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STATE OF WASHINGTON

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No. 34267-7-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

ALEX M.M. RALSTON, JOHN M. RALSTON and GAIL T. RALSTON
Plaintiffs/Appellants

v.

PORT OF PORT ANGELES and PORT ANGELES MARINE, INC.
Defendants/Respondents

ON APPEAL FROM CLALLAM COUNTY SUPERIOR COURT
(HONORABLE CRADDOCK D. VERSER
Visiting Judge from Jefferson County)
Clallam County Superior Court No. 05-2-00644-0

APPELLANTS' AMENDED OPENING BRIEF

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TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR	1
II.	STATEMENT OF ISSUES.....	1
III.	STATEMENT OF THE CASE.....	1
IV.	LEGAL ARGUMENT	19
A.	THE EVIDENCE RAISED GENUINE ISSUES OF MATERIAL FACT REGARDING DEFENDANTS' DUTY UNDER THE RESTATEMENT (SECOND) OF TORTS, § 344.....	19
1.	THE PORT OF PORT ANGELES IS A POSSESSOR OF LAND AS CONTEMPLATED BY THE RESTATEMENT (SECOND) OF TORTS, § 344	20
2.	THE MARINA WAS OPEN TO THE PUBLIC FOR THE PORT'S BUSINESS PURPOSES	22
3.	SAN JUAN EXCURSIONS, INC. WAS A THIRD PERSON PERFORMING NEGLIGENT ACTS AT THE MARINA.....	24
4.	GIVEN ITS ACTUAL KNOWLEDGE OF THE NEGLIGENCE OF SAN JUAN EXCURSIONS, INC. AND THE RESULTING HAZARD, THE PORT OF PORT ANGELES AND PORT ANGELES MARINE, INC. FAILED TO EXERCISE REASONABLE CARE TO GIVE A WARNING ADEQUATE TO ENABLE ALEX RALSTON TO AVOID THE HARM, OR OTHERWISE PROTECT ALEX RALSTON AGAINST THE HARM.....	26
B.	THE EVIDENCE RAISED GENUINE ISSUES OF MATERIAL FACT REGARDING DEFENDANTS'	

	DUTY UNDER THE RESTATEMENT (SECOND) OF TORTS, § 315.....	28
C.	SHEPPARD V. HORLUCK STANDS FOR THE PROPOSITION THAT A MARINA OWNER WITH A CONTRACTUAL RELATIONSHIP WITH A THIRD PARTY TORTFEASOR OVER WHOM IT HAS CONTROL OWES A DUTY TO PERSONS SUBJECT TO POTENTIAL HARM BY THE TORTFEASOR....	31
D.	O.S.H.A. MINIMUM SAFETY STANDARDS SET FORTH THE STANDARD OF CARE FOR AN EMPLOYER WITH CONTROL OF A WORKSITE...	37
E.	O.S.H.A. REGULATIONS ARE EVIDENCE OF THE INDUSTRY STANDARD OF CARE.....	46
V.	CONCLUSION	49

TABLE OF AUTHORITIES

1. Cases in Alphabetical Order

<i>Adamson v. Hand</i> , 93 Ga. App. 5, 90 S.E.2d 669 (1955)...	35
<i>Albrecht v. Baltimore & Ohio RR. Co.</i> , 808 F.2d 255, 265 (1 st Cir. 1985).....	37
<i>Alcoa Steamship Co. v. Carles Ferran & Co.</i> , 383 F.2d 46,50 (5 th Cir. 1967)	23
<i>Anning-Johnson Co. v. OSHRC</i> , 516 F.2d 1081, 1091 & n.21 (7 th Cir. 1975)	39
<i>Bastian v. Carlton County Highway Dep't</i> , 55 N.W.2d 312, 316 (Minn. App 1997).....	40
<i>Beatty Equip. Leasing, Inc. v. Secretary of Labor</i> , 577 F.2d 534, 536-37 (9 th Cir. 1978)	39, 40
<i>Blakeley v. White Star Line</i> , 154 Mich. 635, 118 N.W. 482, 19 L.R.A. N.S. 772, 129 Am. St. Rep 496 (1908).....	35
<i>Brennan v. OSHRC</i> , 513 F.2d 1032, 1036-39 (2d Cir. 1975)	39, 41
<i>Calderera v. Chandris, S.A.</i> , 1993 U.S. Dist. Lexis 12653 (S.D.N.Y.).....	21
<i>Clemons v. Mitsui O.S.K. Lines, Ltd.</i> , 596 F.2d 746 (7 th Cir. 1976, cert. den. 451 U.S. 969, 68 L.Ed.2d 347, 101 S.Ct. 2044	21
<i>Corcoran v. McNeal</i> , 400 Pa. 14, 161 A.2d 367 (1960).....	35
<i>Craig v. Washington Trust Bank</i> , 94 Wn. App. 820, 827, 828, 976 P.2d 126 (Div Three 1999)	20
<i>Davis v. Latschar</i> , 340 U.S. App. D.C. 136, 202 F.3d 359, 364 (D.C. Cir. 2000)	41

<i>Di Ossi v. Maroney</i> , 548 A.2d 1361, 1367 (Sup. Ct. of Delaware 1988).....	20
<i>Easler v. Downie Amusement Co.</i> , 125 Me. 334, 133 A. 905, 53 A.L.R. 847 (1926).....	35
<i>Enersen v. Anderson</i> , 55 Wn.2d 486, 488-489 (1960)	24
<i>Exton v. Central R. Co. of N.J.</i> , 62 N.J.L. 7, 42 A. 486, 45 L.R.A. 508 (1898), affirmed 63 N.J.L. 356, 46 A. 1099, 56 L.R.A. 512	35
<i>Fardig v. Reynolds</i> , 55 Wn.2d 540, 543, 348 P.2d 661 (1960).....	30, 49
<i>Gay v. Ocean Transport & Trading, Ltd.</i> , 546 F.2d 1233 (5 th Cir. 1977, reh. Den. 549 F.2d 203 (5 th Cir. 1977)	21
<i>Greco v. Sumner Tavern, Inc.</i> , 333 Mass. 144, 128 N.E.2d 788 (1955).....	35
<i>Hill v. Verrick</i> , 147 OR. 244, 31 P.2d 633 (1934).....	35
<i>IBP, Inc. v. Herman</i> , 330 U.S. App D.C. 218, 144 F.3d 861, 866 (D.C. Cir. 1998)	40
<i>Jones v. Allstate Ins. Co.</i> , 146 WN.2 291, 300, 45 P.3d 1068 (2002).....	1
<i>Kelley v. Howard S. Wright Constr. Co.</i> , 90 Wn.2d 323, 331, (582 P.2d 500 (1978)).....	30, 37, 39, 44, 49
<i>King v. Avtech Aviation, Inc.</i> , 655 F.2d 77, 79 (5 th Cir. 1981)	38
<i>Klinke v. Famous Recipe Fried Chicken, Inc.</i> , 94 Wn.2d 255-256, 616 P.2d 644 (1980).....	30
<i>Lewis v. Timco, Inc.</i> , 716 F.2d 1425, 1427, 1429 (5 th Cir. 1983).....	21

<i>Marshall v. Knutson Constr. Co.</i> , 566 F.2d 596, 599-600 (8 th Cir. 1977).....	39, 40, 41
<i>McKinnon v. Wash Fed. Sav. & Loan Ass'n</i> , 68 Wn.2d 644, 650, 414 P.2d 773 (1966).....	24
<i>Melerine v. Avondale Shipyards, Inc.</i> , 659 F.2d 706, 709 (5 th Cir. 1981).....	41
<i>Mesa v. Spokane World Exposition</i> , 18 Wn. App. 609, 612, 570 P.2d 157 (1977).....	31, 35, 36, 50
<i>Miller v. Derusa</i> , 77 So.2d 748 (La. App. 1955).....	35, 38
<i>Monteleone v. Bahama Cruise Line, Inc.</i> , 838 F.2d 63, 65 (2 nd Cir. 1988).....	22
<i>Naegele v. Dollen</i> , 158 Neb. 373, 63 N.W.2d 165, 43 A.L.R.2d 1099 (1954).....	35
<i>Nivens v. 7-11 Hoagy's Corner</i> , 133 Wash. 2d 192, 197, 943 P.2d 286 (1997).....	21, 34
<i>Palmer v. Apex Marine Corp.</i> , 510 F. Supp. 72, 74 (W.D. Wa. 1981).....	21
<i>Pan-Alaska Fisheries, Inc. v. Marine Construction and Design Co.</i> , 565 F2d 1129, 1135 (9 th Cir. 1977).....	21
<i>Peck v. Gerber</i> , 154 Or. 126, 59 P.2d 675, 106 A.L.R. 996 (1936).....	35
<i>Pratico v. Portland Terminal Co.</i> , 783 F.2d 255 265 (1 st Cir. 1985).....	37
<i>Rabar v. E.I. DuPont de Nemours & Co.</i> , 415 A.2d at 503-05	39
<i>Ries v. National R.R. Passenger Corp.</i> , 960 F.2d 1156 (3 rd Cir. 1992).....	37

<i>Robertson v. Burlington Northern R.R.</i> , 32 F.3d 408 (9 th Cir. 1994)	37
<i>Rolick v. Collins Pine Company</i> , 975 F.2d 1009 (3 rd Cir. 1992)	48, 49
<i>R.P. Carbone Constr. Co. v. Occupational Safety & Health Reviw Comm'n</i> , 166 F.3d 815 (6 th Cir. 1998)	41
<i>Sheehan v. Transit Auth.</i> , 155 Wn.2d 790, 796-797 (2005)	1
<i>Sheppard v. Horluck</i> , 1998 Wash. App. LEXIS 602 (1998)	31, 32, 33, 35
<i>Sinn v. Farmers Deposit Savings Bank</i> , 300 Pa. 85, 150 A. 163 (1930)	35
<i>Swam v. Aetna Life Ins. Co.</i> , 155 Wash. 402, 407, 408, 284 P. 792 (1930)	30, 49
<i>United States v. Pitt-Des Moines, Inc.</i> , 168 F.3d 976 (7 th Cir. 1999)	41
<i>Universal Constr. Co. v. OSHRC</i> , 182 F.3d 726, 730 (10 th Cir. 1999)	41
<i>Washington v. United States HUD</i> , 953 F. Supp. 762, 773 (N.D. Tex. 1996)	20
<i>Wilson v. Steinback</i> , 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)	30
<i>Winn v. Holmes</i> , 143 Cal. App. 2d 501, 299 P.2d 994 (1956)	35

2. Statutes

29 C.F.R. § 1910.23	25
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29 C.F.R. § 1910.266	48
29 C.F.R. § 1915.4	45
29 C.F.R. § 1915.73	12, 25, 37, 45, 47, 49
46 C.F.R § 177.900	11, 25
29 U.S.C. § 654	24, 38, 40
3. <u>Other Authorities</u>	
Miller, The Occupational Safety and Health Act of 1970 and the Law of Torts, 38 Law & Contemp. Prob. 612, 636 n.138 (1974)	38
Prosser, Torts, P. 202 (4 th Ed. 1971)	38
Restatement (Second of Torts), § 315, 318, 344, 332 (1965)	2, 19, 20, 21, 24, 26, 27, 28, 29, 31, 34, 35
WAC 296-56-60121	26
WAC 296-56-60001	47

I. **ASSIGNMENTS OF ERROR**

The trial court erred in finding no genuine issue of material fact existed and, as a matter of law, appellees Port of Port Angeles and Port Angeles Marine Inc. owed no duty to appellant Alex M.M. Ralston. The standard of review of an order of summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court. *Sheehan v. Transit Auth.*, 155 Wn.2d 790, 796-797 (2005); *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

II. **STATEMENT OF ISSUES**

A. As a property owner, do defendants owe a duty to a business invitee like Ralston to correct unsafe conditions on its property created by third-parties where it has actual notice of the dangerous conditions on its property, authority to correct the dangerous conditions, and fails to take action to protect the business invitee from harm or otherwise warn the business invitee?

B. Does the evidence present a genuine issue of material fact concerning whether defendants breached their duty to plaintiff by failing to take action to correct an unsafe condition or otherwise warn the business invitee of the hazard?

III. **STATEMENT OF THE CASE**

This case involves severe and permanent injuries (C-4 quadriplegia, multiple skull fractures and a permanent left-sided hearing loss) suffered by then 17-year old Alex M.M. Ralston (Ralston) when he fell from the upper starboard deck of the wooden vessel ODYSSEY onto a wooden float as the vessel was undergoing repair and maintenance at the Port of Port Angeles Boat Haven marina on March 28, 2004. The vessel was owned by third-party defendant San Juan Excursions, Inc., and was moored at the Boat Haven marina float pursuant to a Berthage Agreement entered into on March 10, 2004.

Ralston contends that the evidence presented to the trial court on motions for summary judgment filed by defendant Port of Port Angeles and its agent, Port Angeles Marine, Inc. presented genuine issues of material fact regarding:

1. Port of Port Angeles' and its agent, Port Angeles Marine, Inc.'s duty to Ralston under the Restatement (Second) of Torts, §§ 315 and 344, and both the general maritime law and Washington law;
2. Port of Port Angeles' and Port Angeles Marine, Inc.'s duty to enforce O.S.H.A. regulations on a worksite under the multiple employer doctrine.

The Ralstons (Alex Ralston and his parents, John and Gail Ralston) contend the trial court erred in holding that Port of Port Angeles and Port Angeles Marine, Inc. owed no duty to Alex Ralston, and dismissing with prejudice the Ralstons' claims. The Ralstons contend that the evidence presented to the trial court requires a reversal of the trial court's granting of defendants' motions for summary judgment, and a remand to the superior court with instructions that the Ralstons' claims proceed to trial.

All parties briefed the trial court on the choice of law issue, i.e. whether the general maritime law or state law applies in this case. At the time of oral argument, and here, all parties agree that the law to be applied in determining the issues raised on defendants' motions for summary judgment, and on this appeal, is the same whether the general maritime law or state law applies. The choice of law issue was not decided by the trial court, and is not before this Court on appeal. The issue was thoroughly briefed at pages 15 through 25 of Plaintiff's Memorandum in Opposition to Defendants Port of Port Angeles and Port Angeles Marine, Inc.'s Motions for Summary Judgment, CP 353-363.

The evidence setting forth genuine issues of material fact is as follows: Charles W. Faires is the owner and operator of Port

Angeles Marine, Inc. CP 152-153, deposition of Faires, page 4, line 18 through page 5, line 5. Port Angeles Marine, Inc. operates the Port of Port Angeles Boat Haven marina, and has a shipyard. Port Angeles Marine, Inc. is also a party to an Agent Agreement with the Port of Port Angeles to operate both the shipyard and the marina. CP 153, deposition of Faires, page 5, lines 6 through 12.

Port Angeles Marine, Inc. employs a Dan Schmid, who has been employed with the company at least 15, and possibly 20 years. CP 154, deposition of Faires, page 7, lines 1 through 10. Schmid helps out at the marina, "but mainly operates the boatyard for us." CP 154, deposition of Faires, page 7, lines 11 through 14. Mac Gray has been employed by Port Angeles Marine, Inc. for possibly 12 years, CP 154-155, deposition of Faires, page 7, lines 15 through 25, page 8, lines 1 through 4. In March 2004, Gray worked "probably 80 percent boatyard and 20 percent marina." CP 155-156, deposition of Faires, page 8, line 25, 9, lines 1 through 4.

Deposition Exhibit 27, CP 297-308, is the Agent Agreement between Port Angeles Marine, Inc. and the Port of Port Angeles to operate the marina and boatyard for the Port of Port Angeles. That agreement states:

Port hereby enters into an Agent Agreement with the Agent and Agent hereby enters into an Agent Agreement with the Port to operate the Port Angeles Boat Haven, and Port Angeles Boat Yard, situated in the City of Port Angeles, Clallam County, Washington.

Deposition exhibit 27, paragraph 1, CP 298. This Agent Agreement was in effect in March of 2004, and there is no other document that describes Port Angeles Marine, Inc.'s relationship with the Port of Port Angeles. CP 159, deposition of Faires, page 20, lines 10 through 24.

The photographs which are deposition exhibit 38, CP 323-338, were taken by Roger Hoff. CP 182, deposition of Roger Hoff, taken October 6, 2005, page 125, lines 19 through 21. Deposition exhibit 38-19, CP 323-343, is a fishing boat that was in the Port of Port Angeles Boat Yard. CP 130, deposition of Roger Hoff, taken October 6, 2005, page 130, lines 21 and 22. CP 325-332, deposition exhibits 38-20, 38-21 and 38-23, also depict vessels being worked on in the boat yard. CP 329-330, deposition exhibit 38-22, is a photo of the boat yard travel lift.

The floats and docks at the Port of Port Angeles Boat Haven marina are the property of defendant Port of Port Angeles, and the

Port of Port Angeles has full authority and control over the moorage slips adjacent to the floats and docks. CP 158, deposition of Faires, page 19, lines 4 through 13. Port Angeles Marine, Inc. as agent has responsibility for overseeing those moorage slips. CP 158, deposition of Faires, page 19, lines 14 through 18.

CP 309-313, deposition exhibit 28, is a copy of the Port of Port Angeles Rules and Regulations for the Boat Haven marina which were in effect in March of 2004. These are the Rules and Regulations that are contemplated by the first paragraph of paragraph 3 of the Agent Agreement which Port Angeles Marine, Inc. was required to enforce. CP 161-162, deposition of Faires, page 22, lines 18 through 25, page 23, lines 1 through 3. Looking at the Agent Agreement as a whole, one of the primary responsibilities of Port Angeles Marine, Inc. in serving as agent for the Port of Port Angeles is to enforce the Port's Rules and Regulations. CP 164-165, deposition of Faires, page 33, lines 18 through 25, page 34, lines 1 through 3. The Port Rules and Regulations No. 8 provides:

Paragraph 8: Lessee (San Juan Excursions, Inc.) shall at all times comply with Federal, State, and County laws, ordinances and regulations.

The Port of Port Angeles Rules and Regulations contained a provision which allowed the Port to deny permission to a vessel to remain on Port premises if the vessel did not meet normal safety standards, and Faires had that knowledge in March of 2004. CP 163, deposition of Faires, page 32, lines 7 through 14. Paragraph 21(8) provides:

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

CP 309-313, deposition exhibit 28 (emphasis supplied). Either Faires or other Port Angeles Marine, Inc. employees would be responsible for enforcing this provision if they were to see a problem. CP 166, deposition of Faires, page 45, lines 1 through 12.

CP 314-316, deposition exhibit 29 is the Port of Port Angeles Port Angeles Boat Haven Marine Berthage Agreement entered into on March 10, 2004 between the Port of Port Angeles and Roger Hoff, as president of San Juan Excursions, Inc., for the berthage of the ODYSSEY at the Boat Haven marina. The Berthage

Agreement's initial paragraph refers to the "Lessee's renting from the Port certain berthage space at the Port's boat haven." (Emphasis supplied).

Paragraph 12 of the Berthage Agreement states:

12. Port Rules and Regulations. Lessee (San Juan Excursions, Inc.) further understands that the Port has issued and may continue to issue such rules and regulations for the boat haven and harbor area as the Port Commission may, in its judgment, deem reasonable and necessary. Lessee further agrees to abide by and follow such rules and regulations, which are by this reference incorporated herein and made a part hereof.

(Emphasis supplied).

Peter NewDay apprenticed with the Wright Brothers Boat Company when he was 16 years old, in 1964. He enlisted in the United States Coast Guard and trained at the Coast Guard boat repair school in Groton, Connecticut for two years. His primary training there was in repair of wooden vessels. CP 189, deposition of NewDay, page 6, lines 5 through 20. NewDay has been involved in boat repair continuously since 1964. CP 190-191, deposition of NewDay, page 7, lines 24 & 25, page 8, line 1.

Wooden vessels have had guardrails ever since NewDay began in the boat repair business in 1964. CP 192, deposition of NewDay, page 9, lines 8 through 10. Guardrails of the type which provide fall protection to passengers and crew have been a part of wooden vessels throughout the twentieth century. CP 193, deposition of NewDay, page 10, lines 2 through 5.

Peter NewDay operates a full service shipwrighting service. He does not do engine work, electrical work, or painting. CP 193, deposition of NewDay, page 10, lines 15 through 25. CP 293-294, deposition exhibit 7 is the contract entered into between NewDay and Roger Hoff, as president of San Juan Excursions, Inc., for repair work to be performed by NewDay and shipwright Roy Hamilton on the vessel ODYSSEY at the Port of Port Angeles Boat Haven marina in March and April 2004. CP 197, deposition of NewDay, page 60, lines 2 through 19.

CP 337-338, deposition exhibit 38-43 is a photograph of the ODYSSEY which was taken by Roger Hoff from a position about halfway down the ramp which leads to the float where the ODYSSEY was moored. CP 185, deposition of Roger Hoff, taken on October 6, 2005, page 148, lines 1 through 7. CP 333-334, deposition exhibit 38-40 is a photograph of the vessel taken from

the dock. CP 184, deposition of Hoff, taken October 6, 2005, page 140, lines 21 through 25. Alex Ralston is seen standing on the cap rail above the starboard bulwark, wearing a yellow top. As Alex Ralston was only aboard the vessel on March 27 and March 28, these two photos had to have been taken on one of those two days. There can be no dispute that a person standing on either the ramp or the dock would have been aware that work was proceeding on the vessel's upper deck without the benefit of guard rails or other fall protection.

The starboard upper deck guardrail had been removed on March 14, 2004, CP 194, deposition of NewDay, page 41, lines 10 through 12, and had been placed at a location forward of the pilothouse. A portion of the guardrail laying forward of the pilothouse can be seen in CP 289-290, deposition exhibit 3-5, and in CP 337-338, deposition exhibit 38-43. The guard rails were lying on the deck, and covered an area three feet wide by twelve feet long. CP 194, deposition of NewDay, page 41, lines 19 through 23. CP 291-292, deposition exhibit 5 is the drawing prepared by NewDay showing an overhead view of the upper observation deck, detailing the location where NewDay believes the guardrail was laid after it was removed from the starboard upper

deck. CP 195, exhibit 3, deposition of NewDay, page 44, lines 6 through 11. The location that the guardrails are shown at the top of deposition exhibit 5 is the location that the guardrails were in at the time of Alex Ralston's fall, and had been in that location since March 14. CP 196, deposition of NewDay, page 45, lines 3 through 9. NewDay testified that the guardrails lying in that location was "dangerous", in that the guardrails were "not tied down", and they were "in different contorted shapes". He stated that "if you would stumble upon it, you were looking for a good fall." CP 202, deposition of NewDay, page 81, lines 4 through 14. Not only could one stumble over the guardrails lying on the deck, as there was no guardrail present providing fall protection, there was the potential for a person tripping on the guardrail and falling over the edge. CP 202, deposition of NewDay, page 81, lines 15 through 25. That condition was present from approximately March 14 to the day of Alex Ralston's fall. CP 203, deposition of NewDay, page 82, lines 1 through 4.

There is no dispute in this lawsuit that people working on the upper deck of a vessel without guardrails or fall protection is unsafe, and in violation of both U.S. Coast Guard and O.S.H.A. regulations. 46 C.F.R. § 177.900 states:

Deck rails. (a) Except as otherwise provided in this section, rails or equivalent protection must be installed near the periphery of all decks of a vessel accessible to passengers or crew. . . .

29 C.F.R. § 1915.73 states:

Guarding of deck openings and edges.

(c) When employees are working aloft, or elsewhere at elevations more than 5 feet above a solid surface, either scaffolds or a sloping ladder, meeting the requirements of this subpart, shall be used to afford safe footing, or employees shall be protected by safety belts and lifelines meeting the requirements of §§ 1915.159 and 1915.160 . . .

(d) When employees are exposed to unguarded edges of decks, platforms, flats, and similar flat surfaces, more than 5 feet above a solid surface, the edges shall be guarded by adequate guardrails meeting the requirements of § 1915.71(j) (1) and (2), unless the nature of the work in progress or the physical conditions prohibit the use or installation of such guardrails.

NewDay felt the starboard side was unsafe. CP 206, deposition of NewDay, page 92, lines 16 through 17. Faires testified that he had an understanding in March of 2004 that having a person work on a surface such as the upper deck of the ODYSSEY as shown in CP 287-288, deposition exhibit 3-1 where

there is no guardrail or fall protection creates a risk of harm to that person. CP 176-177, deposition of Faires, page 91, lines 18 through 25, page 92, lines 1 through 12.

Faires was aware that the vessel was doing sanding within five days of March 10. CP 169, deposition of Faires, page 62, lines 1 through 7. On that day, there was a person standing in that location with dust falling into the water and going into the air. Roger Hoff said he wanted to take advantage of the nice weather and do some painting while he was in Port Angeles. CP 169, deposition of Faires, page 62, lines 1 through 25. It was clear to Faires that the man he observed was doing work preparatory to painting. CP 170, deposition of Faires, page 63, lines 12 through 14. Faires was standing on the float facing the starboard side of the vessel when he had the conversation with Hoff, possibly midships. CP 171, deposition of Faires, page 64, lines 20 through 25. Evidencing defendants' control over the worksite, Faires gave Hoff a copy of the Boat Yard's Best Management Practices for Users of the Port Angeles Boat Yard, CP 317-318 deposition exhibit no. 32, and told Hoff "there were only two ways you could paint your vessels. You fully encapsulate your boat so the pollutants don't go in the air or water to use a vacuum sander." CP

170-171, deposition of Faires, page 63, line 18 through page 64, line 2. Faires testified that “we just couldn’t allow” pollutants in the water. CP 171, deposition of Faires, page 64, lines 4 through 16.

Faires understood from his knowledge of wooden vessels that they needed to be painted on an annual basis. CP 172, deposition of Faires, page 65, lines 20 through 25, and that the ODYSSEY was a commercial vessel involved in chartering. Faires knew that owners of charter vessels normally like to keep the vessels painted. CP 173, deposition of Faires, page 66, lines 2 through 17.

According to Faires’ testimony, he was on the float at the location of the ODYSSEY a second time, although he does not recall the date. CP 174, deposition of Faires, page 71, lines 18 through 23. He recalls debris on the dock, and Faires told either Hoff or NewDay that it was not acceptable to have boards and to keep the docks clean. CP 174-175, deposition of Faires, page 71, lines 24 and 25, page 72, lines 1 through 5.

According to NewDay, between March 14 and March 28, Faires came to the dock to the location of the ODYSSEY to check on NewDay and Hamilton’s practice of maintaining clean waters. CP 174, deposition of NewDay, page 71, lines 18 through 23.

NewDay stated in a declaration under oath (CP 295-296, deposition exhibit 8) signed in June 2005 that Faires "was present on the float where the ODYSSEY was moored once or twice a week" between March 14 and March 28. On the occasions that he was on the float at the ODYSSEY between March 14 and March 28, Faires would have been in a position to observe that there was no guardrail present on the starboard side upper deck forward of the deck break. CP 199, deposition of NewDay, page 75, lines 15 through 22.

Faires was also on the float where the ODYSSEY was moored while NewDay and Hamilton were replacing the plywood walkway on the upper starboard deck. CP 200, deposition of NewDay, page 76, lines 18 through 24. The absence of the guardrail forward of the deck break would have been visible to Faires, and there was nothing to obstruct his view of the upper starboard deck forward of the deck break. CP 201, deposition of NewDay, page 77, lines 12 through 21.

The first day Alex Ralston was on the vessel (March 27), Faires gave Ralston direction on keeping the paint and dust out of the water. CP 207, deposition of NewDay, page 110, lines 5 through 15. Faires told Ralston that he needed to use the vacuum

machine or use a tarp and keep the dust and paint out of the water, and that was required by EPA regulations. CP 207-208, deposition of NewDay, page 110, lines 19 through 25, page 111, line 1. This conversation occurred just after lunch, at approximately one o'clock in the afternoon. CP 209, deposition of NewDay, page 153, lines 8 through 21. At that time, there was no tarp over the upper starboard deck, and Faires was standing on the float at the stern of the vessel. Ralston was standing on the stern deck, starboard side. CP 210, deposition of NewDay, page 154, lines 5 through 15. At that time, Ralston had a scraper, putty knife, a wire brush and a piece of sandpaper. CP 211, deposition of NewDay, page 155, lines 3 through 6.

In an April 27, 2005 deposition, Roger Hoff testified that he would see the harbormaster named "Chuck" walking by, in a position where he could see the starboard side of the vessel on a "daily or near daily basis." CP 216-217, deposition of Roger Hoff, taken April 27, 2005, page 62, lines 2 through 25, page 63, lines 1 through 16. After the fall, Faires told NewDay that he was present at the vessel on March 27, at a time when the guardrails were down over the entire upper starboard side of the vessel and there was a 17 year-old with painting tools in his hand working on the vessel at

that time. CP 212-213, deposition of NewDay, page 156, lines 12 through 25, page 157, lines 1 through 7.

Although the Ralstons do not believe what Alex Ralston was told is relevant to defendants' motions for summary judgment, it is necessary to set the record straight regarding what Ralston was told. When painter Matt Kielmeyer came aboard the ODYSSEY at between 0800 and 1000 on March 27, he met with Roger Hoff and Alex Ralston in the vessel's interior, where Hoff told them the scope of the work they were to perform. Kielmeyer testified that Hoff told them that they should start on the hull, work up through the main deck, not to work on anything that the shipwrights were working on, and then if things were going good, to "do the wheelhouse." Kielmeyer could not recall any restrictions placed by Hoff on any side or area of the wheelhouse where this work was to be done. CP 220-222, deposition of Kielmeyer, page 20, line 7 to page 22, line 1. Kielmeyer testified that it was his impression at all times aboard the ODYSSEY that both Alex Ralston and Matt Ralston were responsible for performing prep work for all areas of the vessel, including the upper starboard walkway adjacent to the vessel's pilot house. CP 223-224, deposition of Kielmeyer, page 24, line 24 through page 25, line 6. See also, Declaration of

Matthew Kielmeyer, CP 225-226. When asked what was the basis for this understanding, Kielmeyer testified “we would do that area, if time permits, and, since they were the prep people, that they would be the one to do the prep up there.” CP 224, deposition of Kielmeyer, page 25, lines 7 through 11.

Although Alex Ralston has a very limited memory of the events on the day of his injury, he has testified “I remember, at some point of my work experience on the ODYSSEY, I was standing below the overhang of the wheelhouse looking up at the bottom of the overhang, and I remember thinking to myself that I needed to make sure I prepare this area for painting.” CP 231, deposition of Alex Ralston, page 23, lines 11 through 21. Ralston testified “I wanted Roger Hoff’s boat to look the best it could because it is his business, and I remember looking up and thinking that this place, as previously described, the overhang of the wheelhouse, underneath of it, needed to be prepared for painting.” CP 232, deposition of Ralston, page 24, lines 7 through 14.

Roger Hoff’s purported instructions to Alex Ralston to stay away from the starboard side of the upper deck were not as clear as the Port of Port Angeles and Port Angeles Marine, Inc. would like this court to believe. When asked to recite the specifics of what

Ralston was told, Hoff testified that he told Ralston to “[s]tay away from the starboard side where Roy and Pete are working.” CP 186, deposition of Hoff, taken October 6, 2005, page 188, lines 3 through 16 (emphasis added). Peter NewDay testified that “Hoff had told Alex not to go over to the starboard side “[n]ot to disturb Roy Hamilton and myself from what we were doing.” CP 204-205, deposition of NewDay, page 90, line 25, page 91, lines 1 through 3.

At the time of Alex Ralston’s fall, both Peter NewDay and Roy Hamilton had left the upper level and were on the main deck below. His fall occurred at a time when he was not where Roy and Pete were working, and he was not disturbing NewDay and Hamilton from what they were doing.

IV. LEGAL ARGUMENT

A. THE EVIDENCE RAISED GENUINE ISSUES OF MATERIAL FACT REGARDING DEFENDANTS’ DUTY UNDER THE RESTATEMENT (SECOND) OF TORTS, § 344

The evidence presents a genuine issue of material fact on the Port of Port Angeles’ and its agent’s violation of the duty set out in Restatement (Second) of Torts, § 344:

§ 344 Business Premises Open to Public: Acts of third Persons or Animals

A possessor of land who holds it open to the public¹ for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to

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

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

1. **The Port of Port Angeles is a Possessor of Land as Contemplated by the Restatement (Second) of Torts, § 344**

B. The trial court's statement that "the dangerous condition did not exist on the Port's land", see CP 27, Memorandum Opinion and Order on Defendants' Motion for Summary Judgment, page 4, lines 1 and 2, and that therefore the Restatement (Second) of Torts, § 344 does not apply, ignores the holdings in cases involving maritime injuries in which the Restatement (Second) of

¹ The "public" referred to in § 344 has been held to include a tenant who had leased an apartment from an apartment owner, *Washington v. United States HUD*, 953 F. Supp. 762, 773 (N.D. Tex. 1996), a part-time employee of a valet parking service who was struck by an auto operated by a driver who became intoxicated at defendant's social gathering, *Di Ossi v. Maroney*, 548 A.2d 1361, 1367 (Sup. Ct. of Delaware 1988), and a janitor working for an independent contractor on defendant bank's premises, *Craig v. Washington Trust Bank*, 94 Wn. App. 820, 827, 828, 976 P.2d 126 (Div. Three 1999).

Torts has been applied. See, *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1427, 1429 (5th Cir. 1983); *Clemons v. Mitsui O.S.K. Lines, Ltd.*, 596 F2d 746 (7th Cir. 1979), cert. den. 451 U.S. 969, 68 L.Ed.2d 347, 101 S.Ct. 2044; *Pan-Alaska Fisheries, Inc. v. Marine Construction and Design Co.*, 565 F2d 1129, 1135 (9th Cir. 1977); *Gay v. Ocean Transport & Trading, Ltd.*, 546 F.2d 1233 (5th Cir. 1977), reh. den. 549 F.2d 203 (5th Cir. 1977); *Palmer v. Apex Marine Corp.*, 510 F. Supp. 72, 74 (W.D. Wa. 1981). The Washington Supreme Court adopted the Restatement (Second) of Torts, § 344 in *Nivens v. 7-11 Hoagy's Corner*, 133 Wash. 2d 192, 197, 943 P.2d 286 (1997).

In a case such as this, involving a known hazard on a vessel moored at a slip over which the property owner has full authority and control, the term “possessor of land” used in the Restatement (second) must include dangerous conditions and hazards existing on vessels moored in such slips. In *Calderera v. Chandris, S. A.*, 1993 U.S. Dist. Lexis 12653 (S.D.N.Y.), plaintiff fell and was injured while traveling as a passenger on a cruise ship. In applying Restatement (Second) of Torts, § 344, the Second Circuit held that “[t]his principle is applicable to maritime cases, because a

shipowner's responsibility for defective conditions aboard ship 'parallels treatment of the landowner's liability for defective conditions'", *id.* at 11, *citing Monteleone v. Bahama Cruise Line, Inc.*, 838 F.2d 63, 65 (2nd Cir. 1988).

The evidence here indicates that defendant Port of Port Angeles possessed the marina and had the right to control activities there. It leased the slip and received consideration for such moorage (CP 314-316, deposition exhibit 29); harbormaster Faires testified that the floats and docks at the marina are the property of defendant Port of Port Angeles, and the Port of Port Angeles has full authority and control over the moorage slips adjacent to the floats and docks. The Agent Agreement engages Port Angeles Marine, Inc to "operate the Port Angeles Boat Haven. . ." CP 298, deposition exhibit 27, paragraph 1; and the Port had absolute right under its Rules and Regulations to deny permission to any vessel in noncompliance with normal safety standards to remain moored at the marina. CP 313, deposition exhibit 28, paragraph 21(8).

2. The Marina Was Open to the Public for the Port's Business Purposes

Mooring vessels such as the ODYSSEY is the business the Port of Port Angeles is in with respect to the marina. Collecting

rents is in furtherance of the Port's business interests. CP 167, deposition of Faires, page 55, lines 12 through 17. The Port of Port Angeles invites people to moor at the marina, and people who moor their vessels there are responding to that invitation. CP 168, deposition of Faires, page 56, lines 6 through 12. The Berthage Agreement entered into between the Port of Port Angeles and San Juan Excursions called for payment to the Port moorage fees of \$3.24 per foot per month. CP 315, exhibit 29, paragraph 2.1.

CP 319-322, deposition exhibits 36 and 37 are Alex Ralston's W-2 and tax statement, and statement of earnings and deductions for the work he performed on the ODYSSEY in March 2004. At all times while aboard the ODYSSEY, Alex Ralston was an employee of San Juan Excursions, Inc. CP 180-181, deposition of Hoff, taken October 6, 2005, page 117, lines 9 through page 118, line 21.

"[C]ourts applying maritime law may adopt state law by express or implied reference or by virtue of the interstitial nature of federal law." *Alcoa Steamship Co. v. Charles Ferran & Co.*, 383 F.2d 46, 50 (5th Cir. 1967). Washington has adopted the definition

of an invitee in the Restatement (Second) of Torts § 332 (1965)²,

which provides:

(1) An invitee is either a public invitee or a business visitor.

(2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.

(3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

McKinnon v. Wash. Fed. Sav. & Loan Ass'n, 68 Wn.2d 644, 650, 414 P.2d 773 (1966). Where a marina provides moorage to vessels for a fee, visitors or independent contractors working on the vessels are classified as business invitees. *Enersen v. Anderson*, 55 Wn.2d 486, 488-489 (1960).

At a minimum, a genuine issue of material fact exists regarding whether the Port of Port Angeles held the Boat Haven marina open to the public for its business purposes.

3. San Juan Excursions, Inc. was a Third Person Performing Negligent Acts At the Marina

CP 333-334, deposition exhibit 38-40 is a photograph of the vessel taken from the dock, which shows work having been

² § 344 Comment (a) references Restatement (Second) § 332 in determining the persons to whom the duty is owed.

performed on the starboard upper level of the vessel, and no guardrails or fall protection being provided. Under both the Berthage Agreement and the Port's Rules and Regulations, San Juan Excursions, Inc. was obligated to comply with federal³ and state law⁴, and normal safety standards. The Declaration of Michael K. McGlenn, CP 235-253, sets forth the manners in which San Juan Excursions, Inc. was negligent, and how it would have been feasible (and inexpensive) to provide fall protection.

The evidence also presented a genuine issue of material fact that the Port of Port Angeles, through its agent Port Angeles Marine, Inc., had actual knowledge of San Juan Excursions, Inc.'s negligence, and the hazard posed by the lack of guardrails or fall protection. See, CP 207, deposition of NewDay, page 110, lines 5 through 15; CP 207, page 110, lines 19 through 25; CP 208, page 111, line 1; CP 209, page 153, lines 8 through 21; CP 210, page 154, lines 5 through 15; CP 210 page 154, lines 19 through 22; CP 211, page 155, lines 3 through 6; CP 211 page 155, lines 15 through 19.

³ See 29 U.S.C. § 654(a)(1) and (2); 29 CFR § 1910.23(c)(1); 29 CFR § 1915.73(d); 46 CFR § 177.900

4. **Given it Actual Knowledge of the Negligence of San Juan Excursions, Inc. and the Resulting Hazard, The Port of Port Angeles Failed to Exercise Reasonable Care to Give A Warning Adequate to Enable Alex Ralston to Avoid the Harm, or Otherwise Protect Alex Ralston Against the Harm**

In defining reasonable care, Comment (d) to the Restatement (Second) of Torts, § 344 makes clear that a warning of the danger may not be sufficient in many situations and that the landowner will have an obligation to take affirmative measures to eliminate the hazard:

d. Reasonable care. . . . There are, however, many situations in which the possessor cannot reasonably assume that a warning will be sufficient. He is then required to exercise reasonable care to use such means of protection as are available, or to provide such means in advance because of the likelihood that third persons, or animals, may conduct themselves in a manner which will endanger the safety of the visitor. (Emphasis added).

Prior to March 2004, Alex Ralston had never been aboard the ODYSSEY. CP 229, deposition of Alex Ralston, page 7, lines 8 through 10. He was 17 years-old (DOB

⁴ See WAC 296-56-60121, which requires guardrails where employees are exposed to falls of more than four feet from floor or wall openings or waterside edges.

January 14, 1987), and his total job experience included running his own firewood business, performing yard maintenance, performing maintenance at his father's office, and painting a fence of an orthodontist's office. CP 229-230, deposition of Alex Ralston, page 7, line 25, page 8, lines 1 through 6.

The photos which are CP 333-334, deposition exhibit 38-40 and CP 289-290, deposition exhibit 3-5 present a genuine issue of fact regarding whether the danger inherent in allowing a 17 year-old with no vessel experience onto the upper deck of a vessel 10 feet above the walking surface without fall protection is one which a warning may not be sufficient to prevent. It is clear that Coast Guard, O.S.H.A. and W.A.C. regulations all consider warnings to be insufficient, hence the requirement that guardrails be installed.

The Restatement (Second) of Torts, § 344 also requires the possessor to exercise reasonable care to "otherwise protect" the person from a known danger on the possessor's property. CP 309-313, deposition exhibit 28, the Port of Port Angeles Rules and Regulations, paragraph 21(8), holds that vessels which do not meet

normal safety standards “will be denied permission to remain on Port premises”. Port Angeles Marine, Inc. employees including Faires would be responsible for enforcing this provision if they were to see a problem, CP 166, deposition of Faires, page 45, lines 1 through 12, and had the absolute right (and contractual duty under the Agent Agreement, deposition exhibit 27) to either 1) require fall protection be in place, 2) stop the work until fall protection was in place, or 3) deny ODYSSEY permission to remain on the premises.

As a matter of law, the Port of Port Angeles and Port Angeles Marine, Inc. owed a duty to Alex Ralston as set forth in the Restatement (Second) of Torts, § 344.

B. THE EVIDENCE RAISED GENUINE ISSUES OF MATERIAL FACT REGARDING DEFENDANTS’ DUTY UNDER THE RESTATEMENT (SECOND) OF TORTS, § 315

The Restatement (Second) of Torts, § 315 also sets forth the duty of the Port of Port Angeles and Port Angeles Marine, Inc., given the special relationship which existed between these defendants and San Juan Excursions, Inc.:

§ 315 General Principle

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

Comment (c) to Restatement (Second) of Torts, § 315 identifies the sections of the Restatement (Second) of Torts which define the "special relationship" contemplated by § 315:

c. The relations between the actor and a third person which require the actor to control the third person's conduct are stated in §§ 316-319. The relations between the actor and the other which require the actor to control the conduct of third persons for the protection of the other are stated in §§ 314 A and 320. (Emphasis supplied).

Restatement (Second) of Torts, § 318 describes a relationship under which the evidence in this case would create a duty to act on the part of the possessor of land:

§ 318 Duty of Possessor of Land or Chattels to Control Conduct of Licensee

If the actor permits a third person to use land or chattels in his possession otherwise than as a servant, he is, if present, under a duty to exercise

reasonable care so to control the conduct of the third person as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if the actor

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

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

In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences therefrom in favor of the nonmoving party. *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 256, 616 P.2d 644 (1980); see also, *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). There was substantial evidence before the court that harbormaster Faires either knew or had reason to know he had the ability to control the hazardous work conditions present on the ODYSSEY, and either knew or should have known of the necessity and opportunity for exercising such control. “The test of control is not the actual interference with the work of the subcontractor, but the right to exercise such control.” *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 331, 582 P.2d 500 (1978), citing *Fardig*

v. Reynolds, 55 Wn.2d 540, 543, 348 P.2d 661 (1960). See also, *Swam v. Aetna Life Ins. Co.*, 155 Wash. 402, 407, 408, 284 P. 792 (1930). Under both Restatement (Second) of Torts §§ 315 and 344, both the Port of Port Angeles and Port Angeles Marine, Inc. had a duty to exercise the control they had (and the Berthage Agreement and Rules and Regulations provide) to require San Juan Excursions, Inc. to eliminate the hazard which was presented to the ship repair personnel working aboard the vessel prior to March 28, 2004, and to Alex Ralston at the time on March 27 when he was confronted by Faires, and on the date of his injury.

C. SHEPPARD V. HORLUCK HOLDS THAT A MARINA OWNER WITH A CONTRACTUAL RELATIONSHIP WITH A THIRD-PARTY TORTFEASOR OVER WHOM IT HAS CONTROL OWES A DUTY TO PERSONS SUBJECT TO POTENTIAL HARM BY THE TORTFEASOR

The Port of Port Angeles relied heavily on *Sheppard v. Horluck*, 1998 Wash. App. LEXIS 602 (1998)(an unpublished opinion) as a case it claimed is “virtually identical to the present.” Defendant’s Memorandum in Support of Port of Port Angeles’ Motion for Summary Judgment at 10, CP 625-647. In *Sheppard*, this Court restated the long-standing rule under both state and federal maritime law that a landowner is liable for injuries to an invitee that were sustained on property within the landowner’s control. *Id.* at *6, citing *Mesa v. Spokane World Exposition*, 18 Wn.

App. 609, 612, 570 P.2d 157 (1977). In ruling in *Sheppard* the marina owed no duty, this Court was careful to point out twice that: “The Port has no contractual relationship with Horluck, nor does it have authority to control the manner in which Horluck operates its boats.” *Id.* at 2 (emphasis added). Although the issue of whether a party has a right to control the actions of third persons outside their property is generally an issue of material fact, the *Sheppard* court concluded that the Port had “no control” over Horluck’s activities and, therefore, had no duty to the plaintiff to prevent harm caused by Horluck from wakes generated off the Port’s property. *Id.* at 9.

In its Memorandum Opinion and Order on Defendants’ Motion for Summary Judgment, the trial court held:

The trouble with this contention (that defendants had a duty under the Restatement (Second) of Torts to discover the lack of fall protection and require Hoff to remedy the condition) is that the dangerous condition did not exist on the Port’s land. The dangerous condition was in the sole and exclusive control of Mr. Hoff.

Memorandum Opinion and Order on Defendants’ Motion for Summary Judgment, CP 27, page 4, lines 1 through 3. The evidence presented shows that 1) the dangerous condition was on a vessel moored at the Port of Port Angeles marina, pursuant to a Berthage Agreement which provided that the Port of Port Angeles

was leasing the space to San Juan Excursions, Inc., requiring the payment of rent for such berthage space, and 2) the Port of Port Angeles under its Rules and Regulations had the absolute power to terminate the Berthage Agreement should the vessel owner not comply with "normal safety standards." The evidence showed that harbormaster Faires was actually controlling the manner in which the work was being performed.

Here, the Port of Port Angeles had a direct contractual relationship with San Juan Excursions, Inc., CP 314-316, deposition exhibit 29, and a contractual right to control activities of the ODYSSEY while it was at the marina. The Port of Port Angeles required that all vessels at the marina comply with its Rules and Regulations, comply with federal and state law, and "meet normal safety standards." CP 309-313, deposition exhibit 28. The Agent Agreement which the Port of Port Angeles and Port Angeles Marine, Inc. were working under required the agent to "enforce such rules and regulations as the Port may prescribe for its operation. . ." CP 298, 300, 305, deposition exhibit 27, paragraphs 3, 3M and 13.

Unlike the lack of control that existed in *Sheppard* over wakes caused by another vessel off the premises, the Port of Port

Angeles exercised direct and full control over the moorage slips covered by its Berthage Agreement. In his deposition, Faires testified that the Port of Port Angeles had full authority and control over the moorage slips adjacent to its floats and docks. CP 158, deposition of Faires, page19, lines 4 through18. The Washington Supreme Court in *Nivens v. Hoagy's Corner, supra*, held that analysis under the Restatement (Second) of Torts § 344 requires a determination of whether the possessor had control over the location where the injury occurred:

Section 344 appears to be based on the notion that one who controls any confined space, into which he or she invites the public, has an obligation of reasonable care to observe and control activities within that space. n31 Section 344 is an exception to the general rule that one person has no duty to control another person's conduct. n32

Id. at 44.

Even if the trial court's determination that the dangerous condition was not on the Port of Port Angeles' land was relevant, a landowner's duty to invitees extends to the activities of third persons outside the land whose acts endanger the safety of a

business invitee. Comment (b) to the Restatement (Second) of Torts, § 344, provides:

b. "Third persons" include all persons other than the possessor of the land, or his servants acting within the scope of their employment. It includes such servants when they are acting outside of the scope of their employment, as well as other invitees or licensees upon the premises, and also trespassers on the land, and even persons outside of the land whose acts endanger the safety of the visitor. The Section also applies to the acts of animals which so endanger his safety.⁵ (Emphasis supplied).

In *Mesa v. Spokane World Exposition, supra*, the court held that the duty to protect business invitees extended to injuries that occurred on the property of an adjacent landowner. In *Mesa*, cited with approval in *Sheppard*, the court considered the issue of whether a landowner owed a duty to a business invitee for injuries sustained on an adjacent property. Again, the court's decision

⁵ See *Easler v. Downie Amusement Co.*, 125 Me. 334, 133 A. 905, 53 A.L.R. 847 (1926), servants outside scope of employment; *Blakeley v. White Star Line*, 154 Mich. 635, 118 N.W. 482, 19 L.R.A. N.S. 772, 129 Am. St. Rep. 496 (1908), other invitee; *Hill v. Merrick*, 147 Or. 244, 31 P.2d 663 (1934), same; *Sinn v. Farmers Deposit Savings Bank*, 300 Pa. 85, 150 A. 163 (1930), trespasser; *Greco v. Sumner Tavern, Inc.*, 333 Mass. 144, 128 N.E.2d 788 (1955), drunken customers; *Naegele v. Dollen*, 158 Neb. 373, 63 N.W.2d 165, 42 A.L.R.2d 1099 (1954), customer; *Adamson v. Hand*, 93 Ga. App. 5, 90 S.E.2d 669 (1955); *Exton v. Central R. Co. of N.J.*, 62 N.J.L. 7, 42 A. 486, 56 L.R.A. 508 (1898), affirmed, 63 N.J.L. 356, 46 A. 1099, 56 L.R.A. 512; *Miller v. Derusa*, 77 So. 2d 748 (La. App. 1955); *Winn v. Holmes*, 143 Cal. App. 2d 501, 299 P.2d 994 (1956); *Corcoran v. McNeal*, 400 Pa. 14, 161 A.2d 367 (1960); *Peck v. Gerber*, 154 Or. 126, 59 P.2d 675, 106 A.L.R. 996 (1936).

turned on the issue of control or the appearance of control over the adjacent property. Responding to a general public invitation to visit the grounds and pavilions of the defendant's property, the plaintiff entered the property and toured the site with other members of the public. After straying off the defendant's property and entering another building on an adjacent property with obvious signs of ongoing construction, the plaintiff climbed to the third landing of an unlighted stairway and was severely injured when he fell down an unbarricaded ventilator shaft. Reversing the trial court's dismissal on summary judgment and holding that a duty existed that had to be examined by the jury at trial, the court stated:

. . . the jury could find that Expo assumed, as far as the public was concerned, the appearance of control over the Center and thereby brought Mesa as a recipient of the general invitation within the sphere of danger. The fact that others had control of the premises and did not make them safe for the public or that Expo did not know of the unbarricaded ventilator shaft would not preclude Expo's liability.

Id. at 613-14 (emphasis added). The *Mesa* court's decision underscores the importance of the defendant's exercise of control or the appearance of control over the adjacent property. Where control is exercised by the landowner or where there is an appearance of control, a duty exists to business invitees. Whether there was a breach of that duty is an issue of material fact for the jury to decide. As the *Mesa* court stated, ". . . the question of

control and the scope of the invitation are factual matters.” *Id.* at 613 (citations omitted).

D. O.S.H.A. MINIMUM SAFETY STANDARDS SET FORTH THE STANDARD OF CARE FOR AN EMPLOYER WITH CONTROL OF A WORKSITE

The Occupational Safety and Health Administration (O.S.H.A.) has promulgated minimum safety regulations that address the requirements for fall protection and scaffolding in the context of ship repair work at defendants’ mixed use marina and shipyard. 29 C.F.R. § 1915.73(c) and (d). Although violation of O.S.H.A. minimum safety standards does not constitute negligence *per se*, or create a private right of action, O.S.H.A. safety regulations are evidence of a duty owed in a negligence action. *See, Kelley v. Howard S. Wright Constr. Co.*, *supra* at 336. (O.S.H.A. regulations are “relevant to the appropriate standard of care”); *Robertson v. Burlington Northern R.R.*, 32 F.3d 408 (9th Cir. 1994) (O.S.H.A. regulation is evidence of applicable standard of care in a FELA case); *Ries v. National R.R. Passenger Corp.*, 960 F.2d 1156 (3rd Cir. 1992) (same); *Albrecht. v. Baltimore & Ohio R.R. Co.*, 808 F.2d 329 (4th Cir. 1987) (same); *Pratico v. Portland Terminal Co.*, 783 F.2d 255, 265 (1st Cir. 1985) (same). “[W]here the statute [or regulation] does set up standard precautions,

although only for the protection of a different class of persons, or the prevention of a distinct risk, this may be a relevant fact, having proper bearing upon the conduct of a reasonable man under the circumstances, which the jury should be permitted to consider." Prosser, Torts, p. 202 (4th ed., 1971).

29 U.S.C. § 654, entitled "Duties of employers and employees," contains both a general and a specific duty clause for employers. The general duty clause requires that each employer "furnish to each of *his employees* employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." *Id.* § 654(a)(1) (emphasis added). The specific duty clause requires each employer to "comply with occupational safety and health standards promulgated under (O.S.H.A.)." *Id.* § 654(a)(2). § 654(a)(2), which lacks the limiting language "his employees" of § 654(a)(1), establishes for the benefit of *all* employees a specific duty to comply with O.S.H.A. regulations. See Miller, The Occupational Safety and Health Act of 1970 and the Law of Torts, 38 Law & Contemp. Prob. 612, 636 n.138 (1974); *cf. King v. Avtech Aviation, Inc.*, 655 F.2d 77, 79 (5th Cir. 1981) (*per curiam*) (regulation prescribing specific conduct more likely to

establish standard of care than regulation prescribing general conduct).

Given the language of O.S.H.A.'s regulations on the duties of employers and O.S.H.A.'s broad statement of purpose, courts have held that O.S.H.A. regulations protect not only an employer's own employees, but all employees who may be harmed by violation of the regulations. See, e.g., *Beatty Equip. Leasing, Inc. v. Secretary of Labor*, 577 F.2d 534, 536-37 (9th Cir. 1978); *Marshall v. Knutson Constr. Co.*, 566 F.2d 596, 599-600 (8th Cir. 1977); *Brennan v. OSHRC*, 513 F.2d 1032, 1036-39 (2d Cir. 1975); *Kelley v. Howard S. Wright Constr. Co.*, *supra* at 334; see *Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081, 1091 & n.21 (7th Cir. 1975) (dictum); *cf. Rabar v. E.I. DuPont de Nemours & Co.*, 415 A.2d at 503-05 (state statute modeled on O.S.H.A.).

The duty to enforce O.S.H.A. regulations on a worksite where multiple employers have workers extends not only to employers who are engaged in conduct directly violating O.S.H.A. minimum standards, but also to other employers that have some control over the worksite and the contractual ability to enforce safety regulations. "In this situation, a hazard created and controlled by one employer can affect the safety of employees of

other employers on the site. In light of this facet, the Commission has stated that in this situation an employer will have a duty under § 654(a)(2) regarding safety standard violations which it did not create or fully control." *Marshall, supra* at 599 (emphasis added).

State and federal courts have recognized two situations in which an employer on a multi-employer worksite may properly be cited for occupational safety and health violations that do not result from an exposure of the employer's own workers to a hazard. "In the first situation, an employer may be responsible for a Federal O.S.H.A. violation if the employer creates or controls the hazard." *Bastian v. Carlton County Highway Dep't*, 555 N.W.2d 312, 316 (Minn. App. 1997) (emphasis added); *see also, IBP, Inc. v. Herman*, 330 U.S. App. D.C. 218, 144 F.3d 861, 866 (D.C. Cir. 1998). "Under the second scenario, an employer may be responsible for [O.S.H.A.] violations of other employers when it could reasonably be expected to have prevented or abated the violations due to its supervisory authority and control over the work site." *Id.*

The multi-employer doctrine holding controlling employers liable for the conduct of other employers on the jobsite is widely accepted in the federal courts. *See, e.g., Beatty Equip. Leasing,*

Inc., *supra* at 577 F.2d 534 (9th Cir. 1978); *Universal Constr. Co. v. OSHRC*, 182 F.3d 726, 730 (10th Cir. 1999); *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976 (7th Cir. 1999); *R.P. Carbone Constr. Co. v. Occupational Safety & Health Review Comm'n*, 166 F.3d 815 (6th Cir. 1998); *Marshall, supra*; *Brennan v. Occupational Safety & Health Review Comm'n*, 513 F.2d 1032 (2d Cir. 1975). *But see, Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 709 (5th Cir. 1981) (rejecting multi-employer doctrine).

Recognizing the importance of the multi-employer doctrine in its enforcement role, on December 10, 1999, the United States Department of Labor issued a Directive to clarify "the Agency's multi-employer citation policy[.]" CP 263-264, declaration of Richard Gleason, M.S, C.I.H., C.S.P., at paragraph 16. "The Court must defer to the agency's interpretation of a statute that it implements 'so long as it is reasonable, consistent with the statutory purpose, and not in conflict with the statute's plain language.'" *Davis v. Latschar*, 340 U.S. App. D.C. 136, 202 F.3d 359, 364 (D.C. Cir. 2000).

The scope of the Directive was to impact all multi-employer situations throughout O.S.H.A.'s broad regulatory authority, and is not limited to the construction industry. *Id.* Laying out the Agency's

criteria for the citation of employers on multi-employer sites in “all industry sectors,” the Directive establishes a two-step process for determining whether O.S.H.A. regulations apply to a particular employer:

Multi-employer Worksite Policy. The following is the multi-employer citation policy:

- A. Multi-employer Worksites. On multi-employer worksites (in all industry sectors), more than one employer may be citable for a hazardous condition that violates an O.S.H.A. standard. A two-step process must be followed in determining whether more than one employer is to be cited.
1. Step One. The first step is to determine whether the employer is a creating, exposing, correcting, or controlling employer. . . .
 2. Step Two. If the employer falls into one of these categories, it has obligations with respect to O.S.H.A. requirements. . . .

Id. at CP 275-286 (emphasis added).

In determining when an employer is a “controlling employer,” the Agency considers the following factors set forth in the Directive:

The Controlling Employer

Step 1: Definition: An employer who has **general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them. Control can be established by contract or, in the absence of explicit contractual provisions, by the exercise of control in practice.** Descriptions and examples of

different kinds of controlling employers are given below.

Step 2: Actions Taken: **A controlling employer must exercise reasonable care to prevent and detect violations on the site.** The extent of the measures that a controlling employer must implement to satisfy this duty of reasonable care is less than what is required of an employer with respect to protecting its own employees. This means that the controlling employer is not normally required to inspect for hazards as frequently or to have the same level of knowledge of the applicable standards or of trade expertise as the employer it has hired.

....

Types of Controlling Employers

Control Established by Contract. In this case, **the Employer Has a Specific Contract Right to Control Safety:** To be a controlling employer, the employer must itself be able to prevent or correct a violation or to require another employer to prevent or correct the violation. One source of this ability is explicit contract authority. This can take the form of a specific contract right to require another employer to adhere to safety and health requirements and to correct violations the controlling employer discovers.

Id. At CP 275-286 (emphasis added).

Here, Port Angeles Marine, Inc. is operating a multi-employer worksite at a mixed use marina and shipyard where it and other non-Port Angeles Marine, Inc. employers are engaged in ship repair work. See, e.g. Dep. Exhibits Nos. 38-41 (CP 336); 38-20 (CP 326); 38-21 (CP 328); 38-22 (CP 330); 38-23 (CP 332). See

CP 154-155, deposition of Faires, at pages 7 and 8, and CP 297-308, deposition Exhibit 27, the Agent Agreement. As previously established, the Port of Port Angeles, and Port Angeles Marine, Inc. as its agent, had the contractual authority to enforce safety regulations at the marina and shipyard as provided in the Port of Port Angeles' Berthage Agreement with San Juan Excursions, Inc. and the Port of Port Angeles' Rules and Regulations. "[A]n affirmative duty assumed by contract may create a liability to persons not party to the contract, where failure to properly perform the duty results in injury to them[.]" *Kelley v. Howard S. Wright Constr. Co.*, *supra* at 334. Because both the Port of Port Angeles and its agent had a specific contractual right to control safety at the marina and shipyard, they acted as a "controlling employer" and were required to enforce O.S.H.A. safety regulations at the marina and shipyard. See CP 255-286, Gleason Decl. at 10 ll. 14-25. That duty was heightened, where, as here, they had actual knowledge of the violation of the O.S.H.A. minimum standard for fall protection.

As a "controlling employer," Port Angeles Marine, Inc., as agent of the Port of Port Angeles, was obligated to use reasonable care to enforce O.S.H.A. safety regulations for the benefit of its own workers and other workers engaged in ship repair work at the

marina. *Id.* O.S.H.A.'s Directive provides: "A controlling employer must exercise reasonable care to prevent and detect violations on the site." *Id.* At CP 275-286. This Directive outlines a duty owed by the Port of Port Angeles and its agent to exercise reasonable care to protect workers on the multi-employer site. O.S.H.A. standards regarding shipyard employment apply to all employers, "any of whose employees are employed, in whole or in part, in ship repairing, shipbuilding or related employments as defined in this section on the navigable waters of the United States, including dry docks, graving docks and marine railways. 29 C.F.R. § 1915.4(c) (emphasis added). Under this definition, O.S.H.A. regulations concerning shipyard work applied to Faires and his employees who were engaged in the management and operation of the mixed use marina and shipyard where Ralston was injured. See CP 262-263, declaration of Gleason, at page 8, lines 5 through 28; page 9, lines 1 through 9.

Looking at the regulations, it is clear that Port Angles Marine, Inc. and thereby the Port of Port Angeles failed to comply with minimum O.S.H.A. safety standards. See, 29 C.F.R. §§ 1915.73(c) and (d).

Here, Faires knew that the railing on the upper starboard deck of the vessel had been removed during the repair work, that the rail had been absent for two weeks prior to Ralston's injury, and that scaffolding or other fall protection was not being used. As a "controlling employer" of the work site, Port Angeles Marine, Inc., as agent of the Port of Port Angeles, had a duty to take corrective action to comply with O.S.H.A.'s fall protection obligations for the benefit of workers like Ralston and its own workers.

E. O.S.H.A. REGULATIONS ARE EVIDENCE OF THE INDUSTRY STANDARD OF CARE

O.S.H.A. regulations also provide a basis for establishing violation of industry standards through expert testimony. As an expert in the operation of a marina and shipyard, Michael K. McGlenn's declaration states that industry standards required the use of scaffolding or fall protection while performing the repair work on the upper starboard deck of the ODYSSEY. CP 241, declaration of McGlenn, at page 6. According to McGlenn, a reasonably prudent marina or shipyard owner would not allow work to be done on its premises by subcontractors unless the work was done in compliance with applicable O.S.H.A. regulations and standards. *Id.* Based on his many years in the maritime industry,

McGlenn testified that the failure to require compliance with well-known and accepted O.S.H.A. regulations is a violation of the standard of care for a marina or shipyard.⁶ *Id.* at (CP 240-242) 5-7. Moreover, O.S.H.A. safety expert Richard Gleason testified by declaration that: “[t]he above cited O.S.H.A. regulations, specifically 29 CFR § 1915.73 set out the standard of care owed by employers to workers involved in work of the type that Alex Ralston was performing at the time of his fall.” CP 262, declaration of Gleason, at page 8, lines 1 through 5.

O.S.H.A. shipyard regulations require the use of scaffolds, safety belts or lifelines when working above five feet. 29 C.F.R. § 1915.73(c). Because Faires was present on the dock when the railing on the upper deck of the ODYSSEY had been removed, and had been present at various times during the two weeks that the railing was absent, Faires knew or should have known that the subcontractors performing the work were not complying with applicable O.S.H.A. standards. Based on both McGlenn’s and Gleason’s declarations, a genuine issue of material fact exists regarding whether Faires breached the standard of care for a

⁶ As further evidence that industry custom requires use of fall protection in this context, Washington has similar regulations for shipyards that require the use of fall protection. See WAC 296-56-60001(3)(e).

shipyard or marina operator by failing to require compliance with applicable O.S.H.A. regulations and industry standards.

In *Rolick v. Collins Pine Company*, 975 F.2d 1009 (3rd Cir. 1992), the court considered whether O.S.H.A. regulations are admissible as evidence of the standard of care owed by a landowner outside the employment context. In *Rolick*, the plaintiff was a subcontractor who came onto the defendant's land as a business invitee to log trees at the defendant's request. An O.S.H.A. regulation required that dead, broken, or rotted limbs or trees be removed before beginning logging operations. 29 C.F.R. §1910.266(c)(3)(iii). While the plaintiff was logging the defendant's land, he was seriously injured when a tree fell on him. The plaintiff's expert testified that the regulation set forth the standard of care for the defendant in the logging industry. Ruling that O.S.H.A. regulations are admissible as evidence of the standard of care in a particular industry, the court stated: "It is important to reiterate that the use of the O.S.H.A. regulation as evidence here is not to apply O.S.H.A. itself to the case. Rather, it is to 'borrow' the O.S.H.A. regulation for use as evidence of the standard of care owed to plaintiff." *Id.* at 1014 (emphasis added). In essence, the court concluded that expert testimony that the O.S.H.A. standards

established an industry standard was sufficient to establish a duty owed by the defendant to a plaintiff who, like Alex Ralston, was a business invitee.

Here, as in *Rolick*, the expert testimony and O.S.H.A. regulations establish an industry standard that required compliance with O.S.H.A.'s minimum standards for fall protection. 29 C.F.R. § 1915.73(c). There is compelling evidence to create an issue of material fact regarding whether Port Angeles Marine, Inc., as agent for the Port of Port Angeles, breached its duty of care as established by industry custom when it allowed a subcontractor to perform work on its premises in a manner that Port Angeles Marine, Inc. knew or should have known presented a grave risk of harm to its business invitees, in violation of well-known O.S.H.A. shipyard regulations that required the use of fall protection.

V. CONCLUSION

The test is not the degree of control actually exercised, but the right to exercise such control. *Kelley v. Howard S. Wright Constr. Co.*, *supra* at 331, *Fardig v. Reynolds*, *supra* at 543; *Swam v. Aetna Life Ins. Co.*, *supra* at 407. It is beyond dispute here that both the Port of Port Angeles and Port Angeles Marine had the contractual right and contractual duty to act to eliminate violations

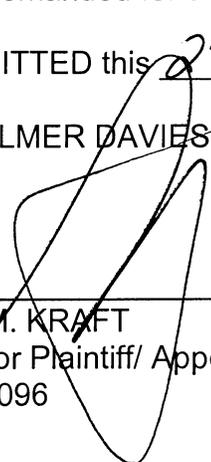
of federal law and conditions lacking compliance with normal safety standards. The court in *Mesa v. Spokane World Expedition, supra* held “. . . the question of control and the scope of the invitation are factual matters.” *Id.* at 613 (citations omitted).

A genuine issue of fact also exists regarding the Port of Port Angeles and Port Angeles Marine, Inc.’s status as a “controlling employer” of the work site. Port Angeles Marine, Inc., as agent of the Port of Port Angeles, had a duty to take corrective action to comply with O.S.H.A.’s fall protection obligations for the benefit of workers like Ralston and its own workers who were working in the vicinity.

The Ralstons respectfully submit the trial court erred in finding no duty was owed, and granting defendants’ motions for summary judgment. The Ralstons ask that the trial court be reversed, and this case remanded for a jury trial.

RESPECTFULLY SUBMITTED this ^{24th} day of March, 2006.

KRAFT PALMER DAVIES, PLLC



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2 On March _____, 2006, I served the foregoing documents on the
3 interested parties in this action and to Division Two of the Court of Appeals of
4 Washington State by depositing a true copy with a messenger following ordinary
5 business practices, addressed as follows:

- 6 1. Appellants' Amended Opening Brief
7 2. Affidavit of Service of Carmen G. Fualaau

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I declare that I am employed in the office of a member of the bar of this Court
at whose direction the service was made. I declare under penalty of perjury under the
laws of the State of Washington that the foregoing is true and correct.

Carmen G. Fualau
Carmen G. Fualau

SUBSCRIBED and SWORN to before me this 24th day of March, 2005.

STEPHANIE NOEL ANDERSON
STATE OF WASHINGTON
NOTARY — — PUBLIC
MY COMMISSION EXPIRES 04-21-09

Stephanie Noel Anderson
NOTARY PUBLIC in and for the State of
Washington, residing at Redmond
My commission expires: 4-21-09

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