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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.

PORT OF BELLINGHAM'S REPLY BRIEF

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I. INTRODUCTION

Plaintiffs urge this Court to answer the certified question based on whether the jury's verdict was supported by substantial evidence. Plaintiffs even urge this Court reach legal theories to which they concede the certified question is "irrelevant." Plaintiffs fundamentally misapprehend the nature of a certified-question proceeding. Under Plaintiffs' approach, this Court would exceed its jurisdiction.

The certified question is a device invented to achieve the benefits of what Justice Douglas once aptly called "cooperative judicial federalism." See *Lehman Bros. v. Schein*, 416 U.S. 386, 391, 94 S. Ct. 1741, 40 L. Ed. 2d 215 (1974). As this Court elucidated 50 years ago, in upholding Washington's certified-question statute, certification was the creative response of our federal system to the difficulties stemming from *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed 1188 (1938). See *In re Elliott*, 74 Wn.2d 600, 602-03, 446 P.2d 347 (1968) (plurality op. by Rosellini, J.). The decision in *Erie* had ended the right of federal courts in diversity cases, dating back to *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 10 L. Ed 865 (1842), to make "an independent judgment as to what the common law of the state was *or should be*." *In re Elliott*, 74 Wn.2d at 602 (emphasis added). But as this Court recognized, the immediate result was far from satisfactory, because what the common law of the state "was or should be" was often unclear:

Since *Erie*, federal courts have been required to follow local law as expounded by state courts. This has not been a problem where there is a state decision or rule on the question. However, where the state

law is not clear, either because of the absence of state decisions or conflicting decisions in the same state, federal courts have been in a quandary. A federal court, confronted with the necessity of ascertaining and applying local law, has been compelled to either (1) guess at the law and risk laying down a rule which may later prove to be out of harmony with state decisions, since state courts are not bound by federal court interpretations of state statutes, or (2) abstain from deciding the case until the state courts pass upon the point of law involved. The great burden created by the abstention doctrine is the matter of delay.

Id. at 602-03.

The certified question was the solution. As this Court explained:

[T]he legislature, in enacting Laws of 1965, ch. 99, sought to afford a procedure whereby litigants in federal court actions might obtain answers, in an expeditious manner, to questions of state law which controlled the disposition of their cases. The procedure is a shortcut, eliminating the necessity of instituting a declaratory judgment action in the superior court and taking an appeal to this court. The statute is not designed to increase the work load of this court, but rather to simplify the procedure for obtaining decisions on state questions which are relevant in federal court suits

Id. at 603.

Plaintiffs would transform this “expeditious” procedure for obtaining decisions on questions of state law into anything but. They would have this Court go beyond the certified question and grapple with facts that the Ninth Circuit has deemed not genuinely in dispute, as reflected in the fact recitation in its certification order. This Court should decline Plaintiffs’ invitation to treat the certified question as an invitation to step into the Ninth Circuit’s shoes and act as if the Ninth Circuit, by its certification order, has transferred the case as a whole to this Court for its resolution—as if the Port’s appeal had come before this Court after a trial to a jury in a superior court of this state.

The Ninth Circuit has done no such thing. The facts relevant to answering the certified question are those set forth in the certification order. Those facts include that the Ferry System exercised “exclusive *control*”¹ over the Marine Facilities, including the ramp on which Ms. Adamson was injured, when one of the System’s ferry vessels was in port. Given those facts, and applying the well-established and long-standing Washington law of landlord liability, the fact that the Ferry System’s exclusive control occurred during what its lease with the Port labeled “priority” use should not subject the Port to possessor liability. Nor should the Port’s assumption of repair and maintenance duties subject the Port to possessor liability. Accordingly, this Court should answer the first question posed by the Ninth Circuit “no,” and the second question “yes.”

II. REPLY ARGUMENT

A. The certified question presents a purely legal issue and does not transfer the entire case for this Court to decide.

1. Whether Plaintiffs’ legal theories should have been submitted to the jury remains before the Ninth Circuit, not this Court.

Plaintiffs mainly advance a substantial-evidence argument.² They argue that their legal theories were “for the jury to decide” because they “presented substantial evidence” to support them. *Resp’ts Br.* at 24, 58.

¹ *Order Certifying Question to Wash. State Supreme Court* at 8 (emphasis added).

² Tellingly, much of Plaintiffs’ argument in this regard is copied verbatim from their Ninth Circuit briefing. A few of many possible examples follow. *Compare, e.g.,* (1) *2d Br. on Cross-Appeal (Ninth Circuit)* at 28-29 with *Resp’ts Br.* at 19-20; (2) *2d Br. on Cross-Appeal (Ninth Circuit)* at 31-32 with *Resp’ts Br.* at 21-22; (3) *2d Br. on Cross-Appeal (Ninth Circuit)* at 47-48 with *Resp’ts Br.* at 43-44; and (4) *2d Br. on Cross-Appeal (Ninth Circuit)* at 12-13 with *Resp’ts Br.* at 56-57.

They urge similarly that “[t]he jury’s verdict should be upheld” because “the jury’s determination was amply supported” and the like. *Id.* at 30, 40, 55, 58. They even go so far as to assert that “[t]he Ninth Circuit’s panel order and the Port’s brief lose sight of the fact that after 9 days of trial, on proper instructions, the jury ruled in favor of the Adamsons.” *Id.* at 3.

But it is *Plaintiffs*, not the Ninth Circuit or the Port, who have lost sight of this case’s posture and this Court’s role in answering a certified question. The Ninth Circuit has not transferred the case to this Court for it to decide the issues as they were presented to the Ninth Circuit. The Ninth Circuit has resolved certain issues, identified material facts not genuinely in dispute, and certified a narrow question to this Court. Issues beyond that question, such as whether Plaintiffs’ legal theories were properly submitted to the jury, remain before the Ninth Circuit, and this Court is not free to decide those issues or revisit the Ninth Circuit’s determinations.

When a case is in federal court based on diversity jurisdiction, all substantive legal questions are governed by state law. *Erie R.R. Co.*, 304 U.S. at 78. The certification procedure provides a means for the federal court to ascertain the governing state law when there is no controlling authority on an issue.³ Only questions of law may be certified, and this

³ Washington adopted its statutory certification procedure, ch. 2.60 RCW, in 1965. The Uniform Law Commission first promulgated its Uniform Certification of Questions of Law Act in 1967. As discussed in the Introduction, this Court upheld the constitutionality of Washington’s certification statute in *In re Elliott*, 74 Wn.2d at 610, in 1968. The division amongst this Court’s members in that case concerned only the issue of constitutionality; nothing in the opinions suggests that the justices disagreed about the reasons for the Legislature’s establishment of a certified-question procedure, or with why that procedure was an effective solution as a matter of *policy* to the problems that had arisen in the wake of *Erie*.

Court reviews those questions *de novo*. *Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 580, 397 P.3d 120 (2017). Matters such as whether substantial evidence supports a jury’s verdict are necessarily beyond the scope of a certified question. “The federal court retains jurisdiction over all matters except the local question certified.” *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 676, 10 P.3d 371 (2000). “Where an issue is not within the certified question[], and is within the province of the federal court, this court will not reach the issue.” *Id.*

2. The Ninth Circuit’s fact recitation binds this Court.

The certification order contains a recitation of material facts that the Ninth Circuit has deemed not genuinely in dispute. This Court is not free to disregard those facts. A court answering a certified question “is bound by the facts as stated in the certification order.” *In re Fountainebleau Las Vegas Holdings*, 267 P.3d 786, 794 (Nev. 2011).

A key fact set forth by the Ninth Circuit is that “the priority use provision [in the lease] effectively gave the Ferry [System] *exclusive control* of the ramp when it was in [p]ort[.]” *Order Certifying Question to Wash. State Supreme Court (“Certification Order”)* at 8 (emphasis added). Plaintiffs repeatedly contradict that established fact by asserting that the Port had a right of control of the ramp at all times. *See, e.g., Resp’ts Br.* at 3 (accusing the Port of “misstat[ing] the record” by asserting that the Ferry System had exclusive control), 8 (asserting “AMHS never had ‘exclusive’ possession or control of the Terminal’s passenger ramp[.]”), 31-32 (characterizing as “baseless” the notion that priority use could ever involve

exclusive control). Plaintiffs even assert that “the Ninth Circuit Panel did not fully appreciate the Terminal’s physical configuration and the actual role of the various entities in its operation.” *Id.* at 4.

The Ninth Circuit is presumed to have “fully appreciate[d]” the facts that are material to its certified question. This Court is bound to accept the facts as set forth by the Ninth Circuit, including that the Ferry System had exclusive control of the Marine Facilities, including the ramp, when the Ferry System was using those facilities.

B. Whether the Port is subject to liability under any of the exceptions to the general rule of landlord nonliability is not before this Court.

1. As Plaintiffs concede, none of their exception-based liability theories depends on the answer to the certified question for viability.

Plaintiffs argue that the jury’s verdict should be upheld based on one or more of the exceptions to the general rule of landlord nonliability. But Plaintiffs concede that none of those theories depends on the answer to the certified question. *Resp’ts Br.* at 23, 30, 58. Those theories are thus not before this Court and are not pertinent to its analysis.

2. The Ninth Circuit implicitly rejected Plaintiffs’ liability theories that do not depend on the certified question.

Even if Plaintiffs’ liability theories based on exceptions to the general rule of landlord nonliability would otherwise relate to the certified question, no speculation is required to conclude that the Ninth Circuit has rejected those theories as a matter of law.

No other conclusion can reasonably be drawn from the issuance of the certification order. Court orders are construed under the same principles as statutes. *Callan v. Callan*, 2 Wn. App. 446, 448-49, 468 P.2d 456 (1970). “The courts will presume that the legislature does not indulge in vain and useless acts and that some significant purpose or object is implicit in every legislative enactment.” *Kelleher v. Ephrata Sch. Dist. No. 165, Grant Cty.*, 56 Wn.2d 866, 873, 355 P.2d 989 (1960). Unless it rejected Plaintiffs’ legal theories that do not depend on the certified question, the Ninth Circuit’s asking the certified question was a “vain and useless act.” That is because the court could otherwise have affirmed based on one or more of those theories, without asking the certified question.

For background purposes, and to bolster that conclusion (and anticipating off-point arguments such as those Plaintiffs make in their brief), the Port explained in its opening brief why the Ninth Circuit would justifiably conclude that Plaintiffs’ “exception” theories were not viable as a matter of law and should not have been submitted to the jury—except for their breach-of-covenant-to-repair theory, which will be remanded for a new trial should this Court answer the certified question favorably to the Port.⁴ Plaintiffs nevertheless argue that substantial evidence supported these theories. The Port will briefly respond, if only to reaffirm why no issue pertaining to the viability of those theories is before this Court.

⁴ Should this Court answer the certified question unfavorably to the Port, no new trial will be necessary despite the District Court’s erroneous exclusion of extrinsic evidence relevant to the scope of the Port’s repair and maintenance duties. In the event of such an answer, the Ninth Circuit can affirm based on possessor liability without reaching the issue of breach of the repair and maintenance duties.

(a) Jobsite-owner liability is not before this Court.

Contrary to Plaintiffs' assertion (*Resp'ts Br.* at 25 n.23), the Port's opening brief was not "silent" on jobsite-owner liability. The Port discussed this Court's holding in *Afoa v. Port of Seattle* ("*Afoa I*") that "[w]here there are multiple employers performing a variety of tasks in a complex working environment, it is essential that a safe workplace duty be placed on a landlord *who retains the right to control the movements of all workers on the site to ensure safety.*" 176 Wn.2d 460, 479, 296 P.3d 800 (2013) (emphasis added). The Port showed based on undisputed evidence that the Marine Facilities were not a common work area⁵ and that the Port lacked any "right to control" how Ferry System crew used the Marine Facilities.⁶ See *Port's Opening Br.* at 19-20. That presumably is why the Ninth Circuit recited that the Ferry System had exclusive control over the ramp when it used the Marine Facilities. *Certification Order* at 8.

Plaintiffs offer two bases to contradict the Ninth Circuit's binding determination on control, neither of which has merit, even assuming this Court were empowered to consider them.

⁵ Contrary to Plaintiffs' suggestion, the fact that the Ferry System hired contractors to operate the ramps and that Port employees would occasionally operate the ramp when not in use by the Ferry System did not transform the Marine Facilities into a "multiemployer work site." Such a work site exists where the owner's employees work alongside the various contractors' employees and the owner retains pervasive control over how the contractors complete their work. See *Afoa I*, 176 Wn.2d at 472, 479. Neither of those circumstances existed here.

⁶ This Court made clear in *Afoa I* that its holding was a "narrow" one addressed to a "unique" situation where the Port of Seattle operates "a highly complex multiemployer worksite and is perhaps the only entity in a position to maintain worker safety." 176 Wn.2d at 481. This Court emphasized further that "the Port [of Seattle] has allegedly retained substantial control over the manner in which work is done at Sea-Tac Airport" and cautioned that, "[t]o the extent other cases arise in the future, liability should depend on similar factors." *Id.* As discussed, similar factors do not exist here.

First, as they did both in the District Court and in the Ninth Circuit, Plaintiffs rely heavily on an e-mail from Port employee Dave Warter to the Ferry System threatening to “shut down” the ramp, as evidence of control. *Resp’ts Br.* at 33, 39 (citing ER 855). But nothing in the lease gave the Port authority to bar the Ferry System from using part of the leased premises under any circumstances. More to the point, the Port undisputedly had no right to control how the Ferry System used the ramp, such as by dictating which Ferry System employees used the ramp, the training those employees received, or their manner of operating the ramp. *See* ER 513-14, 583-83, 616, 794-95. The Ninth Circuit rightly concluded that the e-mail did not create a material fact question regarding control over the ramp.⁷

Second, Plaintiffs point to a sidebar during trial where the Port’s counsel supposedly admitted that the Port controlled the ramp. *Resp’ts Br.* at 8, 27, 33, 39 (citing SER 262). Plaintiffs take counsel’s statement out of context. The Port’s counsel was explaining that the Port did not dispute

⁷ The e-mail was sent in immediate response to—indeed, the same day as—the Chief Mate Preston incident in October 2008. As it did before the Ninth Circuit, Plaintiffs ignore a plethora of evidence demonstrating the fundamental implausibility of the Plaintiffs’ reading of this e-mail—that it supposedly showed that the Port understood that it had a right under the lease to control how Ferry System crew members operated the ramp. Thus, Plaintiffs ignore that, after the parties entered into the April 2009 lease (the controlling lease at the time of Adamson’s accident), when Ferry System crew members’ conduct raised concerns that they were continuing to misoperate the ramp as Chief Mate Preston did in 2008, the Port merely pointed out its concern that this was happening and *asked* the Ferry System to reiterate instructions about proper operations. ER 835. Plaintiffs also ignore the undisputed testimony, including by the Port, the Ferry System, and Adamson herself, that the Port had no right even to enter the Marine Facilities when a Ferry System vessel was docked and presume to tell crew members how to do their jobs. ER 513-14, 582-83, 616, 794-95. Whether the e-mail was sufficient to raise a genuine issue for the jury on the question of control was for the Ninth Circuit to resolve, and it is readily apparent that the Ninth Circuit resolved that question against Plaintiffs—otherwise *there would be no reason for this certification proceeding*.

control for the limited purpose of being able to implement subsequent remedial measures (while the Ferry System was not using the Marine Facilities). SER 262 (*see also* ASER 18). The Port’s counsel clarified, consistent with the Port’s position throughout the case, that the Ferry System had exclusive control of the ramp “during operation.” *Id.*; *see also* ER 536-37 (“[I]f we [the Port] bring people on that ramp, it’s on us, because we are now possessing it. But when Alaska possesses it, it’s on Alaska.”). There was no admission of control during operation by the Ferry System.

But in any event, the Ninth Circuit has already rejected Plaintiffs’ jobsite-owner-liability theory, and no pertinent issue is before this Court.

(b) Landlord liability for undisclosed latent defects is not before this Court.

As for latent defects, Plaintiffs argue that substantial evidence supports that the slack risk was a latent defect, known to the Port at the commencement of the 2009 lease but not disclosed to the Ferry System. *Respt’s Br.* at 48-58. They claim that “the jury plainly rejected the Port’s factual argument” that the Ferry System had notice of the slack risk. *Id.* at 55 (emphasis removed). But Plaintiffs cannot escape the critical fact that Chief Mate Preston’s incident (not the red-herring Geiger report) put the Ferry System on notice of every material fact regarding the slack risk. *See Port’s Opening Br.* at 17-18. Presumably that is why the Ninth Circuit did not affirm based on a determination that substantial evidence supported liability under the latent-defect exception. No issue pertaining to that liability theory is before this Court.

(c) **Landlord liability for hazards in common areas is not before this Court.**

The Ninth Circuit rejected the notion that the ramp was a common area when it determined that the Ferry System had exclusive control of the ramp when it was using the Marine Facilities. *Certification Order* at 8; *see Port's Opening Br.* at 14 n.11. If Plaintiffs' evidence had created a fact question on whether the ramp was a common area, the Ninth Circuit would have been compelled to affirm the judgment, because Adamson would have been the Port's invitee. The Ninth Circuit did not do that.

The reason that the ramp is not a common area is *not* because the Port never had any other tenants for the Marine Facilities. *See Resp'ts Br.* at 46. The ramp is not a common area because, as the Ninth Circuit determined, the Ferry System had exclusive possession and control of the Marine Facilities, including the ramp, during its periodic use of those facilities. *See* ER 580-81. And it would have had such exclusive possession and control even if the Port *had* leased the Marine Facilities to other tenants. That the Ferry System's contractors and members of the public accessed the ramp during the Ferry System's use of the Marine Facilities changes nothing. Such access was based on the Ferry System's invitation and subject to its control, not the Port's.

Plaintiffs' reliance on Restatement (Second) of Torts section 359 and cases applying the "public use" exception, including Plaintiffs' so-called "wharf cases," is misplaced. Those authorities all address injury to persons using the premises *as members of the public, rather than as*

tenants.⁸ Here, Adamson was using the Marine Facilities not as a member of the public, but within the scope of her employment with the Port's tenant, the Ferry System. Moreover, she was injured while operating industrial equipment as part of her job, an activity no member of the public would ever have had occasion to do. No issue pertaining to liability for hazards in common areas or to members of the public is before this Court.

(d) Breach of repair and maintenance covenants is not before this Court.

As explained in the Port's opening brief, the Ninth Circuit evidently has determined that a new trial is warranted, should this Court answer the certified question favorably to the Port. And that new trial will focus on whether the Port breached its repair and maintenance covenants under the lease. A new trial is warranted on that issue because of the District Court's erroneous exclusion of extrinsic evidence relevant to interpret the lease.

But none of that bears on the certified question. Contrary to Plaintiffs' characterization, the Port has not asked this Court to reformulate the certified question and decide "evidentiary questions." *Resp'ts Br.* at 41 n.37. The Port discussed the extrinsic-evidence issue in its brief only for purposes of explaining what issues are *not* before this Court. The issue

⁸ See *Brunton v. Ellensburg Wash. Lodge No. 1102 of Benevolent & Protective Order of Elks*, 73 Wn. App. 891, 872 P.2d 47 (1994) (wedding reception guest fell down stairs); *Fitchett v. Buchanan*, 2 Wn. App. 965, 472 P.2d 623 (1970) (racetrack patron hit by wheel); *Enersen v. Anderson*, 55 Wn.2d 486, 348 P.2d 401 (1960) (crew member of boat moored at marina operated by defendant injured when plank broke under his weight); *Nelson v. Booth Fisheries Co.*, 165 Wash. 521, 6 P.2d 388 (1931) (crew member employed by defendant, but on personal errand, slipped and fell); *Gregg v. King County*, 80 Wash. 196, 141 P. 340 (1914) (hand of child sitting on public dock crushed due to incoming boat); *Campbell v. Portland Sugar Co.*, 62 Me. 552 (1873) (longshoreman walking on wharf open to public stepped into hole in wharf and fell).

raised by the certified question, as it pertains to the repair and maintenance covenants, is whether the *mere existence* of those covenants put the Port in the position of possessor of the Marine Facilities at all times, including while the Ferry System was using them. Whether the Port breached the repair and maintenance covenants is immaterial to the certified question because the Port is subject to liability for any breach of the covenants regardless of whether it was the possessor.

Plaintiffs nevertheless make their case to this Court for affirming the jury's verdict based on breach of the repair and maintenance covenants. As discussed in its opening brief (at 21), the Port disagrees that modifying the ramp controls to eliminate the slack risk "did not require an 'upgrade'" and that it is reasonable to interpret the repair or maintenance covenants as including upgrades (*see Resp'ts Br.* at 43). But those issues are immaterial to any issue before this Court; they will be determined by a jury on remand, should this Court answer the certified question favorably to the Port.

* * *

No issue pertaining to any of the Plaintiffs' exception-based legal theories is before this Court. Whether to uphold the jury's verdict is for the Ninth Circuit to determine, and it has determined that the answer to the certified question, based on the predicate facts it has recited, is key to the outcome of this case.

C. The general rule of landlord nonliability applies because the Ferry System, not the Port, was in possession—control—of the Marine Facilities when Adamson was injured.

The ultimate issue raised by the certified question is whether, based on the undisputed facts, the Port “possessed” the Marine Facilities, including the passenger ramp, when Adamson’s injury occurred.⁹ Only if the Port possessed the Marine Facilities at that time was Adamson the Port’s invitee. *See Regan v. City of Seattle*, 76 Wn.2d 501, 504, 458 P.2d 12 (1969). In turn, the critical aspect of possession is the right to *control*: a possessor of land is one “who is in occupation of the land with intent to *control* it.” *Pruitt v. Savage*, 128 Wn. App. 327, 331, 115 P.3d 1000 (2005) (quoting RESTATEMENT (SECOND) OF TORTS § 328E (1965)) (emphasis added). And the “critical question” in determining the existence of a landlord-tenant relationship is “whether exclusive *control* of the premises has passed to the tenant.” *Regan*, 76 Wn.2d at 504 (emphasis added).

1. The fact that the Ferry System’s use of the Marine Facilities is periodic does not mean that the Port remains in the position of possessor during that use.

The certified question asks whether the fact that the Ferry System’s use of the Marine Facilities is periodic and not continuous throughout the lease term means that the Port retained a right of control during that use. Plaintiffs argue that the text of the lease itself is “dispositive of the certified

⁹ Plaintiffs assert that “the Port persistently misrepresents the small part of the overall Terminal actually leased to AMHS.” *Resp’ts Br.* at 4. But the supposedly “small part...actually leased”—which includes the Marine Facilities—is the part that is relevant to resolution of the certified question.

question.” *Resp’ts Br.* at 32. But their argument confuses terminology and contradicts the certification order.

The supposedly dispositive provisions of the lease are those that distinguish between areas where the Ferry System had a right of “exclusive use” and those where it had a right of “priority use.” *Resp’ts Br.* at 32. Certainly, the Ferry System had a right to “exclusive use” of certain areas of the terminal (*e.g.*, office space) and only “priority use” of the Marine Facilities. But that does not mean that the Ferry System did not have exclusive possession and *control* during its exercise of its priority-use rights, during which Adamson’s injury occurred. The Ninth Circuit so concluded, based on the undisputed facts. *Certification Order* at 8. If the Ninth Circuit agreed with Plaintiffs that the lease terminology alone is dispositive, it never would have asked the certified question.

Nor has the Ninth Circuit asked this Court to interpret the lease or decide the issue of control. Rather, the Ninth Circuit has told this Court that the Ferry System had exclusive possession—*control*—during its use of the Marine Facilities. *Certification Order* at 8. The question for this Court is whether the fact that the Ferry System had exclusive possession of the Marine Facilities only during its use of those facilities—and not 24 hours a day, seven days a week, continuously throughout the lease term—means that the Port retained the liability of a possessor. This Court’s precedents clearly point to the answer: “No.”

Chief among those precedents are *Hughes v. Chehalis School District No. 302*, 61 Wn.2d 222, 377 P.2d 642 (1963), and *Barnett v.*

Lincoln, 162 Wash. 613, 299 P. 392 (1931). This Court recognized in both *Hughes* and *Barnett* that an agreement that conveys exclusive possession and control creates a landlord-tenant relationship, even where the tenant's use is periodic and brief. See *Hughes*, 61 Wn.2d at 224-26 (agreement for use school hall for one evening for annual event was a lease); *Barnett*, 162 Wash. at 617-21 (agreement including preferential-use rights to berthing space and wharves was a lease). These cases speak directly to the certified question, yet Plaintiffs do not attempt to distinguish *Hughes* factually, and they do not address *Barnett* at all. Nor do Plaintiffs offer any compelling reason why the result should be different here.

Consistent with *Hughes* and *Barnett*, this Court should hold that the Port did not remain in the position of possessor of the ramp during the Ferry System's use of the Marine Facilities just because that use was not continuous during the entire term of the lease. Under long-established precedent, control is critical because control means authority to act to prevent injury. To exclude short-term or periodic leases from this principle would mean that a landlord, like the Port here, would be subject to liability despite not having such control. The relevant time period for purposes of this Court's analysis should be the time when the Ferry System was exercising its priority-use rights. Per the Ninth Circuit, the Ferry System had exclusive control during that time. *Certification Order* at 8. The Port was thus not subject to liability as a possessor.

2. A covenant to repair or maintain does not put the landlord in the position of a possessor.

The certified question also asks whether the existence of the repair and maintenance covenants in the Port’s lease with the Ferry System put the Port in the position of possessor of the Marine Facilities at all times, including during the Ferry System’s use of those facilities. The answer to that question should also be “no.”

As already mentioned, Plaintiffs’ argument regarding the repair and maintenance covenants focuses on whether the Port *breached* those covenants—an issue immaterial to the certified question. To the extent Plaintiffs address the authorities cited by the Port, they do so only in the context of arguing that the jury was justified in finding that the Port breached the repair and maintenance covenants. *See Resp’ts Br.* at 38-39 (discussing *Resident Action Council v. Seattle Housing Auth.*, 162 Wn.2d 773, 175 P.3d 84 (2008); *Lemm v. Gould*, 425 S.W.2d 190 (Mo. 1968)). Thus, Plaintiffs knock down a strawman argument that “something more” than the presence of a repair covenant in a lease is necessary to impose liability for a *breach* of that covenant (again, irrelevant to the certified question), but fail to address whether something more than the presence of a repair covenant in a lease is required under Washington law to establish that a landlord *retained control* over the leased premises, for purposes of being subject to liability as a possessor.

Something more is, in fact, required. Plaintiffs fail to acknowledge this Court’s holding in *Resident Action Council* that performing a duty to repair and maintain “is not tantamount to asserting a right of control.” 162

Wn.2d at 780-81. That case is not distinguishable on the ground that it did not involve “landlord liability.” *Resp’ts Br.* at 39. It involved the precise issue raised here: whether a landlord retained control of part of the leased premises (the entry door to each unit) by virtue of its duties to repair and maintain that part. *See Resident Action Council*, 162 Wn.2d at 780-81. In holding that the landlord did *not* retain control, this Court distinguished between common areas, over which the landlord retained possession, and areas appurtenant to the lease premises, over which possession passed to the tenant, notwithstanding the landlord’s repair and maintenance duties. *Id.*

This Court is not the only one to hold that repair and maintenance duties do not amount to retained control. In a landlord-liability case where the landlord had reserved the rights to inspect and repair the leased premises, the New Mexico Supreme Court held there was no indication that the property owner was anything “more than a non-possessory landlord.” *Gabaldon v. Erisa Mortg. Co.*, 990 P.2d 197, 204 (N.M. 1999).

Here, as in *Resident Action Council* and *Gabaldon*, possession of the leased premises passed to the tenant. Significantly, although the Port had inspection, repair, and maintenance duties, the Ninth Circuit has sensibly determined that the lease provision requiring the Port to discharge those duties only at “reasonable times” meant that it could do so only “when the Ferry was not docked.” ER 348 (§ 5.1(8)). This confirms the exclusivity of the control the Ferry System had over the Marine Facilities during use. Although Adamson asserts that “[t]he Ninth Circuit panel erroneously believed that the Port could not access the ramp to meet its obligations while

an AMHS [vessel] was docked” (*Resp’ts Br.* at 7 n.8), the Ninth Circuit’s fact recitation, again, binds this Court.

Consistent with *Resident Action Council* and *Gabaldon*, this Court should hold that the Port’s repair and maintenance duties under its lease with the Ferry System did not amount to retention of control sufficient to put it in the position of possessor of the Marine Facilities at all times, including during the Ferry System’s use of those facilities.

D. Landlord nonliability is the general rule, not an exception to a general rule of liability.

A basic legal premise of the Ninth Circuit’s certification order is that “as a general rule property that is conveyed to a lessee becomes the responsibility of the lessee, and the landlord is no longer treated as a possessor of land.” *Certification Order* at 7. Plaintiffs challenge this premise as “incorrect” and “erroneous.” *Resp’ts Br.* at 16 n.16, 31. They assert that Adamson was the Port’s business invitee regardless of its status as a landlord. The Ninth Circuit is correct, not Plaintiffs: the general rule is that a landlord does not have the liability of a possessor of land, and its tenant’s employees are not the landlord’s invitees.

Plaintiffs’ assertion that a “premises owner” owes a duty of reasonable care to invitees overlooks that possession, not ownership, determines whether a duty is owed. *Resp’ts Br.* at 18. Washington has adopted sections 343 and 343A of the Restatement (Second) of Torts on premises liability. *See Iwai v. State, Employment Sec. Dep’t*, 129 Wn.2d 84, 93-94, 915 P.2d 1089 (1996). Liability under those sections is premised

on being a “possessor of land.” *Id.* (quoting RESTATEMENT (SECOND) OF TORTS §§ 343, 343A (1965)); *see also Pruitt*, 128 Wn. App. at 331 (“By its terms, [§ 343] applies only to one who is a ‘possessor of land.’”).

In the context of a lease, section 343 of the Restatement “applies only to common areas...because by definition a landlord is not the ‘possessor’ of non-common areas.” *Pruitt*, 128 Wn. App. at 331. A landlord remains in possession of common areas, and the tenant is the landlord’s invitee in those areas. *Mucsi v. Graoch Assocs. Ltd. P’ship No. 12*, 144 Wn.2d 847, 855, 31 P.3d 684 (2001). But as to non-common areas, a lease conveys possession and control of the subject property to the tenant. *Regan*, 76 Wn.2d at 504.

Adamson undisputedly was an invitee, but only of her employer, the Ferry System, and not the Port. Plaintiffs fail to grasp that Adamson can be deemed the Port’s invitee only if the Port was in possession of the Marine Facilities when she was injured. If the Ferry System exclusively possessed the Marine Facilities when Adamson was injured, then she was only the Ferry System’s invitee, and not the Port’s.

As stated in the Port’s opening brief: “The landlord, having surrendered possession of the leased premises, generally is not subject to liability to a tenant for injuries caused by a condition on the land.” *Port’s Opening Br.* at 10 (citing *Regan*, 76 Wn.2d at 504; *Hughes*, 61 Wn.2d at 224-25). In general, the tenant “takes the property as he finds it, with all existing defects which he knows or can ascertain by reasonable inspection.” *Hughes*, 61 Wn.2d at 225.

Plaintiffs offer no support for their assertion that “this Court has subsequently ameliorated the harshness” of the rule set forth in *Hughes*. *Resp’ts Br.* at 34. Plaintiffs argue that exceptions now exist that give rise to liability where the landlord (1) fails to disclose known, hidden defects, (2) breaches a covenant to repair or maintain the premises, or (3) retains possession over part of the premises (common areas). *Id.* at 35. But these exceptions are not new. Indeed, as Plaintiffs themselves acknowledge in a footnote, this Court recognized them even before *Hughes*. *Id.* at 34 n.31.

Moreover, as the New Mexico Supreme Court held, “the exceptions to the general rule of non-liability and references to Restatement sections outlining the duties of a *possessor* of property...provide no basis for the expansion of *non-possessory* landlords’ duties.” *Gabalton*, 990 P.2d at 204. “[T]he legal position of a non-possessory landlord is not one of immunity or privilege[, it] is simply the same legal position offered by sellers of property. They are simply not, as a matter of law, responsible for what takes place on land they do not possess, and do not have a right to control.” *Id.*

Stare decisis requires a clear showing that an established rule is incorrect and harmful before it may be abandoned. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 278, 208 P.3d 1092 (2009). This “prevent[s] the law from becoming ‘subject to incautious action or the whims of current holders of judicial office.’” *Id.* (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). Plaintiffs have not undertaken to show that this Court’s longstanding

precedents keying premises liability to possession are incorrect or harmful. And the Legislature’s lack of action to modify this Court’s precedents in this area “adds weight to the conclusion that they have not been harmful.” *Deggs v. Asbestos Corp.*, 186 Wn.2d 716, 729, 381 P.3d 32 (2016).¹⁰

Plaintiffs rely primarily on two cases to support their argument that Adamson was the Port’s invitee, despite the existence of a lease between the Port and her employer: *Afoa I*, 176 Wn.2d 460, and *Ford v. Red Lion Inns*, 67 Wn. App. 766, 840 P.2d 198 (1992). Both cases are inapposite because, in both, the defendant retained a right of control over the use of the premises by virtue of its business operations on the premises.

In *Afoa I*, the plaintiff, Afoa, was injured while driving an industrial vehicle on the airfield at Sea-Tac Airport. 176 Wn.2d at 464-65. The Port leased the airfield area to airlines “subject at all times to the exclusive control and management by the Port.” *Id.* at 465. Afoa’s employer, EAGLE, was engaged to move aircraft on the airfield under a license agreement with the Port of Seattle that required EAGLE to “abide by all Port rules and regulations and allows the Port to inspect EAGLE’s work.” *Id.* The question was whether Afoa was an invitee of the Port of Seattle or merely a licensee. *Id.* at 467-68. This Court held that Afoa was the Port of Seattle’s invitee because “the Port is in the business of running an airport, and Afoa was doing airport work.” *Id.* at 468.

¹⁰ Importantly, the Legislature *has* acted to change the law in the area of residential tenants. *See* Residential Landlord-Tenant Act, ch. 59.18 RCW, and specifically RCW 59.18.060 (imposing various duties on residential landlords). That the Legislature has not acted to change the law for commercial leases is evidence that the Legislature sees no good policy reason to change that law, as it has been laid down in this Court’s decisions.

In *Ford*, the plaintiff’s employer rented 30 motel rooms from Red Lion Inns and contracted to reserve a portion of the motel parking lot. 67 Wn. App. at 767-68. The plaintiff, Ford, slipped on ice in the reserved parking area. *Id.* Ford contended, and Red Lion did not dispute, that Ford was its invitee. *Id.* at 769. The Court of Appeals agreed because Ford “was injured while acting in his capacity as an employee of a company that leased rooms and parking stalls from Red Lion—an activity integral to Red Lion’s business[.]” *Id.* at 770. The Court of Appeals held that Red Lion could be subject to liability because, as a motel operator, it was a “possessor of land” as to the area where Ford was injured. *Id.* at 770.¹¹

A business invitee 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 land.*’” *Afoa I*, 176 Wn.2d at 467 (quoting *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986) (quoting RESTATEMENT (SECOND) OF TORTS § 330 (1965)) (emphasis added)). The record does not support Plaintiffs’ assertion that the Port is “[o]bviously... in the business of running a ferry terminal.” *Resp’ts Br.* at 20. Certainly, the record reflects that the Port operates and manages the common areas of the terminal. But Adamson was not injured in a common area. She was injured within the Marine Facilities, an area where at all relevant times the

¹¹ Because in *Ford* the motel owner (Red Lion) *did not dispute* that it owed a duty of care to Ford as the motel’s business invitee, 67 Wn. App. at 769, the Court of Appeals had no occasion to address the legal principles that govern the disposition of Plaintiffs’ claim to be a business invitee of the Port, beyond simply applying the law of business invitee given the concession made by the Red Lion. Ultimately, the party in Adamson’s position lost because the application of that law in the circumstances—yet another slip-and-fall involving an icy condition voluntarily encountered by a claimant—was clear.

Port's role was strictly as lessor and where the Ferry System exercised exclusive control, including over all equipment, employees, contractors.

The Marine Facilities are not analogous to the Sea-Tac airfield in *Afoa I* or the hotel parking lot in *Ford*. Unlike here, the plaintiffs' employers in those cases had no right to exclude the premises owners from the areas where injury occurred. The premises owners retained the right to control the areas and their use at all times. Here, the Ninth Circuit has told this Court that the Ferry System exercised exclusive possession and control over the Marine Facilities during its use of those facilities. In answering the certified question, this Court should hold that such control is dispositive.

III. CONCLUSION

In response to the certified question, this Court should apply its precedents to hold that a landlord does not become subject to possessor liability, despite the tenant's exclusive control, merely because the lease provides (1) the landlord may allow other uses if the tenant's use is not continuous throughout the lease term and (2) the landlord has duties to repair and maintain the premises.

Respectfully submitted this 29th day of October, 2018.

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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 an employee at Carney Badley Spellman, P.S., 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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DATED this 29th day of October, 2018.



Patti Saiden, Legal Assistant

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