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No. 96187-5

(Ninth Circuit No. 16-35314)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT IN

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

Plaintiffs-Appellees,

v.

PORT OF BELLINGHAM, a Washington Municipal
Corporation,

Defendant-Appellant.

**AMICUS CURIE BRIEF
SUBMITTED BY
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
WASHINGTON RETAIL ASSOCIATION
BUILDING OWNERS AND MANAGERS ASSOCIATION OF
SEATTLE KING COUNTY**

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I. IDENTITY AND INTERESTS OF AMICI CURIE

This amicus brief is respectfully submitted by three associations representing shopping center owners, retail tenants, building owners, property managers and other stakeholders.

Founded in 1957, the International Council of Shopping Centers (“ICSC”) is the global trade association of the shopping center industry. Its more than 70,000 members in over 100 countries include shopping center owners, developers, managers, investors, retailers, brokers, academics, and public officials. In 2017, Washington State had 38,462 retail real estate establishments employing 706,301 people.

Formed in 1987, the Washington Retail Association (“WRA”) represents over 3,500 retail storefronts, including the largest national chains to the smallest independent businesses.

Established in 1912, the Building Owners and Managers Association Seattle King County (“BOMA”) is a professional trade association with several hundred members from over 250 firms who either own or manage commercial real estate or provide goods and services to the industry.

These associations have a strong interest in the fair treatment of landlords and tenants under Washington law.

II. STATEMENT OF THE CASE

Amici adopt the statement of the case provided by the United States Court of Appeals for the Ninth Circuit’s Order Certifying Question to Washington State Supreme Court (“Certification Order”).

III. AUTHORITY AND ARGUMENT

A. A Landlord Should Not Be Liable for an Injury that Occurs on Property Under the Exclusive Control of a Tenant at the Time of the Injury.

Amici have a serious cause for concern that the Court may impose on a landlord a duty to maintain *a safe workplace* for a tenant’s employee when the landlord does not have possession and control of the premises. It is imperative that the Court *distinguish* landlord liability from employer liability for a safe workplace.

This case is distinguishable from the multi-employer workplace found in *Afoa v. Port of Seattle*, 176 Wn.2d 460, 296 P.3d 800 (2013) (“*Afoa I*”). In *Afoa I*, the Port of Seattle’s lease agreements with airlines at Sea-Tac Airport granted the airlines use of the “Airfield Area” to taxi to and from the passenger gates. *Id.* at 465. But, the airlines use of the Airfield Area was “subject at all times to the exclusive control and management by the Port.” *Id.* In addition, the Port of Seattle allegedly inspected the work by the airlines’ contractors and that such contractors

and their employees were subject at all times to the Port of Seattle's pervasive and overriding supervision and control. *Id.* at 482. The Court held that a jobsite owner who exercises *pervasive control* of a work site have a duty to keep that work site safe for all workers. *Id.* at 481. In resolving that case on its facts, however, the Court declined to adopt such an approach wholesale. *Id.* Instead, the Court acknowledged the unique facts of that case and emphasized its narrow holding to avoid unintended liability for others:

We recognize that many aspects of this case are unique; the Port operates a highly complex multiemployer work site and is perhaps the only entity in a position to maintain worker safety. Moreover, the Port has allegedly retained substantial control over the manner in work is done at Sea-Tac Airport. To the extent other cases arise in the future, liability should depend on similar facts. This narrow holding limits concerns raised by amici that adhering to *Kelley* raises the specter of unintended liability for municipal corporations and other licensors.

Id. at 481.

In contrast, here, the agreement between the Port of Bellingham and the Alaska Marine Highway System (“Ferry”) did not give the Port of Bellingham exclusive control of the passenger ramp at issue. *Certification Order at 5-6*. Rather, the agreement granted “priority use” of the passenger ramp to the Ferry and stated that the Port of Bellingham may not

unreasonably interfere with the Ferry's use. *Id.* According to the Ninth Circuit, this priority use provision "effectively gave the Ferry exclusive control over the ramp" because no other ship could use the ramp at the same time as the Ferry. *Id.* at 8.

When the landlord grants priority use and exclusive control (possession) to the tenant, and an injury takes place to the tenant's employee during such exclusive control, the landlord should not be liable.

Amici have a concern that a contrary holding would have significant implications. For example, shopping centers and other buildings often provide priority use and control of outdoor seating areas to adjacent restaurant tenants that, technically, are not solely and exclusively part of the tenant's leased premises, but such tenant has sole use and exclusive control (possession) of such outdoor seating area at times. In addition, shopping centers and department stores license kiosk space that have similar exclusive control of such spaces (again, possession), though not leasehold premises. Moreover, shopping centers have intermittent tenancies with seasonal tenants (*e.g.*, holiday pop-ups) that may seek to shift tort liability to landlords based on the outcome of this case.

The old saying that "possession is nine-tenths of the law" holds true here: A landlord should not be liable for injuries arising in space under

priority use and exclusive control of a tenant—that is, the party in possession of the premises at the time of the incident.

B. A Landlord Does Not Have a Duty to Ensure Workplace Safety When Such Landlord Lacks Control Over the Work.

Contrary to Respondents' position, a property owner's duty to a tenant's employees is significantly different from a general contractor's duty to subcontractor employees. *See Respondents Brief at 26 (citing Kelley v. Howard S. Wright Construction Co., 90 Wn.2d 323, 582 P.2d 500 (1978))*. In *Kelley*, the Court held that a *general contractor* had a duty to provide a reasonably safe workplace. *Id.* at 334. Subsequently, this Court held that all general contractors have a nondelegable duty to ensure compliance with safety regulations. *Stute v. P.B.M.C. Inc., 114 Wn.2d 454, 464, 788 P.2d 545 (1990)*. This Court determined that general contractors were in the best position to ensure the safety of all workers on the jobsite.

Yet, this Court has held that jobsite *owners* do not play a role sufficiently analogous to general contractors to automatically impose the same nondelegable duty to ensure safety compliance. *See Kamla v. Space Needle Corp., 147 Wn.2d 114, 124, 52 P.3d 472 (2002)*. This Court recognized that property owners may not have the same degree of knowledge or expertise about the manner in which work should be

performed or WISHA compliant work conditions as a general contractor does, and therefore, it is unrealistic to conclude that property owners can control work conditions. *Id.*

In this case, Port did not exert sufficient control over work conditions akin to a general contractor to impose a nondelegable duty of workplace safety. To impose such nondelegable duty on the Port based on the facts in this case would have far reaching implications for other landlords in similar situations.

IV. CONCLUSION

Amici request this Court to conclude that the priority use granted in this case effectively gave exclusive control over the passenger ramp to the Ferry, and therefore, the Port is not liable as a premises owner for the injury that involved the ramp used exclusively by the Ferry at the time.

Respectfully submitted this 14th day of January, 2019.

REAL PROPERTY LAW GROUP, PLLC

By 
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am a member at **Real Property Law Group, PLLC**, over the age of 18 years, not a party to nor interested in the above- entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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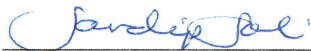
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