

NO. 34267-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

ALEX M. M. RALSTON; JOHN M. RALSTON; and GAIL T. RALSTON,

Appellants,

vs.

PORT OF PORT ANGELES; and PORT ANGELES MARINE, INC.,

Respondents.

PORT OF PORT ANGELES,

Third-Party Respondents,

vs.

ROGER HOFF, SAN JUAN EXCURSIONS, INC.; and PETER NEWDAY,

Third-Party Respondents.

APPEAL FROM CLALLAM COUNTY SUPERIOR COURT
Honorable Craddock D. Verser, Visiting Judge From Jefferson County

BRIEF OF RESPONDENT PORT ANGELES MARINE, INC.

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I. NATURE OF THE CASE

This is a slip and fall claim. Although the plaintiff had exceptional injuries, the single legal issue on appeal is whether the Port of Port Angeles and the company supervising the harbor, Port Angeles Marine, Inc. (this respondent), owed any duty to an employee of a boat owner working on the boat moored at the Port's marina. The trial court correctly ruled that no duty was owed. The trial court's ruling dismissing appellant's claims should be affirmed.

II. ISSUES PRESENTED

- A. Did the trial court correctly dismiss Alex Ralston's claims because Port Angeles Marine, Inc. owed no duty to him?
- B. Did the trial court correctly dismiss the matter on summary judgment?

III. STATEMENT OF THE CASE

A. ROGER HOFF BROUGHT THE *ODYSSEY* TO PORT ANGELES FOR REPAIRS AND PAINTING.

Roger Hoff ("Hoff") owns a company called San Juan Excursions, Inc. (CP 406) San Juan Excursions is based in Friday Harbor, Washington. (CP 428) Hoff and his wife also own a boat called the *Odyssey*. (CP 406) San Juan Excursions leases the *Odyssey* from Hoff and his wife. (*Id.*)

The Port of Port Angeles owns the Boat Haven Marina. (CP 463-73) Port Angeles Marine, Inc. (“PA Marine”) is the Port’s agent that manages the Boat Haven. (*Id.*) PA Marine is responsible for all of the tasks required for supervision of the Boat Haven and Boat Yard. (*Id.*) PA Marine’s hours of operation in the winter (October 1 to March 31) under the Agency Agreement were “Monday thru Friday, 8 to 5, Saturday 8 to 12:00 noon, Sunday 10 to 12:00 noon, and to maintain call service at all other hours and holidays for the supplying of gasoline or other petroleum products.” (CP 467)

On March 10, 2004, Hoff brought the *Odyssey* into Boat Haven Marina for repairs. (CP 407) He also intended to have the boat painted at the same time. (CP 409, 411) Hoff signed a Berthage Agreement on March 10 after he moored the *Odyssey* at the Boat Haven. (CP 427-28) Under the Berthage Agreement, the relationship between PA Marine and Hoff was strictly one of Lessor and Lessee for berthage space. (*Id.*) The Berthage Agreement did not permit or authorize PA Marine to control or supervise the work on the *Odyssey*. (*Id.*)

In the agreement, PA Marine made no stated or implied promises that it would supervise the work on the *Odyssey*. (CP 427-28) The Berthage Agreement stated further:

It is further understood and agreed by the Lessee the Port will not be held responsible or liable for any damage or loss to or of the said boat, its tackle, gear, equipment or property either upon said boat or upon the premises of the Port, from any cause whatever, **or for injury to the Lessee or invitees occasioned by any cause upon the Port premises or adjacent thereto**, unless occasioned by the Port's negligence.

(CP 427) (emphasis added).

B. HOFF HIRED ALL THE PERSONNEL THAT WORKED ON THE ODYSSEY.

Hoff hired the crew that did all the *Odyssey's* repair work and painting. (CP 407-10) He hired two experienced shipwrights, Peter NewDay and Roy Hamilton, to perform the repairs on the boat that spring. (CP 475) NewDay and Hamilton were to perform necessary repairs to the upper deck walkway on the starboard side of the vessel. (CP 416, 475) The Repair Contract called for replacing the starboard side overhang beams and framing. (*Id.*) The contract specified: "All repairs to be done in a craftsman like way by qualified and licensed shipwrights: Peter NewDay and Roy Hamilton." (*Id.*) Hoff considered NewDay to be the ultimate decision-maker in the area where the work was being done. (CP 412, 414)

At the same time, Hoff hired Matt Kielmeyer to paint the boat. (CP 408, 411) He also hired Alex Ralston (“Ralston”¹) and his cousin, Matt Ralston, to assist Matt Kielmeyer with the prep work and the painting. (CP 409) NewDay told Hoff to “keep [his] people out” of the construction area, and Hoff prohibited Ralston from going to the starboard side of the upper level. (CP 412-13, 415) Hoff told Alex Ralston five or ten times to stay out of the way of Peter NewDay and Roy Hamilton. (CP 417-18)

C. PA MARINE HAD ONLY ONE OR TWO BRIEF INTERACTIONS WITH HOFF PERTAINING TO VIOLATION OF POLLUTING LAWS.

Charles (Chuck) Faires, the Harbormaster and president of PA Marine, met Hoff when they had one interaction about the prep work being done for painting. (CP 46, 478) Faires went to speak to Hoff because he was concerned that unprotected sanding was polluting the air and water. (*Id.*) According to Faires, this conversation took place a few days after the *Odyssey* moored at the Boat Haven. (*Id.*) Faires gave Hoff a copy of the Port’s Best Management Practices and advised him of the ways he could paint the boat without polluting. (CP 479-80) Neither

¹ The suit was brought by Alex Ralston and his parents; they will be referred to here collectively as “Ralston.”

Faires nor Hoff had any expectation that Faires would come aboard the boat and inspect for workplace safety violations. (CP 46-47, 59)

Faires had one other conversation with either Hoff or one of the shipwrights prior to the accident. (CP 481-82) Faires talked to one of them about removing debris from the dock. (CP 482) He could not remember the date of the conversation. (CP 481)

Incidentally, Faires knew Alex Ralston. (CP 484) Faires' daughter had "baby-sat" him years earlier. (*Id.*) Faires had no knowledge that Alex Ralston was working on the *Odyssey*. (CP 483) He had no conversations with him prior to his fall. (*Id.*)

D. RALSTON FELL OFF THE BOAT ON MARCH 28, 2004.

Ralston worked on Hoff's boat on March 27 and 28, 2004. (CP 420-21, 425) He did the prep work for painting. (CP 410, 419) Hoff maintained authority over Ralston's work. (CP 421) Hoff told him not to go to the starboard side of the upper deck because it was not safe. (CP 415, 424) Hoff echoed this in his deposition, saying,

I do remember that I him [*sic*] to work only on the port side because the other side was not protected, you know, and that the port side was all intact, and there was plenty of work to do on the port side. I said, ["Don't go over on the starboard side. Stay away from that. It's under construction. There's no railings. Stay over here.[" And that was it....

(CP 424) Nonetheless, Ralston crossed over to the starboard side of the upper deck and fell off the boat, landing on the dock. (CP 422-23) As a result of the tragic fall, Alex Ralston is now a quadriplegic. (CP 25)

E. RALSTON BROUGHT SUIT FOR HIS INJURIES.

Ralston filed suit against Port of Port Angeles and PA Marine on July 12, 2005 in Clallam County, Washington. (CP 680-83).² Motions for summary judgment by the Port of Port Angeles and PA Marine were granted by Judge Verser on December 8, 2005. (CP 24-28) Ralston appeals the dismissal of his claims to this Court. (CP 10-20)

IV. LEGAL ARGUMENT

Despite Ralston's numerous attempts to extend the duty doctrine to encompass the facts of this case, no basis exists for such an extension. PA Marine owed no duty to Ralston. He was not on port property when he fell. PA Marine was not his employer, nor was there a "special relationship" between the two that would create any duty to him. The trial court properly dismissed Ralston's claims.

² Ralston also sued his employer, San Juan Excursions, in federal court, U.S.D.C. (W.D. Wash.) Cause No. 3:05-cv-05308-FDB, based on the Longshore & Harbor Workers Compensation Act. The federal court dismissed that suit on February 9, 2006.

A. STANDARD OF REVIEW.

When the appellate court reviews a grant of summary judgment, it undertakes the same inquiry as the trial court. *Grundy v. Thurston County*, 155 Wn.2d 1, 6, 117 P.3d 1089 (2005) (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)). Summary judgment shall be rendered “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). All facts are considered in the light most favorable to the non-moving party and summary judgment is appropriate if, taking all the evidence together, reasonable persons could only reach one conclusion. *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). If the moving party meets his burden to demonstrate that no genuine issue of material fact exists, the nonmoving party must produce evidence showing that material facts are in dispute. *Atherton Condominium Apartment-Owners Ass’n Bd. of Directors v. Blume Development Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

Appellant’s brief presents nothing to create a genuine issue of material fact regarding any duty owed to Alex Ralston. This Court should affirm the trial court’s grant of summary judgment to respondents.

B. WASHINGTON COMMON LAW RESOLVES THIS ISSUE.

In its summary judgment memorandum opinion and order, the trial court stated, “The parties acknowledge that whether this particular issue is decided using maritime law or the law of the State of Washington is not material. Thus this opinion will not address that issue.” (CP 26) For this reason, the trial court’s memorandum opinion relied exclusively on Washington law. (CP 24-28)

In fact, the rule is well-settled that a “dock owner’s duty to seamen using the dock is defined by the application of state law, and not maritime law.” *Wuestewald v. Foss Maritime Co.*, 319 F. Supp. 2d 1002, 1009 (N.D. Cal. 2004) (citing *Victoria Carriers, Inc. v. Law*, 404 U.S. 202, 206-07, 92 S. Ct. 418, 30 L. Ed. 2d 383 (1971) (stating that “‘the gangplank has served as a rough dividing line between state and maritime regimes’ with piers and docks ‘deemed extensions of land.’”)).

Ralston does not challenge the trial court’s application of Washington law in his opening brief. In fact, he expressly states that choice of law is not an issue on appeal. (Brief of Appellant, p. 3) This court generally will not review any claim of error which was not raised in the trial court or one that does not appear in the assignments of error. RAP 2.5(a); RAP 10.3(g). No basis exists for resorting to any law other than Washington common law to resolve the issues in this appeal.

C. PA MARINE OWED RALSTON NO DUTY BECAUSE IT WAS NOT THE POSSESSOR OF THE AREA PRESENTING THE HAZARD.

1. Whether a Duty Existed Is a Question of Law That This Court Reviews De Novo.

A plaintiff in a negligence case must prove duty, breach, causation, and damages. *Mucsi v. Graoch Associates Ltd. Partnership No. 12*, 144 Wn.2d 847, 854, 31 P.3d 684 (2001). The existence of a duty is a question of law. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996). Questions of law are reviewed de novo. *HTK Management, L.L.C. v. Seattle Popular Monorail Authority*, 155 Wn.2d 612, 627, 121 P.3d 1166 (2005).

2. Common Law Principles Regarding Premises Liability Require a Conclusion of No Duty.

In a premises liability case, the court first inquires into who is the possessor of the land in order to determine if a common law duty exists. *Coleman v. Hoffman*, 115 Wn. App. 853, 859, 64 P.3d 65 (2003). One is a possessor land if one is (a) a person who is in occupation of the land with intent to control it, (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with an intent to control it, or (c) a person entitled to immediate occupation of the land. *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 655, 869 P.2d 1014 (1994) (citing RESTATEMENT (SECOND) OF TORTS, §328E (1965)). If one is the owner or possessor of the property, with the ability to control and

maintain it, one cannot escape liability for injuries as a result of defective conditions on the property. *Coleman*, 115 Wn. App. at 859. After possession of the land is established, a landowner's duty to entrants is governed by that person's status as an invitee, licensee, or trespasser. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 49, 914 P.2d 728 (1996).

PA Marine did not maintain, control, or otherwise possess the boat. It maintained and controlled the dock where the boat was moored. PA Marine cannot owe a duty on property it does not possess.

PA Marine's only relationship with the boat and its owner was that of landlord/tenant. PA Marine was simply the lessor of the berth and San Juan Excursions was the lessee. (CP 427-28) Washington law does not support a duty under that circumstance.

Where a landowner divides the premises and rents various parts to tenants, while reserving other parts of common areas for walkways and entrances, it is his duty to maintain these common areas in a safe condition. *Geise v. Lee*, 84 Wn.2d 866, 868, 529 P.2d 1054 (1975). In this case the defective condition was not on the dock. No evidence or testimony indicated that Ralston's injuries came from any hazard on the common walkway leading Ralston to the *Odyssey*.

Moreover, a landlord is not responsible to “persons injured on or off the land, for conditions which develop or are created by the tenant after possession has been transferred.” *Frobig v. Gordon*, 124 Wn.2d 732, 736, 881 P.2d 226 (1994) (citing W. Page Keeton et al., PROSSER AND KEETON ON TORTS §63, at 434 (5th ed. 1984)). The law in Washington requires actual control to have been exercised over the lessee’s operations before the duty of a landlord which Ralston seeks to impose can arise:

The duty and liability of the invitor-lessor do not, as a rule, extend to matters having to do merely with the lessee's management or operation of premises which would be safe except for such management or operation, at least where the lessee is in sole actual control.

Peterick v. State, 22 Wn. App. 163, 170-71, 589 P.2d 250 (1977) (citing 49 AM. JUR. 2D *Landlord and Tenant* § 763 (1970)), *overruled on other grounds by Stenberg v. Pacific Power & Light Co.*, 104 Wn.2d 710, 709 P.2d 793 (1985)).

Here, there is no dispute of fact that the lessee, Hoff and his contractor NewDay, were in “sole, actual control” of the *Odyssey* and the workplace where Ralston was injured. Alex Ralston’s injuries were a direct result of the hazard that San Juan Excursions created after the moorage spot was leased to it. PA Marine did not create that hazard. Therefore, under the common law theory of premises liability, Ralston cannot show that PA Marine owed him a duty of care.

3. Ralston Was Not PA Marine's Invitee.

As stated above, the legal duty owed to a person entering the owner's premises depends on whether he/she is an invitee, a licensee, or a trespasser. *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 125, 52 P.3d 472 (2002). An invitee is a person who is invited to enter or remain on land. *Minahan v. Western Washington Fair Ass'n*, 117 Wn. App. 881, 893, 73 P.3d 1019 (2003), *rev. denied*, 151 Wn.2d 1007 (2004) (citing RESTATEMENT (SECOND) OF TORTS §332 (1965)).³

Ralston was San Juan Excursion's invitee. He was *not* PA Marine's invitee. The trial court did not make any finding about his status, except to say that it will "accept" that Ralston was an invitee. (CP 26) Any finding that Ralston was PA Marine's invitee would have been in error because PA Marine did not invite him, nor did he remain on the PA Marine premises. He left PA Marine premises when he embarked on

³ Ralston's citation to *Enerson v. Anderson*, 55 Wn.2d 486, 348 P.2d 401 (1960) for the definition of a business invitee appears in error. (Brief of Appellant, p. 24) *Enerson* does *not* say, as appellant alleges, that where a marina rents moorage space for a fee, visitors or independent contractors working on vessels are classified as business invitees. In that case, the plaintiff was a sea scout who jumped off a boat that was docking in order to tie it up. 55 Wn.2d at 487. As he landed on the deck, a plank broke and he was injured. *Id.* The court held that the definition of business invitee must include some "real or supposed mutuality of interest in the subject to which the visitor's business or purpose relates." 55 Wn.2d at 488. This is no longer the sole test. The definition was amended when the court adopted the RESTATEMENT (SECOND) OF TORTS §332 (1965) as quoted on pages 23-24 of Appellant's Brief. *McKinnon v. Washington Federal Savings & Loan Assn*, 68 Wn.2d 644, 650, 414 P.2d 773 (1966).

the boat. He cannot claim PA Marine owed him the duty it owes its invitees once he had passed over PA Marine's dock and onto the *Odyssey*.

D. RALSTON'S RELIANCE ON EXCEPTIONS TO THE GENERAL PRINCIPLES REGARDING DUTY IS MISPLACED.

1. *Nivens* Is Not Applicable in This Instance.

Ralston relies on *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 197, 943 P.2d 286 (1997) and its adoption of RESTATEMENT (SECOND) OF TORTS §344 (1965) as the basis for this Court to find a duty in this instance. (Brief of Appellant, pp. 19-28); 133 Wn.2d at 204. *Nivens* and §344 of the RESTATEMENT are narrow exceptions to the general common law rule that there is no duty to protect others from criminal acts of third parties. Neither applies to the facts presented here.

In *Nivens*, a group of young people regularly congregated in a parking lot at a local 7-11 convenience store. 133 Wn.2d at 195. They drank beer and fought amongst themselves. *Id.* One night, as *Nivens* was crossing the parking lot, one of the teenagers asked him to buy beer. *Id.* He refused. *Id.* Several of the youths assaulted him. *Id.*

Nivens sued the store for failure to provide adequate security. 133 Wn.2d at 196. When the trial court granted defendant's motion in limine excluding expected testimony that the store should have hired security guards, *Nivens* elected not to proceed with the trial without that testimony. 133 Wn.2d at 196-97. Summary judgment was entered and the Court of

Appeals affirmed. *Id.* at 197. The Supreme Court affirmed on other grounds.

The *Nivens* court first acknowledged that a landowner owes business invitees a duty to protect them from dangerous conditions on the premises. 133 Wn.2d at 198. At the same time, there is generally no duty owed to protect invitees from criminal acts. 133 Wn.2d at 199 (quoting *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 223, 802 P.2d 1360 (1991)).

The Supreme Court found a duty under the exception for special relationships. The court noted that a duty may arise to protect another if a special relationship exists between the defendant and third-party, or the third-party's victim. 133 Wn.2d at 200. The *Nivens* court held, "[A] special relationship exists between a business and an invitee because the invitee enters the business premises for the economic benefit of the business." 133 Wn.2d at 201.

Rather than swinging the door wide open, as Ralston argues, the Supreme Court substantially limited the scope of this newly-recognized duty. It held that the business is not the guarantor of the invitee's safety from all third-party conduct on the premises. 133 Wn.2d at 203. Rather, the Court adopted RESTATEMENT (SECOND) OF TORTS §344 (1965) as the limit on the duty. Section 344 states:

A possessor of land who holds it open to the public 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.

133 Wn.2d at 203-04.

The resolution of the present case turns on the application of two elements from the formulation set out in §344:

- “holds [land] open to the public for entry for his business purposes”
- “subject to liability to members of the public while they are upon the land for such a purpose.”

Regarding the first element, unlike in *Nivens*, Ralston did not travel across port property for PA Marine’s business purposes. No testimony or evidence showed he did anything to benefit PA Marine. In fact, Chuck Faires did not even know that Ralston was there. (CP 483) Rather, Ralston was there solely for San Juan Excursions’ purposes. Ralston does not meet the requirements of the first element.

Ralston also does not fit within the requirements of the second element. Contrary to his assertion that the Port of Port Angeles is a possessor of land as contemplated by the RESTATEMENT (SECOND) OF TORTS, §344 (Brief of Appellant, p. 20), Ralston was not on land controlled by PA Marine at the time of the incident. Hours earlier, he had walked onto the port property. (CP 419, 486) But he passed through it and left port property when he boarded the *Odyssey*. PA Marine's duty to Ralston ended when he passed onto the boat. He was not on port land when he tripped on the hazard and fell overboard.

The trial court correctly found this undisputed fact in its memorandum opinion:

The problem with this contention [that §344 imposed a duty on PA Marine and the Port of Port Angeles] is that the dangerous condition did not exist on the Port's land. The dangerous condition was within the sole and exclusive control of Mr. Hoff. Section 344 of the Restatement imposes liability to a landowner for acts of third parties only when the member of the public who is injured is injured "on the land."

(CP 27) Therefore liability cannot attach under §344 because Ralston was not on PA Marine land at the time he fell, nor had he previously been on the land for PA Marine's business purposes.

2. The Other Cases Cited by Ralston in This Connection Do Not Aid His Argument.

Although the trial court correctly concluded that *Nivens* did not apply in this case, Ralston tries several ways to make it relevant to these facts. First, he argues broadly that the court’s decision “ignores the holdings in cases involving maritime injuries in which the Restatement (Second) of Torts has been applied.” (Brief of Appellant, pp. 20-21.) While his cases cite RESTATEMENT (SECOND) OF TORTS, none of his cases refer to §344. He cites to various other parts of the RESTATEMENT having nothing to do with this issue. Nor does this argument recall the earlier concession that maritime law did not govern the issues in the case. (Brief of Appellant, p. 3)

Ralston’s reliance on *Calderera v. Chandris, S.A.*, 1993 U.S. Dist. Lexis 12653 (S.D.N.Y.) (Brief of Appellant, p. 21) is also inappropriate for a number of reasons. First, it is an unpublished case; and unpublished opinions have no precedential value. *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 577 n.10, 964 P.2d 1173 (1998);⁴ *c.f.* RAP 10.4(h) (a party may not cite unpublished Court of Appeals decisions on appeal).

⁴ Even if it were a published case, the use of the words “the Second Circuit held” mischaracterizes the opinion. (Brief of Appellant, p. 21) The Southern District of New York District Court is *not* the Second Circuit Court of Appeals (as the gloss would indicate).

Ralston's reliance on the case should be completely disregarded. Ralston fails to cite an applicable case to extend the duty doctrine.

3. Ralston Completely Overstates PA Marine's Role in an Effort to Find a Duty.

In his attempt to find that PA Marine owed him a duty, Ralston completely overstates the scope of PA Marine's work at the Port. PA Marine was in charge of renting out moorage slips. While it had the right to control activities on its property, the berthage agreement did not permit PA Marine to take control over what occurred on the boats themselves. That was the business of the individual owners.

Similarly, PA Marine had the ability to deny permission to any vessel that did not comply with the Port's safety rules, provided that these actions were within the scope of its purview. For instance, Chuck Faires told Hoff to make sure that his employees used either a vacuum sander or fully encapsulated the boat so that sanding did not pollute the water or air. (CP 479-80) This action was taken to prevent harm to the waters surrounding the dock. This is not equivalent to taking control over the boat. Ralston's mischaracterization of PA Marine's role does not yield a duty.

4. Even if PA Marine Had Knowledge of the Hazard on the *Odyssey* That Does Not Create a Legal Duty to Act.

The summary judgment standard requires that all facts and inferences are taken in the light most favorable to appellant Ralston. *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005). Ralston argues that there was an issue of fact whether PA Marine had actual knowledge of the hazard on the boat. (Brief of Appellant, p. 25) Assuming, *arguendo*, that Chuck Faires had knowledge of the hazard on board the *Odyssey*, which PA Marine does not concede, Ralston still cites no legal authority equating that knowledge with a duty to act. This argument fails to create a *genuine* issue of *material* fact sufficient to avoid summary judgment.

5. PA Marine Had No Duty to Warn Ralston.

Ralston's argument that there was a duty to warn him of the dangers on the boat is not directed at PA Marine. (Brief of Appellant, pp. 26-28) He states that the RESTATEMENT also requires "the possessor to exercise reasonable care to 'otherwise protect' the person from a known danger on the possessor's property." (Brief of Appellant, p. 27) This argument is directed at Hoff and San Juan Excursions. They were the possessors of the property where the hazard was located, not PA Marine. This argument also fails here.

6. No Special Relationship Existed Between PA Marine and San Juan Excursions, Inc.

In the wide-ranging brief, Ralston continues his search to find a duty owed by PA Marine by arguing that a special relationship existed between the defendants and San Juan Excursions, Inc. (Brief of Appellant, pp. 28-31) No such relationship existed.

Not only does Ralston seek to find a duty by enlarging the scope of the land that supposedly PA Marine had control over, thus erroneously including the boat, he also seeks to enlarge PA Marine's supposed control over events that occurred on the boat. He relies on *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978). This reliance is misplaced.

First, *Kelley* is a construction case. The Court began its opinion with the general rule that one who engages an independent contractor (in that case, a subcontractor) is not liable for the injuries sustained by employees of that independent contractor resulting from the work. 90 Wn.2d at 330. However, the Court noted the common law exception to the rule, stating that the exception exists "where the employer of the independent contractor, the general contractor in this case, retains control over some part of the work." *Id.*

In *Kelley*, the plaintiff was injured when he fell from a temporary platform. 90 Wn.2d at 326. His employer was covered by the State Industrial Insurance Act and was immune from suit. 90 Wn.2d at 327. In its contract with the owners of the project, Wright “assumed sole responsibility for supervising and coordinating all aspects of the work.” *Id.* Hence, its duty to the plaintiff was established by contract.

Ralston seeks to stress the Court’s statement, “The test of control is not the actual interference with the work of the subcontractor, but the right to exercise such control.” (Brief of Appellant, p. 30); 90 Wn.2d at 330-31. No factual support exists for this argument in the record of the present case. Unlike the parties in *Kelley*, San Juan Excursions had no contract with PA Marine regarding the work to be done on the boat. San Juan Excursions was not hired by PA Marine to complete any work, nor did PA Marine have a right to exercise control over its work. San Juan Excursions hired its own people, including Alex Ralston, to repair and paint its boat within the confines of a berth at the marina. The only relationship between San Juan Excursions and PA Marine was tenant and landlord.

The trial court in this case correctly noted that *Kelley* did not arise in a landlord-tenant setting. (CP 28) As indicated, a landlord is generally not responsible for conditions created by a tenant after possession has

been transferred. *Frobig v. Gordon*, 124 Wn.2d at 736. The trial court accurately cited *Peterick v. State*, as authority “for general landlord liability for injuries resulting from tenant activity.” (CP 28) Here, there is no dispute of the fact that the lessee Hoff and his contractor NewDay were in “sole, actual control” of the workplace on the *Odyssey* where Ralston was injured. See *Peterick v. State*, 22 Wn. App. at 171.

PA Marine did not exercise any control over activities on the boat. It did not even give the appearance of such control. PA Marine intervened only when the activities on the boat interfered with the port’s property and interests, such as when the sanding created air and water pollution. PA Marine exercised no supervisory function at all over the activities on the boat. *Kelley* does not apply here to reverse the grant of summary judgment.

7. *Mesa v. Spokane Exposition* Also Does Not Apply.

Ralston also relies on *Mesa v. Spokane World Exposition*, 18 Wn. App. 609, 570 P.2d 157 (1977), *rev. denied*, 90 Wn.2d 1001 (1978), to no avail.⁵ In that case, four individuals went to the exposition site before the pavilions were completed. 18 Wn. App. at 611. They traveled through

⁵ Ralston cites numerous cases in support of his “third persons” argument, the most recent being forty-six years old and none from this jurisdiction. (Brief of Appellant, p. 35) None are supportive. Those cases concern mainly barroom brawls. They do not apply here.

grounds of the Washington State Pavilion. *Id.* The plaintiff discovered and went up an unlighted stairway, stepped off the third landing, and fell through an unbarricaded ventilator shaft. *Id.* At no time while touring the pavilion did the plaintiff see any warnings, signs, ropes, or barriers, or any other evidence that the Center was not to be visited. 18 Wn. App. at 611-12.

The trial court granted summary judgment for Spokane World Exposition (“Expo”) but the Court of Appeals reversed. The Court began its opinion by stating that the invitor is generally only liable for injury to an invitee sustained while he is on the land within the invitee’s control and within the scope of the invitation. *Id.* at 613. However, the Court held that Mesa was a public invitee of the Expo, and therefore was “led to believe that the pavilions and grounds were intended to be visited by himself and that reasonable care had been taken to make the pavilions and grounds safe for visitors.” *Id.* The Court held there were genuine issues of material fact concerning the scope of the invitation. *Id.* at 612.

No such question of fact exists here regarding the scope of the invitation. In order for the facts from *Mesa* to apply here, Ralston would have had to have received an express invitation from PA Marine, not Hoff, and then accidentally wander onto the boat before accidentally falling off the boat. Those things simply did not happen. *Mesa* does not apply.

Ralston was not “accidentally” on the boat. He went there expressly at Hoff’s invitation to work on it. As the trial court correctly noted, “The facts in Mesa, are easily distinguishable from the facts at issue.” (CP 27) The trial court did not err in granting summary judgment.

E. ARGUING FACTS AND LAW FROM *SHEPPARD V. HORLUCK* IS INAPPROPRIATE BECAUSE IT IS UNPUBLISHED AND NOT PRECEDENTIAL, AND APPELLANT SHOULD BE SANCTIONED FOR VIOLATING THE RULES OF APPELLATE PROCEDURE.

Ralston raises issues from this court’s unpublished opinion, *Sheppard v. Horluck*, 1998 Wn. App. LEXIS 602, 1998 WL 180492 (Wash. App. Div. 2) (1998). (Brief of Appellant, pp. 31-37) This argument flies in the face of this Court’s rules and case law.

RAP 10.4(h) states, “A party may not cite as an authority an unpublished opinion of the Court of Appeals.” Again, unpublished opinions have no precedential value. *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d at 577 n.10.

As pointed out in PA Marine’s reply brief to the trial court, citation to this opinion as part of summary judgment was inappropriate. Arguing it to this Court is inappropriate as well. It matters not whether the Port of Port Angeles raised this below. Ralston is arguing it here. The argument should be stricken.

Terms should be assessed against Ralston for failing to comply with the Rules of Appellate Procedure. *See* RAP 18.9(a).

F. OSHA STANDARDS DO NOT APPLY BECAUSE PA MARINE WAS NOT RALSTON'S EMPLOYER.

Ralston's extensive arguments regarding the Occupational Health and Safety Administration (OSHA) regulations fail to acknowledge one dispositive fact: Those regulations govern employer/employee relationships. *See* 29 U.S.C. §654:

Each *employer* (1) shall 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; (2) shall comply with occupational safety and health standards promulgated under this chapter.

(Emphasis added.) *See also California Stevedore & Ballast Co. v. Occupational Safety & Health Rev. Comm'n*, 517 F.2d 986, 988 (9th Cir. 1975) ("Congress clearly intended to require *employers* to eliminate all foreseeable and preventable hazards.") (emphasis added); *Prince v. Thomas*, 25 F. Supp. 2d 1045, 1049 (N.D. Cal. 1997) ("[F]ederal OSHA requirements have also been held not to apply in a case between an employer and a person who is not an employee.").

PA Marine was not his employer. These regulations do not apply here. Ralston's claim that OSHA's reach extends to this case fails. (*See* Brief of Appellant, pp. 39-45.) Ralston cannot rely on *Marshall v.*

Constr. Co., 566 F.2d 596 (8th Cir. 1977) any more than he can rely on *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978) (discussed *supra*). In *Marshall*, another construction case, Knutson Construction was the general contractor. 566 F.2d at 597. Knutson employed a safety administrator who performed inspections on the *entire* jobsite. *Id.* It was cited in a scaffolding safety issue because it reasonably could have known that the scaffold was unsafe. 566 F.2d at 598.

Taken together, *Marshall* and *Kelley* stand for the proposition that when two employers are working on a joint project and one employer's scope of influence extends into the other's, the first employer may have a duty to the employees of the second employer. That does not apply to the instant case. PA Marine and San Juan Excursions *never* worked on a joint project. Under the berthage agreement, San Juan Excursions was a mere lessee of property. The multiple employer doctrine fails here, and Ralston's characterization of PA Marine as a "controlling employer" (Brief of Appellant, p. 44) is completely without substance.

The trial court correctly rejected Ralston's OSHA arguments:

While Plaintiffs argue that the contractual authority to require compliance with Port "rules and regulations" and to remove "unsafe vessels" from the Port imparts the duty to insure compliance with workplace safety regulations, the expressed intent of the parties to the contract does not allow this court to interpret the contract to impose such a duty. This is particularly true when neither the Port nor P.A.

Marine, nor any of its invitees have ever believed that the Port had the duty, obligation, authority, or expertise to enforce the hundreds of workplace safety regulations which may be applicable to work conducted by its tenants aboard the moored vessels.

(CP 28) Ralston cannot find that PA Marine owed him a duty under the OSHA statutory scheme.⁶

⁶ Similarly, Ralston's argument that the OSHA regulations are evidence of an industry standard of care would only apply if one is in the *same* industry as the employer. PA Marine was not in the same industry as San Juan Excursions. This argument misses the mark.

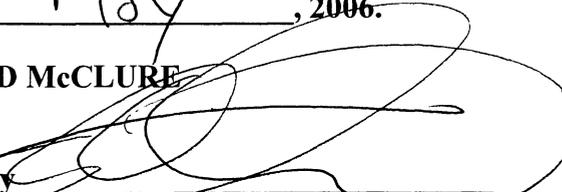
V. CONCLUSION

While Alex Ralston admittedly suffered catastrophic injuries when he fell off of Roger Hoff's boat the *Odysey*, his claims against PA Marine lack any legal or factual basis. PA Marine did not owe him any duty. PA Marine did not create the hazard, did not exercise control over the boat, and did not have a special relationship with the boat owner. Ralston was not on port property at the time that he fell. None of his attempts to find a duty owed to him are successful.

The trial court properly granted PA Marine's Motion for Summary Judgment. This Court should affirm the trial court's order of summary judgment.

DATED this 25th day of May, 2006.

REED McCLURE

By 

Earl M. Sutherland WSBA #23928
Terry J. Price WSBA #31523
Attorneys for Respondent Port
Angeles Marine, Inc.

067686.089065/122239

That she is a citizen of the United States of America; that she is over the age of 18 years, not a party to the above-entitled action and competent to be a witness therein; that on the date herein listed below, affiant deposited in the United States mail, postage prepaid, copies of the following documents:

1. Brief of Respondent Port Angeles Marine, Inc.; and
2. Affidavit of Service by Mail

addressed to the following parties:

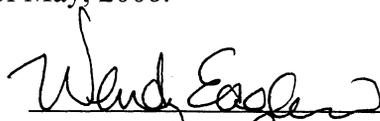
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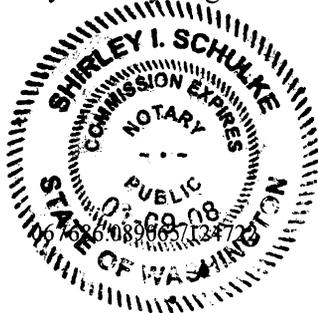
DATED this 26th day of May, 2006.



Wendy Eagleman

SIGNED AND SWORN to before me on 5-26-2006

by Wendy Eagleman.





Print Name: Shirley Schulke
Notary Public Residing at Sammamish, WA
My appointment expires: 01/09/2008