safety burden on the entity in the best position to ensure a safe working environment."

Moreover, the "jury is ultimately responsible for determining 'the entity in the best position to ensure a safe working environment.'" *Afoa II*, 191 Wn.2d at 125 (*quoting Afoa I*, 176 Wn.2d at 479).

(1971) (adopted *Restatement (Second) of Torts* § 360 to find landlord liable for injuries to tenants in common areas); *Teglo v. Porter*, 65 Wn.2d 772, 399 P.2d 519 (1965) (adopting *Restatement (Second) of Torts* § 357 and holding landlord liable for premises conditions it covenanted to address); or *Regan v. City of Seattle*, 76 Wn.2d 501, 458 P.2d 12 (1969) (landlord liable to invitees to the premises it leased for injuries arising from latent defects on its premises).

However, to advance the Port's baseless, and essentially fact-driven argument that a landlord's duty is severely truncated, the Port has enlisted WPPA's support.

In its brief, WPPA deliberately misstates Washington law on landlord liability and offers an entirely new factual argument never before advanced in this case (and certainly not presented to the jury), hoping that this Court will overlook the fact that this new evidence on appeal does not meet the requirements of RAP 9.11 by offering only a "fig leaf" judicial notice argument. WPPA's ill-conceived and sloppy offering does not help the Port's position here.

First, on the law, WPPA echoes the Port in asserting in its brief at 9 that "under longstanding Washington law, a landlord owes no general duty of care to those who enter upon the property while in the tenant's control," citing *Regan*. It repeats that misstatement, again citing *Regan*, in its brief

at 17. As noted above, this statement is simply wrong.

As this Court stated in *Regan*, a premises owner/landlord is liable to the public invited onto its premises for injuries caused by latent defects on those premises, regardless of whether a lease took place. *Regan*, 76 Wn.2d at 504 (“If a landlord, with actual or constructive knowledge of a defect in his premises, leases these premises for a purpose involving the admission of the public then he is subject to liability for injuries to the public caused by this defect.”). *See also, Estep v. Security Savings & Loan Soc.*, 192 Wash. 432, 437-38, 73 P.2d 740 (1937) (landlord who covenants to repair premises has an antecedent duty to inspect same for latent defects);<sup>3</sup> *Frobig v. Gordon*, 124 Wn.2d 732, 736, 881 P.2d 226 (1994) (landlord has duty to tenant for latent premises defects).

Similarly, a premises owner/landlord is liable to others injured by its imperfect execution of its covenanted repair or other structural maintenance obligations. *Rossiter v. Moore*, 59 Wn.2d 722, 370 P.2d 250 (1962) (landlord owed duty to tenant’s guest who fell after landlord, who had orally covenanted to repair premises, removed a railing; Court observed that apart from landlord-tenant law, a landlord is liable as a premises owner

---

<sup>3</sup> *Accord, Mesher v. Osborne*, 75 Wash. 439, 449-50, 134 Pac. 1092 (1913) (child fell into cesspool after landlord negligently executed his covenant to keep premises in repair).

for its affirmative negligent acts).

As for WPPA's attempt to interject a factual argument regarding the interpretation of lease agreements into this case based on new evidence not presented to this Court by motion under RAP 9.11, WPPA br. at 5 n.1, this Court should reject it.<sup>4</sup>

WPPA cannot cite any authority that supports the proposition, rejected here by the jury, that the term "priority use" means that AMHS, not the Port, bore the exclusive responsibility to repair the passenger ramp. To achieve this feat of interpretive legerdemain, the Court would have to ignore the specific terms of the lease that gave AMHS *limited* use of the premises, ER 340. The parties *clearly* expressed their intent as to the passenger ramp, a part of the leased "Marine Facilities" – "priority use" meant that AMHS "is entitled to superior but not exclusive right of use to the identified areas. [The Port] may allow other uses of the priority use areas so long as such use

---

<sup>4</sup> Although this Court's January 23, 2019 letter directed WPPA to refile its *amicus* brief, deleting its extensive appendix, and WPPA did so in its corrected brief, it did not take the Court's point to heart when it tries to slip new evidentiary material into the record in the guise of a footnote to a website. That new evidence was never presented to the district court. Judicial notice should not allow such evidence to be considered. The existence of "priority use" terms in port leases is not the real point WPPA seeks to make with this new evidence. Rather, it wants to argue an interpretation of such lease agreements, without such leases having been tested in discovery, that is far from an essentially disputed fact. Judicial notice applies narrowly on appeal and must be addressed in light of RAP 9.11. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 98-99, 117 P.3d 1117 (2005). WPPA makes no effort to comply with RAP 9.11. This Court should reject any argument based on the footnoted materials.

does not unreasonably interfere with [AMHS's] use.” *Id.* But, more importantly, the Port and WPPA ignore the specific repair covenant (§ 4.1) and Accident Hazards (§ 4.7) provisions in the lease that made the ramp *exclusively the Port's responsibility*, not AMHS's.<sup>5</sup> Indeed, the Port's Dave Warter threatened to shut down the ramp for hazards, demonstrating Port control over it. ER 855 (“I will not hesitate to shut this ramp down if it is deemed unsafe.”).

Not satisfied with ignoring the Port's lease provisions noted above, WPPA doubles down by contending that if the Port's lease agreement with AMHS is enforced as written, ports cannot control maritime operations sufficiently to prevent accidents while a vessel is berthed in one of their facilities. WPPA br. at 10-17. In making this argument, WPPA seemingly contends that federal maritime law controls. WPPA even goes so far as to assert that enforcing the Port's lease agreement as written would have “sweeping implications” for Washington ports. *Id.* at 17-20.

On the latter point, it should not be lost on this Court that the Adamsons have asked merely that the Port *abide* by the terms of the lease

---

<sup>5</sup> WPPA's reliance on the old case of *Barnett v. Lincoln*, 162 Wash. 613, 299 Pac. 392 (1913) is truly odd. WPPA and the Port, not Shannon, are fixated on narrow pieces of the lease, ignoring all of its provisions. Indeed, in that case, the question was not the interpretation of lease terms, but rather whether a lease existed at all. That a reviewing court would look to all aspects of the instrument manifesting whether a lease is created is sensible, and unremarkable.

it wrote. All of the “parade of horrors” claims from WPPA to the contrary, the Port determined that it wanted to retain full responsibility to repair its Terminal passenger ramp and to keep it free of structural or mechanical defects. If it wanted otherwise, it could, and should have, so covenanted with AMHS.<sup>6</sup>

As for WPPA’s contention on maritime law, the Adamsons argued that federal maritime law applied here to no avail. *Adamson v. Port of Bellingham*, 907 F.3d 1122 (9th Cir. 2018). There is considerable irony in WPPA asserting that federal maritime law has any bearing given the Ninth Circuit’s decision. Under that federal maritime law, a regime of reasonable care under the circumstances applies. *See, e.g., Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 631-32, 79 S. Ct. 406, 31 L. Ed. 2d 550 (1959). Under that standard, the Port clearly had a duty to Shannon that it breached here.

Quite apart from Washington’s common law noted above, WSAJF cogently suggests that a landlord remains a possessor even *after* the lease of the premises where that possessor/landlord evidences an intent to control

---

<sup>6</sup> Ironically, it should be noted that the Port of Seattle lease of its Bell Street terminal to Norwegian Cruise Lines in Article 16 provided that Norwegian, not that port, had the duty to repair and maintain passenger ramps. § 16.1 (“Tenant shall, at its sole cost and expense, keep all furniture, fixtures, operating equipment (including the passenger gangways, passageways, and mobile ramps as well as luggage handling conveyors), and all security equipment necessary for Cruise Ship Activities in good order, maintenance and repair.”). <https://portofseattle.nextrequest.com/documents/222300>.

the premises in salient fashion, citing *Restatement (Third) of Torts* § 49. WSAJF br. at 7. Indeed, critically, control under that *Restatement* section can be manifested with regard to risks on the premises over which the possessor has the authority and ability to take steps to reduce, or over instrumentalities of harm present on the premises. *Id.*<sup>7</sup> Moreover, the Third *Restatement* contemplates multiple possessors with shared control. *Id.* at 7-8.

WSAJF requests that this Court adopt the analysis of the Third *Restatement* as to the definition of a possessor and the attendant concept of control, particularly where the use of premises is shared. *Id.* at 7-8. The Adamsons certainly agree with that analysis, even though the same result occurs in this case under the *Restatement (Second) of Torts* §§ 343, 343A

---

<sup>7</sup> Comment t to § 49 addresses the duty of “former possessors,” purchasers of premises from a former owner. Liability flows to such former possessors under certain circumstances such as those in Illustration 8:

Tate Industries owns a building it uses for manufacturing trailers. When Tate purchased the building, it contained scaffolding attached to ceiling beams that permitted employees to reach the tops of trailers during the assembly process. Needing a larger plant, Tate agrees to sell the facility to Gracie Industries. After Tate ceases manufacturing operations and anticipates moving, it becomes aware that a connecting piece of the scaffolding is cracked. The crack is not visible, however, because wooden planks obscure the piece. Tate does not reveal these defects to Gracie, which is unaware of them. After Gracie takes possession, Megan, one of its employees, is injured when the scaffolding collapses and she is thrown to the ground. Tate is subject to liability to Megan.

Of course, the Port is in no sense a “former possessor” of the Terminal or its passenger ramp, but if it were, liability would, and should, flow to it for its failure to interlock the ramp’s controls.

and existing Washington law, as noted above.

In sum, the Port's assertion that the general rule in Washington is *caveat emptor* or "landlord nonliability" is flatly wrong, as the Adamsons, WSAJF, and IBU make very clear. The WPPA's arguments offer little assistance to the Port's position. The general rule in Washington is that a premises possessor owes a duty of care for persons it allows on its premises under §§ 343/343A. That rule is tempered in some instances when the possessor leases the premises, as will be discussed *infra*.

(3) The Port's Duty As a Landlord

The Port claims that it did not have a duty with regard to the passenger ramp, despite its choice to retain such a duty, and common law and statutory principles imposing such a duty, because AMHS's "priority use" of the ramp was actually an "exclusive" use of the ramp in defiance of the lease's actual language. It also ignores the jury's finding that AMHS was *without fault* for Shannon's injuries. This Court should reject the Port's contentions.

(a) The Port Retained a Duty to Shannon as to the Passenger Ramp by Contract

The Port acknowledged in its opening brief that it had a duty as a landlord to Shannon derived from its lease of the Terminal to AMHS. Appellant br. at 33 ("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." (citing *Regan*); 36 ("... a landlord may assume such a duty under the terms of a lease..."). But on reply, the Port stubbornly insists that this duty issue is not before this Court. Reply br. at 12-13. It attempts to argue that the multiple repair/maintenance responsibilities it *chose* to retain by lease covenant as to the ramp but not make it the ramp's possessor for purposes of liability. Reply br. at 17-19. But, of course, on this highly factual question, on proper instructions, *the jury ruled against it* and in Shannon's favor.

The significance of "exclusive" and "priority" use should be for a jury to decide, but the critical point here is that AMHS *never* had *exclusive* control of the passenger ramp that harmed Shannon. Resp'ts br. at 31-33. *See also*, WSAJF br. at 16-20; IBU br. at 4-7; 9-13.

Here, based on the terms of the lease itself, notwithstanding the Port's present, tortured argument that AMHS actually "controlled" the ramp, the Port had the explicit responsibility to provide an operator manual for the ramp and to compel users to abide by it, and to repair the ramp and to maintain it free of structural or mechanical defects that might cause accidents. The Port, and only the Port, could close down the ramp if it was unsafe. ER 855. The Port, and only the Port, could spend the money to effectuate changes on the ramp like interlocking its controls. Even the

Port's counsel admitted that the Port controlled the ramp. SER 262.

In sum, this Court should reject the contention of the Port and its *amicus* allies, WPPA, that the mere lease of a priority use of a portion of the physical premises of the Port's Terminal, for a temporally limited period, somehow exonerates the Port from its common law or covenanted duty to Shannon as to the ramp.

(b) The Port Owed a Duty to Shannon with Regard to a Latent Defect in the Passenger Ramp

As the Adamsons argued in their brief at 48-58, the Port owed Shannon a duty of care in connection with latent defects in the passenger ramp at its Terminal, regardless of whether the Port gave AMHS "priority" or "exclusive" use over it. A premises owner has a duty to persons it knows will be on its premises for latent defects thereon under Washington's premises liability common law, regardless of whether the premises have been leased. *See* WSAJF br. at 6-8.

The Port and its *amici* allies have no real answer to this authority other than the Port's speculation about what the Ninth Circuit panel determined. Reply br. at 10.

(c) The Port Owed Shannon a Duty of Care as to the Passenger Ramp, a Common Area in the Terminal

Further, as the Adamsons contend in their respondents' brief at 44-48, Washington law unambiguously provides that a landlord is liable for

hazards in common areas that result in injuries to others. This is particularly true as to common areas in waterfront facilities. The IBU brief is particularly apt on this point, reaffirming that a landlord retains responsibility for hazards found in common passageways such as a passenger ramp. IBU br. at 14-17.

The Port and its *amici* allies again have no real answer to this aspect of landlord liability. Reply br. at 11-12.

(d) The Port Owed a Duty of Care to Shannon as the Owner of a Multi-Employer Worksite

Rather than address the Port's duty as the owner of premises in which multiple employers are working, resp'ts br. at 23-31, the Port is merely dismissive of that argument, claiming the Ninth Circuit had "ruled" on this issue, when that court's certification order did not address it. Reply br. at 8.<sup>8</sup> In its desperation to avoid an issue that is so clearly unfavorable to it, as the IBU and WSLC briefs confirm, the Port conjures up factual and legal arguments to support its position. Contrary to the facts, in a footnote, *id.* at 8 n.5, it asserts that its Terminal was not a multi-employer worksite, and then it contends that any liability for a multi-employer worksite is confined to those circumstances where it controlled the movement of all

---

<sup>8</sup> Conspicuously, the Port's *amici* allies, ICSC, apparently do not share the Port's sense that the multi-employer worksite issue is not before this Court.

workers on the site. *Id.* at 8-9. It is wrong on both assertions.

First, its factual argument that the Terminal was not a multi-employer worksite is just flatly wrong. The district court recognized that this was a viable theory in the case when it denied the Port's summary judgment motion. ER 12-15. The district court denied summary judgment to the Port because the Port, as the owner of premises where multiple employers were working, had a duty to provide a workplace instrumentality it controlled – the ramp – that was safe. *Id.* More to the point, factually, the Port's own employees were at the Terminal providing a variety of services related to Terminal operations, Port and AMHS contractors were at the Terminal operating the ramp, Bellingham police provided security there, and the public used the ramp. Resp'ts br. at 5-7, 24. The testimony at trial of Richard Gleason, a certified workplace safety specialist, that the Port was the "controlling employer" of a multi-employer site, SER 157-59, was *unrebutted*. The Port's footnote misleadingly tries to suggest that this Court should assess the ramp operation in isolation from the multiple tasks undertaken at the Terminal at the Port's direction, contrary to this Court's direction in *Afoa I*.

Second, on the law, the Port obstinately tries to ignore the fact that as the Terminal's owner it had unambiguous WISHA obligations for safety of *any* employees working there that it could not delegate to anyone else.

More critically, it is unambiguous here that the Port *alone* had responsibility for the ramp itself, to ensure that it was repaired when necessary, and ensure that it was repaired when necessary, and maintained free of structural and mechanical defects generally. Again, it was the Port's decision, and the Port's alone, not to interlock the ramp controls.

Both the WSLC and IBU briefs make it very clear that the Port is responsible for hazards it creates to any employee working on its site. WSLC br. at 9-11; IBU br. at 18-20. In particular, the WSLC brief carefully delineates the WISHA duties that apply to the Port regarding its ownership of a site in which the employees of multiple employers are performing work. The obligations imposed by WISHA with regard to safe instrumentalities with which work is conducted have nothing to do with the need for general control of the work in the workplace necessary to treat a property owner as the equivalent of a general contractor. As the WSLC brief notes at 9, the *control of the instrumentality of the harm* – here, the passenger ramp – is key. The port *created* the hazard at its passenger ramp by choosing not to interlock its controls. Even if the Port tried to delegate responsibility for the mechanical safety of the ramp (and it expressly did not do so, reserving that control to itself in the lease), the duty is *non-delegable*.

The Port simply has no answers for this Court's decisions in *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 709 P.2d 774 (1985) and *Stute*

*v. P.B.M.C., Inc.*, 114 Wn.2d 454, 788 P.2d 545 (1990), or the Court of Appeals decisions in *Ward v. Ceco Corp.*, 40 Wn. App. 619, 699 P.2d 814, *review denied*, 104 Wn.2d 1004 (1985) and *Martinez Melgoza & Assoc., Inc. v. Dep't of Labor & Indus.*, 125 Wn. App. 843, 106 P.3d 776, *review denied*, 155 Wn.2d 1015 (2005) that plainly articulate the principle that where an owner of a multi-employer worksite affirmatively *creates* the dangerous condition that injures the employee of an employer on that site, it is liable. *Stute*, 114 Wn.2d at 461 (“Since subcontractors lack the supervisory authority of a general contractor, the injury party must prove the subcontractor was in control of *or* created the dangerous condition in order to hold the subcontractor liable.”) (emphasis added).

The ICSC *amici* brief is particularly superficial on this key point. ICSC’s brief looks generally to the control over the premises generally and not to the property owner’s control over the specific instrumentality of the plaintiff’s harm. *See, e.g.*, ICSC br. at 4 (discussion of outdoor seating areas in malls). The ICSC *amici* make the glib observation that “possession is nine-tenths of the law,” but ignore the fact that where, as here, the Port retained control of the passenger ramp and its maintenance and repair, chose not to spend but a few dollars to interlock the ramp’s controls when it was on notice of the ramp’s hazard, chose to tell no operational staff (its own, its contractors, or AMHS) of the hazard, and the ramp, not unexpectedly

harmed Shannon without warning, the Port had a duty to Shannon.

Simply put, the Port *created* the dangerous condition at the ramp it controlled – it refused to interlock the controls. It bore responsibility to those who were then harmed by its dangerous instrumentality. The Port’s workplace safety duty as to the ramp was the Port’s alone by contract and non-delegable by statute, regulation, and common law. WSLC br. at 13-14.

Contrary to the Port’s and ICSC’s argument, this Court’s decision in *Afoa v. Port of Seattle*, 191 Wn.2d 110, 421 P.3d 903 (2018) (“*Afoa II*”) in no way detracted from the principle articulated by the *Afoa I* court that an owner of a multi-employer worksite could have liability even in the absence of control over the worksite where the premises owner created or controlled the instrumentality of the plaintiff’s harm. The Court in *Afoa II* reaffirmed the principle that a premises owner exercising control over work on a multi-employer site equivalent to that of a general contractor has a non-delegable duty (as would a general contractor under WISHA) to the employees of subcontractors on those premises. 191 Wn.2d at 121. The Court reaffirmed that this duty was non-delegable. *Id.* at 123 n.10 (“When an entity has a nondelegable duty, it cannot escape liability by delegating its duty to another entity.”). The main thrust of *Afoa II*, however, was the allocation of fault to certain empty chair defendants and not the situation, as here, where the premises owner created a hazard on its premises and then

specifically retained responsibility for the instrumentality that created the hazard.<sup>9</sup> *Afoa II* did not alter the principle articulated in *Goucher*, *Stute*, or *Ward*, and it would be bad public policy to do so. An entity like the Port retaining control over the structural and mechanical safety of a workplace instrumentality is best situated to address its hazards, and to bear the liability of failing to do so.

In sum, the Port owed Shannon a duty as the owner of a multi-employer premises where it retained responsibility for an instrumentality of that work place that was hazardous and caused harm to Shannon.

#### D. CONCLUSION

The *amici* briefs submitted in this case readily confirm that the Port owed Shannon a duty of care as a premises owner, an owner of property on which multiple employees were working, or as a landlord. This Court should answer the certified questions YES and NO. The jury's verdict should be upheld. Costs on appeal should be awarded to the Adamsons.

---

<sup>9</sup> The Court expressly reaffirmed the Port's fault. *Id.* at 124 ("There is a long-standing common law duty to provide a safe workplace in Washington, and the Port is directly in this case as a result...") Nor did the Court disturb the jury's verdict finding the Port liable as a premises owner. *Id.* at 135 n.1.

DATED this 12th day of February, 2019.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973  
Talmadge/Fitzpatrick/Tribe  
2775 Harbor Avenue SW  
Third Floor, Suite C  
Seattle, WA 98126  
(206) 574-6661

James P. Jacobsen WSBA #16331  
Joseph Stacey, WSBA #12840  
Stacey & Jacobsen LLP  
4039 21<sup>st</sup> Ave W., Suite 401  
Seattle, WA 98199-1252  
(206) 282-3100

Attorneys for Respondents Adamson

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the *Respondents' Answer to Amici Briefs* in Supreme Court Cause No. 96187-5 to the following:

James Jacobsen  
Joseph Stacey  
Stacey & Jacobsen LLP  
4039 21st Avenue West, Suite 401  
Seattle, WA 98199

Dmitri Iglitzin  
Barnard Iglitzin & Lavitt LLP  
18 West Mercer Street, Suite 400  
Seattle, WA 98119

Frank J. Chmelik  
Seth A. Woolson  
Chmelik Stikin & Davis, P.S.  
1500 Railroad Avenue  
Bellingham, WA 98225-4542

Howard M. Goodfriend  
Smith Goodfriend, P.S.  
1619 Eighth Avenue North  
Seattle, WA 98109

Michael B. King  
Jason W. Anderson  
Rory D. Cosgrove  
Carney Badley Spellman, P.S.  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104-7010

Daniel E. Huntington  
Richter-Wimberley PS  
422 W. Riverside Avenue  
Suite 1300  
Spokane, WA 99201

Sandip Soli  
Real Property Law Group, PLLC  
1326 Fifth Avenue, Suite 654  
Seattle, WA 98101

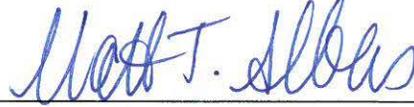
Valerie McOmie  
4549 NW Aspen Street  
Camas, WA 98607

Molly J. Henry  
Alicia L. Lowe  
Schwabe, Williamson & Wyatt, P.C.  
1420 Fifth Avenue, Suite 3400  
Seattle, WA 98101

Original E-filed with:  
Supreme Court Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: February 12, 2019, at Seattle, Washington.



---

Matt J. Albers, Paralegal  
Talmadge/Fitzpatrick/Tribe

**TALMADGE/FITZPATRICK/TRIBE**

**February 12, 2019 - 12:06 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 96187-5  
**Appellate Court Case Title:** Shannon C. Adamson, et al v. Port of Bellingham

**The following documents have been uploaded:**

- 961875\_Briefs\_20190212120240SC283322\_5791.pdf  
This File Contains:  
Briefs - Answer to Amicus Curiae  
*The Original File Name was Respondents Answer to Amici Briefs.pdf*
- 961875\_Motion\_20190212120240SC283322\_5891.pdf  
This File Contains:  
Motion 1 - Overlength Answer  
*The Original File Name was Mot for Overlength Answer to Amici Briefs.pdf*

**A copy of the uploaded files will be sent to:**

- abrenes@chmelik.com
- aloupe@maritimelawyer.us
- alowe@schwabe.com
- anderson@carneylaw.com
- andrienne@washingtonappeals.com
- assistant@tal-fitzlaw.com
- danhuntington@richter-wimberley.com
- fchmelik@chmelik.com
- fretonio@schwabe.com
- howard@washingtonappeals.com
- iglitzin@workerlaw.com
- jjacobsen@maritimelawyer.us
- jstacey@maritimelawyer.us
- kblue@chmelik.com
- king@carneylaw.com
- lmcmaster@chmelik.com
- matt@tal-fitzlaw.com
- mhenry@schwabe.com
- sandip.soli@gmail.com
- ssoli@rp-lawgroup.com
- swoolson@chmelik.com
- valeriamcomie@gmail.com

**Comments:**

Motion for Leave to File Overlength Answer to Amici Briefs; Respondents' Answer to Amici Briefs

---

Sender Name: Matt Albers - Email: matt@tal-fitzlaw.com

**Filing on Behalf of:** Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:  
2775 Harbor Avenue SW  
Third Floor Ste C  
Seattle, WA, 98126  
Phone: (206) 574-6661

**Note: The Filing Id is 20190212120240SC283322**