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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I
NO. 72925-0-1

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

Plaintiffs / Respondents,

v.

PORT OF BELLINGHAM, a Washington Municipal Corporation,

Defendant / Third-Party Plaintiff / Appellant,

v.

STATE OF ALASKA/DEPARTMENT OF TRANSPORTATION AND
PUBLIC FACILITIES – ALASKA MARINE HIGHWAY SYSTEM,

Third-Party Defendant / Respondent.

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APPELLANT'S REPLY BRIEF

PORT OF BELLINGHAM, a Washington Municipal Corporation

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TABLE OF CONTENTS

SECTION	PAGE
I. INTRODUCTION.....	1
II. ARGUMENT	3
A. The Court Lacks Subject Matter Jurisdiction for Admiralty Claims Because the Ramp is Part of the Land	3
1. In Deciding Whether Passenger Ramps and Gangways Confer Admiralty Jurisdiction, Courts Examine Whether They are “Extensions of Land” or “Extensions of a Vessel.”	3
2. Piers, Docks, and Permanently Affixed Ramps are Considered Extensions of the Land and, Therefore, Do Not Confer Admiralty Jurisdiction Against a Land Owner	5
3. Gangways that are Equipment of the Vessel are Considered Part of the Vessel and Confer Admiralty Jurisdiction When Someone is Injured Using the Gangway Even When the Gangway is Extended Over Land	7
4. The <i>Victory Carriers</i> Case and the <i>Scheuring</i> Case Cited by Alaska Both Recognize the Distinction Between Extensions of the Land and Extensions of the Vessel	9
5. Finding that the Port’s Passenger Ramp Meets the “Locality Test” for Admiralty Jurisdiction Leads to Absurd Results	12
B. The Port’s Claims are Not Barred by Alaska’s Sovereign Immunity	12

1. Alaska’s Legislature Waived Sovereign Immunity by Adopting AS 09.50.250	13
2. Alaska Ignores AS 09.50.250(5)’s Legislative History Which Conclusively Supports the Port’s Reading of that Subsection	13
C. The Port’s Claims are Not Barred by Any Exclusive Remedy Provisions	14
1. Alaska is Excluded from Washington’s Industrial Insurance Coverage by RCW 51.12.100(1).....	15
2. Alaska’s Argument that it is Entitled to the Protections of Washington’s IIA Ignores Plain Statutory Language of RCW 51.12.100(1).....	19
3. Alaska is Not Entitled to the IIA’s or the WCA’s Exclusive Remedy Protections	20
D. Alaska and the Port are Differently Situated Under the Lease	23
III. CONCLUSION.....	25

TABLE OF AUTHORITIES

CASE LAW	PAGES
<i>Bessey v. Carnival Cruise Lines</i> , 579 F. Supp. 2d 1377 (S.D. Fla. 2008)	6
<i>Deaconess Hosp. v. Washington State Highway Comm'n</i> , 66 Wash.2d 378, 409, 403 P.2d 54 (1965)	3
<i>Dobrovich v. Hotchkiss</i> , 14 F. Supp. 2d 232 (D. Conn. 1998)	6
<i>Executive Jet Aviation, Inc. v. City of Cleveland, Ohio</i> , 409 U.S. 249, 253 (1972).....	4
<i>Florida Fuels v. Citgo Petroleum, Inc.</i> , 6 F.3d 330, 332 (5 th Cir. 1993).....	11
<i>Golden Val. Elec. Ass'n, Inc. v. City Elec. Service, Inc.</i> , 518 P.2d 65 (1974)	22
<i>Gutierrez v. Waterman S.S. Corp.</i> , 373 U.S. 206 (1963).....	10
<i>Hastings v. Mann</i> , 340 F.2d 910 (4 th Cir. 1965), cert. denied, 380 U.S. 963 (1965).....	6
<i>In re Saltis</i> , 94 Wash.2d 889, 893, 621 P.2d 716 (1980).....	3
<i>Lindquist v. Dept. of Labor & Industries</i> , 36 Wn. App. 646, 677 P.2d 1134 (1984)	16, 17, 18
<i>Mahnich v. Southern S.S. Co.</i> , 321 U.S. 96, 102 (1944)	11
<i>Manson-Osberg Co. v. State</i> , 552 P.2d 654 (1976)	21, 22
<i>Matthews v. Hyster Co., Inc.</i> , 854 F.2d 1166, 1168 (9 th Cir. 1988).....	8

<i>Matthews v. Lykes Bros. Steamship Co., Inc.</i> , 1987 WL 16506, 1987 A.M.C. 1707 (C.D. Cal. 1987)	8
<i>McCullough v. Travelers Ins. Co.</i> , 389 U.S. 1050 (1968), rehearing denied, 393 U.S. 903 (1968).....	6
<i>MLC Fishing, Inc. v. Velez</i> , 667 F.3d 140 (2nd Cir. 2011) ...	6
<i>MSM Hauling, Inc. v. Department of Labor & Industries</i> , 112 Wn.2d 450, 771 P.2d 1147 (1989).....	16, 17
<i>Northwest Airlines, Inc. v. Alaska Airlines, Inc.</i> , 343 F.Supp. 826 (1972)	21, 22
<i>Parker v. South Louisiana Contractors, Inc.</i> , 537 F.2d 113 (5 th Cir. 1976), cert. denied, 430 U.S. 906 (1977)	5, 6
<i>Peytavin v. Government Employees Insurance Company</i> , 453 F.2d 1121 (5th Cir. 1972)	6
<i>Romero Reyes v. Marine Enterprises, Inc.</i> 494 F.2d 866, 870 (1st Cir.1974).....	9, 11
<i>Scheuring v. Traylor Bros., Inc.</i> , 476 F.3d 781 (9 th Cir. 2007)	8, 9
<i>Skagit Motel v. Department of Labor & Indus.</i> , 107 Wash.2d 856, 858–59, 734 P.2d 478 (1987)	3
<i>Skagit Surveyors & Engineers, LLC v. Friends of Skagit Cnty.</i> , 135 Wn. 2d 542, 958 P.2d 962 (1998)	3
<i>Solano v. Beilby</i> , 761 F.2d 1369, 1371 (9 th Cir. 1985)	8
<i>State v. Roggenkamp</i> , 153 Wn.2d 614, 624, 106 P.3d 196, 200 (2005).....	20
<i>The Admiral Peoples</i> , 295 U.S. 649 (1935).....	5, 7
<i>The Shangho</i> , 88 F.2d 42 (9 th Cir. 1937)	7, 8

<i>Travelers Ins. Co. v. Shea</i> , 382 F.2d 344 (5 th Cir. 1967), cert. denied.....	6
<i>Vega v. United States</i> , 86 F. Supp. 293 (S.D.N.Y. 1949), aff'd 191 F.2d 921 (2 nd Cir. 1951) (per curiam), cert. denied, 343 U.S. 909 (1952).....	5, 6
<i>Victory Carriers, Inc. v. Law</i> , 404 U.S. 202, 205 (1971)	4, 9, 10, 12
<i>Wuestewald v. Foss Maritime Co.</i> , 319 F. Supp. 2d 1002 (N.D. Cal. 2004)	11

<u>STATUTES</u>	<u>PAGES</u>
------------------------	---------------------

Alaska's Workers' Compensation Act, Chapter 23.30 AS ("WCA").....	13, 14, 15, 16, 20, 21, 22
Admiralty Extension Act 46 USC § 30101	10
AS 90.50.250	13
AS 90.50.250(5).....	13, 14
Jones Act.....	11, 12, 14
Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901	17
RAP 2.5(a)(1)	3
Washington's Industrial Insurance Act - RCW Title 51 (IIA)	15, 16, 17, 18, 19, 20, 21, 23, 24
RCW 51.12.090	17
RCW 51.12.100	18
RCW 51.12.100(1).....	15, 16, 17, 19, 20

I. INTRODUCTION

For purposes of this appeal and according to CR 12(b)(6), the Port of Bellingham (“Port”) is entitled to assume the following facts as true:

- The passenger ramp upon which Mrs. Shannon Adamson’s injuries occurred is a multi-ton, permanent, shore-based structure connected to the second floor of the Port’s ferry terminal building and is an integral part of that ferry terminal. The water-end of the passenger ramp is raised and lowered by electronically controlled wire cables.
- Mrs. Adamson was employed by Alaska as a crew member of the ferry vessel known as the M/V Columbia at the time of the accident.
- The State of Alaska leased the passenger ramp along with the ferry terminal from the Port in the 2009 Lease. The State of Alaska trained and supplied the operators of the ramp, including Mrs. Adamson.
- As with all the Alaska ferries, on the day of the accident when the M/V Columbia first arrived, a local shipyard employee (contracted by Alaska) walked onto the passenger ramp from the second floor of the ferry terminal building and, using the controls at the end of the passenger ramp, lowered the water-end of the passenger ramp onto the second deck of the ferry. Passengers then disembarked on foot. An Alaska ferry crew member then raised the passenger ramp into its “lockout” position above the ferry for the duration of the M/V Columbia’s planned 10 - 11 hour visit. Hours later, when the M/V Columbia was ready to load walk-on passengers, an Alaska ferry crew member, here Mrs. Adamson, walked through the ferry terminal out onto the ramp and moved the water-end of the ramp from its “lockout” position to begin the process of lowering the ramp’s water-end onto the second deck of the ferry.

- In normal circumstances after the apron on the water-end of the passenger ramp is set on the ferry, the crew member walks back to the door into the ferry terminal building and begins to take tickets from walk-on passengers. That crew member then walks onto the ferry. After the passengers and the crewmember are on the ferry, the shipyard worker raises the water-end of the passenger ramp away from the ferry and back into its “lockout” position so the ferry can depart. The passenger ramp stays in the “lockout” position until the next ferry arrives.
- Just before the accident, Mrs. Adamson had accessed the passenger ramp by walking through the Port’s ferry terminal building, up to the second floor, and out onto the passenger ramp to the electronic control panel at the end of the ramp.
- Mrs. Adamson was injured when the water-end of the passenger ramp suddenly dropped to the pier below while Mrs. Adamson was operating the electronic controls to lower the water-side end of the passenger ramp from its “lockout” position down to the second deck of the M/V Columbia for the passenger loading process.
- When the accident occurred, the passenger ramp was not then in contact with the M/V Columbia (although the apron on the water-end the passenger ramp glanced off and came to rest on the hull of the M/V Columbia after it fell).
- The accident occurred because Mrs. Adamson did not operate the controls correctly, thereby, casing the water-end of the passenger ramp to drop suddenly, parting the wire ropes, and causing it to fall to the pier below.
- Alaska directed Mrs. Adamson to operate the passenger ramp.
- Alaska failed to provide Mrs. Adamson instructions and/or training on how to properly and safely operate the passenger ramp, and failed to ensure that Mrs. Adamson adequately knew how to operate the passenger ramp before allowing her to do so.

- Alaska knew, but failed to adequately warn Mrs. Adamson, that a failure to properly and safely operate the passenger ramp could cause the ramp to fall and result in personal injury.
- Port employees, as part of their employment, do not go onto AMHS ferries.

Based on these facts, the Port has asserted claims upon which relief can be granted.

II. ARGUMENT

A. **The Court Lacks Subject Matter Jurisdiction for Admiralty Claims Because the Ramp is Part of the Land.**

It is well established that litigants may not waive subject matter jurisdiction. *Skagit Surveyors & Engineers, LLC v. Friends of Skagit Cnty.*, 135 Wn. 2d 542, 958 P.2d 962 (1998) (citing *Deaconess Hosp. v. Washington State Highway Comm 'n*, 66 Wash.2d 378, 409, 403 P.2d 54 (1965); Accord *Skagit Motel v. Department of Labor & Indus.*, 107 Wash.2d 856, 858–59, 734 P.2d 478 (1987). Any party to an appeal may raise the issue of lack of subject matter jurisdiction at any time. RAP 2.5(a)(1); Accord *In re Saltis*, 94 Wash.2d 889, 893, 621 P.2d 716 (1980).

1. **In Deciding Whether Passenger Ramps and Gangways Confer Admiralty Jurisdiction, Courts Examine Whether They are “Extensions of Land” or “Extensions of a Vessel.”**

To be clear, the term gangway typically refers to vessel equipment

that travels with a vessel.¹ It is the means of ingress and egress from a vessel for those afoot. Alaska misstates the law of admiralty jurisdiction (also known as maritime jurisdiction) by making the facile, incomplete, and inaccurate statement that such jurisdiction exists “over seamen’s injuries on gangways leading to vessels on navigable waters.”² This conclusory statement significantly fails to appreciate the long held and crucial navigable waters “locality test” in conferring admiralty jurisdiction.

For at least one hundred and fifty (150) years, the threshold requirement in maintaining admiralty jurisdiction for a tort claim has been, and continues to be, this “locality test,” which is to say the injury must occur on a vessel in navigable waters to confer admiralty jurisdiction. *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 253 (1972). The U.S. Supreme Court has noted that the “locality test” “has been constantly reiterated.” *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 205 (1971).

¹ The term “gangway” is used in case law more commonly but is somewhat interchangeable with the term “passenger ramp.” The former seems to refer to vessel equipment that travels with the vessel and the later seems to refer to a structure permanently affixed to the shore. Both are used for ingress and egress afoot. For ease, the Port will refer to its structure and shore based structures as “ramps” and ship based structures as “gangways”.

² Respondent’s Brief at 15.

The “locality test” when applied to gangways and passenger ramps means that gangways that are part of the vessel’s equipment are considered “extensions of the vessel” when being used for ingress and egress from the vessel and, therefore, confer admiralty jurisdiction against the vessel.³ On the other hand, passenger ramps that are permanently affixed to piers or docks are considered “extensions of land” and, therefore, do not confer admiralty jurisdiction against either the vessel (with limited exception discussed below) or the landowner.⁴

2. Piers, Docks, and Permanently Affixed Ramps are Considered Extensions of the Land and, Therefore, Do Not Confer Admiralty Jurisdiction Against a Land Owner.

Applying the “locality test” the federal courts have almost uniformly found piers, docks, and ramps permanently affixed to those piers, docks, or land to be “extensions of land.” At least four circuit court cases involving land-based or pier-based ramps have denied admiralty jurisdiction over such structures and, subsequently, have been denied certiorari by the U.S. Supreme Court. *See, e.g., Vega v. United States*, 86 F. Supp. 293 (S.D.N.Y. 1949), *aff’d* 191 F.2d 921 (2nd Cir. 1951) (per

³ *The Admiral Peoples*, 295 U.S. 649 (1935); see discussion below.

⁴ *See, e.g., Parker v. South Louisiana Contractors, Inc.*, 537 F.2d 113 (5th Cir. 1976), cert. denied, 430 U.S. 906 (1977); also, see discussion below.

curiam), cert. denied, 343 U.S. 909 (1952) (holding that a passenger ramp - using the term “gangplank”- nailed and bolted to the pier did not confer admiralty jurisdiction); *Hastings v. Mann*, 340 F.2d 910 (4th Cir. 1965), cert. denied, 380 U.S. 963 (1965) (holding that a boat launch ramp descending from land into the water did not confer admiralty jurisdiction); *Travelers Ins. Co. v. Shea*, 382 F.2d 344 (5th Cir. 1967), cert. denied, *McCullough v. Travelers Ins. Co.*, 389 U.S. 1050 (1968), rehearing denied, 393 U.S. 903 (1968) (holding that an outfitting pier and ramp permanently anchored to shore and the river bed by cement pilings did not confer admiralty jurisdiction); *Parker v. South Louisiana Contractors, Inc.*, 537 F.2d 113 (5th Cir. 1976), cert. denied, 430 U.S. 906 (1977) (holding that a multi-ton, mechanized, permanently land-based ramp did not confer admiralty jurisdiction).⁵ Like those cases, the Port’s pier-based ramp permanently affixed to land does not confer admiralty jurisdiction as against the Port.

⁵ Numerous other lower court cases have reached the same holding. See, e.g., *Peytavin v. Government Employees Insurance Company*, 453 F.2d 1121 (5th Cir. 1972) (holding that ferry loading ramp attached to shore did not confer admiralty jurisdiction); *Bessey v. Carnival Cruise Lines*, 579 F. Supp. 2d 1377 (S.D. Fla. 2008) (holding that a “gangway” permanently affixed to the Port of Miami did not confer admiralty jurisdiction); *MLC Fishing, Inc. v. Velez*, 667 F.3d 140 (2nd Cir. 2011) (holding that a ramp extending from a marina to a floating dock used to load fishing boat passengers did not confer admiralty jurisdiction); and *Dobrovich v. Hotchkiss*, 14 F. Supp. 2d 232 (D. Conn. 1998) (reaching same conclusion as *MLC Fishing* on nearly identical facts).

3. Gangways that are Equipment of the Vessel are Considered Part of the Vessel and Confer Admiralty Jurisdiction When Someone is Injured Using the Gangway Even When the Gangway is Extended Over Land.

The common application of the “locality test” confers admiralty jurisdiction against the vessel for injuries occurring on a gangway that is part of the vessel’s equipment when being used for ingress and egress. This application of the ‘locality test’ was clearly stated in *The Admiral Peoples*, 295 U.S. 649 (1935), where a woman tripped and injured herself while exiting a vessel by way of the vessel’s gangplank. In maintaining admiralty jurisdiction against the vessel for the injury, the court reasoned as follows:

The basic fact in the instant case is that the gangplank was a part of the vessel. It was a part of the vessel's equipment, which was placed in position to enable its passengers to reach the shore. It was no less a part of the vessel because in its extension to the dock it projected over the land. Thus, while libelant was on the gangplank, she had not yet left the vessel.

Id. at 651-52 (emphasis supplied).

The Ninth Circuit has applied the “locality test” including the application of admiralty jurisdiction against a vessel for injuries while using vessel owned gangplanks and vessel owned ramps. In *The Shangho*, 88 F.2d 42 (9th Cir. 1937), the court found admiralty jurisdiction over a

vessel owned gangplank that was furnished by and carried aboard the vessel.⁶ Two other Ninth Circuit cases reach the same conclusion, albeit using imprecise language, to assert admiralty jurisdiction against a vessel over, respectively, the “ramp of a ship” and the “ramp of a vessel.” See *Solano v. Beilby*, 761 F.2d 1369, 1371 (9th Cir. 1985); and *Matthews v. Hyster Co., Inc.*, 854 F.2d 1166, 1168 (9th Cir. 1988). These cases did not involve gangways extending from the vessel at all, but rather ramps *fully aboard and inside the vessel* leading from one point on the vessel to another point on the vessel, thus clearly within admiralty jurisdiction without the need to apply the application of the ‘locality test’ for vessel owned gangplanks that extend from a vessel over a pier.⁷

In *Scheuring v. Traylor Bros., Inc.*, 476 F.3d 781 (9th Cir. 2007), the Ninth Circuit recognized the crucial difference between land based ramps that are extensions of the land and vessel owned gangplanks that are

⁶ The trial court’s Findings of Fact clarify that the gangplank in question “was owned, maintained, and furnished by said vessel . . . and was at all times herein mentioned a part of the equipment and appurtenances of said vessel, and of the vessel itself.” Findings of Fact, p. 7 (attached hereto as “Exhibit A”).

⁷ In *Solano*, the vessel was a roll-on roll-off (“RO/RO”) cargo vessel and the plaintiff was injured while “utilizing a series of steep up and down ramps *inside of the vessel*.” Appellant’s Opening Brief at 7 (emphasis supplied) (attached hereto as “Exhibit B”). In *Matthews*, the vessel was another RO/RO vessel, and the injury occurred on a ramp connecting a higher deck to a lower deck, both fully aboard the vessel. See trial court Findings of Fact at p. 5, *Matthews v. Lykes Bros. Steamship Co., Inc.*, 1987 WL 16506, 1987 A.M.C. 1707 (C.D. Cal. 1987) (attached hereto as “Exhibit C”).

extension of the vessel⁸ when it deferred a ruling on admiralty jurisdiction against the vessel owner, stating that there is a genuine issue of material fact whether the ramp at issue in that case was more like a gangway owned by the vessel (i.e. maritime jurisdiction) or part of the dock and pier (i.e. no maritime jurisdiction). In doing so, the court explained:

This distinction is critical since a gangway constitutes an appliance of a vessel but a dock or pier does not. [citing *Victory Carriers*] ... *see also Romero Reyes v. Marine Enterprises, Inc.* 494 F.2d 866, 870 (1st Cir.1974) (noting that “the authorities are virtually unanimous that maritime liability encompasses the gangway”).

Id. at 789-90.

4. The *Victory Carriers* Case and the *Scheuring* Case Cited by Alaska Both Recognize the Distinction Between Extensions of the Land and Extensions of the Vessel.

Alaska mistakenly relies on two cases which repeat the vessel equipment rule, *Victory Carriers* and *Scheuring*, to argue for the expansion of admiralty jurisdiction to the Port’s permanent, land-based passenger ramp and, perhaps more significantly, against the Port (as opposed to the vessel). In *Victory Carriers*, the Court denied admiralty jurisdiction for a claim against the vessel for a dock worker who was

⁸ Traylor Bros, Inc. owned a floating construction barge, which could only be reached by a process in which workers descended a 20-foot ramp, to a floating dock then took a skiff across the water to the Traylor Bros., Inc.’s barge. The 180-lb. ramp had fallen off the floating dock, and a worker incurred injuries while trying to lift the heavy ramp out of the water.

injured while driving a forklift when the overhead protection rack of the forklift came loose and fell onto him. The Court stated that “longshoremen injured on a pier by pier-based equipment” are not within admiralty jurisdiction. *Victory Carriers* at 211. Further, the Court discussed it holding in another case, *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963), in which the *Gutierrez* Court allowed admiralty jurisdiction against a vessel over an injury on the dock caused by beans that had spilled as a result of “defective cargo containers” that were “appurtenant” to the vessel.⁹ The *Victory Carriers* Court held:

The decision in *Gutierrez* turned, not on the ‘function’ the stevedore was performing at the time of his injury, but, rather, upon the fact that his injury *was caused by an appurtenance of a ship*, the defective cargo containers, which the Court held to be an ‘injury, to person ... caused by a vessel on navigable water’ which was consummated ashore[.]

Victory Carriers, at 210-11 (emphasis supplied). The *Victory Carriers* Court’s in obiter dicta noted that “[t]he gangplank has served as a rough dividing line between the state and maritime regimes,” *Id.* at 207. Since no gangplank was before the Court in that case, it does not help

⁹ In 1948 the Admiralty Extension Act 46 USC § 30101 was enacted. Section a. of the Act provides that “The admiralty and maritime jurisdiction of the United States extends to and includes cases of injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land.”

understand the “locality test” as applied to passenger ramps and gangplanks on the issue here.¹⁰

More applicable is *Wuestewald v. Foss Maritime Co.*, 319 F. Supp. 2d 1002 (N.D. Cal. 2004) which has both factual and procedural similarities to the present case. In *Wuestewald*, a crewmember of an oil barge docked in San Francisco Bay was injured while disembarking the vessel. The vessel was equipped with portable aluminum ladders for ingress and egress to the dock. At the time of the injury, the vessel deck rested below the dock due to low tide; as the plaintiff attempted to ascend the portable aluminum ladder to the dock above, the legs of the ladder slid out causing him to fall and sustain injuries. The plaintiff sued both the vessel and the dock owner under the Jones Act, general maritime law and California tort law. The Court bifurcated the claims, applying admiralty law against the vessel but refusing to apply admiralty law to the dock owner. Instead, the Court applied California law to claims against the

¹⁰ There are cases, albeit rare, where admiralty jurisdiction against a vessel is found under the vessel’s “seaworthiness duty” and based upon the vessel’s breach of this non-delegable duty where the only ingress and egress provided is a land based ramp and the injury occurs while using that ramp. In *Romero Reyes v. Marine Enterprises, Inc.* 494 F.2d 866, 870 (1st Cir.1974) the Court held that the land based ramp was the primary means of ingress and egress to the vessel (the vessel had another unused portable structure), that the vessel owed a duty to provide a safe passage and that the vessel had violated this duty and that the duty cannot be delegated to the landowner. This warranty of seaworthiness is an “absolute non-delegable duty” that runs from a vessel owner to the vessel’s crewmembers. *Florida Fuels v. Citgo Petroleum, Inc.*, 6 F.3d 330, 332 (5th Cir. 1993); see also *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 102 (1944).

dock owner, stating: “A dock owner’s duty to seamen using the dock is defined by the application of state law, and not maritime law.” *Id.* at 1009 (citing, inter alia, *Victory Carriers* at 206-07).

5. Finding that the Port’s Passenger Ramp Meets the “Locality Test” for Admiralty Jurisdiction Leads to Absurd Results.

Indeed, the error of assigning admiralty jurisdiction and arguing to extend such jurisdiction against the Port is seen most clearly when contemplating an injury to a Port employee or a shipyard employee on the passenger ramp occurring after the M/V Columbia has left the berth. It is clear that once the “locality test” is met there would *always* be admiralty jurisdiction for that locality. Such a decision would lead to an absurd result where an injured Port employee or shipyard worker on the ramp when a vessel was not at the ferry terminal could assert an admiralty claim against the Port or the shipyard employer.

B. The Port’s Claims are Not Barred by Alaska’s Sovereign Immunity.

Alaska contends that its sovereign immunity protects it from the Port’s contract claims (even the claims related to breach of contract), asserting that the 2009 Lease is insufficient to waive that immunity. This argument ignores the fact that Alaska’s legislature expressly and plainly

waived sovereign immunity in AS 90.50.250. Alaska misinterprets AS 90.50.250(5) and tellingly ignores the subsection's legislative history precisely because that history debunks Alaska's misinterpretation.

1. Alaska's Legislature Waived Sovereign Immunity by Adopting AS 09.50.250.

Alaska's legislature clearly and expressly waived Alaska's sovereign immunity to the Port's contractual and tort claims by adopting AS 90.50.250 which reads, in relevant part:

A person or corporation having a contract, quasi-contract, or tort claim against the state may bring an action against the state in a state court that has jurisdiction over the claim.

The Port has never argued (nor does it need to argue) that the 2009 Lease serves to waive Alaska's sovereign immunity for the simple reason that Alaska's legislature expressly enacted that waiver. Alaska's assertion of sovereign immunity is misplaced.

2. Alaska Ignores AS 09.50.250(5)'s Legislative History Which Conclusively Supports the Port's Reading of that Subsection.

Alaska erroneously argues that AS 09.50.250(5) acted to move all claims, rather than just AMHS employee claims, arising out of a state employed seaman's injuries into Alaska's Workers' Compensation Act, Chapter 23.30 AS ("WCA"). This would mean that the Port's breach of

contract claims must be brought under Alaska's WCA – something the Alaska's WCA clearly does not allow or contemplate. Alaska's argument then is two-fold. First, bring all claims under the WCA and second, sorry but the WCA does not allow your claims. This ignores the clear and unambiguous legislative history cited and discussed in the Port's opening brief.¹¹

When read as a whole along with its legislative history, AS 09.50.250(5) applies only to the claims of injured AMHS maritime employees, i.e. moving such claims into Alaska's WCA and eliminating any maritime related remedies against Alaska (i.e. Jones Act, general maritime law, etc). This subsection simply does not bar third-party claims related to those maritime employee injuries. Tellingly, Alaska failed to produce any legislative history supporting its erroneous interpretation and did not even attempt to address the legislative history discussed in the Port's opening Brief.

C. The Port's Claims are Not Barred by Any Exclusive Remedy Provisions.

The real issue is not whether Alaska's sovereign immunity bars the Port's claims (which it does not), but whether or not Alaska is entitled to

¹¹ See Appellant's Brief at Pgs. 31-33; Accord CP 424-425.

exclusive remedy protections under either Alaska’s WCA or Washington’s Industrial Insurance Act, Title 51 RCW (“IIA”) when applying Washington law as the 2009 Lease specifies. Alaska is not entitled to any such protections.

1. Alaska is Excluded from Washington’s Industrial Insurance Coverage by RCW 51.12.100(1).

Alaska is only entitled to the exclusive remedy protections contained in Washington’s IIA if Alaska meets the definition of an “employer” under that Act. For Alaska to be an “employer”, Mrs. Adamson must be an “employee” as defined in the IIA, which she was not.¹² Instead, she was a crew member of a vessel and, therefore, expressly excluded from IIA coverage by RCW 51.12.100(1). That subsection unambiguously states that the IIA does not extend coverage to “a master or member of a crew of any vessel, or to employers and workers for whom a right or obligation exists under the maritime laws or federal employees’ compensation act for personal injuries or death of such workers.” RCW 51.12.100(1) (emphasis added); Accord Appellant’s Brief at Pgs. 14-17. This statutory language is very clear that RCW 51.12.100(1) establishes two separate class of workers not covered by the

¹² Appellant’s Brief at Pgs. 14-17.

IIA, namely: (i) the master or member of a crew of any vessel, and; (ii) workers with rights under maritime laws or federal employees' compensation acts.

Despite this clear statutory language, Alaska cites its “expectation” that Washington’s Department of Labor & Industries would cover Mrs. Adamson’s injuries¹³ and inapplicable case law on long-haul trucking¹⁴ and longshoremen¹⁵ to urge this Court to ignore the unambiguous exclusion of Mrs. Adamson (and, therefore, Alaska) from coverage under the IIA. Alaska fails to cite an attorney general’s opinion or a single case supporting its strained interpretation which necessarily ignores the plain language of RCW 51.12.100(1).

As a purely factual matter, Mrs. Adamson’s injuries were not covered or paid under Washington’s IIA. It is undisputed that Mrs. Adamson was compensated for her injuries under Alaska’s WCA. CP 207-208, 354. Alaska attempted to cloud this issue by sending a self-serving email from the Alaska Marine Highway System Risk Manager responsible for this matter purportedly confirming extra-territorial

¹³ Alaska’s Response at Pg. 25, Fn. 14.

¹⁴ See Alaska’s discussion of *MSM Hauling, Inc. v. Department of Labor & Industries*, 112 Wn.2d 450, 771 P.2d 1147 (1989) discussed in Alaska’s Response at Pg. 26.

¹⁵ See Alaska’s discussion of *Lindquist v. Dept. of Labor & Industries*, 36 Wn. App. 646, 677 P.2d 1134 (1984) discussed in Alaska’s Response at Pg. 26.

coverage by the Washington IIA. CP 86. This email, which does not override clear Washington State law excluding members of vessel crews¹⁶ from the IIA, was sent July 17, 2014, i.e. nearly two (2) years after the accident and thirty-one (31) days before Alaska filed its CR 12(b)(6) motion. Such self-serving actions speak volumes about the strength of the argument.

Similarly irrelevant is Alaska's citation to *MSM Hauling* and *Lindquist*, neither of which discuss nor address the IIA's exclusion of a vessel's crew from the IIA's ambit. *MSM Hauling* discussed whether or not RCW 51.12.090 excluded long-haul trucking employees from coverage under Title 51 RCW. *MSM Hauling* was a trucking business seeking to avoid paying workers' compensation premiums. *MSM Hauling*, 112 Wn.2d at 451-453. This case has no bearing on the interpretation of RCW 51.12.100(1). Likewise, the *Lindquist* decision has no relevance to the issues before this Court. In that case, Mr. Lindquist was a longshoreman (i.e. a dock worker) whose workplace injuries were covered by the federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901, *et. seq.* The *Lindquist* Court determined that Mr. Lindquist's injuries were excluded from coverage

¹⁶ RCW 51.12.100(1)

under the IIA due to the IIA's then-exclusion of "workers for whom a right or obligation exists under the maritime laws for personal injuries or death of such workers." *Lindquist*, 36 Wn. App. at 651-652.

Mr. Lindquist was a dock-worker, and not a crew member of a vessel; therefore, the *Lindquist* court did not examine the IIA's separate exclusion of "a master or member of a crew of any vessel." Moreover, the *Lindquist* court's discussion of RCW 51.12.100 implicitly acknowledges that the exclusion of the crew or master of a vessel is separate and distinct from the exclusion of workers with a right under maritime laws for personal injuries or death. To wit, when discussing the then-current version of RCW 51.12.100, the court wrote, using italics, as follows:

The Department has contended from the inception of this case that coverage for the decedent's death is precluded under the State Act by the first paragraph of that statute (see footnote 2). It reads:

The provisions of this title shall not apply to a master or member of a crew of any vessel, or to employers and workers for whom a right or obligation exists under the maritime laws for personal injuries or death of such workers.

Lindquist, 36 Wn. App. at 651-652 (italics original). The court was careful to italicize only that portion of RCW 51.12.100 it was relying on for its decision, leaving "a master or member of a crew of any vessel" not-

italicized, recognizing that language as a separate exemption which did not apply to Mr. Lindquist.

2. Alaska’s Argument that it is Entitled to the Protections of Washington’s IIA Ignores Plain Statutory Language of RCW 51.12.100(1).

Alaska contends that RCW 51.12.100(1) should be “interpreted” such that the exclusion of “a master or member of a crew of any vessel” only applies if that master or crew member is also covered by a federal workers’ compensation scheme or general maritime laws. Alaska is arguing that Mrs. Adamson must be excluded by both clauses of RCW 51.12(100)(1) or she is covered. Alaska boldly claims this argument is consistent with the “legislature’s intent” despite failing to cite a single piece of legislative history or case law to that end. Alaska’s interpretation also blatantly violates long-standing canons of statutory construction by rendering significant portions of RCW 51.12.100(1) meaningless. Our Supreme Court holds that:

Another well-settled principle of statutory construction is that each word of a statute is to be accorded meaning. [T]he drafters of legislation ... are presumed to have used no superfluous words and we must accord meaning, if possible, to every word in a statute. [W]e may not delete language from an unambiguous statute: Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.

State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196, 200 (2005)
(internal citations omitted).

If Alaska's interpretation of RCW 51.12.100(1) were adopted, then the inclusion of "master or member of a crew or any vessel" in RCW 51.12.100(1) would be unnecessary surplus. The Court cannot adopt that interpretation and essentially strike "master or member of a crew or any vessel" and the word "or" from the statute, thereby rendering them meaningless. See *Roggenkamp*, 153 Wn.2d 614.

3. Alaska is Not Entitled to the IIA's or the WCA's Exclusive Remedy Protections.

The Court should examine this case under Washington law as a simple breach of contract and/or tort claim, disregarding Alaska's misplaced claim to exclusive remedy protections under either the IIA or the Alaska's WCA. The parties agree that Washington law governs this case. Accordingly, because Mrs. Adamson is excluded from Washington's IIA, Alaska is not an "employer" under that Act and is not entitled to any of the exclusive remedy protections found in Title 51 RCW. Likewise, because Washington law applies, Alaska is not entitled to any exclusive remedy protections found in Alaska's WCA.

Even assuming, *arguendo*, that Alaska were entitled to the exclusive remedy protections afforded under the WCA, it waived those protections by entering into the 2009 Lease.¹⁷ In an off-hand footnote, Alaska argues that waiver of Alaska’s exclusive remedy provision must be express.¹⁸ This is incorrect. Alaska’s case law is clear. Unlike Washington’s IIA, waiver of the exclusive remedy provision under the WCA does not need to be express. To support its erroneous position, Alaska misconstrues the operative portions of the indemnity provisions found in *Northwest Airlines, Inc. v. Alaska Airlines, Inc.*, 343 F.Supp. 826 (1972) and *Manson-Osberg Co. v. State*, 552 P.2d 654 (1976). In *Alaska Airlines* the court held that the indemnity provision required Alaska Airlines to indemnify Northwest Airlines for an injury to an Alaska Airlines employee: (i) without explicitly mentioning that the Alaska Airlines employees were in the class of “persons” for which Alaska Airlines was to indemnify Northwest Airlines, and; (ii) without explicitly

¹⁷ See Appellant’s Brief at Pgs. 17-22.

¹⁸ Alaska’s Response at Pg. 20, Fn. 10.

mentioning or waiving the WCA's exclusive remedy provision.¹⁹ *Alaska Airlines*, 343 F.Supp. at 829.

Alaska also misstates the nature of *Golden Val. Elec. Ass'n, Inc. v. City Elec. Service, Inc.*, 518 P.2d 65 (1974) when arguing that a waiver of the WCA's exclusive remedy provision must be express. In that case there was no express written covenant of indemnification whatsoever. Alaska's Supreme Court examined whether or not a covenant of indemnification, and thereby a waiver of the WCA's exclusive remedy provision, could be implied in a written contract. *Id.* at 66. The *Golden Val.* Court declined the invitation to imply an indemnification provision. *Id.* at 68. Here, the cost allocation provisions are written in the 2009 Lease and the issue here is: (i) if Alaska law applies; (ii) did Alaska waive its protection like Alaska Airlines did in the in the *Northwest Airlines* case. The Port affirmatively argues that Alaska law does not apply and,

¹⁹ Similarly, in *Manson-Osberg* the reference to "claims or amounts arising or recovered under the workmen's compensation laws" is an indemnification as to fines or premiums owed under those laws. The operative section of that indemnification provision stated that Manson-Osberg "shall be responsible for all damage or injury to any person or property of any character resulting from any act, omission, neglect or misconduct in the manner or method of executing said work..." This operative language likewise did not specifically acknowledge or waive the WCA's exclusive remedy provision, but the Supreme Court of Alaska found that waiver nonetheless. *Manson-Osberg*, 552 P.2d at 656.

even if it did, the Section 6.1 language provided a waiver under Alaska law. See C.P. 50-51 at Section 6.1.

D. Alaska and the Port are Differently Situated Under the Lease.

Alaska next argues that the Port's claims fail because Lease Section 6.1 is insufficient to waive the Port's exclusive remedy protections under the Washington IIA and, therefore, it could not possibly be interpreted to waive any similar protections for Alaska. Likewise, Alaska argues that the Port's waiver of subrogation rights against Alaska for the Port's losses due to workers' compensation claims under Lease Section 6.2(a) supports this argument.²⁰ These arguments are erroneous and inappropriate in the context of a CR 12(b)(6) analysis. Alaska's contention that it and the Port must be treated identically under Lease Sections 6.1 and 6.2(a) ignores both the language in Section 6.2(a) which treats Alaska and Port differently and the fact that the parties are differently situated under the Lease. First, Paragraph 6.2(a) shows the parties' understanding of what the Port has asserted in its briefing all along, i.e. that Alaska is not covered by Washington's IIA. That section requires that only the Port cover all of its employees under Washington's IIA. See CP 51 at Section 6.2(a). Notably, neither that section (nor any other

²⁰ See Alaska's Response at Pgs. 37-38.

section) of the Lease requires Alaska to cover its employees under Washington's IIA (or for that matter any other workers compensation scheme), which coincides with the legal reality that Alaska's ferry workers cannot be covered under Washington's IIA. Accordingly, the Lease by its own express terms treats the Port's employees and Alaska's employees differently.

Second, the Port and Alaska are differently situated in their status in, and operation under, the 2009 Lease itself and it is not surprising that they would have differing rights and obligations under that Lease. Specifically, the Port is a landlord and Alaska is a tenant whose employees come onto the Port's property. The Port bears the risk of Alaska employees bringing suit against the Port for injuries on Port property when Alaska has the underlying obligation to train and supervise its employees. There is no similar risk of Port employees going onto the Alaska ferries, suffering an injury and suing Alaska. It is logical that the Port would seek and be entitled to greater protections and securities under the Lease to shield itself from liability for Alaska's negligent actions. Common sense indicates that landlords and tenants have different risks and liability protection interests. The fact that the Port has greater protections under the Lease is, therefore, not the death-knell Alaska would like it to be but,

rather, consistent with the Lease, common sense, and the law. The Port and Alaska's differing rights under Lease Sections 6.1 certainly does not warrant CR 12(b)(6) dismissal of the Port's claims.

III. CONCLUSION

CR 12(b)(6) provides a high standard that Alaska has not met. Simply stated, the Port and the Alaska entered into the 2009 Lease both agreeing to apply Washington law. Now, Alaska argues mightily to apply admiralty jurisdiction and Alaska law, even going so far as to say that its own Attorney General was wrong. Admiralty jurisdiction and Alaska law do not apply. The Lease dispute should go forward under Washington law - the law the parties agreed to apply.

Dated this 14th day of May, 2015.

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United States

Circuit Court of Appeals

For the Ninth Circuit.

FAN SHAN HANG, claimant of the Chinese
Steamship "SHANGHO", etc., and T. MAT-
SUURA, Master,

Appellants,

vs.

M. PRESTLIEN,

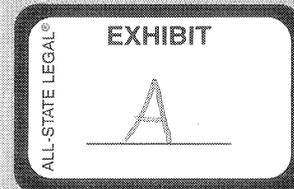
Appellee.

Apostles on Appeal

Upon Appeal from the District Court of the United
States for the Western District of Washington,
Northern Division.

FILED

OCT 1 - 1936



theretofore had been furnished by the respondents, the master and the owners of said vessel, and the members of her crew as part of the equipment of said vessel for the purpose of furnishing a means of ingress and egress to and from said vessel for the libelant and other members of the longshoring crew and those who had work and whose duty it was to be upon said vessel; that said gangplank was owned, maintained and furnished by said vessel and the respondents, her owners, and was at all times herein mentioned a part of the equipment and appurtenances of said vessel, and of the vessel itself; that previous thereto libelant had been instructed by his said employer, the Rothschild Stevedoring Co., under and [6] by virtue of the authority of the respondents, the master and the owners of said vessel, to go aboard the vessel at said time to aid and assist in the loading and storage on said vessel of certain cargo which was then lying on the dock of the Sound View Pulp Company alongside of said vessel.

FIFTH

That libelant, pursuant to the instructions hereinbefore mentioned, and while acting in the course of his employment heretofore described, together with at least a half dozen of the other members of the longshoring crew, and those who had work and whose duty it was to be upon said vessel, the libelant leading the way for said crew, proceeded on foot from the dock of said Sound View Pulp Company, up to and at the dock end of said gangplank,

FILED

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CLERK, U.S. COURT OF APPEALS

No. 83-5591

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH SOLANO and MICHAEL URLEVICH,

Plaintiffs and Appellants,

vs.

CALIFORNIA UNITED TERMINALS,

Defendant and Appellee.

Appeal from the United States District Court for the
Central District of California.
Hon. A. Andrew Hauk, Judge.

APPELLANTS' REPLY BRIEF

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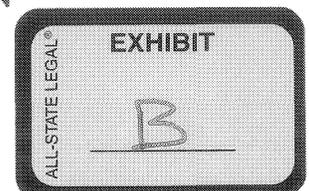
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TOPICAL INDEX

PAGE

I.

Appellee's "Statement of Facts" Must Be
Rejected Because This Court is Required to
View The Record Favorably to the Appellants.....1

II.

Contrary to the Terminology Employed by
Appellee for the First Time on Appeal,
California United is Not a "Parking Lot"
but Rather a Cargo Terminal Operator.....3

III.

A Recent Decision by This Court is
Consistent With the Other Cases of This
Circuit Cited in Appellant's Opening Brief.....4

IV.

This Appeal Must be Decided on the
Basis of Federal Admiralty Law,
Not the State Law of Bailments.....6

V.

Appellee's Request for "Sanctions"
For a "Frivolous" and "Improper"
Appeal is Completely Groundless.....7

VI.

Conclusion.....10

TABLE OF AUTHORITIES CITED

<u>CASES</u>	<u>PAGE</u>
Clipper Exxpress v. Rocky Mountain Motor Tariff, 690 F.2d 1240 (9th Cir. 1982).....	2
Eagle-Picher Industries, Inc. v. Liberty Mutual Ins., 682 F.2d 12 (1st Cir. 1982).....	9
Int'l Bro. of Team., etc. v. Zantop Air Transport Corp., 394 F.2d 36 (6th Cir. 1968).....	8
Ollestad v. Greenville S.S. Corp., 738 F.2d 1049 (9th Cir., July 25, 1984).....	5,6
Scindia Steam Nav. Co., Ltd. v. de los Santos, 451 U.S. 156, 101 S.Ct. 1615 (1981).....	5

OTHER AUTHORITIES

Federal Rules of Evidence, Rule 201.....	4
Item No. 1440, Tariff No. 3, Port of Long Beach.....	4
United States Code, Title 33, section 903.....	7

No. 83-5591

In the
United States Court of Appeals
For the Ninth Circuit

JOSEPH SOLANO and MICHAEL
URLEVICH,

Plaintiffs and
Appellants,

vs.

CALIFORNIA UNITED TERMINALS,

Defendant and
Appellee.

Appellants' Reply Brief.

I.

APPELLEE'S "STATEMENT OF FACTS" MUST BE
REJECTED BECAUSE THIS COURT IS REQUIRED TO
VIEW THE RECORD BELOW FAVORABLY TO THE
APPELLANTS.

In its brief, appellee attempts to relate a "statement of facts" regarding the present appeal. However, in light of established rules of appellate review, this "statement of facts" must be rejected, because this court must view the record favorably to the appellants.

As stated in appellants' opening brief, it is an established tenet of appellate review that, when reviewing a summary

judgment, an appellate court must view all facts and reasonable inferences in the light most favorable to the appellant. See, e.g., Clipper Exxpress v. Rocky Mountain Motor Tariff, 690 F.2d 1240, 1250 (9th Cir. 1982). In its brief, appellee violates this established rule on at three occasions in its "statement of facts."

First, California United states at page six of its brief that it "was unaware of any custom of parking lot operators to inspect the working parts of parked automobiles." This carefully couched statement manages to avoid the real issue in this case, which was whether California United was aware of the custom of tagging cars with defects. Since California United's own employee, Peter Gonzales, was aware of such a custom (Gonzales deposition at pp. 21-24), appellee's asserted lack of knowledge of this custom must be rejected.

Second, California United asserts that the declaration of Lester Wood is irrelevant because the 1946 Cadillac could have been safely pulled on board the M/V Allunga. [Appellee's brief at p. 7, 11 n.5.] This assertion conveniently overlooks the deposition testimony of plaintiff Michael Urlevich, which established that the standard procedure at the Long Beach Harbor was not to pull or tow cars that were over ten years old on board a ship. Most cars over ten years old cannot safely be equipped with a tie-down bar. (Urlevich deposition at pp. 24-25.) Mr. Wood's declaration, which states that it "is customary to place warnings upon vehicles which cannot be safely pushed, pulled, or driven on board" vessels such as the M/V Allunga, is therefore relevant, since the Cadillac could not safely have been towed on board.

Finally, as it has done in the past, California United emphasizes its version of the deposition testimony of Jerzy Szymula. [Appellee's brief at pp. 8-9.] Appellant does not dispute the fact that Mr. Szymula first testified that the Cadillac was not driveable due to either the brakes or the steering and then later contradicted that testimony. Appellee apparently forgets that, upon review from a summary judgment, appellants are entitled to a favorable reading of that testimony. The fact that Mr. Szymula later contradicted implicating testimony is therefore irrelevant. This court can therefore properly look only to the testimony which is favorable to appellants.

II.

CONTRARY TO THE TERMINOLOGY EMPLOYED BY
APPELLEE FOR THE FIRST TIME ON APPEAL,
CALIFORNIA UNITED IS NOT A "PARKING LOT"
BUT RATHER A CARGO TERMINAL OPERATOR.

In its brief, appellee California United Terminals repeatedly refers to itself merely as a "parking lot." [See, e.g., appellee's brief at p. 1, 4.] California United employs this designation for the first time on appeal. It correctly referred to itself in the district court below as a "cargo terminal." [See, e.g., Motion for Summary Judgment p. 7, Excerpts of the Clerk's Record p. 44.] Appellants submit that calling California United a "parking lot" is at best inaccurate, and at worst terribly misleading to this court. Since Port of Long Beach regulations prohibit the parking of motor vehicles on wharves or landings except for the purpose of discharg-

ing freight,¹ California United can therefore not properly be termed a "parking lot," since it would be unlawful for it to operate one.

The true nature of the business conducted by California United is best summarized by appellee's own service manager, Arthur Barry Watson. Mr. Watson described his employer as a "public steamship terminal," the function of which "is for the receiving and delivery of cargo and vessel operations, loading and unloading of vessels." [Watson deposition at p. 6, contained in appellee's Supplemental Excerpts of the Clerk's Record.] Appellee's self portrayal as a mere parking lot is therefore misleading and must be rejected.

III.

A RECENT DECISION BY THIS COURT IS
CONSISTENT WITH THE OTHER CASES OF THIS
CIRCUIT CITED IN APPELLANTS' OPENING BRIEF.

In addition to the cases cited in appellants' opening brief regarding the analogous duty of shipowners to longshoremen,

¹ For the sole purpose of negating appellee's claim on appeal that it is merely a parking lot, appellants request that, pursuant to Federal Rules of Evidence, Rule 201, this court takes judicial notice of Tariff No. 3 of the Port of Long Beach, Item No. 1440, promulgated by the Board of Harbor Commissioners. That Item provides in pertinent part as follows:

"It shall be unlawful for any person to drive, operate, stand or park, or to cause or permit to be driven, operated, stood or parked, any motor or other vehicle onto or upon any wharf or landing in the port of long Beach except for the purpose of loading or discharging freight and passengers, or while actually engaged in the performance of necessary duties which require the presence of such vehicles on said wharf or landing."

appellants hereby call to the court's attention the recent case of Ollestad v. Greenville S.S. Corp., 738 F.2d 1049 (9th Cir., July 25, 1984). In that case, plaintiff longshoreman was injured when he slipped and fell on a boomrest, a large triangular metal structure used to support the ship's boom when not in use. The boomrest had been placed on the deck by the ship's crew prior to the time that the longshoremen came on board. The jury found that the shipowner was negligent, and the district court entered judgment accordingly.

This court affirmed the judgment of the district court. As does appellee in this case, the defendant in Ollestad attempted to rely upon certain language in Scindia Steam Nav. Co., Ltd. v. de los Santos, 451 U.S. 156, 101 S.Ct. 1615 (1981), to absolve it of any duty to longshoremen. This court rejected defendant's contention, stating:

"This court has interpreted Scindia as supporting the principle that 'the shipowner has a reasonable duty of care to warn of defects and make conditions safe,' with the limitation that '"the shipowner's duty of reasonable care under the circumstances does not impose a continuing duty to inspect the cargo operations once the stevedore begins its work.'" (Citations.) This is not a case like Scindia, where the shipowner's alleged negligence arose out of its conduct after longshore operations had begun. Rather, we are concerned in the case with the shipowner's duty of care to make the ship safe for longshoremen before turning the ship over

to the stevedore." 738 F.2d at 1052 (emphasis added).

The reasons for applying the same standard of care to terminal operators and shipowners has been covered in detail in appellants' opening brief, pp. 17-18. The Ollestad case deals with a situation where a dangerous condition existed prior to the start of the cargo loading process. The present appeal involves the same situation, since the 1946 Cadillac was not safe for loading prior the start of the stevedoring operation. In sum, both a shipowner and a terminal operator should be under the same standard of care to insure the safety of longshoremen prior to the start of the cargo loading operation. As thoroughly analyzed in appellants' opening brief, a question of fact exists as to whether California United had actual, constructive, or inquiry notice of the 1946 Cadillac's lack of brakes. The summary judgment entered by the district court below, therefore, should be reversed.

IV.

THIS APPEAL MUST BE DECIDED ON THE BASIS
OF FEDERAL ADMIRALTY LAW, NOT THE STATE
LAW OF BAILMENTS.

The district court below found that appellants' cause of action was an admiralty maritime claim. [Findings of Fact and Conclusions of Law p. 2; Excerpts of the Clerk's Record p. 31.] The court made no specific finding that California law governed the case. Yet, in its brief, appellee cavalierly states that "[t]his case presents an application of the state law of bail-

ments." [Appellee's brief at p. 1.] This statement finds no support in the record and must be rejected.

Appellants in their opening brief have stated the reasons which they believe mandate the application of general maritime law to this case. See appellants' opening brief at p. 17. The desire to protect federal maritime interests calls for the application of federal maritime law. Appellants can only note further that it would serve no apparent purpose to apply state law to California United while applying federal law to appellants' employer under the Longshoremen's and Harbor Workers' Compensation Act. Appellants' claim against their employer is plainly covered under the Act. See 33 U.S.C. section 903. Since there is a federal interest in the protection of longshoremen injured on the job, federal law should apply, regardless of the identity of any particular defendant.

V.

APPELLEE'S REQUEST FOR "SANCTIONS" FOR A
"FRIVOLOUS" AND "IMPROPER" APPEAL IS
COMPLETELY GROUNDLESS.

The most incredible facet of appellee's brief is its request for sanctions "for appellants' first raising of issues on appeal and misrepresentation of facts." [Appellee's brief at pp. 25-27.] Appellants will show below that appellee's request is completely without foundation. Generally speaking, it is clear that: (1) This appeal cannot be "frivolous," because the law is not clear as to the nature and extent of a terminal operator's duty to longshoremen; (2) It is completely proper for a party to request a court to take judicial notice of evidence outside of the record, since

this court is free to deny such a request if it so desires; and (3) The facts of the case have not been misrepresented, but rather presented in a light favorable to the appellants, which is required when reviewing a summary judgment. This case therefore does not even approach the level where sanctions might be considered.

Appellee states that it objects to appellants' request for judicial notice of the Pacific Coast Marine Safety Code (PCMSC). It first states that such a request is "plainly improper." Nonsense. As stated in appellants' opening brief, this court may take judicial notice of matters not brought to the attention of the lower court when necessary to show the impropriety of the lower court's decision.² Int'l Bro. of Team., etc. v. Zantop Air Transport Corp., 394 F.2d 36, 40 (6th Cir. 1968).

Appellee next states that the PCMSC is irrelevant because appellants were not employed by California United. Appellants do not dispute that they were not employed by California United. The issue is whether the PCMSC obligated California United and its employee, Peter Gonzales, to place a warning on a 1946 Cadillac so as to inform appellants that the car had no brakes. Hence, the PCMSC is relevant.

² It is interesting to note that appellee objects to consideration of matters not presented in the district court, while at the same time attempting to introduce the settlement agreement between appellants and Amerford International Corporation. This agreement was entered into almost two years after California United's motion for summary judgment was granted. The settlement was found to be in good faith by Judge Mariana Pfaelzer.

Appellee then states that judicial notice cannot be taken of a private agreement, citing Eagle-Picher Industries, Inc. v. Liberty Mutual Ins., 682 F.2d 12, 22 n.8 (1st Cir. 1982). The entire footnote is quoted below.³ As can readily be seen, appellee's proposition is not supported by this footnote; indeed, it is not supported by the remainder of the case or, apparently, any other reported case. This court can therefore properly take judicial notice of the PCMSC if it so desires.

Appellee next states that the unique design of the M/V Allunga was somehow not before the district court. Appellee's arguments miss the point. The M/V Allunga was unique because it did not utilize the usual system of booms and cranes for the loading and discharge of cargo. Appellee at all relevant times knew that the only way an automobile could be loaded from the dock to the ship would be either by driving it, pushing it, or towing it. In short, the accident would not have occurred in this case but for the design of the ship. The design of the M/V Allunga was therefore properly before the district court, and is properly before this court.

³ "Various amici curiae have sought to enlarge the record on appeal by offering evidence of the drafting history of the standardized liability policies at issue here, which is said to support the exposure position. But this is not the sort of material of which we may take judicial notice, and we may not ordinarily consider factual material not presented to the court below. See, e.g., Construction Aggragous Corp. v. Rivera de Vicenty, 573 F.2d 86, 95 n.7 (1st Cir. 1978). Nor will we reverse the district court on a ground not urged upon or considered by it, in the absence of exceptional circumstances not present here. See, e.g., Dobb v. Baker, 505 F.2d 1041, 1044 (1st Cir. 1974). For it is the duty of counsel in the first instance to determine whether there is material so likely to be known throughout the industry and by the parties that it should be proffered to the court." 682 F.2d at 22 n.8.

Appellee also objects to the declaration of Lester Wood, in which Mr. Wood stated that it "is customary to place warnings upon vehicles which cannot be safely pushed, pulled, or driven on board." Appellee states that this declaration was never served upon it or filed with the court. This statement is incorrect. See Docket Sheet, Solano v. Beilby, p. 3, No. 33; Excerpts of the Clerk's Record p. 106, No. 33.

It is therefore readily apparent that appellee's request for sanctions in this case is completely without merit and, in some cases, very misleading to this court. This groundless request should therefore be denied.

VI.

CONCLUSION.

On the basis of the foregoing argument and authorities, it is respectfully submitted that California United Terminals, in its appellee's brief, has not demonstrated the correctness of the judgment of the district court in its favor. Therefore, for the reasons specified in the appellants' opening brief and in this brief, plaintiffs submit that the erroneous judgment of the district court should be reversed.

Respectfully submitted,

Newton R. Brown
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Mitchell Levy
Attorneys for Plaintiffs and
Appellants.

1987 WL 16506

United States District Court, C.D. California.

Fred MATTHEWS, Elias Satola,
and Paul Bjazefich, Plaintiffs,

v.

LYKES BROTHERS STEAMSHIP CO., INC.,

Hyster Company, Inc., et al., Defendants.

MARINE TERMINAL CORPORATION,
Plaintiff-in-Intervention,

v.

LYKES BROTHERS STEAMSHIP CO., INC.,

Hyster Company, Inc., et al., Defendants.

AND Related Cross-Actions

No. CV 83-6699-DWW
(KX). | February 16, 1987.

Attorneys and Law Firms

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

DAVID W. WILLIAMS, Senior District Judge.

I.

INTRODUCTION

*1 This personal injury action was brought by three individual longshoremen under Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Section 905(b) against defendant Lykes Brothers Steamship Company. The plaintiffs also named the Hyster Company alleging theories of negligence and product liability arising out of the design and maintenance of the 80,000 pound forklift truck involved in the accident. The action was filed in the Superior Court of the County of Los Angeles and was timely removed to this court pursuant to Section 28 U.S.C. Section 1441et. seq., plaintiffs all being citizens of the State of California and the defendants being foreign

corporations. The Hyster Company is a Nevada corporation with its principal place of business in the State of Oregon and the Lykes Brothers Steamship Company is a Louisiana corporation having its principle place of business in the State of Louisiana.

The accident occurred on September 30, 1982 aboard the vessel CHARLES LYKES. Plaintiff Bjazevich, driving a forklift owned by the vessel lost control driving in reverse down a ramp aboard ship and struck plaintiff Satola and another forklift driven by plaintiff Matthews. Mr. Bjazevich explained the accident by claiming his brakes failed. All expert post accident testing showed the brakes to function normally.

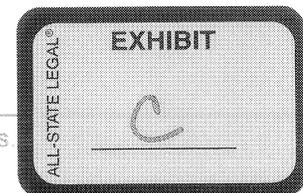
Following removal to the United States District Court, the plaintiffs employer, Marine Terminals Corporation filed a Complaint in Intervention seeking the reimbursement of compensation and medical payments made to the plaintiffs pursuant to its obligation under the Longshoremen's and Harbor Workers' Compensation Act.

Cross-claims were filed by the Hyster Company against Marine Terminals Corporation, the International Longshoremen's and Harbor Workers' Union ('ILWU') and the Pacific Maritime Association ('PMA'). The additional defendants joined by way of cross-claims were dismissed by the court by summary judgment.

Separate motions for summary judgment were brought by defendant Lykes Brothers and by defendant Hyster Company which were denied by the court.

Timely demand having been made, the matter was scheduled to proceed as a jury trial. The issues of liability and damages were bifurcated on the motion of the plaintiff over the objection of defendants Lykes Brothers and Hyster Company.

Trial of the matter commenced in United States District Court on January 26, 1987 and presentation of evidence was concluded on February 3, 1987. By stipulation of the parties it was agreed that the Complainant in Intervention, Marine Terminals Corporation need not be present at or participate in the liability phase of the trial. It was further ordered by the court, over objection of plaintiff's attorney that the cross-complaint for indemnity filed by Lykes Brothers Steamship Company against the Hyster Company would be heard by the court alone, by the court hearing evidence presented concurrently to the jury as supplemented by certain documentary evidence.



*2 Twenty-five witnesses testified at the trial and voluminous documentary evidence was presented together with videotape evidence depicting the accident scene, the manner of operation of vehicles, the condition of the vessel and equipment of the type utilized at the time of the accident.

At the close of the plaintiffs case, defendants respectively moved pursuant to FRCP Rule 50(a) for a directed verdict which the court denied. The case proceeded with the presentation of extensive defense evidence and at the close of all evidence, the court, having reviewed all of the evidence, invited further motions. The defendants Lykes Brothers Steamship Company and Hyster Company individually made and argued a renewal of the FRCP Rule 50(a) motion for a directed verdict which the court granted.

In ruling upon the motion, the court without weighing the credibility of the witnesses determined that there could be but one reasonable conclusion as to the verdict and that the evidence was overwhelming. The court in ruling, expressed the view that there was not sufficient evidence in conflict so that reasonable jurors could reach a different conclusion and, accordingly the court was constrained to grant the motion. The court further observed that it would be inappropriate to allow the jury to consider the matter as, in the very unlikely event that any jurors voted for liability against either of the defendants, the court would be compelled to remove the case from the jury and grant a motion for a judgment N.O.V. The court was strongly of the view that no substantial evidence was in conflict to create a jury question and that reasonable persons in the exercise of impartial judgment could not reach any different conclusion than the court had reached. The evidence remained overwhelming even viewing all evidence in the light and with all reasonable inferences most favorable to the plaintiffs against whom the motion was brought.

II.

FINDINGS OF FACT WITH RESPECT TO DEFENDANT

LYKES BROTHERS STEAMSHIP COMPANY:

1. The S.S. CHARLES LYKES is a modern containerized cargo vessel, referred to as a 'RO/RO' ('roll-on, roll-off') vessel which was owned, and operated by defendant Lykes Brothers Steamship Company at all times relevant to this action.

2. The S.S. CHARLES LYKES was one of four sister ships identical in layout and design, constructed by the Bath Iron Works of Bath, Maine in approximately 1975.

The S.S. CHARLES LYKES was designed with several internal shipboard ramps to allow large forklifts and trucks to drive directly into the ship to load cargo such as twenty foot containers or palletized material. Access to this ship is afforded by a large ramp which is lowered to the dock by gantry controls affixed to the stern of the vessel. The S.S. CHARLES LYKES and its sister ships were all designed to be loaded and discharged with the use of heavy lift fork trucks specifically adapted to this task manufactured by the Hyster Company.

3. Bath Iron Works set specifications for the heavy lift fork truck in order to allow its use aboard the vessel. These specifications involved a height restriction of the machine to permit its operation aboard the vessel and the rotation of the seat to a 45 degree angle in order to permit ease of operation both forward and rearward.

*3 The vessel CHARLES LYKES and its sister ships were initially sold by Bath Iron Works to the States Steamship Company and were placed in service in 1975.

4. The CHARLES LYKES and its sister ship, the TYSON LYKES were utilized on a regular schedule calling at the port of Long Beach approximately every 30 to 40 days from the time the vessels were built through and including the time of the accident. The stevedore services were regularly performed by Complainant in Intervention Marine Terminals Corporation ('MTC') both when the vessels were owned by States Steamship Company and during the entire time of their ownership by Lykes Brothers Steamship Company.

5. Lykes Brothers did not design, build or modify the vessel or its Hyster forklifts.

6. Trial testimony from a number of present and former employees of MTC, Lykes Brothers and maritime experts familiar with cargo operations in Long Beach, confirmed the vast experience which MTC had in performing stevedore operations aboard the CHARLES LYKES and identical sister ships. As noted, each of the ships carried forklift vehicles similar to that involved in the accident.

7. Testimony from Gordon Phillips, night superintendent for MTC and Captain Charles O'Brien, former MTC day superintendent confirmed that the vessels were in port for

an average of 2.5 days during stevedore operations in the port of Long Beach. The ships were ordinarily worked by two longshore gangs a day but at times as many as three. The day shift cargo operations ran from 8:00 a.m. to 5:00 p.m. and the night shift from 6:00 p.m. through 3:00 a.m. From the period of 1976 through the time of the accident in 1982, CHARLES LYKES was in the port of Long Beach approximately ten times per year. Over the 81 months this encompassed, the vessel would have made 67.5 trips into Long Beach harbor and have been worked by MTC 168.75 days and, with two shifts per day over 2,700 hours. MTC personnel confirmed that forklift machines would enter the vessel and make four to five round trips per hour. Using the lowest figure, this amounts to over 10,800 trips made by the very same machine involved in the accident onto and off of the ship, utilizing the same ramps. For the 3 machines carried onboard the vessel which were identical to the accident machine, this amounts to over 32,000 trips. Other testimony indicated that approximately 15 machines were used per work shift which on the same average amounted to over 162,000 trips by various vehicles on and off the vessel—all of which were operated by MTC's personnel. If the sister ships and machines utilized in the same port by the same stevedore were considered, the number of trips on and off the vessel in identical circumstances to that involved in the accident number in the many hundreds of thousands—all without any safety concern respecting the suitability of the condition of the ship, the internal cargo ramps, or the Hyster machines for the cargo operations performed by MTC.

8. Extensive testimony from MTC management personnel including former operations manager, David Hoppes, claims manager, Gary Habecost, night superintendent, Gordon Phillips, former day superintendent, Charles O'Brien, and others, established that it was the duty of MTC to inspect the vessel for safety prior to start of cargo operations. At no time prior to the accident were the machines, including the heavy lift truck involved in the accident, the ramps or any other aspect of the vessel found to be unsafe or unsuitable for MTC and its longshoremen employees. The condition of the ship and the machines were always found to be suitable for MTC to work safely.

*4 9. Testimony from MTC's management personnel and from Lykes Brothers employees, Joseph Carriere and former RO/RO superintendent, John Finley established that the contractual relationship between Lykes Brothers and MTC required that MTC supply only skilled, trained operators to drive the subject H520B forklift machines, each of which

weighed 80,000 pounds unladen and over 120,000 pounds when loaded with a cargo container.

10. In other testimony, MTC's management witnesses acknowledged that it was the obligation of MTC to follow the applicable OSHA regulations including Title 29 CFR Section 1917.27 which provides in relevant part:

Qualification of machinery operators.

(1) only those employees determined by the employer to be competent by reason of training or experience, and who understand the signs, notices and operating instructions and are familiar with the signal code in use shall be permitted to operate a crane, winch or other power operated cargo apparatus or any power operated vehicle' (emphasis added)

11. Extensive testimony from personnel of MTC, Lykes Brothers, and expert witness, Charles O'Brien and John McEvoy of the PMA confirmed that the shipowner, Lykes Brothers had no ability to determine the competency of individual longshoremen as machinery operators and was entitled to rely on the expert stevedore contractor (MTC) to assign appropriately trained personnel to the operation of machines such as the subject heavy duty forklift truck.

12. Mr. Bjazevich testified that he had hundreds of hours of experience in heavy duty forklift trucks. However, detailed records maintained by the Pacific Maritime Association respecting Mr. Bjazevich were received in evidence. The records were testified to by Mr. John McEvoy, a former senior PMA official and disclosed that Mr. Bjazevich worked primarily as a holdman and not as a 'jitney' driver. In fact, the records produced, indicated that over the period of five years prior to the accident Mr. Bjazevich worked less than 1% of his time on vehicles weighing in excess of 10 tons.

13. Testimony of plaintiff Elias Satola and Mr. Satola's statements to MTC's claims manager Gary Habecost following the accident, indicated that Mr. Bjazevich was not an experienced heavy forklift operator.

14. Mr. Bjazevich in his own testimony acknowledged that he had never taken any formal training programs offered by the PMA for driving of the heavy forklift trucks. He admitted that he did not know the purpose of various controls, including the inching pedal on the machine involved in the accident. He testified that he did not ever use such controls because he did not know what they were and they 'don't work half the time anyway.'

15. There was no evidence produced at trial suggesting that the vessel or any of its officers or crew were aware that Mr. Bjazevich was driving the machine. Nowhere is there any indication that the vessel was aware of Mr. Bjazevich's apparent lack of driving skills.

16. Extensive expert testimony and that of MTC supervisors confirmed that it was the obligation of MTC and its supervisory personnel, including superintendents, ship bosses, hatch bosses and signal men to control the cargo operation and to supervise and control the longshoremen working aboard the vessel, including those driving forklifts.

*5 17. In addition to the enforcement of OSHA regulations, MTC had its own safety code (exhibit 164) which applied to the operation of lift truck machines on the dock and aboard ship. The enforcement of such safety rules were the obligation of MTC supervisory personnel and obedience to them was the responsibility of the individual longshoreman. Respecting lift trucks operated on vessels, these regulations required that the vehicle be operated at a safe speed, fully under control and in such a fashion that the operator can bring the machine safely to an emergency stop within the clear space ahead of the vehicle.

18. MTC's signalman Tommy Prince was present on 'C' deck to direct traffic and to provide operational signals to longshoremen driving machines moving cargo. Decisions respecting the number and location of a signalman were the responsibility of MTC.

19. Cross examination of vessel representatives by the plaintiff's attorney sought to establish that if an obvious unsafe act was observed by crew member, the vessel could complain about it to the individual longshoreman and request MTC supervisory personnel to take corrective action. However, direction and control of the individual longshoreman had to come from MTC's employees. Longshoremen would ordinarily not take any orders or directions from the vessel's crew. In any event, there were no officers or crew members in the vicinity of Mr. Bjazevich as he drove his machine onboard the ship to 'B' deck, deposited the container and proceeded to the ramp where the accident took place when he lost control of the machine. There was no evidence that any employee of Lykes Brothers observed Mr. Bjazevich in the process of driving a machine from the point he first mounted it through the point to when the accident sequence began.

20. Testimony established that Mr. Bjazevich was called from the 'hungry sheet' in the union hall to replace the driver who had been assigned to the machine at the start of the night shift at 6:00 p.m.. Mr. Bjazevich arrived at the dock and mounted the machine at approximately 8:10 p.m. The accident took place during Mr. Bjazevich's first trip aboard the ship. He testified that he picked up a container at the dock, and drove aboard the ship, ascending the ramp leading from 'C' deck to 'B' deck. He deposited the container and was in the process of returning to the dock down the same ramp when the accident took place. During the course of his driving of the machine prior to the accident, he had used the brakes on several occasions and found them to work satisfactorily.

21. Extensive evidence presented at trial established that the machine involved in the accident had been used continuously in each work shift prior to the accident without any reported problem concerning its brakes. The CHARLES LYKES had arrived in the port of Long Beach in the early morning hours of September 29, 1982 and the machine was used for the day shift on the 29th of September, the evening shift of the 29th of September, the day shift for the 30th of September and it was used without incident for several hours during the evening shift on the 30th before Mr. Bjazevich began driving a machine, all without reported problems of any sort.

*6 22. Testimony concerning the ship's ramps disclosed that the 'B' deck to 'C' deck ramp where the accident took place was a 6 degree incline corresponding to an 11% grade. Signs present on the walls of the ramp indicated 'caution ramp, 'slow down' and 'caution bump, slow down.' Testimony from Mr. John Finley indicated that it was the vessel's preference that drivers use low gear when going up or down a ramp with a load. It was the vessel's preference that first gear be used when descending the ramp without a load although control over the machine could be adequately maintained in second gear as long as the operator kept his speed moderate by use of the brake. Plaintiff Matthews testified that it was the habit and custom of longshoremen to utilize first gear when carrying a load and to utilize second gear when descending the ramp unloaded but to keep one's foot on the brake to regulate speed. Testimony from Hyster personnel familiar with the operation of the H520B forklift testified that the maximum speed obtainable in first gear is approximately 4 miles per hour and that top speed in second gear is 8 miles per hour. If one were to accelerate to maximum speed descending a ramp, it is possible that one could obtain a speed as high as 9 miles per hour in second gear. Testing of the machine confirmed that the machine could be stopped within 4 feet in first gear

and within approximately 10 feet in second gear whether on a flat surface or on the vessel's ramp. The stopping distance in each gear is significantly less than the total length of the machine.

23. Prior to Mr. Bjazevich attempting to descend the ramp from 'B' deck to 'C' deck, a Marine Terminal's tow-motor and attached 'mafi' trailer, approximately 40 feet in length, had stalled on the vessel's steering ramp, completely blocking access to or from the vessel. Despite the congestion at the bottom of the ramp the MTC signal man, Prince, waved to Mr. Bjazevich to come down the ramp.

24. Mr. Bjazevich testified that he began down the ramp in second gear and without applying the brake. His feet rested on the floor board of the vehicle. At approximately the point where he had gone halfway down the ramp, Mr. Bjazevich testified he received a signal from Mr. Prince to stop, observed the congestion, and 'went for the brake'. Mr. Bjazevich testified that there was no braking reaction and he looked down to observe and confirm that his foot was in fact on the brake pedal with no braking action. The machine then continued down the ramp out of control, striking the trailer, hitting the offshore railing of the vessel's stern ramp, striking a 10 ton Taylor forklift on which Mr. Matthews was seated, and coming to rest astride the flat surface of the vessel's stern ramp railing with its wheels off the ground. In the course of the accident, Mr. Satola was struck and knocked to the deck.

25. A Marine Terminal's mechanic working on the stalled tow motor and trailer heard high engine RPM's coming from the forklift which Mr. Bjazevich was driving. The sound is consistent with application of the accelerator pedal.

*7 26. The accident occurred at approximately 8:42 p.m. as established by witness testimony and the vessel deck log book. Mr. John Finley, Lykes Brother's RO/RO cargo coordinator, had been approaching an elevator on 'C' deck forward of the accident site when he heard a crash and saw the Hyster on the railing. He immediately went to assist with anyone injured. The Captain, a trained medical officer rendered first aid to Mr. Satola who had been knocked to the deck. After seeing to the condition of the injured men, Mr. Finley visibly examined the forklift truck and observed that the air pressure was in excess of 90 pounds per square inch indicated by the dial on the dashboard and that the controls were in reverse, second gear. He retrieved a camera and documented the condition of the forklift as he considered both observations significant. In second gear it would be possible for an operator to obtain an unsafe speed while

descending the ramp unless the brakes were used to moderate speed. In addition, the air pressure of 90 pounds per square inch indicated that there was ample air pressure for full braking efficiency of the vehicle. Only 60 to 65 pounds per square inch is necessary for 100% braking efficiency per the uncontradicted testimony of Lykes Brothers and Hyster expert witnesses.

27. Because of the nature of the accident and the potential for bodily injury and property damage claims, both Lykes Brothers and MTC wished to verify the condition of the machine. Both Lykes Brothers and MTC were aware that plaintiff Bjazevich had claimed loss of brakes as an explanation for his loss of control over the machine. Testimony of trial witnesses verified that no one touched or altered the condition of the machine prior to its removal from the ship's railing for testing. The logistical problem of removal of the machine from the damaged vessel railing was solved after midnight and two heavy forklift vehicles made a 'married' lift and placed the involved Hyster 520B down on the vessel's stern ramp.

28. The plaintiff called a Marine Terminal's ship boss, Fred Anthony, who claimed to have driven the machine from the vessel's stern ramp to the dock and an additional short distance from the end of the ramp.

29. Mr. Anthony testified that after starting the machine he placed it in first gear and backed it down the ramp from the ship. At the bottom of the ramp he claimed he had 'no brakes' and stopped the machine to build up air pressure and then proceeded to move it approximately 40 feet where he stopped the machine to get it out of the way of the cargo working area. He further testified that on leaving the machine, he complained to MTC's superintendent Dave Hoppes that the brakes did not function.

30. The testimony of Mr. Anthony was severely impeached by defense experts respecting the manner of operation of the machine and the impossibility of what Mr. Anthony claimed to have observed it being able to occur. The pumping of the brakes which Mr. Anthony had testified to having done for the purpose of building up brake pressure was described as completely inconsistent with the operation of an air brake system. Pumping, according to defense experts only has an affect on hydraulic type brakes and in an air brake system, air pressure builds up only by the compressor delivering air to the brake air storage chambers. Mr. Anthony's testimony was further directly impeached by two MTC superintendents who were present in the process of his steering the machine

off the stern ramp. Mr. Gary Habecost testified that he was very interested in the condition of the brakes because of the potential of liability of MTC if the accident were to be attributed to operator error as distinguished from mechanical condition of the machine. Mr. Habecost walked along side of Mr. Anthony as the machine was steered off the stern ramp. Mr. Habecost testified that the accident machine was bracketed counterweight to counterweight by another machine to prevent it from potentially getting out of control. He observed Mr. Anthony driving and saw nothing wrong with the brakes. He observed Mr. Anthony brake the machine to a stop without incident. Mr. Habecost was present when Mr. Anthony descended from the machine and heard him advise MTC manager David Hoppes that the brakes worked fine. Mr. David Hoppes also testified that Mr. Anthony upon leaving the machine did not mention anything respecting any problem with the brakes and in fact confirmed that the brakes worked without any problem.

*8 31. Immediately after Mr. Anthony descending from the machine, two MTC mechanics Charles Cherneska and Harold Jolleston boarded the machine at the direction of the MTC superintendents and extensively tested it on the dock adjacent to the vessel. Mr. Cherneska testified that he was familiar with the operation of such machines and their brake system. He drove the machine in each of the respective gears and braked it vigorously to a stop in each gear position first, second and third and in both forward and reverse direction. He also examined the air system and the other systems on the vehicle and could find nothing out of the ordinary. To confirm his opinion that there was absolutely nothing wrong with the machine, he exchanged positions with Mr. Jolleston and observed while Mr. Jolleston drove the machine with similar results. He then reported to his superiors at MTC, Mr. Habecost and Mr. Hoppes, that the machine worked perfectly well and that there was no problem with the brakes.

MTC then disabled the machine by cutting an ignition wire. This was done so that it could not be moved or altered so that it would remain on the dock through the following morning when other expert examination could be obtained.

32. Extensive testimony was presented by the defendants respecting post accident testing of the machine. All tests confirming that there was nothing detectably wrong with the air braking system, brake linings, brake pads or the brake pedal (treadle valve).

33. MTC commissioned an independent surveyor, J. A. Jacobson and Associates to examine the machine on their

behalf to render an opinion as to the cause of accident. Mr. John Curry, an experienced surveyor attended at the vessel the following morning, October 1, 1982, and observed the machine drive tested. Mr. Curry rendered a report which was received in evidence which concluded that the cause of the accident was driver error associated with excessive speed and possible misapplication of a pedal other than the brake pedal.

34. The same morning, an expert brake firm, Hetzel Brothers, whose technician was a 'Class A' brake inspector licensed by the State of California, examined the machine in detail. Air pressure was measured as well as applied and unapplied loss of air from the braking system, condition of brake linings, and braking efficiency. The Hetzel Brothers' technician concluded that there was nothing wrong with the braking system or air system and confirmed that through aggressive drive testing that the brakes functioned perfectly well.

35. Thereafter, the machine was placed back aboard the vessel and was taken out of service with instructions that no one was to touch it until further examination by Hyster mechanics and Failure Analysis Associates when the vessel arrived in the port of San Francisco. Upon arrival in San Francisco on the morning of October 2, 1982 the machine was taken directly off the ship where it was thoroughly examined by Hyster mechanics. Extensive examination and testing was performed on behalf of Lykes Brothers by Stephen Winder, Phd. of Failure Analysis Associates. Dr. Winder, an experienced engineer with Failure Analysis having expertise in accident reconstruction and extensive knowledge of braking systems, directed functional tests performed on the machine and a thorough examination of the air brake system. The test report was received in evidence, confirming that no problems of any nature could be identified with a braking system of the machine.

*9 36. Thereafter, the Hyster machine was replaced aboard the vessel CHARLES LYKES and was continued to be used by stevedore companies throughout the various ports at which the vessel called without any further reported incident and particularly no problems with the brakes. The testimony from Hyster mechanics and vessel personnel confirmed that prior to the incident with Mr. Bjazevich there had been no reported problem involving the braking system of the Hyster machine.

37. At trial the plaintiffs called Martin Siegal, a mechanical engineer as an expert. Mr. Siegal had not examined the machine involved in the accident at any time but theorized that the accident could be explained by 'hard contaminants' entering the brake treadle valve temporarily blocking the

supply of air to the brake system. An alternative explanation would be that the operator stepped on the inching pedal or clutch rather than the brake. Mr. Siegal explained that the presence of contamination amounted to an 'intermittent failure mode' which explained why the brakes worked at all times before the accident and performed perfectly well at all times during functional testing after the accident. Professor Siegal had no quarrel with the absence of any detected problems in later testing of the machine. He explained that the contaminants which caused the accident could have 'blown out' of the system after temporarily causing a total brake failure. The court refers to and incorporates herein its comments at paragraph 32 of the findings with respect to Hyster Company.

38. Mr. Siegal had no information on the maintenance program carried out by Lykes Brothers and had no information to indicate that Lykes Brothers failed to carry out maintenance described in the service manual for the vehicle. He had no information concerning the maintenance practice of Lykes Brothers Steamship Company either as to the regular servicing performed by Hyster on the machine every forty days in the port of San Francisco, or the regular shipboard maintenance throughout the course of each voyage.

39. Defense expert testimony on the part of Lykes Brothers from Dr. Winder of Failure Analysis and Albert Hetzel of Hetzel Brothers brake service confirmed that the ship had taken extraordinary good care of the Hyster machines, including the machine involved in the accident.

40. Testimony from Mr. Hetzel, Dr. Winder, Hyster's mechanic Dominic Balesteri and Lykes Brothers maintenance and repair manager, Joseph Carriere confirmed that the vessel took extraordinary good care of the Hyster machines and extensively examined them to assure that the brake system was in proper working order before the machines were released for use by stevedoring companies. The vessel CHARLES LYKES as well as its sister ships were on a regular liner schedule with voyages initiating in the port of San Francisco from which the ship travelled to ports in Japan, Korea, and Okinawa before returning to Japan, then Honolulu, then Long Beach before returning to San Francisco. Each time the vessel was in the port of San Francisco, (approximately every 40 days) the individual Hyster machines would be taken off the ship and completely checked out and serviced as required by the Hyster Company. Before the vessel sailed to the first Japanese port, Hyster Company furnished the vessel with a safety certificate akin to a gear certification issued by the American Bureau of Shipping certifying that the machine

was in good and safe working order and suitable for use by stevedoring companies for a longshoring operation.

*10 41. While onboard the ship, care and maintenance of the Hyster vehicles were the responsibility of the engineering department, headed by chief engineer, Barnard Morris who testified as a trial witness. Within the engineering department the machines were inspected and tested prior to use in every port by the deck engine mechanic, Mr. Leroy Wilson. Mr. Wilson, who testified in videotape deposition described his work method which included complete functional testing of the machines including the accident machine in each port before the machine was released for use by longshoremen. A part of the testing which he performed included starting the machine, placing it in gear and testing the brakes. The machine would be run to full throttle with the service brake depressed in both forward and reverse gears and the parking brake would be similarly tested. This function testing was performed in each of the individual ports. In addition, during the longer return portion of the voyage from Yokahama to Honolulu, a detailed checklist examination was undertaken. The checklist, (copies of which was received in evidence), was jointly prepared by Hyster Company and Lykes Brothers to thoroughly examine all aspects of the machine. Anything requiring replacement parts or significant work by the Hyster Company was noted and Lykes Brothers would be notified by telex in San Francisco so that necessary maintenance could be performed. Any other items noted on the form as calling for attention were dealt with immediately and rectified before the machine was used in the port of Honolulu. After cargo operations were complete in Honolulu, the vessel would sail for the port of Long Beach. Again, in Long Beach, Mr. Wilson, supervised by a licensed member of the engineering department of the ship would check-out the machines to be sure they functioned properly prior to release to MTC in Long Beach harbor.

42. Mr. Wilson testified that he tested all of the machines utilized by MTC prior to the start of cargo operations and found them all, including the machine involved in the accident, to be in excellent working order.

43. At no time during the conduct of cargo operations from the arrival of the vessel in Long Beach of September 29th through the time of Mr. Bjazevich's accident was the ship aware of any problems with the operations of the No. 04 Hyster. MTC's supervisory personnel acknowledged that it was the practice of their employees and superintendents to report any problems with machinery. None were reported regarding the accident machine at any time until Mr. Bjazavich had

his accident. There is nothing whatsoever in the evidence to indicate that Lykes Brothers had any actual or constructive knowledge of anything wrong with the Hyster involved in the accident.

Expert witnesses called at trial by Lykes Brothers Steamship Company, including Albert Hetzel, (brake expert); Stephen Winder, (Failure Analysis, reconstruction expert); Captain Charles O'Brien, (maritime cargo expert), as well as MTC's management personnel, Gordon Phillips, (night superintendent); Gary Habecost, (claims manager) and David Hoppes, (operations manager) all attributed the accident cause as operator error on the part of plaintiff Paul Bjazevich.

*11 44. The Hunter machines, and the cargo ramps aboard the CHARLES LYKES as well as the slope the ramps onboard, were all open and obvious conditions as testified to by MTC's superintendents and by cargo operations expert, Captain Charles O'Brien.

45. Use of the Hyster 520B machines requires a trained operator because of the complexity of the equipment and its tremendous size. A trained operator is required to know as a matter of fundamentals the nature of the controls on the machine and their purpose. The evidence indicates that Mr. Bjazevich was not fully acquainted with the controls and, did not know the purpose of the inching pedal. In any event, Mr. Bjazevich did not at any time intend to use the inching pedal and specifically denied having attempted to use it or to have placed his foot on it at any time during the accident sequence. Accordingly, evidence produced by the plaintiff indicating that machines manufactured by Hyster Company after 1980 incorporated a brake beneath the inching pedal and Lykes Brothers' purchase of some of the machines is immaterial and not causally connected with the accident.

46. Mr. Bjazevich was, by his own testimony familiar with the angle of the ramp and the use of the machine gears. Mr. Bjazevich testified he considered both first and second gear to be 'low gear.' He did not maintain control of the machine by use of the brake as he began going down the ramp. Even assuming a brake failure, he failed to take steps which a trained operator would including alternative action such as downshifting into first gear or activating the parking brake on the dash to bring the machine to a safe stop.

47. Even if the court were to give full weight to the theory of Mr. Siegal of an intermittent brake failure, there is simply no evidence to suggest that Lykes Brothers failed to exercise reasonable care to have the machine serviced or maintained as required and absolutely no evidence whatsoever to suggest

that Lykes Brothers would have been able to predict and avoid a 'one time only' failure such as the plaintiffs' expert postulated.

48. Ignoring all questions of witness credibility and giving full weight to the testimony presented by the plaintiff, the evidence is overwhelming that there was no negligence on the part of Lykes Brothers Steamship Company. The court does not believe that any reasonable jury would find liability against Lykes Brothers Steamship Company and, in the extremely unlikely event that the jury were to return such a verdict the court would be compelled to set it aside.

III.

CONCLUSIONS OF LAW—GENERAL

In directing a verdict in favor of defendant Lykes Brothers and Hyster Company the court is mindful of the principle that such action is proper if the evidence permits only one reasonable conclusion. *Cal Computer Products, Inc. v. IBM*, 613 F.2d 727 732-733 (9th Cir. 1979). In doing so the court has avoided consideration of credibility of witnesses and has resolved all inferences in favor of the plaintiffs who have the burden of persuasion on the issue of liability. The court has found that the evidence is such that no reasonable jury could accept plaintiff's evidence as adequate to support a verdict in plaintiff's favor.

IV.

CONCLUSIONS OF LAW—PLAINTIFFS'

CLAIM AGAINST LYKES BROS. STEAMSHIP CO.

*12 In 1972 Congress amended the Longshoreman's and Harbor Worker's Compensation Act (33 USC § 905(b)) to provide that a Longshoreman injured 'by the negligence of a vessel . . . may bring an action against such vessel as a third party' and that the vessel's liability 'shall not be based on the warranty of seaworthiness.' The concept of seaworthiness is, of course, a form of strict liability which required no proof of fault on the part of the vessel owner. The Plaintiff merely was required to show the existence of an unsafe condition on the vessel which had a causal connection to the accident. Prior to the amendment to the Act, the vessel could be held liable even though the unsafe condition was the fault of the stevedore contractor. However, the vessel was entitled to

pursue an action against the stevedore company for breach of its warranty of workmanlike performance to conduct cargo operations safely. The 1972 Amendments to the Act were designed to eliminate the Ryan-Sieracki trilogy of suits which resulted. (*Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946); *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, D6 S.Ct. 232, 100 L.Ed. 133 (1957)) which resulted. The Act increased compensation payments substantially but eliminated the shipowner's indemnity action against the stevedore company and limited the Longshoreman's actions against the vessel to negligence.

1. LYKES OWED STRICTLY LIMITED DUTIES TO PLAINTIFFS

A. Lykes Owed Only Four Limited Duties Of Care To Plaintiff.

In the seminal case of *Scindia Steam Navigation Company, Ltd. v. De Los Santos*, 451 U.S. 156, 68 L.Ed.2d 1, 101 S.Ct. 1614 (1981), the Supreme Court held that the duties owed by a shipowner such as Lykes Brothers to longshoremen such as plaintiffs are strictly limited. As the Ninth Circuit has recognized, '[i]t is the exceptional case, under *Scindia*, in which the shipowner remains liable as a 'deep pocket' defendant, when it turns the vessel over to the stevedore for loading.' *Bandeen v. United Carriers (Panama), Inc.*, 712 F.2d 1336, 1341 (9th Cir., 1983).

In *Scindia*, the Supreme Court interpreted the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. section 901 et seq., the exclusive remedy of a longshoreman against a shipowner (see 33 U.S.C. section 905(b)), and held that a shipowner owes only four strictly limited duties to longshoremen during cargo operations:

1. First, before the ship is turned over to the longshoremen for cargo operations, the shipowner must exercise:

'ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property . . .' (emphasis added) *Scindia, supra*, at p.167.

This first duty applies only to the shipowner's actions before the cargo operations begin. In *Taylor v. Moram Agencies*, 739 F.2d 1384, (9th Cir., 1984), the Ninth Circuit recognized the distinction between the shipowner's duties before cargo

operations begin and its duties once cargo operations are underway. In *Taylor*, the longshoreman plaintiff was injured when he slipped on beans spilled onto the ship's deck and winch platform. The plaintiff argued that the spilled beans were a dangerous condition which the shipowner had a duty to correct during the cargo operations. The Ninth Circuit rejected plaintiff's claims, holding that:

*13 'Under the provisions of *Scindia*, a shipowner who has turned over a safe vessel and equipment has the right to rely on the stevedore to avoid exposing the longshoremen to hazards which develop in the confines of the cargo operation.'(emphasis added) *Id.*, at p.1386.

'The *Scindia* Court made it clear that the primary responsibility for maintaining a safe condition during cargo operations rests on the stevedore.'(emphasis added) *Id.* at p.1387.

The Ninth Circuit concluded that, even assuming the shipowner had known of the spilled beans on the winch platform, it was entitled to rely on the stevedore 'to do what was necessary to maintain a safe place for the longshoremen to work.'*Id.* at p.1388.

Other circuits are in accord. For example, in *Helaire v. Mobil Oil Corp.*, 709 F.2d 1031 (5th Cir., 1983), the Fifth Circuit stated that the shipowner must 'exercise care to deliver to the stevedore a safe ship with respect to gear, equipment, tools and workspace', *Id.*, at p.1036, but that 'once loading operations have begun . . . [the shipowner] is not held to a duty to discover the [dangerous] condition or to anticipate its danger.'*Id.*, at pp.1038-39. In *Spence v. Marichamns R/S*, 766 F.2d 1504 (11th Cir., 1985) the Eleventh Circuit commented '[O]nce the cargo unloading activities began, the shipowner's duties narrowed considerably.'*Id.* at p.1507.

Thus, under this first duty, Lykes Brothers was required to exercise 'ordinary care' in maintaining the No. 4 Hyster and the S.S. CHARLES LYKES in such a condition that an expert and experienced stevedore exercising reasonable care could have performed the cargo operation with reasonable safety. The evidence at trial demonstrated that Lykes Brothers carefully maintained the vessel and the No. 4 Hyster, and had no notice of any dangerous conditions therein at any time, and certainly none when it turned over the vessel and the No. 4 Hyster to the longshoremen. Plaintiff produced no evidence that Lykes Brothers failed to properly maintain the Hyster

machine. To the contrary, the evidence is overwhelming that the machine was well cared for. Continuous maintenance was done aboard the vessel and Hyster performed detailed inspections and repair every forty days when the ship arrived in the port of San Francisco.

2. Second, the shipowner must warn the stevedore of: 'any hazards on the ship or with respect to its equipment that [1] are known to the vessel or should be known to it in the exercise of reasonable care, [2] that would likely be encountered by the stevedore in the course of his cargo operations and [3] that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.'(emphasis added; brackets added.) Scindia, supra, at p.167.

Like the shipowner's first duty, the second duty is applicable only to the shipowner's actions before the vessel and its equipment are turned over to the longshoremen for cargo operations.Taylor, supra, at pp.1386-87. As noted in the findings of fact, MTC was intimately acquainted with the vessel and the subject Hyster machine, having serviced the vessel and its sister ships hundreds of times.

*14 3. Third, the Scindia court imposed a strictly limited duty on the shipowner to intervene during cargo operations if the shipowner:

'(1) has actual or constructive knowledge of a dangerous condition, (2) knows that the longshoremen are continuing to work despite the existence of an unreasonable risk of harm to them, and (3) could not reasonably expect that the stevedore would remedy the situation.'(emphasis added; Parentheses in original.) Taylor, supra, at p. 1388. (Citing Scindia, supra, at pp.175, 176).

This third duty arises only in exceptional circumstances, when the stevedore's judgment is 'so obviously improvident' (emphasis added) (Scindia, supra, at p.175) that the shipowner should have known that it could not rely upon the stevedore to protect the longshoremen from the danger. This duty will only apply in the most unusual and extreme cases: '[a]s a general matter, the shipowner may rely on the stevedore to avoid exposing the longshoremen to unreasonable hazards.'Scindia, supra, at p.170. Here, Lykes Brothers knew nothing of the replacement of the regular driver by Mr. Bjazevich and was not shown to have been aware of the traffic jam on the stern ramp. Further, Lykes Brothers knew nothing of Mr. Bjazevich's apparent incompetence as a heavy lift driver. Even if one were to accept

the plaintiffs' expert's theory of a one time only brake failure, this condition arose during cargo operations. Lykes Brothers had no actual or constructive knowledge of any brake problem on the subject forklift.

4. Fourth, and last, the shipowner will be subject to additional duty if it 'actively involves itself in the cargo operations' (emphasis added) or assumes active control of areas or equipment of the vessel during the cargo operations.Scindia, supra, at p. 167. A shipowner which undertakes this type of active involvement or control is bound to exercise due care to avoid injury to longshoremen during cargo operations under the shipowner's control, or from hazards presented by equipment or areas of the vessel under the shipowner's active control.Scindia, supra, at p.167. Taylor, supra, at p.1387.

This fourth duty was not triggered in the instant case, since Lykes Brothers never assumed 'active control' over the No. 4 Hyster driven by plaintiff Bjazevich or over the cargo operations. 'Active involvement' or 'active control' is more than mere contact or peripheral involvement. For example, in Taylor, supra, the ship's crew observed the longshoremen performing the cargo operation, oiled the winch whose platform was covered with spilled beans during the operation, and at least once attempted to sweep the spilled beans off the deck of the vessel. The plaintiff in Taylor argued that the ship's crew had thus actively involved itself in the cargo operations and the equipment and areas of the vessel being used by the longshoremen so as to trigger this fourth duty. The Ninth Circuit disagreed.

The evidence at trial demonstrated that the officers and crew of the S.S. CHARLES LYKES did not take active control of, or actively involve themselves in, cargo operations or in the use of the No. 4 Hyster by plaintiff Bjazevich so as to trigger this fourth duty.

*15 During cross examination, plaintiff's attorney, Mr. Levy attempted to suggest that the vessel's right to intervene in stevedore cargo activities that could damage the vessel or cargo amounts to 'active control' or a custom or practice removing the case from the Scindia rule. Questioning of Lykes Brothers RO/RO supervisor John Finley merely pointed out that the vessel owner has the right to complain to the stevedore contractor when officers observe obviously dangerous conduct on the part of longshoremen. Such arguments have been rejected by the courts. See, e.g., Spence v. Mariehamns R/S, 766 F.2d 1504, at 1507, 08 (11th Cir., 1985).

As a matter of law plaintiffs have failed to prove that Lykes Brothers negligently violated any of the specific duties described above. Plaintiffs cannot carry their burden merely by proof of the fact of the accident, or even by proof that the Hyster indeed malfunctioned or contained a defect (which evidence, as a matter of fact, does not exist). Plaintiffs were required 'go the next step' and prove that Lykes Brothers negligently maintained the No. 4 Hyster and negligently turned the forklift or the vessel over to MTC, the stevedoring company, in an unsafe condition, or, that during the cargo operations Lykes Brothers had actual knowledge of a dangerous condition in the Hyster or the vessel and knew that the stevedore MTC would violate its legal duties with judgment so 'obviously improvident' that Lykes Brothers could not rely upon MTC to protect the longshoremen.

As noted by the district court in Milton v. Bangladesh Shipping 1986 AMC 1684, at 1685, 86'to charge the shipowner with absolute knowledge of any defect present on his ship would constitute a return to the warranty of seaworthiness doctrine, in that proof of unseaworthiness requires no proof of fault . . . that doctrine was abolished by the Act by the 1972 amendment. Accordingly, as with fault-based remedies generally, the Court must find that the defendant had a duty of care that was breached before liability can be assigned.

B. Absent Exceptional Circumstances, LYKES is Not Liable for an 'Open and Obvious' Condition.

For the reasons stated above, Lykes Brothers cannot be liable to plaintiffs for any injuries caused by the 'open and obvious' condition of the vessel ramps or the operation of the Hyster machine, and had no duty to warn plaintiffs of such a condition, unless plaintiffs can prove the exceptional fact that Lykes Brothers also knew that MTC's judgment was so poor that MTC could not be relied upon to protect the longshoremen.Helair, *supra*, at p.1038, 1039.

C. The Primary Duty to Protect the Longshoremen Rests on the Stevedore Company.

Lykes Brothers had no duty to monitor or supervise the stevedore's cargo operations. As a matter of law, the primary duty of protecting the plaintiffs during the cargo operations was the responsibility of MTC, the stevedoring company. As stated by the Scindia Court:

'the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo

operations that are assigned to the stevedore . . . the shipowner, within limits, is entitled to rely on the stevedore, and owes no duty to the longshoremen to inspect or supervise the cargo operations.'(emphasis in original)

*16 Scindia, supra, at p.172.

The evidence at trial was acutely clear that the accident was solely the result of plaintiff Bjazevich's negligence and panic. The responsibility for assigning Bjazevich to drive the 20-ton No. 4 Hyster rested strictly with MTC, and Lykes Brothers had no responsibility therefor.

D. LYKES is Not Liable for Products Liability.

Plaintiffs alleged various theories of products liability against Hyster for alleged defects in design and manufacture in the No. 4 Hyster forklift. The evidence at trial made abundantly clear that those theories were meritless. Further, as a matter of law, none of plaintiffs' product-liability-style evidence and theories may be asserted against Lykes Brothers. In Wilhelm v. Associated Container Transportation (Australia), Ltd., 648 F.2d 1197, 1198, (9th Cir., 1981), the Ninth Circuit held that as a matter of law a longshoreman cannot recover on a products liability claim against a shipowner. See also Whitehill v. United States Lines, Inc., 177 Cal. App. 3d 1201, 223 Cal. Rptr. 452 (1986), where the state court applied federal maritime law and concluded:

'while it may be possible for a longshoreman to bring a products liability claim against the builder of a ship [citations] the longshoreman may not bring such a claim against the shipowner.'[citing Wilhelm].

The same result obtains here where plaintiffs seek to allege that the S.S. CHARLES LYKES or its ramps were defectively designed, constructed, or had insufficient signs and warnings. LYKES did not build the vessel or the Hyster machine and is not strictly liable therefor.

2. NONE OF PLAINTIFFS' THEORIES CAN PREVAIL AGAINST LYKES

A. Lykes Is Not Liable For Brake Failure, If Any, Absent Proof of Its Negligence.

During the testimony at trial, plaintiffs presented no evidence of brake failure in the No. 4 Hyster other than the self-exculpatory testimony of Mr. Bjazevich and the severely impeached testimony of Fred Anthony. Even accepting that

such testimony is colorable evidence of an 'intermittent' failure suggested by Mr. Siegal, plaintiff's expert, plaintiffs did not establish any breach by Lykes Brothers of its duties to them.

The evidence was overwhelming that Lykes Brothers carefully maintained the No. 4 Hyster, in strict accordance with Hyster's operator and maintenance manuals and supplemented with detailed inspection and maintenance by Hyster Co. mechanics at the end of each voyage in the port of San Francisco, and had no notice at any time of any defects therein. Absent negligence or notice, Lykes Brothers cannot be liable for any claimed brake failure.

B. Lykes Is Not Liable For Any Design Defect In The No. 4 Hyster Or Its Controls.

Plaintiffs were presented expert testimony and opinion from Mr. Siegal suggesting that the No. 4 Hyster was defective in design, because it did not incorporate a brake pedal under its inching pedal, and did not have the entire dashboard controls rotated when the driver's position was rotated to a forty-five degree angle. These arguments fail because the Hyster was not defective. In any event, none of plaintiffs' products-liability theories apply to Lykes Brothers, the shipowner.

*17 The evidence is be uncontroverted that Lykes Brothers purchased the No. 4 Hyster as part of the ship's original equipment, did not participate in its design or manufacture, and never modified it. In *Bilderbeck v. World Wide Shipping Agency*, 776 F.2d 817 (9th Cir., 1985), the Ninth Circuit affirmed the District Court's grant of summary judgment in favor of the defendant shipowner, where the longshoreman plaintiff pled only that the ship and its equipment was defectively and negligently designed and manufactured. The Court recognized that the longshoreman plaintiff could not assert a products liability claim against the shipowner, and that plaintiff had failed to plead that the ship or its equipment had been 'negligently altered' or 'improperly maintained' or that its design or manufacture had been rendered unsafe by the shipowner's negligence or 'negligently drawn specifications': without these claims, the court held, plaintiff failed to adequately plead any negligence claim against the shipowner. Plaintiff's evidence as to Lykes Bros. is similarly lacking.

C. Lykes Is Not Liable For The Angle Or Any Aspect Of The Ship's Ramps.

The ramps aboard the CHARLES LYKES are, obviously, an integral part of the ship's structure. Lykes Brothers did not and could not change their angle, and did not design or

build them in the first place. Just as in *Bilderbeck, supra*, absent evidence that Lykes Brothers negligently created or modified the ramps, it has no liability therefor. If plaintiffs had any basis for their contention, their recourse was against the vessel's builder. *Wilhelm, supra*; *Whitehall, supra*.

Further, the angle of a ramp is an 'open and obvious' condition. Under *Scindia, supra*, Lykes Brothers was entitled to rely on the judgment and skill of the stevedore, MTC, and its longshoremen to take the usual precautions that any automobile driver knows to take when descending a hill. This is particularly true where MTC inspected the vessel hundreds of times and used the very same Hyster machines aboard the CHARLES LYKES and sister ships many thousands of times. Lykes Brothers had no duty to intervene unless it knew Bjazevich was driving the No. 4 Hyster down the ramp in an unsafe manner. The evidence at trial was clear that Lykes was not supervising Bjazevich on the cargo operation—and had no duty to do so—accordingly plaintiffs' attempt to blame Lykes Brothers for Bjazevich's negligence cannot be supported.

V.

FINDINGS OF FACT WITH RESPECT TO

DEFENDANT HYSTER COMPANY

Plaintiffs failed to introduce such relevant evidence as a reasonable mind might accept as adequate to support a conclusion that defendants were liable for this accident. Plaintiffs were unable to explain the overwhelming evidence produced by defendants that the operator was not well trained, that the accident was caused by operator error and that the brakes were working properly. This evidence included uncontroverted proof that the brakes worked properly immediate before and immediately after plaintiff Bjazevich lost control of the heavy lift truck and continued to work for many years. Plaintiff's explanation that an influx of contaminants could possibly cause temporary brake failure was not of a quality and weight that reasonable jurors might use to reach such a conclusion. The central problem with this evidence was that it is not reasonable or logical for contaminants to cause this accident and then immediately disappear. An influx of contaminants, if it ever existed, could not correct itself. Plaintiffs failed to prove that there was a defect in the heavy lift truck or that maintenance was performed improperly. The evidence permits only one

reasonable conclusion that the accident was caused by operator error.

*18 1. In 1975 the Hyster Company, Inc. ('Hyster') designed, manufactured and delivered the Hyster 520B heavy lift truck involved in this accident to its customer Bath Iron Works.

2. The customer Bath Iron Works set the specifications for the Hyster heavy lift truck so that the heavy lift truck could load and unload containerized cargo on the RO/RO vessel that became the S.S. CHARLES LYKES.

3. The heavy lift truck weighed approximately 80,000 pounds (about the weight of 27 passenger cars), had tires as tall as a person and lifted containers that weighed over 40,000 pounds.

4. The heavy lift truck met all applicable industry standards for design and manufacture including the American National Standards Institute Safety Code B56.1-1969 ('B56 Safety Code'). The 1969 edition of the B56 Safety Code applied to this heavy lift truck.

a. There were three foot pedals on the heavy lift truck, a clutch, service brake and accelerator. The pedals were positioned in the standard manner like a car with a stick shift transmission. The clutch was on the far left, the accelerator on the far right and the service brake was next to the accelerator, on its left. This pedal arrangement was the standard in the industry for heavy lift trucks in 1975.

b. The clutch pedal was called an 'inching pedal'. Like a clutch, it disengaged the transmission from the engine. The pedal got its name because it is used only during inching. Inching occurs when the operator slowly positions the truck to pick up or deposit a container and at the same time raise or lower the forks. With the inching pedal depressed, the operator can accelerate the engine to supply power for lifting and at the same time slowly position the truck. This style inching pedal was the standard in the industry for heavy lift trucks in 1975.

c. In 1975, it was not feasible to design or manufacture an inching-brake pedal for this heavy lift truck. The state of the art in 1975 was such that inching pedals could not be designed or manufactured to simultaneously disengage the transmission and apply the brakes. This type of inching-brake pedal required a special stronger transmission that was not available in 1975. In 1980, five years after this heavy lift truck was designed and manufactured, new stronger transmissions were developed and Hyster offered, as a customer option,

inching-brake pedals on heavy lift trucks. With this new inching-brake option, there were still three pedals, an inching-brake pedal, service brake pedal and accelerator pedal. A trained operator knew the differences between a 1975 model and a 1980 model and could operate both safely.

d. Photographs were introduced into evidence showing the differences between the 1975 model heavy lift truck involved in this accident and the newer 1980 model. There were significant differences in the appearance of the inching pedal, shift quadrant (since the newer model used a different transmission), and the front uprights. The 1975 model had '520' displayed on it and the 1980 model had '620' displayed on it. The newer model also had a large gas tank mounted on the running board that the driver walked over as he mounted the truck, which the older model did not have. There was no failure to warn about the differences in the trucks.

*19 e. The brake system on the heavy lift truck was similar to brake systems on large highway trucks. The system incorporated a spring-activated parking brake and air-activated service brakes. Air pressure was generated by an air compressor that used the truck's engine for power. Air went through a filter, into the compressor and then into two air tanks. The same filter also supplied air to the engine. From the air tanks, air was delivered to the service brakes through the service brake pedal, which acted as an air valve. In order to release the parking brake, it was necessary to build up air pressure. Once sufficient air pressure was built up, the operator pulled the parking lever located to his left on the dashboard to release the parking brakes. A video tape and photographs were admitted in evidence showing an operator activating the parking brake lever. The lever was within the operator's view and within easy reach of the operator. The air pressure compressed the parking brake spring, releasing the parking brakes. As a safety device, if while the truck was operating the air pressure decreased to the point that the service brakes would not work properly, the parking brakes automatically went on stopping the truck.

5. Hyster delivered an Operator's Guide with the heavy lift truck. The Guide warned that the operator had to be trained and further provided instructions on how to safely use the heavy lift truck. These instructions included an explanation as to how to use the brake pedal to apply the service brakes and how to use the inching pedal to disengage the transmission from the engines during inching operations. There was a placard on the dash board of the heavy lift truck that read 'For Safety, Trained Operator Only'.

6. In order to safely operate the heavy lift truck, the operator had to be properly trained. The requirement for a trained operator was set by Federal OSHA, the B56 Safety Code, and the National Safety Code Accident Prevention Manual for Industrial Operations, Section 6.

7. At the time of the accident the S.S. CHARLES LYKES was being loaded and unloaded by longshoremen employed by MTC. MTC had a contract with Lykes Brothers for the loading and unloading that required MTC to use only trained, skilled longshoremen to operate the heavy lift trucks.

8. Many different types, models, makes and styles of heavy lift truck were used at the port of Long Beach. It was the responsibility of the longshoreman to know the differences between the trucks and only operate equipment that they could operate safely. Trained operators knew the differences. When starting to operate a heavy lift truck, a trained operator verified the function of the truck's controls before attempting to operate the truck. The Hyster heavy lift truck involved in the accident had been operated safely by longshoreman in Long Beach, San Francisco, Japan, Korea, Taiwan, Hong Kong and Hawaii.

9. On the night of the accident, MTC had the sole responsibility for providing a trained, skilled operator for the Hyster heavy lift truck. The job of actually training the longshoremen and selection of operators was the joint responsibility of Pacific Maritime Association ('PMA') and the International Longshoremen's and Harbor Workers' Union ('ILWU').

*20 10. The operator at the time of the accident was plaintiff Bjazevich. Although PMA offered training courses, including courses for fork trucks, semi-tractors and RO/RO seminars, plaintiff Bjazevich never attended any training courses whatsoever. Plaintiff Bjazevich never read the Operators' Guide for the Hyster heavy lift truck. Plaintiff Bjazevich was never required to demonstrate his proficiency in operating heavy lift trucks. He did not know how all the controls worked on the heavy truck involved in the accident.

11. PMA kept pay records for longshoremen by occupation category. Category Code 055 is for operation of heavy lift trucks. Since longshoremen get extra pay for operating heavy lift trucks, they always make sure that their time in that category is accurately reflected in the PMA records. PMA's pay records for plaintiff Bjazevich showed that in the five years before the accident less than one percent of his total time at work was spent in category 055 operating heavy lift trucks.

12. The Hyster heavy lift truck was properly maintained at the time of the accident. The heavy lift truck was maintained by Lykes Brothers while the vessel sailed outside of its home port of San Francisco. Scheduled maintenance and repair of the heavy lift truck was performed by Hyster when it was at its home port of San Francisco. On August 6, 1982, two months before the accident, Hyster performed a complete brake job on the heavy lift truck. That brake job was performed properly pursuant to industry standards.

13. The heavy lift truck performed properly without any brake problems or failure of any kind from 1975, when it was first placed into service, until April, 1986, when it was retired from active service and placed in mothballs for future use on an 'as needed' basis by the U.S. military. During the entire 11 year period, the heavy lift truck was used constantly to load and unload containerized cargo on the vessel S.S. CHARLES LYKES. The heavy lift truck was safely used by longshoremen at ports in Long Beach, San Francisco, Japan, Korea, Taiwan, Hong Kong and Hawaii.

14. In late September, 1982, the vessel S.S. CHARLES LYKES arrived in the Port of Los Angeles two days before the accident occurred. During those two days, the Hyster lift truck was constantly used by longshoremen to load and unload the vessel. The Hyster heavy lift truck performed properly during this time and there were no problems with the brakes whatsoever.

15. On the day of the accident, September 30, 1982, the Hyster heavy lift truck was safely used by longshoremen during the day shift to load and unload the vessel. There were no problems with the brakes whatsoever.

16. On the night of the accident, the Hyster heavy lift truck was safely used by a longshoreman during the first part of the evening shift. There were no problems with the brakes whatsoever. The longshoreman operating the heavy lift truck suddenly and unexpectedly got sick and could not continue his shift.

*21 17. Plaintiff Bjazevich went to the Union Hall in the early evening to sign-up for work on the evening shift. Before going to the Union Hall, he ate dinner at home and had a glass of wine. He was not able to get a work assignment. He placed himself on a Jitney board so he could be called at home if a work assignment came up. He then went home not expecting to work. After arriving home, he was called to replace the sick longshoreman.

18. Plaintiff Bjazevich drove to work and was assigned by his employer MTC to drive the Hyster heavy lift truck. This accident occurred on his first trip on the heavy lift truck. Plaintiff Bjazevich got onto the heavy lift truck on the dock, released the parking brake, placed the transmission in gear, pressed the accelerator pedal and drove to pick up a container on the dock. He used the service brake pedal to stop to pick up the container. He did not use the inching pedal.

19. He did not know the function of the inching pedal and never used the inching pedal when he drove lift trucks. It was his custom and practice to rest his left foot flat on the floor of the truck and only use his right foot to operate the pedals. He drove trucks by only using the accelerator and service brake pedals.

20. After picking up the container, he drove the Hyster heavy lift truck in forward gear onto the ship, up the internal ship's ramp, and deposited the container on 'B' deck. He used the service brakes to stop the heavy lift truck as he deposited the container. He then put the heavy lift truck into reverse gear, and started retracing his steps to leave the ship. As he started down the ramp, he received a signal from a fellow longshoreman employed by MTC to come down the ramp. About half way down the ramp, the signalman changed the signal to 'stop'.

21. At this point, he was backing down the ramp in second gear and lost control of the heavy lift truck. It was a safer practice to use first gear, because it slowed down the heavy lift truck and made it easier to control. The heavy lift truck came down the ramp, climbed a railing on the stern ramp that connects the ship to the dock and stopped on top of the railing. The accident occurred at approximately 8:45 p.m. The three plaintiffs claim they were injured in the accident.

22. At the time of the accident, there was adequate air pressure in the brake system of the heavy lift truck. Had plaintiff Bjazevich applied the service brake pedal the heavy lift truck would have stopped and the accident would not have occurred.

23. The operator Bjazevich claimed the brakes failed. He claimed he applied the service brake pedal but there was no braking whatsoever; he looked down and saw his right foot on the brake pedal. He did not attempt to apply the parking brakes and did not try to slow the heavy lift truck by shifting down into first gear. He did not attempt to apply the inching pedal.

24. MTC employees used two other heavy lift trucks to lift the Hyster heavy lift truck off the railing and onto the ramp. This process took several hours. Around midnight, when the Hyster heavy lift truck was finally lifted back onto the ramp, the air pressure in the braking system had decreased to 30 psi. This decrease in pressure is normal and expected. At this lower air pressure, the service brakes will not work. In order to drive the truck, it is necessary to first start the engine and build up air pressure. Only when air pressure is built up to the point that the service brakes will work is it possible to put the transmission in gear and drive the heavy lift truck.

*22 25. A fellow longshoreman sat on the Hyster heavy lift truck as it was pushed off the stern ramp by the two other heavy lift trucks. The two other heavy lift trucks cradled the Hyster in between like a three-car train. The fellow longshoreman claimed he applied the brakes on the Hyster heavy lift truck as it was lead off the ramp. The brakes worked properly but on the fourth brake application, the brakes did not work. The fellow longshoreman was never trained on the operation of the Hyster heavy lift truck. The fellow longshoreman's testimony about the brakes was not consistent with the way in which the heavy lift truck operates. Reasonable jurors could only conclude that the fellow longshoreman did not properly operate the heavy lift truck. The Hyster was then parked on the dock.

26. As soon as the heavy lift truck was packed on the dock, two MTC mechanics immediately tested the brakes. They found the brakes were working properly. At the conclusion of their tests the MTC mechanics disconnected the electrical system on the heavy lift truck so that it could not be operated until further tests the next day.

27. On the next day, the truck was tested by brake experts hired by Lykes Brothers. These experts were certified by the State of California to inspect air brake systems on heavy trucks. These experts thoroughly tested the brakes and found them working properly.

28. On this same day, an independent survey company who were experts in investigating the cause of maritime accidents examined the brakes on the heavy lift truck at the request of MTC. They found the brakes were working properly after the accident. They also found the cause of the accident was operator error.

29. The heavy lift truck was placed aboard the S.S. CHARLES LYKES and sailed to San Francisco.

30. Immediately upon reaching San Francisco, the heavy lift truck was inspected by additional experts hired by Lykes Brothers and by Hyster mechanics. The heavy lift truck was tested for six hours and the brakes were working properly, including the brake pedal valve. During the tests, the heavy lift truck was driven, in reverse, second gear, down the ramp inside the ship where plaintiff Bjazevich lost control. The service brakes promptly stopped the truck on the ramp. The parking brake was tested on the ramp and it held the truck. The truck was driven in reverse down the ramp and shifted down to first gear. This slowed the truck to less than walking pace. These experts confirmed the brakes were working properly, including the brake pedal valve.

31. The heavy lift truck was placed back into service. No adjustments or repairs were made to the brake system. The truck continued in service and has never had any brake problems whatsoever. The truck has been safely used by longshoremen in Japan, Korea, Taiwan, Hong Kong and the United States.

32. Plaintiffs failed to produce substantial evidence of a quality and weight that reasonable jurors might conclude that defendants were liable for the accident. A college professor testified as an expert witness for plaintiffs. His testimony regarding possible causes of this accident was not reasonable or logical. He lacked qualifications, since he never worked as a designer of heavy lift trucks, air brake systems on heavy trucks, transmissions or clutches for trucks over 50,000 pounds. He never saw the heavy lift truck involved in this accident and never saw an identical model truck. He never worked as a mechanic on truck air brake systems.

*23 a. He claimed that one explanation of the accident was contamination in the air passages of the service brake pedal that locked up the valve and prevented it from opening. He was unable to explain how the brakes would work properly before and after the accident if there were contaminants in the brake air valve. The evidence plainly showed that if contaminants somehow got into the system and prevented the air valve from opening the contaminants would remain in the air valve continuing to clog it until the valve was cleaned or replaced. Contaminants would not just disappear, especially since the valve was clogged shut. Other highly qualified brake experts testified that (i) contaminants would not just disappear, (ii) the valve would have to be repaired, (iii) that they had never seen or heard of a clogged air valve, and (iv) no contaminants were in the system, for any such contaminants

would have reached the engine through the shared air system and caused severe engine damage.

b. Also, he claimed the parking brake lever was inaccessible to the operator. However, he never saw the heavy lift truck involved in this accident. The videotape of the heavy lift truck and photographs admitted into evidence clearly showed that the lever was readily accessible and actually showed an operator using the parking brake lever.

c. Further, he claimed that the inching pedal should have incorporated a brake. The evidence clearly established it was not feasible in 1975 to have an inching-brake pedal because the state of the art had not yet developed the stronger transmission that was required. Moreover, he claimed that the fact there were a mixed fleet of heavy lift trucks, some with an inching pedal and some with an inching-brake pedal, caused operator confusion and would cause an operator to intentionally step on the inching pedal to apply the service brakes, and that defendants were somehow responsible for this operator error. The evidence clearly showed it was the operator's responsibility to familiarize himself with the controls of each truck before attempting to operate the truck and that it was MTC's responsibility to provide only trained and skilled operators for each truck. Further, in this case, the operator plaintiff Bjazevich, testified that he was not confused and he intended to apply the service brake pedal, not the inching pedal. Plaintiff Bjazevich went on to state that he did not know what the inching pedal did and never used inching pedals when he drove lift trucks.

33. The accident was caused by operator error. The operator was not well trained and failed to apply the service brake pedal.

34. There were no defects in design or manufacture of the heavy lift truck.

35. Maintenance on the heavy lift truck was performed properly by Lykes Brothers and Hyster. There was no breach of any warranty, either expressed or implied, by Hyster.

36. Hyster incorporates all findings of fact requested by Lykes Brothers.

VI.

CONCLUSIONS OF LAW REGARDING HYSTER COMPANY

*24 1. Maritime law, not state law, applies to this case. Owens-Illinois, Inc. v. U.S. District Court, 698 F.2d 967, 970-971 (9th Cir. 1983).

2. Maritime law includes the doctrine of strict liability in tort from Restatement (Second) of Torts, section 402A. Emerson G.M. Diesel, Inc. v. Alaskan Enterprise, 732 F.2d 1468, 1473 (9th Cir. 1984).

3. Plaintiffs failed in their burden of proof, in that plaintiffs failed to prove the product was defective and unreasonably dangerous in 1975 when it left Hyster. Restatement (Second) of Torts, Section 402 A (1965).

4. Plaintiffs failed in their burden of proof, in that, plaintiffs failed to prove the product was being used in a reasonable foreseeable way, since plaintiff Bjazevich was not a trained operator. Restatement (Second) of Torts, Section 402 A (1965) Emerson G.M. Diesel, Inc. v. Alaskan Enterprises, 732 F.2d at 1473.

5. Plaintiffs failed in their burden of proof, in that, plaintiffs failed to prove Lykes Brothers or Hyster was negligent.

6. Plaintiffs failed in their burden of proof, in that, plaintiffs failed to prove that Hyster breached any warranty, whether express or implied.

7. This accident was caused by operator error.

8. The heavy lift truck was manufactured pursuant to and met all applicable industry standards for design and manufacture including the B56 Safety Code.

9. There was no failure to warn on the part of Hyster.

10. It was the duty of MTC to only permit trained and skilled longshoremen to operate heavy lift trucks. Defendant Lykes Brothers and Hyster had no such duty.

11. It was the duty of PMA and the ILWU to properly train and select longshoremen to operate heavy lift trucks. Defendant Lykes Brothers and Hyster had no such duty.

12. Operators had to be trained before they could operate lift trucks.

Federal OSHA, B 56 Safety Code, and the National Safety Code Accident Prevention Manual for Industrial Operations, Section 6.

13. The operator of the heavy lift truck had a duty to read and understand the Owners' Guide before operating the heavy lift truck.

14. The operator had a duty to not operate the heavy lift trucks unless he could do so safely.

15. Hyster had no duty to made the pedal arrangement on the heavy lift truck the same as the pedal arrangements on other trucks used at the port of Long Beach.

16. The operator had a duty to know the differences in the trucks used at the port of Long Beach so that he could safely operate the trucks.

17. The operator had a duty to familiarize himself with the controls of each truck before attempting to operate the truck.

18. Hyster had no duty to anticipate that untrained operators would attempt to operate the heavy lift truck involved in this accident.

19. Hyster incorporates all conclusions of law requested by Lykes Brothers.

Parallel Citations

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

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

NO. 72925-0-1

Plaintiffs,

CERTIFICATE OF SERVICE

vs.

PORT OF BELLINGHAM, a Washington
Municipal Corporation,

Defendant.

PORT OF BELLINGHAM, a Washington
Municipal Corporation,

Third-Party Plaintiff/APPELLANT,

vs.

STATE OF ALASKA, by and through its
DEPARTMENT OF TRANSPORTATION
AND PUBLIC FACILITIES – ALASKA
MARINE HIGHWAY SYSTEM,

Third-Party Defendant/
RESPONDENT.

I, ANNETTE M. ARP, declare under penalty of perjury under the laws of the State
of Washington that the following is true and correct:

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1. I am employed by the law firm of Chmelik Sitkin & Davis P.S., at all times hereinafter mentioned I was a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

2. On the date set forth below I sent for service, in the manner noted, the document entitled:

- APPELLANT'S REPLY BRIEF
- CERTIFICATE OF SERVICE

on the parties listed below:

Attorney for Third-Party Defendant/Respondent State of Alaska

Chris P. Reilly, WSBA #25585
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COURT OF APPEALS, DIVISION I

First Class Mail: for Filing

Judge's Copy via Email: susan.dahlem@courts.wa.gov

DATED this 13th day of May, 2015, at Bellingham, Washington.


ANNETTE M. ARP

F:\PORT OF BELLINGHAM\Accounting\BCT Ramp Injury\PLEADINGS - Whatcom Superior_COURT OF APPEALS\APPEAL PLDGS\Reply Brief\CERTIFICATE OF SERVICE_COURT OF APPEALS_5-11-15.docx