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STATE OF WASHINGTON  
1/24/2019  
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NO. 96187-5

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SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents,

v.

PORT OF BELLINGHAM,  
a Washington Municipal Corporation,

Appellant.

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**AMICUS CURIAE BRIEF BY  
WASHINGTON STATE LABOR COUNCIL (WSLC)**

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Dimitri Iglitzin, WSBA No. 17673  
Barnard Iglitzin & Lavitt LLP  
18 W Mercer Street, Suite 400  
Seattle, WA, 98119-3971  
(206) 257-6003  
*Iglitzin@workerlaw.com*

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## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Washington State Labor Council (“WSLC”) is the “voice of labor” in Washington. The WSLC represents and provides services to local unions throughout Washington State. There are more than 600 local unions affiliated with the WSLC, representing 450,000 rank-and-file union members working in Washington State. The enforcement of robust workplace safety regulations and culture is vital to the welfare of all Washingtonians. The WSLC advocates for strict compliance with Washington’s workplace safety regulations, and against any attempt to abrogate Washington’s mandatory workplace safety statutes and regulations by private contract. The workers endangered are never parties to these private contracts, but they suffer the consequences of workplace injuries.

## **II. INTRODUCTION**

*Amicus curiae* Washington State Labor Council (WSLC) addresses an employer’s duty under the Washington Industrial Safety & Health Act (WISHA), RCW 49.17.060(2), with respect to a multiple employer workplace safety hazard. The WISHA specific duty clause, RCW 49.17.060(2), requires each employer to ensure compliance with all applicable safety regulations. In a multiemployer worksite, the

Washington and federal courts agree that the employer who creates a hazard has the primary duty to remedy the hazard. The hazard creating an employer's WISHA duty extends beyond its own employees to protect all affected employees in the worksite.

As discussed below, Washington's public policy as expressed in RCW 49.17.010, and rooted in Article II § 35 of the Constitution, disallows any employer from contracting away its duty to remedy workplace safety hazards that it creates and/or controls.

This Court should answer the certified questions "Yes" and "No." The first question should be answered "yes" because no contract, of any nature, can shield the Port of Bellingham ("POB") from liability for a workplace safety hazard that it both created and controlled in a multiemployer worksite. The POB created and maintained the hazard and the Alaska Marine Highway System ("AMHS") was at the dock at most for 24 hours a week. The mechanical safety hazard remained unabated for six days out of seven when the POB was in exclusive control of the premises. But the fact that only one ship could be moored in that berth at a time never transferred "exclusive" possession of the hazard to the AMHS. During the brief priority use the AMHS cannot be in "exclusive" possession of a mechanical hazard that was created and maintained by the POB. In a multiemployer workplace, it is legally impossible for the

employer who created a safety hazard in violation of specific WISHA regulations to transfer “exclusive” control of the hazard by allowing another employer to use the life-threatening equipment.

This was a physical hazard, well known to the POB, that posed the risk of serious injury or death. One wire and a few minutes of electrician time would have eliminated the hazard. The POB’s argument violates Washington’s well-established workplace safety public policy. The second question should be answered “no” because, under WISHA, the lease can never pass “exclusive control” of a workplace safety hazard created by one employer to another employer in a multiemployer workplace.

### **III. SIGNIFICANT FACTS**

The priority use property at the Bellingham Cruise Terminal was a multiemployer worksite. ER 158-59. The “priority” use property was used to load passengers, supplies, cargo, cars and trucks aboard the ferry. The priority use property included the parking lot, the car ramp, and the passenger ramp. The passenger ramp was operated by the POB’s employees, AMHS employees, outside contractors who helped maintain the ramp, Bellingham Stevedore Co., and Puglia Engineering employees. The priority use parking lot was used by the general public, the

Bellingham Police Officers (providing facility and vessel security), AMHS employees, POB employees, and by employees of numerous trucking companies who used the parking lot and the auto ramp to load commercial trucks aboard the ferry.

In 2008, the POB's managers learned that the mere operation of the ramp's controls could cause the ramp to collapse. ER 891-94. The POB recognized that the ramp was a hazard. SER 194-96; ER 659. None of the POB's employees who operated the ramp knew of the collapse danger until the ramp collapsed. ER 701; SER 270, 278. Shannon Adamson had no idea that the controls could collapse the ramp. SER 124-25, 253; RT 118.

Shannon Adamson's expert witnesses agreed that the workplace standard of care required the POB to fix the controls by eliminating the collapse hazard. (SER 159-61, SER 201-205; SER 233). Mechanical engineer Schaefer testified that it was technologically feasible to interlock the controls so that the ramp could not collapse. SER 201-04. Schaefer also testified that it was economically viable to make the change as the fix required the installation of one wire and about 15 minutes of electrician's time. *Id.* If this simple fix had been made the ramp would not have collapsed. *Id.*

#### IV. ARGUMENT

1. **Washington State And Federal Multiemployer Safety Statutes And Regulations Disallow The Contractual Shifting Of A Workplace Safety Hazard By The Creating Employer Into The “Exclusive” Possession Of Another Employer At The Site. Thus, “Priority Use” Can Never Shift “Exclusive Possession” Of The Hazard Onto The AMHS, And The POB Owed Shannon Adamson A Duty Of Care.**

- a. **Federal law**

Since the 1970s, OSHA has used the multiemployer doctrine to sanction employers who create, expose, correct, or control a workplace hazard that violates OSHA regulations. Under the Federal OSHA multiemployer policies, an employer, regardless of his employment relationship to the injured, is responsible and citable if the employer: (1) creates the hazard, (2) exposes the injured worker to the hazard, (3) fails to correct the hazard when responsible for correcting a hazard, (4) controls the worksite, or (5) has general supervisory authority over the worksite where the injury occurs. Occ. Safety and Health Admin., Dep’t of Labor, CPL 02-00-124, OSHA Instruction: Multiemployer Citation Policy, at X. A. page 1 (Dec. 10, 1999).

Many of the published cases deal with construction industry injuries where the general contractor is liable under (5) because the

general has general supervisory authority over the worksite. However, in Washington, it is long established that a premises owner is liable when the premises owner violates a specific WISHA regulation and that violation injures a worker employed by another employer. *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 669–76, 709 P.2d 774, 778–82 (1985) (a job site owner liable for violating specific WISHA safety regulations injuring the employee of another employer, adopting *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 804–05 (6th Cir. 1984) (same)). Thus, here we are concerned with sections (1) to (4) as they apply to a premise’s owner. The multiemployer directive and the specific regulations discussed below apply to the POB and Adamson because as premises owner the POB was also an “employer”, RCW 49.17.020(4), and Shannon Adamson was an employee, RCW 49.17.020(5). *Goucher*, 104 Wn.2d at 670–73, 709 P.2d at 779–80 (premises owner liable as an “employer” for violation of specific WISHA regulations).

The OSHA instruction applies to “multiemployer worksites (in all industry sectors) ...” *Id.* at X. A. page 3. The hazard creator’s tort liability runs to any worker who may be injured on the worksite regardless of who employs that worker. *Sec’y of Labor, Complainant v. Double “A” Indus., Inc., Respondent*, 19 O.S.H. Cas. (BNA) ¶ 1833 (O.S.H.R.C.A.L.J. Mar. 22, 2002).

The creating employer need not have had plenary control over the entire workplace or how the work was to be performed to be held liable. For example, in *Beatty Equipment Leasing, Inc. v. DOL*, 577 F.2d 534 (9th Cir. 1978), a subcontractor installed scaffolding at a construction site. The subcontractor then left the site. The scaffolding violated OSHA regulations. The subcontractor, who obviously did not control the job site or how the work was performed, was held responsible for creating a workplace hazard. “We agree with the Commission that this policy can best be effectuated by placing the responsibility for hazards on those who create them.” *Id.* 577 F.2d at 537.

As similarly stated by another federal appeals court:

In a situation where, as here, an employer is in control of an area, and responsible for its maintenance, we hold that to prove a violation of OSHA the Secretary of Labor need only show that a hazard has been committed and that the area of the hazard was accessible to the employees of the cited employer or those of other employers engaged in a common undertaking.

*Brennan v. Occupational Safety & Health Review Comm'n*, 513 F.2d 1032, 1037–38 (2d Cir. 1975). *See also Flores v. Infrastructure Repair Serv., LLC*, 52 Misc. 3d 664, 671–72, 34 N.Y.S.3d 324, 329–30 (N.Y. Sup. Ct. 2015) (defendant provided the dangerous equipment and was therefore liable).

**b. Washington law**

This Court has blessed the multiemployer doctrine on numerous occasions. *Afoa v. Port of Seattle*, 176 Wn.2d 460, 472, 296 P.3d 800, 807 (2013)(“Under [the multiemployer] rule, an employer who controls or creates a workplace safety hazard may be liable under OSHA even if the injured employees work only for a different employer”). Both sides argued *Afoa* below and in the Ninth Circuit. The *Afoa* facts are distinguishable from Adamson’s facts.

While *Afoa* is important here, the liability arose under different facts. Recall that Brandon Afoa was injured when the brakes of his “tug” failed and he crashed into a piece of derelict equipment stored on the tarmac. The tug was owned by his employer Eagle. From the various published opinions, it is plain that the Port had no role in maintaining the tug; it only had the right to insist that the tug be properly maintained. The Port claimed that it was up to others to ensure that the tug was properly maintained.

The Port further argued the airlines had control:

We’ve heard evidence that the air carriers did, in fact, tell EAGLE how to do its job ... They told them how to load [equipment] ... [and] how to move it. They even told them how to clean their ashtrays. That’s control. That’s the retention of the right to control, and that’s what the air carriers did.

It continued: “[l]f somebody was going to see a problem, it would have been the air carriers. And if they saw, they had a duty to fix it. They had a duty to tell EAGLE to fix that equipment. That’s the ... control they retained.”<sup>42</sup> The Port argued to the jury that they must answer “no” to special verdict form question 1 because “the Port did not retain the right to control how the ground support people ... maintained their equipment, how the air carriers maintained their equipment, how they did their job.

*Afoa v. Port of Seattle*, 198 Wn. App. 206, 220, 393 P.3d 802, 810 (2017), *rev’d*, 421 P.3d 903 (2018). Thus, the Port of Seattle was in the position to argue that it had no direct duty to inspect or maintain the tug. Therefore, it was necessary for Afoa to prove that the Port of Seattle’s actions were so pervasive that it was responsible for subcontractor negligence just like a general contractor is on a construction site. *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 336, 582 P.2d 500, 507–08 (1978).

In contrast, in Washington, subcontractors, who do not have overall control of the workplace or direct how the work is conducted, **are liable for the hazards that they create which injure any employee on the worksite**. Thus, with a specific hazard created by an employer on a multiemployer worksite, plenary control or direction of the work is unnecessary to liability. In *Ward v. Ceco Corp.*, 40 Wn. App. 619, 699 P.2d 814 (1985), Ceco, a subcontractor, was employed to build concrete forms. Ceco removed the concrete forms, placed slippery oil on the floor,

but did not install guardrails against falls as required. Mr. Ward, the employee of the general contractor, slipped and fell over the unguarded edge and sued Ceco for WISHA violations.

WAC 296.155.040(1) impose[s] an undisputed duty upon Ceco to erect guardrails for the protection of its own employees ... the same regulation [imposes] a duty upon Ceco to protect other workers whom Ceco had reason to know would be working within the “zone of danger” created by Ceco (i.e. oil coated flooring near the edge of an elevated platform.

*Id.* at 625.

Similarly, a subcontractor having control, *albeit control shared with the general contractor*, over the work place owes the same duty owed to its own employees, *particularly where the subcontractor created the dangerous condition within the workplace.*”

*Id.* (emphasis supplied).

The only issue was whether Ceco had a duty, and the resolution of our issue is one of law, based upon factual findings that Ceco had control over the dangerous area *or created the dangerous condition which Ward might reasonably have been expected to encounter.*

*Id.* at 627 (emphasis supplied). *Accord Jones v. Halverson-Berg*, 69 Wn. App. 117, 124, 847 P.2d 945 (1993) (“a subcontractor is liable to the extent it controls or creates a dangerous condition”): *Martinez Melgoza & Assocs. v. Dep’t of Labor & Indus.*, 125 Wn. App. 843, 848-49, 106 P.3d 776 (2005) (“Under the OSHA specific duty clause, 29 U.S.C. 654(a)(2), the majority of federal circuit courts have adopted what is known as the

multiemployer worksite doctrine, under which “an employer who controls *or creates a worksite safety hazard* may be liable under OSHA even if the employees threatened by the hazard are solely employees of another employer.” (emphasis added citing OSHA cases)).

Commenting upon *Ward*, this Court stated:

In *Ward*, the injured party was an employee of the general contractor, and he was attempting to hold a subcontractor liable for his injuries. Since subcontractors lack the supervisory authority of a general contractor, the injured party must prove the subcontractor was in control **of *or created the dangerous condition in order to hold the subcontractor liable.***

*Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 461, 788 P.2d 545, 549 (1990)(emphasis supplied). *See also Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 672, 709 P.2d 774, 780 (1985) (“WISHA regulations should be construed to protect not only an employer’s own employees, but all employees who may be harmed by the employer’s violation of the regulations.”).

**2. The POB Violated Specific WISHA Regulations By Constructing A Hazardous Ramp And Then Failing To Eliminate The Hazard As Required By Law.**

Washington law requires any employer to remedy recognized workplace hazards. As stated in the “Significant Facts” section, the POB

knew about the hazard, none of the employees in the workplace did, the hazard should have been fixed, it was technologically feasible to fix it, and it was inexpensive to fix the controls. The facts of this case dictate that the POB violated the following WISHA safety regulations.

**You must:**

Provide and use safety devices, safeguards, and use work practices, methods, processes, and means that are reasonably adequate to make your workplace safe.

WAC 296-800-11010.

**You must:**

\* Not construct, or cause to be constructed, a workplace that is not safe.

- This rule applies to employers, owners, and renters of property used as a place of employment.

WAC 296-800-11020.

**You must:**

Take responsibility for the safe condition of tools and equipment used by employees.

Note: This applies to all equipment, materials, tools, and machinery whether owned by the employer or another firm or individual.

WAC 296-800-11030.

When dangerous equipment can be made safe in an economical and technologically feasible manner, the employer must do so. As stated by the court of appeals, relying upon federal cases:

Employers do not have an absolute duty to make safe the working environment of its employees. But employers do have the duty to abate recognized hazards. An effective abatement method is one that will materially reduce or eliminate the hazard and is a feasible and useful means of doing so. “Abatement is ‘feasible’ when it is ‘economically and technologically capable of being done.’”

*W. Oilfields Supply v. Washington State Dep’t of Labor & Indus.*, 1 Wn. App. 2d 892, 408 P.3d 711, 718 (2017) (footnotes omitted).

These WISHA regulations establish that the Port had a duty to its own employees to make the ramp safe by installing a single wire. Because the POB had a specific duty to its own employees, it also had a legal duty to Shannon Adamson. As shown below, this duty was non-delegable, so the lease cannot shield the POB from a duty to Shannon Adamson. Thus, the “priority” use does not excuse the POB.

### **3. Non-Delegable Duty.**

*Ward v. Ceco Corp.*, 40 Wn. App. 619 (1985), is instructive on the non-delegable duty nature of the POB’s duty to Shannon Adamson. In *Ward*, the subcontractor created a fall hazard by failing to install railings. Ward, an employee of the general contractor, fell and sued Ceco. Ceco sought to defend by introducing the contract with the general in which the general assumed responsibility for workplace safety. The court refused to admit the contract on the basis that the duty was non-delegable so the contract was not a defense.

Similarly, the duty imposed on Ceco to erect a guardrail for the safety of all employees by statute and regulation was non-delegable. *See Short v. State Comp. Ins. Fund*, 52 Cal.App.3d 104, 125 Cal.Rptr. 15 (1975); *Kirk v. Kemp Bros.*, 12 Cal.App.3d 136, 90 Cal.Rptr. 553 (1970); *Morehouse v. Taubman Co., Inc.*, 5 Cal.App.3d 548, 85 Cal.Rptr. 308 (1970). Consequently, any provision in the contract between Ceco and Sellen designed to shift the duty to Sellen is invalid as to the injured employee. Thus, evidence concerning the Sellen-Ceco contract was irrelevant and, therefore, inadmissible. ER 402.

*Ward v. Ceco Corp.*, 40 Wn. App. 619, 629, 699 P.2d 814, 820 (1985); *See also Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 459, 788 P.2d 545, 548 (1990) (“In this case, the employer had created the situation that caused the injury. Therefore, it had a nondelegable duty to install safety equipment.”). The non-delegable nature of this duty was reaffirmed in *Afoa v. Port of Seattle*, 421 P.3d 903, 910 & n.10 (Wn. 2018).

#### **4. In Washington, It Is Illegal To Build, Rent, Or Lease A Dangerous Workplace.**

The POB’s interpretation of the lease violates Washington law. The POB asks this Court to ignore Washington law. The linchpin of the POB’s argument is that it may construct a dangerous workplace, upon discovery leave the danger in place despite the fact that it was technologically feasible and inexpensive to eliminate the life-threatening hazard, and escape liability for resulting injury by allowing another employer to enjoy “priority” use of the equipment. The POB’s equipment

endangered the POB's employees as well as the AMHS's employees because none of the employees who actually operated the dangerous equipment knew that the mere operation of the ramp's controls could cause the ramp to collapse. The POB argues that the lease transfers "exclusive" control of this hazard to the AMHS by allowing it priority use of the equipment for at most 24 hours a week. Thus, the POB's argument seeks to abrogate Washington workplace safety laws via an archaic argument about transfer of possession under a lease. However, an interpretation of a lease clause that would violate Washington's statutes must be rejected as unenforceable. As it is illegal in Washington to build, rent, or lease a dangerous workplace, the POB's lease cannot absolve it from multiemployer workplace liability. Thus, the POB cannot transfer exclusive possession of the hazard to the AMHS.

Washington law makes it illegal to construct, rent or lease an unsafe workplace. WAC 296-800-11020 (general industry standard); WAC 296-155-040(5) (construction industry standard).

The POB argues that its duty to "maintain" the premises in good repair and to eliminate accident hazards, means that the POB was required to maintain the ramp in its hazardous condition. The Honorable Marsha J. Pechman commented that POB's argument violated public policy. The

trial court invited the POB to brief the public policy issue, an invitation that was never accepted.

MR. CHMELIK: And that would be why the word “maintain” would be given its common usage, to maintain as it exists, not to upgrade. But I will grant the court –

THE COURT: Well, if that’s your position, you know, then you better write for me something about why that wouldn’t be void for **public policy**, that you say that you can have a hazard just sit there, sit there, sit there, that’s in violation of codes, and not do something about it, when you are inviting people in every week to cross that path. So I’m trying to tell you like it is. I don’t think this lease helps you. I think it hurts you.

MR. CHMELIK: Well, my point was, Judge, I think that this is an area that’s ripe for discussion, but we were not planning to admit the lease. But what I did want to do, Judge – I’m sorry -- what we did want to do was call Ms. McFearin to say, I went to Alaska, and they leased the property from us. And that’s all.

THE COURT: Well, isn’t that obvious?

MR. CHMELIK: It is obvious, Your Honor. I’m stating the obvious.

(Trial Transcript, March 23, 2016 at 625-26, emphasis supplied).

The Court:

Mr. Chmelik pointed me to the concept of “maintain,” and I posed the question, how is it that you can maintain a hazard and not have that be void for **public policy**? Because if you find that this ramp is a hazard – and there’s been testimony from plaintiffs’ experts that it is a hazard – how is it that you can contract that you don’t have to fix that? That made no sense to me.

(Trial Transcript, March 25, 2016, at 876, emphasis supplied).

The trial court was correct that the POB's interpretation of the lease violates Washington's public policy. The legislature has declared that the pursuit of robust workplace safety is a bedrock principle of Washington's public policy.

The legislature finds that personal injuries and illnesses arising out of conditions of employment impose a substantial burden upon employers and employees in terms of lost production, wage loss, medical expenses, and payment of benefits under the industrial insurance act. Therefore, in the public interest for the welfare of the people of the state of Washington and in order to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington, the legislature in the exercise of its police power, and in keeping with the mandates of Article II, section 35 of the state Constitution, declares its purpose by the provisions of this chapter to create, maintain, continue, and enhance the industrial safety and health program of the state, which program shall equal or exceed the standards prescribed by the Occupational Safety and Health Act of 1970 (Public Law 91-596, 84 Stat. 1590).

RCWA § 49.17.010 (West).

Workplace safety is enshrined in our constitution.

#### § 35. Protection of Employees

The legislature shall pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health; and fix pains and penalties for the enforcement of the same.

WA. Const. art. II, § 35.

WISHA prohibits the building, leasing, or renting of an unsafe workplace. WAC 296-800-11020; WAC 296-155-040(5). It was therefore illegal for the Port to construct an unsafe workplace, to rent an unsafe workplace, or for the AMHS to lease an unsafe workplace. The general industry regulation applied to the POB as it was both an “owner” and an “employer” at the cruise terminal and the POB’s employees operated and maintained the ramp. The regulation also prohibited the AMHS from renting an unsafe workplace. To accept the POB’s argument is to reject the applicable WISHA safety regulations and to allow the POB, by private contract, to abrogate Washington’s workplace safety statutes and regulations. When a contract violates public policy, as the POB’s interpretation does, the contract in that regard is void.

“[I]t is the general rule that a contract which is contrary to the terms and policy of an express legislative enactment is illegal and unenforceable [sic].” *State v. NW. Magnesite Co.*, 28 Wn.2d 1, 26, 182 P.2d 643 (1947). While we recognize an overarching freedom to contract, provisions are unenforceable where they are prohibited by statute. *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 481, 687 P.2d 1139 (1984).

*Jordan v. Nationstar Mortgage, LLC*, 185 Wn.2d 876, 883, 374 P.3d 1195, 1199 (2016).

The linchpin of the POB’s argument that it may construct an unsafe workplace and transfer the liability for the danger to the lessee by

allowing priority use 24 hours a week is void as against public policy. The POB is liable as premises owner because it was also an employer in a multiemployer workplace and it created the specific hazard and violated WISHA when it failed to fix the hazard. The law of landlord/tenant is no shield to liability for the POB's independent violations of Washington workplace safety laws.

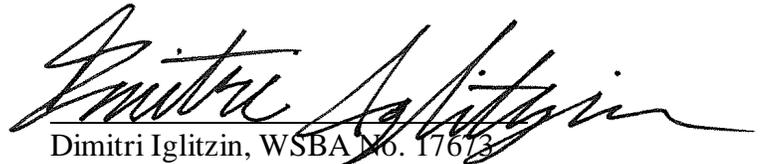
## V. CONCLUSION

The POB's arguments run counter to its responsibilities to its own employees and to all employees who work at the Bellingham Cruise Terminal. The argument repudiates Washington work place safety law. The POB's argument seeks return to concepts of medieval common law which are rejected in modern decisions. "The conceptual justification for the traditional immunity for negligent landlords is hopelessly archaic, and its application to contemporary life is increasingly seen as both unrealistic and indefensible." *Flower v. Harper et al.*, Harper, James and Gray on Torts, § 27.16 at 328 (3<sup>rd</sup> Ed. 2008). "The ancient rule of immunity — stemming from feudal, mediaeval property law notions based upon English early law — is no more." Stuart M. Speiser, et al., *The American Law of Torts*, § 14:78 at 331 (2015). Restatement (Third) of Torts § 51 (2010) has rejected the old common law concepts and applies a standard of reasonable care under the circumstances. "[T]he status-based duties for

land possessors are not in harmony with modern tort law. This Section rejects the status-based duty rules and adopts a unitary duty of reasonable care to entrants on the land.” *Id.* cmt. a. These mediaeval concepts cannot trump Washington’s workplace safety laws.

It is respectfully submitted that this Court answer the first certified question “Yes” and the second certified question “No.”

Respectfully submitted this 11th day of January, 2019.



Dimitri Iglitzin, WSBA No. 17673  
Barnard Iglitzin & Lavitt LLP  
18 W Mercer Street, Suite 400  
Seattle, WA, 98119-3971  
(206) 257-6003  
*Iglitzin@workerlaw.com*

*Attorneys for Washington State Labor  
Council*

**DECLARATION OF SERVICE**

I, Jennifer Woodward, hereby declare under penalty of perjury under the laws of the State of Washington that on January 11, 2019, I caused the foregoing Brief of Amicus Curiae Washington State Labor Council to be electronically filed with the Washington State Supreme Court, which will provide notification of such filing to all parties in this matter.

SIGNED this 11th day of January, 2019, at Seattle, WA.

  
Jennifer Woodward  
Paralegal

**SCHWERIN CAMPBELL BARNARD IGLITZIN & LAVITT**

**January 11, 2019 - 11:45 AM**

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**Filing on Behalf of:** Dmitri L. Iglitzin - Email: iglitzin@workerlaw.com (Alternate Email: )

Address:  
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Seattle, WA, 98119  
Phone: (206) 257-6015

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