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Court of Appeals
Division I
State of Washington

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.

BRIEF OF APPELLANT

PORT OF BELLINGHAM, a Washington Municipal Corporation

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I. INTRODUCTION

In 2009, the Port of Bellingham, a Washington government (the “Port”) and the State of Alaska (“Alaska”) entered into a new¹ twenty (20) year lease (the “2009 Lease”) for Alaska’s continued use of the Port’s “Bellingham Cruise Terminal” facility in Bellingham as the southern terminus of the Alaska owned ferry system known as the Alaska Marine Highway System (the “AMHS”).

The Port’s facility includes a two story terminal building, a passenger ramp, and a vehicle ramp. The terminal building is used by both the Port and Alaska, sometimes at the same time. The original 1989 lease provided that it was interpreted under Alaska law, but by 2009 the Port and Alaska agreed that the laws of the State of Washington would govern “the construction, validity, performance and enforcement” of the 2009 Lease. CP 56 at Section 11.10.

In November of 2012, an AMHS ship’s officer and seaman employee, Shannon Adamson, was on the passenger ramp operating the electric controls that raised and lowered the

¹ The original twenty (20) year lease between the Port and Alaska was executed in 1989 and expired in 2009.

passenger ramp which was suspended from wire ropes. As she operated the controls, the ramp broke free of the wire ropes resulting in the ramp suddenly dropping to the dock below. Ms. Adamson suffered injuries. Ms. Adamson and her husband sued the Port for her injuries. The Port alleged that Ms. Adamson had operated the ramp improperly.

The Port filed third-party claims against Alaska seeking to apportion fault under the 2009 Lease, contribution under common law, and for breach of Alaska's contractual duties under the 2009 Lease (i.e. failing to properly train Ms. Adamson and ensuring the ramp was operated safely and correctly, etc.). The trial court granted Alaska's 12(b)(6) motion to dismiss the Port's third-party claims and denied the Port's motion for reconsideration, clarification and /or certification for appeal. The trial court declined to clarify which of Alaska's arguments was the basis of the trial court's ruling.

After dismissing the Port's third-party claims, the trial court granted the Adamson's motion to dismiss their state court claims² thereby concluding the state trial court proceedings.

² The Adamsons filed an identical lawsuit against the Port in the Federal District Court for the Western District of Washington on November 25, 2014, under Case No. 2:14-CV-01804.

II. ASSIGNMENTS OF ERROR AND STANDARD OF REVIEW

Appellant assigns error to the trial court's decisions as follows.

1. The trial court erred by granting Alaska's motion to dismiss. (*The standard of review is de novo, and the appellate court performs the same inquiry as the trial court*³).

2. The trial court erred by denying the Port's motion for reconsideration, clarification and/or certification for appeal. (*The standard of review is abuse of discretion, and, where the court's grant of the underlying motion was improper, its refusal to grant reconsideration is likewise improper*⁴).

Without limiting the foregoing, the trial court committed error to the extent it determined:⁵

a. that Alaska and/or Adamson were covered under the Washington Industrial Insurance Act (Title 51 RCW);

b. that Alaska law applied and/or that Alaska did not waive its employer protection under Alaska's Worker Compensation Act;

c. that Article 6 of the 2009 Lease relating to apportionment of fault was *ultra vires* because it violated of the Alaska Constitution;

d. that Alaska Statute AS 90.50.250(5) enacted in 2003 withdrew Alaska's long standing waiver of sovereign immunity

³ *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d. 206, 209 (2007).

⁴ *Singleton v. Naegeli Reporting Corp.*, 142 Wn.App. 598, 612, 175 P.3d 594, 601 (2008).

⁵ The Port requested clarification from the trial court as to the basis of its ruling but the trial court declined and, therefore, each basis must be appealed and addressed.

for tort and contract claims against Alaska for the Port's claims, and;

e. that the Doctrine of Equitable Estoppel did not apply.

III. STATEMENT OF THE CASE

A. The 2009 Lease

In 1988, the Port and Alaska entered into a lease for Alaska to utilize the (then yet to be constructed) Bellingham Cruise Terminal. The Port and Alaska used a lease document provided by Alaska. It contained fault allocation language (Article 6, pages 25-26) very favorable to Alaska. Also, the 1988 Lease provided that “[t]he laws of the State of Alaska shall govern the construction, validity, performance and enforcement of this lease”. CP at 338.

In 2009, after twenty (20) years of use, and with the experience of both the Port and Alaska using the terminal building at the same time, the Port and Alaska entered into lease negotiations for a new lease - the 2009 Lease. CP 242. After several months of negotiations, the Port proposed a draft lease, including Section 11.10 changing the of governing law from Alaska Law to Washington Law, specifically stating:

[t]he laws of the State of Washington shall govern the

construction, validity, performance and enforcement of this lease.

CP 56 at Section 11.10.

The Port also proposed a change to Article 6 incorporating a balanced reciprocal indemnity provision which apportioned liability in the same proportion as fault:

ARTICLE 6: INDEMNITY AND INSURANCE

Section 6.1 – Indemnity: To the extent permitted by law, the Lessor shall defend, indemnify, and hold the state, its officers, agents and employees harmless from any and all suits or claims for damages and/or injuries of whatever character to the extent and in proportion to the negligent or intentional acts of the Lessor, its employees or agents. Likewise, to the extent permitted by law, the Lessee shall defend, indemnify and hold the Lessor, its officers, agents and employees harmless from any and all suits or claims for damages and/or injuries of whatever character to the extent and in proportion to the negligent or intentional acts of the Lessee, its employees or agents.

CP 242-243, 262.

A day later, Alaska sent an email to the Port attaching a revised copy of the proposed lease. CP 243, at ¶¶9-10 and CP 272. In that email, the AMHS Procurement Manager detailed a modification to the Port's proposed Article 6 allocation of fault provision by including an email form from an attorney for Alaska's

Law Department⁶ as follows:

I received the notary page and incorporated it into the doc. Alaska Dept of Law modified the indemnification section of the lease agreement, see statement below for clarification.

Thank you,
Charlie Deininger
Department Procurement Manager

4/29/09

The state constitution prohibits public officials from entering agreements that would ostensibly obligate the state to indemnify other parties. In this regard, state law is not terribly dissimilar from the federal Anti-Deficiency Act, 31 U.S.C. §1341. So, rather than get bogged down in the subject of cross-indemnities, etc., I've struck the indemnity provision entirely. Instead, I've replaced it with language that holds each party independently responsible for its own degree of fault in the event of a third party claim.

The attached draft includes other minor revisions, which I've highlighted in bold, italic font. Unless otherwise noted by deletion, inserted language, etc., I have no objections to the Port's proposed changes. I'll leave it to AMHS to chime in with operational concerns, if any."

CP 272 (emphasis added). The draft lease attached to Mr. Deininger's email contained the following reworded Section 6.1, which the Port and Alaska accepted after the Port inserted the

⁶ The Attorney General's Office is called the "Law Department" in the State of Alaska.

words “or the other party” (shown underlined below):

ARTICLE 6: ALLOCATION OF FAULT; INSURANCE

Section 6.1 – Allocation of Fault: In the event a third party asserts a claim for damages against either Lessor or the state in connection with this lease, the parties agree that either may take those steps necessary for the fact finder to make an allocation of comparative fault between Lessor and the state, in which case the party’s liability to the claimant or the other party, if any, will not exceed its proportionate degree of fault. Additionally, Lessor and the state agree that neither will assert a claim against the other for recovery of costs or attorney fees arising from any such third party claim. Finally, the parties agree they will not make an assignment of claims against the other to third parties.

CP 243-244 at ¶¶ 11-12 and CP 296-297; Accord CP 50-51 at Section 6.1 (emphasis added). The change was important because no longer was each party required to provide an indemnification which would include payment of attorney fees and costs and which would typically be the basis of a claim in advance of the adjudication of the underlying claim. Instead, Alaska drafted language which would require the parties await a fact finder determination to determine liability.

Notably, Washington Courts hold that:

Indemnification clauses are subject to the fundamental rules of contractual construction, which

require “reasonable construction so as to carry out, rather than defeat, the purpose.” Because [the courts] construe indemnity clauses realistically, [they] must address the intent of the parties to allocate the risk of loss or damages arising out of a contract....

Nunez v. Am. Bldg. Maint. Co. W., 144 Wn.App. 345, 350-51, 190

P.3d 56, 58-59 (2008) (internal citations deleted). Further, it is

axiomatic that:

Indemnity clauses are subject to fundamental rules of contractual construction, and are to be construed reasonably so as to carry out, rather than defeat, their purpose. Any ambiguity is to be resolved against the drafter...

N. Pac. Ry. Co. v. Sunnyside Val. Irrigation Dist., 85 Wn.2d 920,

922, 540 P.2d 1387, 1389 (1975) (emphasis added).

Alaska’s language called for just the sort of fact-finder determination of fault that the Port sought to invoke with its third-party claims against Alaska in this case. Article 6.1, drafted by Alaska, meant that liability of the Port and Alaska would not be the subject of a demand for indemnification before the underlying case proceeded, but rather an allocation of fault as part of a fact finder process. Again, that Article stated, in relevant part:

In the event a third party asserts a claim for damages against either Lessor or the state in connection with this lease, the parties agree that either may take

those steps necessary for the fact finder to make an allocation of comparative fault between Lessor and the state . . .

CP 50-51.

Alaska's language also limited its liability (and the liability of the Port) to just their proportionate share of fault, and not attorney fees:

Additionally, Lessor and the state agree that neither will assert a claim against the other for recovery of costs or attorney fees arising from any such third party claim. . . .

Id. The Port accepted the revised Article 6.1 and the 2009 Lease was executed on May 5, 2009. CP 60.

In addition to the express agreement of the parties to allocate fault in the event of a third-party injury, the 2009 Lease contractually obligated Alaska "to use and occupy the premises in a careful and proper manner." CP 49 at Section 5.1(2). Alaska was required to operate the car and passenger ramps "in compliance with all of the procedures, specifications or other requirements contained in the applicable operations manuals for those ramps."

CP 46 at Section 4.5.⁷

On November 2, 2012, Ms. Adamson was employed by AMHS as a ship's officer on the Alaska state ferry *M/V COLUMBIA* which was then docked at the Bellingham Cruise Terminal. Ms. Adamson went out onto the passenger ramp from the terminal building to operate the controls, which raise and lower the passenger ramp, to lower the ramp onto the second deck of the Alaska ferry, when the ramp abruptly dropped resulting in injuries to Ms. Adamson. The Port alleges Ms. Adamson's injuries were caused by incorrect operation of the ramp controls and/or the failure of Alaska to properly train its employees (or specifically Ms. Adamson) on the appropriate procedure for operating the ramp. Ms. Adamson sustained injuries as a result of the incident and has been paid medical care and disability benefits from the Alaska's worker's compensation system. CP 207-208, 354.

⁷ The Port provided Alaska with copies of the operation manual for the passenger ramp and, likewise, posted a copy next to the control panel for the ramp. Third-Party Complaint at Paragraph 3.6-3.7, See CP 20 – 28.

B. Procedural History of the Case

On February 11, 2014, Ms. Adamson and her husband filed their complaint against the Port. CP 6-12. The Port filed its Answer, Affirmative Defenses and Third-Party Complaint (the “Answer”) on March 17, 2014, alleging third-party claims against Alaska under negligence, breach of contract, contractual allocation of fault, and general maritime indemnity grounds. CP 14-28.

On August 15 2014, Alaska filed its CR 12(b)(6) motion to dismiss the Port’s claims brought against Alaska (the “Motion to Dismiss”). CP 210-224. The Court granted the Motion to Dismiss on November 17, 2014. CP 442-444.

On November 25, 2014, the Port timely filed a motion for reconsideration, clarification and/or certification for appeal. On December 12, 2014, the trial court denied the Port’s motion for reconsideration, clarification and/or certification for appeal and declined to provide the basis for the dismissal. CP 446-463, 493-494.

On December 26, 2014, the trial court granted the Adamsons’ motion to voluntarily dismiss the only remaining claims in this lawsuit after the Adamsons filed an identical lawsuit against

the Port in the Federal District Court for the Western District of Washington on November 25, 2014, under Case No. 2:14-CV-01804. On January 7, 2015, the Port timely filed its Notice of Appeal. CP 496-505.

IV. ARGUMENT

Alaska, by bringing a CR 12(b)(6) motion, faced perhaps the loftiest burden of any motion in civil practice. It is well established that:

A dismissal for failure to state a claim under CR 12(b)(6) is appropriate only if it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief. In undertaking such an analysis, a plaintiff's allegations are presumed to be true and a court may consider hypothetical facts not included in the record. A CR 12(b)(6) motion should be granted sparingly and with care and only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. Any hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff's claim.

Holiday Resort Cmty. Ass'n v. Echo Lake Associates, LLC, 134

Wash. App. 210, 218-19, 135 P.3d 499, 503 (2006) (internal

citations omitted). This exceedingly high burden has not been, and indeed cannot be, overcome in this case.

Alaska bases its CR 12(b)(6) motion to dismiss on four arguments, all of which must fail in light of Alaska's burden under CR 12(b)(6) and the facts of this case. Each argument must be discussed as the trial court declined to specify the basis for its rulings.

First, Alaska invited the trial court to invoke the Washington Industrial Insurance Act as a bar the Port's claims. Second Alaska asked the trial court to ignore the Washington choice of law provision in the 2009 Lease and look to Alaska's own workers compensation laws, the Alaska Workers' Compensation Act, to bar the Port's claims. Failing those two arguments, Alaska next attacked the validity of the reciprocal fault apportionment provision found in Article 6 of 2009 Lease by claiming that the provision is *ultra vires* despite the fact that an Alaska assistant attorney general drafted the section and warranted it was lawful and enforceable against Alaska.⁸ Finally, though only vaguely and in its last pleading filed on November 6, 2014, Alaska sought to construe Alaska statute AS 90.50.250(5) as withdrawing Alaska's waiver of

⁸ Of course, the *ultra vires* argument only affects Article 6 of the Lease and not the other breach of contract claims.

sovereign immunity for all of the Port claims. The full breadth of that argument was not clearly asserted until the October 31, 2014, oral argument on the CR 12(b)(6) motion. See the Report of Proceedings for the October 31, 2014 hearing.

A. Alaska and Adamson are Not Covered by Washington's Industrial Insurance Act

Title 51 RCW, the Washington Industrial Insurance Act (the "Act") provides the statutory structure for compensating "workers" (as the term is defined in the Act) for their work related injuries in Washington. The Act removes those injury claims from the court system and provides "employers" (as the term is defined in the Act) protection from lawsuits arising therefrom.

It is uncontroverted that at the time of the incident, Ms. Adamson was a seaman and a crewmember aboard the Alaska ferry, the M/V Columbia, and she was performing her duties in that capacity. See CP 212, Footnote 1; Accord *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 343 (1991). The Act's plain language makes it clear that it does not apply to a crew member of a vessel such as Ms. Adamson and the MV Columbia. Specifically, RCW 51.12.100(1) states:

Except as otherwise provided in this section,⁹ 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 or federal employees' compensation act for personal injuries or death of such workers.

RCW 51.12.100(1) (emphasis added); See generally *Chan v. Society Expeditions*, 39 F.3d 1398, 1401 (9th Cir. 1994). The Act is unambiguous - it does not apply to: (i) a master or member of a crew of any vessel, or; (ii) to workers covered under maritime laws or federal compensation acts (such as the Longshore and Harbor Worker's Compensation Act). These two exclusions are separate from each other and any argument that Ms. Adamson was covered under the Act because she didn't meet both exceptions is simply wrong. Indeed, the Washington's Attorney General, commenting on only the first exception, opined on this issue, stating:

This statute [i.e. RCW 51.12.100]...is clear and unambiguous and means exactly what it says. It expressly excludes the master or member of a crew of any vessel.

Wash. AGO 1959-60, No. 159, 1960 WL 59145 (emphasis added).

Not only does the Act expressly exclude coverage to

⁹ The exceptions, such as the one provided for geoduck divers, do not apply to Ms. Adamson. See RCW 51.12.100.

seaman such as Ms. Adamson, but the definitions within the statute specifically exclude Alaska and Ms. Adamson from its ambit.

Specifically, Ms. Adamson is not a “worker” as the term is defined in RCW 51.08.180, which states:

Worker means every person in this state who is engaged in the employment of an employer under this title . . .

Likewise, Alaska is not an “employer” as the term is defined in RCW 51.08.070, which reads (emphasis added):

Employer means any person, body of persons, corporate or otherwise, and the legal representatives of a deceased employer, all while engaged in this state in any work covered by the provisions of this title...

By virtue of the fact that Ms. Adamson’s work on November 2, 2012, was not covered by the Act, due to the exclusion in RCW 51.12.100(1), Alaska is not an “employer” and Ms. Adamson is not an “employee” as defined by the Act.

While the Act does contain an “exclusive remedy” provision which protects employers from third-party claims,¹⁰ that provision cannot protect Alaska from the Port’s breach of contract and common law contribution claims since Title 51 does not apply to

¹⁰ See RCW 51.04.010.

Ms. Adamson or Alaska. As such, the CR 12(b)(6) dismissal of the Port's claims on this basis was improper.

B. Washington Law Applied and, Therefore, the Court Should Not Have Considered the Alaska Workers Compensation Act; However, Even If It Did, the 2009 Lease Contained a Waiver of Alaska's Employer Protections

In 1989, the Port and Alaska entered into a lease providing that the lease was governed by Alaska law. In 2009, the Port and the State reached a different agreement, providing that "[t]he laws of the State of Washington shall govern the construction, validity, performance and enforcement" of the 2009 Lease. CP 56 at Section 11.10 This significant change was obviously considered and negotiated as part of the 2009 Lease and reviewed by an Assistant Alaska Attorney General. In an email from Alaska, the Assistant Attorney General who reviewed the draft 2009 Lease the attorney stated:

The attached draft includes other minor revisions, which I've highlighted in bold, italic font. Unless otherwise noted by deletion, inserted language, etc., I have no objections to the Port's proposed changes. I'll leave it to AMHS to chime in with operational concerns, if any.

CP 272.

Therefore, the Alaska Workers Compensation Action should not have been considered by the trial court and this Court need not examine the Alaska statutory employment status of Ms. Adamson. The only relevant issue for the Court is to determine whether or not the Port has stated a claim in Washington law against its tenant under the 2009 Lease upon which it could be entitled to relief in its Answer, which it has.

Even if this Court examines (it is unclear what the trial court considered) Ms. Adamson's State of Alaska employment status, Alaska waived any exclusive remedy protections it has from suit under Alaska's Workers' Compensation Act, Chapter 23.30 AS. While Alaska's Workers' Compensation Act protects employers (including the State of Alaska in its capacity as employer) from third-party lawsuits related to their employee's injuries, Alaska's courts find waiver of that protection under much less stringent circumstances than Washington courts. The State of Alaska's courts have not held that an employer has to expressly waive its

immunity under the Alaska Workers' Compensation Act.¹¹ Rather, an employer in Alaska need only agree to protect a third-party from liabilities of the type the third-party incurs in order to waive the employer's exclusive remedy provisions under Alaska's Workers' Compensation Act. See *Northwest Airlines, Inc. v. Alaska Airlines, Inc.*, 343 F. Supp. 826, 839 (1972); *Accord Manson-Osberg Company v. State of Alaska*, 552 P.2d 654 (1976).

In *Northwest Airlines*, Northwest Airlines settled lawsuits for injuries in a plane crash brought by Alaska Airlines employees and sought reimbursement for the same from Alaska Airlines. Like the State of Alaska here, Alaska Airlines had granted Northwest Airlines an indemnification provision limited to Alaska Airlines' own actions, reading as follows:

Alaska [Airlines] agrees to hold harmless and indemnify Northwest [Airlines], its officers, agents, contractors, servants and employees from all claims and liabilities for damage to, loss of, or destruction of any property of Alaska [Airlines], its officers, agents, servants, and employees, and the property of any other person or persons, and for injuries to or death of any person or persons which may now or hereafter arise out of or be in any way connected with the

¹¹ This is significantly different from Washington, where an employer must expressly waive their Title 51 exclusive remedy protections. See *Hatch v. City of Algona*, 140 Wn.App. 752, 167 P.3d 1175 (2007).

service and facilities furnished to Alaska [Airlines]
under this agreement.

Northwest Airlines, 343 F. Supp. at 827 (emphasis added).

The United States District Court for the District of Alaska held that the above indemnification language was sufficient to waive Alaska Airlines' workers' compensation immunity from third-party suits and require Alaska Airlines to indemnify Northwest Airlines for settlement payments Northwest Airlines made to Alaska Airlines employees arising out of the plane crash. *Id.* at 829.

Likewise, in a similar holding, the Supreme Court of Alaska ruled that:

The clearest exception to the exclusive-liability clause [of the Alaska Workers' Compensation Act] is the third party's right to enforce an express contract in which the employer agrees to indemnify the third party for the very kind of loss that the third party has been made to pay to the employee.

...

Invariably, when a contractual right of indemnity is the basis of the cause of action, the courts permit recovery by a third party from an injured workman's employer simply because the cause of action arises out of an independently created contractual right which is totally independent of the exclusive jurisdiction provisions of the [Alaska] workmen's compensation act, so long as the compensation act itself does not prohibit such agreements.

Manson-Osberg Co. at 658 (emphasis added).

An attorney in Alaska's Law Department drafted the apportionment of fault language found in Article 6.1 of the 2009 Lease. The Lease contains no reservations or qualifications concerning Alaska's employees. Presumably, Alaska's own lawyers know Alaska law and could have inserted such an exclusion as part of the 2009 Lease negotiations if Alaska did not intend to accept liability for injuries its actions caused to all persons, including its employees. Alaska chose not to insert limiting language of that nature, and any ambiguity must be resolved against the drafter, Alaska. *Nunez v. Am. Bldg. Maint. Co. W.*, 144 Wn.App. 345, 350-51, 190 P.3d 56, 58-59 (2008) (internal citations deleted); *N. Pac. Ry. Co. v. Sunnyside Val. Irrigation Dist.*, 85 Wn.2d 920, 922, 540 P.2d 1387, 1389 (1975).

Like the causes of action in *Northwest Airlines* and *Manson-Osberg Co.*, the cause of action here arises out of an independently created contractual right which is totally independent of the exclusive remedy provisions of the Alaska's Workers' Compensation Act. Here, the injury that occurred to Ms. Adamson while operating Port equipment after having been trained and

supervised by Alaska is exactly the type of foreseeable injury that could occur and for which apportionment of fault is appropriate.

While analysis of Alaska law is neither appropriate nor necessary in this case, Article 6 of the 2009 Lease constitutes an enforceable waiver of Alaska's exclusive remedy protections under the Alaska Workers' Compensation Act and must be interpreted as such. Accordingly, the CR 12(b)(6) dismissal of the Port's claims on this basis was improper.

C. The Allocation of Fault Provision of the Lease is Not *Ultra Vires*

Alaska next contends that Lease Article 6.1's allocation of fault provision¹² is null and void despite the fact that: (i) Alaska does not cite any controlling precedent establishing that the allocation of fault provision is *ultra vires*; (ii) Alaska statute authorizes breach of contract and tort claims against the State, and; (iii) Alaska's own legal counsel from the Department of Law proposed the Article 6.1

¹² The proportionate fault provision in the Lease is consistent with the Federal General Maritime Law. It is a well established admiralty principle that liability is allocated in accord with the degree of negligence or fault of each party. See *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975) (holding that a court should allocate damages between the parties "proportionately to the comparative degree of their fault."); *McDermott, Inc. v. AmClyde*, 512 U.S. 202 (1994). It is unquestionable that the allocation of fault provision proposed by Alaska is simply the same obligation imposed by Federal General Maritime Law.

allocation of fault language specifically to avoid a potentially unenforceable indemnification obligation.

At the trial court, Alaska relied on a 2005 Alaska Attorneys General opinion asserting its position that “unqualified indemnification” provisions are, in the Alaska Attorney General’s opinion, unenforceable. This statement, while unsupported by any court decision, may be true but is irrelevant here. That opinion discusses the constitutionality of a broad and unqualified indemnification by the State of Alaska which could obligate Alaska to pay for, among other things, another party’s negligence and acts of God. That is simply not the case here. In contrast, the 2009 Lease’s allocation of fault provision is very narrow and limited only to Alaska’s own fault - not acts of God or another party’s actions. This is directly in line with Alaska’s waiver of its sovereign immunity for suits in tort and contract. See AS 09.50.250.¹³

Importantly, the Alaska Attorney General’s opinion relied on by Alaska in this case was written four (4) years before the lawyer from that very same office proposed language in the 2009 Lease to

¹³ “A person or corporation having a contract, quasi-contact, or tort claim against the state may bring an action against the state...”

avoid the very same constitutional issue. CP 88-90 and 272.

Alaska's Department of Law drafted Article 6.1 of the 2009 Lease with the Alaska Attorney General's opinion in mind, as the following e-mail excerpt from the 2009 Lease negotiations reveals:

I received the notary page and incorporated it into the doc. Alaska Dept of Law modified the indemnification section of the lease agreement, see statement below for clarification.

Thank you,
Charlie Deininger
Department Procurement Manager

4/29/09

The state constitution prohibits public officials from entering agreements that would ostensibly obligate the state to indemnify other parties. In this regard, state law is not terribly dissimilar from the federal Anti-Deficiency Act, 31 U.S.C. §1341. So, rather than get bogged down in the subject of cross-indemnities, etc., I've struck the indemnity provision entirely. Instead, I've replaced it with language that holds each party independently responsible for its own degree of fault in the event of a third party claim.

CP 272 (emphasis added).

It is not credible to conclude that the Assistant Attorney General who drafted Lease Article 6.1 did not know about the 2004 opinion and did not specifically propose the 2009 Lease language

to comply with the opinion. This alone supports enforcing the agreement of the parties as set forth in the 2009 Lease.

Alaska relied on *California-Pacific Utilities Co. v. The United States*, 194 Ct. Cl. 703 (1971) in arguing that the 2009 Lease's allocation of fault provision is unenforceable. A careful reading of that case, however, supports a ruling by this Court that the allocation of fault provision is enforceable by the Port.

In *California Pacific Utilities*, the California-Pacific Utilities Company ("CPU") issued a permit to the United States to allow U.S. soldiers to conduct training exercises on CPU's land. A soldier was injured and sued CPU. CPU brought claims against the United States seeking to reform its contract with the United States to add a broad indemnification obligation requiring the United States to indemnify CPU for a broad range of incidents including CPU's own negligence or acts of God. CPU argued that the parties (i.e. CPU and the United States) intended to include such an indemnification in the original permit agreement. *Id.* at 716-718. The Court of Claims denied CPU's request to reform the contract finding that the parties did not intend to include a broad indemnification, that any such term would have violated the United

States' Anti-Deficiency Act¹⁴ and that the United States had informed CPU that a broad indemnification was unenforceable and could not be included. *Id.* at 721.

Importantly, during the original negotiations for the permit agreement between the United States and CPU, the United States informed CPU that, while it could not offer broad indemnification, the United States could (and indeed did) include a provision allowing CPU to interplead the United States in order to apportion fault between CPU and the United States in the event of a third-party injury claim. *Id.* at 721, 746-748. The agreement between CPU and the United States included the following provision which the Court of Claims enforced:

The parties agree that if any civil cause of action for money damages, for injury or loss of property, or personal injury or death, is brought against the owner of the permitted premises concerning which the owner claims that the United States is liable under the Federal Tort Claims Act..., the owner may petition for removal of the cause of action to a United States District Court if such action is brought in any other court, and that the United States be impleaded as a third party defendant in such action.

¹⁴ 31 U.S.C. § 1341.

Id. at 748. While the Court of Claims ultimately held that the United States was not liable for the soldier's injuries, they did so based on the facts after applying the provision allowing CPU to implead the United States and not based on a finding that this provision violated the Anti-Deficiency Act. *Id.*

To the extent that Anti-Deficiency Act cases are instructive on this Court's determination of whether or not the 2009 Lease's apportionment of fault provision is *ultra vires*, *California Pacific Utilities* overwhelmingly support's permitting the Port to pursue its claims against Alaska pursuant to the 2009 Lease Article 6.1's apportionment of fault. Just like in *California Pacific Utilities*, Alaska's attorney informed the Port that the Port's originally proposed indemnification language was potentially unenforceable. Alaska, like the United States, proposed alternative allocation of fault language that Alaska's Department of Law stated was enforceable (i.e. 2009 Lease Article 6.1).

Just as the contractual provision permitting CPU to implead the United States did not violate the federal Anti-Deficiency Act in *California Pacific Utilities*, the allocation of fault provision permitting the Port to implead Alaska to determine Alaska's fault (if any) for

Ms. Adamson's injury does not violate any applicable State of Alaska constitutional provisions; accordingly, the argument that the Lease allocation provision is *ultra vires* fails and the trial court improperly dismissed the Port's Article 6 claims, let alone the other breach of contract and common law claims.

D. The Port's Claims are Not Barred by Alaska's Sovereign Immunity

Alaska has long waived its sovereign immunity for any contract, quasi-contract, or tort claims against the state in any state court with jurisdiction, stating:

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.

AS 09.50.250.

In 2003, Alaska's legislature added a new subsection (5) to AS 90.50.250. The new subsection (5) removed the waiver of sovereign immunity for AMHS seaman employees' federal maritime claims against the State of Alaska and instead provided that the exclusive venue for the seamen's' claims against the State of Alaska was Alaska's Workers' Compensation Act, AS 23.30.

Subsection (5) reads:

However, an action may not be brought if the claim...arises out of injury, illness, or death of a seaman that occurs or manifests itself during or in the course of, or arises out of, employment with the state; AS 23.30 [Alaska's Workers' Compensation Act] provides the exclusive remedy for such a claim, and no action may be brought against the state, its vessels, or its employees under the Jones Act (46 U.S.C. 688), in admiralty, or under the general maritime law.

Alaska argues that this 2003 amendment withdrew Alaska's long standing waiver of sovereign immunity for all tort and contractual claims against the State of Alaska in any way related to state employed seamen and, therefore, precluded the Port's claims.

The Court's primary purpose when interpreting statutes is "to discern and implement the intent of the legislature." *Estate of Bunch v. McGraw Residential Ctr.*, 174 Wash. 2d 425, 432, 275 P.3d 1119, 1122 (2012). When interpreting a statute, the courts look to the statute's plain language. Statutes which are subject to only one interpretation do not require interpretation and that plain language reading shall be applied. See *HomeStreet, Inc. v. State, Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297, 300 (2009).

It is uncontroverted that Alaska (like private employers in the state) can waive its employer protection under Alaska's Workers

Compensation Act for third-party claims. A plain language reading of AS 09.50.250(5) makes it evident that this subsection does not change that general rule with regard to Alaska's seaman employees. Rather, it is designed to route all of Alaska seaman employees' injury claims through Alaska's Workers' Compensation Act. When the statute refers to "such a claim" it is obvious that it is a reference to only the claims of the AMHS seaman employees for which Alaska Workers' Compensation Act provides the "exclusive remedy."

The statement that "no action may be brought against the state, its vessels or its employees under the Jones Act..., in admiralty, or under the general maritime law" for such worker injuries evidences the fact that this subsection was designed to preclude AMHS employees' claims against the State of Alaska and not potential third-party claims against Alaska where Alaska waived its employer protections found under Alaska Workers' Compensation Act. See AS 09.50.250(5).

Moreover, nowhere does AS 09.50.250(5) discuss or address third-party claims brought against Alaska arising from a waiver of Alaska's employer protection.

Assuming, *arguendo*, there is ambiguity as to AS 09.50.250(5)'s meaning, the plain meaning of the statute may be gleaned from its legislative history. See *Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn. 2d 425, 432, 275 P.3d 1119, 1122 (2012). The legislative history of AS 09.50.250(5) proves that Alaska's interpretation of that subsection is erroneous and inapplicable. Prior to AS 09.50.250(5), Alaska employed seaman were the only State of Alaska employees allowed to directly sue the State of Alaska for workplace injuries, as those injuries were not covered by the Alaska Workers' Compensation Act. Instead, injured State of Alaska employee seaman could bring claims under the Jones Act, 46 U.S.C. 688, and general maritime law. CP 424.

In 2003, the then Governor of Alaska Frank H. Murkowski, proposed the addition of subsection (5) to AS 09.50.250 to require that Alaska's AMHS seaman bring any workplace injury claims under Alaska's Worker's Compensation Act, just like all other Alaska employees, and to preclude direct suit by those employees against the State of Alaska. CP 424-425. In summarizing the intent of the proposed bill, Governor Murkowski stated:

...I am transmitting a bill that would provide a uniform

equitable remedy for work injuries of all state employees under a single compensation system.

...

Legal arguments over liability [for state maritime worker's injuries] and the subjective nature of non-economic damages provided under maritime law generate greater claims adjudication costs and significantly greater compensation awards to injured [state maritime] employees. The cost to the state for the claims of these [maritime] employees is nearly 75% higher than the cost related to claims of other state employees covered by workers' compensation. Litigation expenses and defense costs presently incurred defending the Alaska Marine Highway System (AMHS) and other agency maritime employee claims will be significantly reduced by this legislation.

The proposed legislation would limit the remedy for work injuries incurred by the state-employed seaman to those benefits provided all other employees under the Alaska Workers' Compensation Act.

CP 424-425 (emphasis added).

This legislative history is clear. The statutory change was directed solely at AMHS seaman claims and sought to treat those AMHS seaman exactly the same as all other Alaska state employees. The legislative history does not reveal any intent to abrogate all third-party claims in contract or tort related to an Alaska state seaman employee injury or to modify Alaska's long standing waiver of sovereign immunity for contracts and torts (except to direct state employed seaman claims through AS 23.30).

Had Alaska's legislature intended AS 09.50.250(5) to prevent any and all third-party claims related to Alaska employed seaman injuries, it could have done so clearly and expressly. Alaska's legislature did not make that express declaration. Rather the undisputable intent behind AS 09.50.250(5) was to "provide a uniform equitable remedy for work injuries of all state employees." CP 424. Adopting Alaska's interpretation of that subsection would fly in the face of that intent by creating a unique set of statutory protections applying only to Alaska's maritime employees; i.e. the withdrawal of a long standing waiver of sovereign immunity for contract and tort claims except only for those claims brought under the Alaska Workers' Compensation Act by AMHS employees. While this argument was creatively raised at oral argument on October 31, 2014, it is simply not supported by a fair reading of the statute or the legislative history. As such, the CR 12(b)(6) dismissal of the Port's claims on this basis was improper.

E. Equitable Estoppel Precludes Dismissal of the Port's Claims Against Alaska

Assuming, *arguendo*, that the allocation of fault provision of the 2009 Lease is *ultra vires*, and/or AS 09.50.250(5) withdraws Alaska's

waiver of sovereign immunity for all third-party claims such as the Port's, the Washington Doctrine of Equitable Estoppel justifies reversing the trial court's dismissal of the Port's claims against Alaska. Equitable estoppel can be invoked against Alaska if: (i) Alaska asserted a position by conduct or words which is inconsistent with their position in the CR 12(b)(6) motion to dismiss; (ii) the Port acted in reasonable reliance on that position; (iii) the Port will be prejudiced by a repudiation of that position; (iv) estoppel is necessary to avoid a manifest injustice, and; (v) estoppel will not impair governmental functions.

Silverstreak, Inc. v. Washington State Dep't of Labor & Indus., 159 Wn.2d 868, 887, 154 P.3d 891, 901 (2007).¹⁵

There can be no doubt the Port is entitled to apply equitable estoppel against Alaska in this instance. Alaska clearly and undeniably opined, through its lawyer at the Department of Law, that the allocation of fault provision would be enforceable against Alaska. Moreover, the Law Department never raised the sovereign immunity issue. The Port relied on that statement in abandoning its proposed indemnification language and entering into the 2009 Lease with Alaska. The Port will

¹⁵ Equitable estoppel applies against governments under Alaska case law in similar circumstances as well. See *Boyd v. State Dept. of Commerce and Economic Development*, 977 P.2d 113, 116-117 (1999).

suffer prejudice if the allocation of fault is not enforced, as the Port and the taxpayers of Whatcom County could conceivably be forced to bear the burden of Alaska's own negligence. It would be manifestly unjust to allow Alaska to escape their potential liability when they agreed to be held accountable for the same, especially when they received the benefit of the bargain from the 2009 Lease. No Alaskan governmental functions will be impaired by applying estoppel because this is narrowly limited to a proprietary lease entered into by Alaska in the State of Washington.

V. CONCLUSION

In 2009, the Port, a Washington government, negotiated in good faith with the representatives of the State of Alaska. These two governments, presumably recognizing the issues surrounding the joint use of the Bellingham Cruise Terminal after twenty (20) years of leasing history, did what landlords and tenants do in every lease – they sought to fairly allocate the risk of a claim on the basis of their relative fault.

No less than then a lawyer from the Alaska Law Department provided the appropriate language to achieve the parties' mutual goal. There was no exception for injuries to Alaska's workers in the Lease, nor did the State of Alaska mention the alleged withdrawal of its waiver of sovereign immunity it now argues occurred in 2003.

Now, where Alaska proposed the allocation of fault language, where Alaska had exclusive control over the actions of the injured employee, where Alaska was contractually obligated to train the injured employee, where Alaska was contractually obligated to operate the Port's equipment in accordance with the proper procedures, and where Alaska received the benefit of its bargain with the Port, Alaska seeks to avoid its contractual obligations with arguments that essentially amount to a claim that the Port mistakenly trusted Alaska. This request patently fails to meet the high burden required under CR 12(b)(6) for dismissal of the Port's claims. The Port respectfully requests that this Court reverse the trial court and reinstate the Port's claims against

Alaska.

DATED this 16th day of March, 2015.

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