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TREATED AS PLAINTIFFS BRIEF

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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BRIEF OF RESPONDENTS

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A. INTRODUCTION

Shannon Adamson, a crew member of the Alaska State ferry M/V COLUMBIA, was severely injured when the passenger ramp owned by the Port of Bellingham (“Port”) connecting her vessel to the Port’s Bellingham Cruise Terminal (“Terminal”) collapsed. The Port leased a portion of the Terminal to Shannon’s employer, the Alaska Marine Highway System (“AMHS”).<sup>1</sup> Aware of the ramp collapse hazard since 2008 and responsible for its repair and mechanical/structural defects, the Port took no steps to remedy the ramp’s hazard or to tell persons like Shannon, working on or near the ramp, of its specific danger. After a lengthy federal court trial in which the jury was instructed largely from pertinent WPIs on liability arising from three distinct sources for the duty the Port owed Shannon under Washington law, the jury returned a verdict of \$16.007 million for Shannon and her husband, Nicholas.

On appeal, the parties argued the three distinct duty sources referenced above. A Ninth Circuit panel decided *sua sponte* to certify Washington law duty issues to this Court.

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<sup>1</sup> The complete 2009 lease is at ER 334-65. Excerpts of the lease were exhibit 114. ER 838-47. An earlier lease is at ER 366-419. The Port’s obligation regarding the premises in the 2009 lease, ER 343-45, mirrors that in the earlier lease. ER 381-86.

In responding to the certified questions, the Port readily glosses over the facts bearing on its egregious negligence that nearly killed Shannon, resulting in her extensive, life-altering damages. It misstates the facts relating to AMHS's use of a portion of its Terminal premises. It engages in rank speculation regarding the Ninth Circuit panel's reasons for its certification order. It even attempts to have this Court alter the legal issues to be decided without forthrightly stating that it is doing so.

This Court can answer the specific questions posed by the federal court and address all three duty issues because under the circumstances did the Port's "priority use" of the ramp negate its duties in tort and under the lease. Once it analyzes the three duty sources before the jury, this Court will conclude that the Port owed Shannon a duty as a premises owner, as a premises owner of a multi-employer worksite when it created the workplace hazard that injured Shannon, and as a landlord with regard to the ramp. As the jury found, the Port breached these duties regarding its passenger ramp, although the injury-causing condition on the ramp could have been eliminated by the installation of a single wire costing a dollar and a small investment of an electrician's time.

## B. CERTIFIED ISSUES AND ANSWERS

The Ninth Circuit’s order certifying a question to this Court, 899 F.3d 1047, 1051-52 (9th Cir. 2018), (*see* Appendix), articulates the question for this Court as follows:

Is party A (here the Port of Bellingham) liable as a premises owner for an injury that occurs on part of a leased property used exclusively by party B (here the Alaska Marine Highway System – the “Ferry”) at the time of the injury, where the lease has transferred only priority usage, defined as a superior but not exclusive right to use that part of the property, to party B, but reserves the rights of party A to allow third-party use that does not interfere with party B’s priority use of that part of the property, and where party A had responsibility for maintenance and repair of that part of the property?

Perhaps stated more broadly, the question of Washington law presented is whether priority use can be considered to give exclusive control, and if so in what circumstances.

The answer to the first question is YES. The answer to the second question is NO.

#### C. STATEMENT OF THE CASE

The Ninth Circuit panel’s 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. The Port’s opening brief does not assist the Court with regard to the certified questions because it fails to accurately describe the facts that were before the jury in the district court. The Port repeatedly implies that AMHS had what amounted to “exclusive” control of what it describes as the Terminal’s marine facilities. In making that factual

argument, rejected by the jury,<sup>2</sup> the Port misstates the record. Consequently, the Adamsons provide this more accurate statement of the record.

The Port's Terminal is large, built as a site for general marine transportation, including cruise ships. ER 819; RT (3/25/16):1071-84. In its order at 4-6, the Ninth Circuit panel did not fully appreciate the Terminal's physical configuration and the actual role of the various entities in its operation, referencing only the parties' lease, and omitting consideration of the Terminal Services Agreement that further documents the Port's extensive Terminal responsibilities. SSER 42-45. Throughout its brief, the Port persistently misrepresents the small part of the overall Terminal actually leased to AMHS.

The Port first leased the Terminal to AMHS in 1989, and the lease was renegotiated in 2009. AMHS leased a relatively small portion of the Terminal, ER 340 (§ 1.2), and operationally, AMHS used the Terminal only for a short period of time.<sup>3</sup> The Terminal has parking facilities, passenger rooms, and other facilities open for public use; the passenger areas in the

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<sup>2</sup> The jury exonerated AMHS from any fault. ER 162. If the jury had concluded AMHS had control over the passenger ramp, rather than the Port, the jury's verdict would not have occurred.

<sup>3</sup> By the Port's own admission, br. of appellants at 4, AMHS ships were present at the Terminal for, at most, perhaps 24 hours in the course of an entire week, leaving the Terminal's marine facilities to the Port's exclusive control the remainder of the week.

Terminal account for the bulk of the building, and those areas remained entirely under Port control. RT (3/25/16):1068-81.

The lease explicitly distinguishes between “exclusive” and “priority” use, and gave AMHS “priority use” only over marine facilities, including the passenger ramp, vehicle ramp, and 125 of the Port’s parking places, not the “exclusive possession” the Port now argues. ER 340.<sup>4</sup> For example, the Port could allow other operators to use the Terminal,<sup>5</sup> although it had not entered into such agreements at the times pertinent to this case.

The Port retained use of most of the Terminal. RT (3/25/16):1071-84. Although parking spaces were allocated to AMHS, the Port retained complete control over all the other parking spaces. RT (3/25/16):1081. It retained control over passenger rooms and other Terminal facilities. RT (3/25/16):1068-81. It had security responsibilities at the Terminal. ER 351-52 (§ 10.1 – Port to develop security plan); SSER 42 (§ 1.2a – provide security services).<sup>6</sup> The Port was required to have 4 employees onsite every

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<sup>4</sup> For the 125 parking spaces, the Port provided “vehicle staging services.” SSER 42.

<sup>5</sup> There were many other Terminal users, including other passenger vessels that did not require use of the ship berth. <http://www.portofbellingham.com/206/passenger-ferries-charters> (last visited October 17, 2018).

<sup>6</sup> Such a security plan is “to ensure the application of security measures designed to protect the facility and its servicing vessels or those vessels interfacing with the facility, their cargoes, and persons on board at the respective MARSEC levels.” 33 C.F.R. § 101.105. The security measures that were the Port’s obligation are broad in their scope. 33 C.F.R. § 101.255; 33 C.F.R. § 105.200.

day that a ship was at the berth. SSER 45. The Port even had to clean the entire Terminal. ER 346-47 (§ 4.10); SSER 42 (§ 1.1).<sup>7</sup>

The passenger ramp was operated by a number of entities including the Port's own employees, Bellingham Stevedore Co. (by contract with the Port), AMHS employees, and AMHS's contractor's (Puglia Engineering) employees. SER 268-70. The Port's contractors maintained and repaired the passenger ramp. RT (3/21/16):12-13; (3/22/16): 298-99. The public routinely used the passenger ramp to access docked vessels. RT (3/29/16):1385-86.

The Ninth Circuit panel's order references sections of the Terminal lease, order at 6, but other lease terms are equally vital to this Court's resolution of the certified question. The order appropriately notes sections 1.3, 1.4, and 4.1, but does not mention the Port's structural repair obligation that extended to *any* improvements on the premises. ER 343. In § 4.7, the Port agreed to eliminate "Accident Hazards" by maintaining the premises "free of structural or mechanical hazards and in accordance with applicable building codes." ER 345. Critically, despite the Port's assertion that it had no ability to access the ramp to repair it, the Port had the right to enter the

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<sup>7</sup> The Port benefits in the millions of dollars paid by AMHS for the privilege of its ships and passengers utilizing the Terminal.

premises “*at all reasonable times*” to examine their condition under § 5.1(8) of the lease. ER 348.<sup>8</sup> The Port also had a contractual obligation in § 4.5 to provide an operations manual for the ramp that dictated how it was to be operated: “The state shall operate the Car and Passenger Ramp in compliance with procedures, specifications and other requirements contained in such operations manuals...” ER 394. Under the lease terms mentioned above, the Port retained specific, and *extensive*, control over key Terminal facilities generally and the ramp specifically; moreover, during the bulk of any week, the Port had exclusive control of the passenger ramp as no AMHS vessels docked at the Terminal.

That AMHS never had “exclusive” control over the ramp is further reinforced by § 6.1 of the lease. Under that provision, the parties agreed that “[i]n the event a third party asserts a claim for damages against either Lessor or [AMHS] in connection with the lease, the parties agree that either may take those steps necessary for the fact finder to make an allocation of comparative fault between Lessor and [AMHS]...” This provision would

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<sup>8</sup> The Ninth Circuit panel erroneously believed that the Port could not access the ramp to meet its obligations while an AMHS was docked. Order at 8-9. But that is contrary to the lease terms. The Port’s similar assertion in its brief at 2, 4-5, 33, that it could not access the ramp to address any mechanical or structural defects in it is also wrong. At ER 582-83, cited by the Port in its brief at 33 as the basis for claiming Port staff could not access the ramps while an AMHS ship was docked at the Terminal, the Port’s Dave Warter, the Terminal Manager, *admitted* that he went on the car ramp while vessels were docked. When the lease says the Port may access the ramp at *all* reasonable times, it means just that.

be entirely superfluous were the ramp and other “priority use” portions of the premises under the sole and exclusive control of AMHS. Had the Port intended to make AMHS exclusively responsible for the repair, maintenance, and upkeep of all portions of the leased premises it could have made that obligation clear and unambiguous in its lease agreement. *Compare Leonard v. Prince Line*, 157 F.2d 987 (2nd Cir. 1946) (City leased pier to shipping line with covenant requiring Prince Line to “maintain the superstructure of said wharf property and the structures thereon ... in good and sufficient repair and condition”).

Notwithstanding the Ninth Circuit panel’s reference to “exclusive” and “priority” use, the lease terms referenced above document that factually and legally AMHS never had “exclusive” possession or control of the Terminal’s passenger ramp, the car ramp, or the Terminal parking lot. But most critically, the Port’s counsel actually *admitted* to the district court that the Port controlled the entire facility. SER 262 (“we have always maintained control of the ramp...” “We have never elicited any evidence that we didn’t have control of the facility.”).

The Ninth Circuit order notes at 5 that the Port *knew* the Terminal’s passenger ramp was dangerous from a 2008 incident about which it had a detailed structural engineering extensive report, but it declined to fix the ramp or to specifically warn ramp operators like Shannon of its life

threatening hazard. The order was correct in that assessment particularly where the Port's counsel stated in response to a question from the court that no one from the Port would deny that the ramp represented a mechanical hazard. ER 659.

The record before the district court makes clear that the Port knew of the ramp's hazard. In 2008, AMHS Chief Mate Rich Preston was adjusting the ramp in order to load passengers. The ramp's controls allowed slack to be placed into the supporting cables, and then the locking pins to be withdrawn; the ramp fell about 18 inches. The event was captured on video. Ex. 6. Terminal manager Dave Warter came out of the building and helped Preston secure the ramp. RT (3/23/16):448-49.

The Port hired an outside engineering firm, Geiger Engineering, to determine if the ramp was damaged and, if so, to recommend repairs. Geiger produced a report which warned that with as little as 18 inches of slack in the cables, they could break, causing the ramp to completely collapse. ER 891-94. Geiger told the Port that the gangway controls should be interlocked to prevent a future collapse. ER 892.

Interlocking the controls was both easy and inexpensive.<sup>9</sup> All of the

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<sup>9</sup> Gerard Schaefer, a mechanical engineer and a licensed professional engineer, examined the passenger ramp and its control panel; he determined that the components to interlock the supporting cables and the locking pins were already in place, including a proximity sensor on the ramp, and a relay in the control panel. SER 195-206. Because the basic components were already in place, the interlock circuit only required the clipping of

components needed to interlock the pins and the cables were already in place, with one minor exception. SER 196-208, 322. A single piece of wire, costing roughly \$1 that an electrician could install in about 15 minutes in the ramp's control panel would have interlocked the cables and the pins, making a collapse impossible. SER 196-208, 322, 328. Shannon would not have been injured had the Port done so.

Before reading the report, the Port's managers had no idea that the ramp's controls could collapse the ramp. SER 58-59, 63-65, 92, 106. After reading the report, its three top managers *knew* that the ramp's controls could cause a collapse, severely injuring the operator. *Id.* The Port's Terminal manager, Dave Warter, thought that anyone who operated the ramp should be told of the collapse danger, SER 49, but he never told any ramp operators about its collapse danger. SER 49-50.<sup>10</sup> Warter's boss, Dan Stahl, admitted that he did not send the Geiger report to AMHS, and he

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one wire and installation of another. SER 322, 328. Schaefer testified that, from an engineering perspective, with such a simple fix the Port should have interlocked the cables and pins. SER 198. He noted that the first principle of engineering is to design out the danger, and to fix the control panel would have taken less than one hour, and involved one wire. SER 202-04. If that inexpensive wire had been installed, the ramp would not have collapsed, and Adamson would not have been injured. *Id.* The Port listed Garrett E. Smith, P.E., as an expert witness, Dkt. No. 129 at 8, but chose not to call him. Thus, Schaefer's testimony was uncontradicted.

<sup>10</sup> Elizabeth Monahan, the head of the Port's workplace safety committee, disclaimed any obligation by the Port to warn Puglia or the AMHS's workers of the collapse danger. SER 81-83.

never warned AMHS of the collapse danger. SER 86-88. After the 2008 incident, AMHS's Captain John Falvey asked the Port to take over ramp operations. Dkt. 169 (Falvey Dep. at 68-75). Stahl rejected Falvey's request, SER 103, even though a Port employee, Erik Tritz, was ready to do so, SER 272, and Warter knew of no reason preventing Tritz from assuming such responsibility. SER 55-56.

The Port deliberately chose not to interlock the ramp's pins and cables.<sup>11</sup> SER 109-14. The Port's engineer, Scott Wendling, made no root cause analysis,<sup>12</sup> did not try to operate the controls, did not look at the ramp's instructions, did not know that the Port lacked any training program whatsoever for the ramp's operation, and had no idea about which groups of employees operated the ramp. The Port made no inquiries about interlocking the controls. SER 107-14.

Adamson, an M/V COLUMBIA crew member, was severely injured on November 2, 2012, when the ramp collapsed. SER 285-96, 321. She had no idea that the ramp's controls could severely injure or kill her. SER 124-25. The Port's counsel conceded in opening statement that Shannon

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<sup>11</sup> In 2015, the Port interlocked the ramp controls to prevent a collapse after Shannon's injury. SER 40.

<sup>12</sup> Such an analysis was required by Washington workplace safety rules to ensure that the 2008 event would not be repeated. SER 165-66.

did not know that the controls were dangerous. RT (3/21/16):118.

The Adamsons filed the present action for damages against the Port in the United States District Court for the Western District of Washington alleging its negligence with regard to the ramp. ER 455-62. The case was assigned to the Honorable Marsha J. Pechman, an experienced district court judge who formerly served as a King County Superior Court judge. The Port moved for summary judgment on its liability as a premises owner/landlord under Washington law, and the district court denied that motion, determining that the Adamsons' negligence theory against the Port was predicated on three distinct Washington common law duties – the Port's duty as a premises owner in a multi-employer workplace to avoid creating a safe workplace hazard through an instrumentality it provided. Its duty as a premises owner to a business invitee; or its duty as a landlord to employees of a tenant. *See Adamson v. Port of Bellingham*, 2016 WL 362251 (W.D. Wash. 2016).<sup>13</sup>

The case was tried over 9 days. The district court properly instructed

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<sup>13</sup> During trial, the Port moved for judgment as a matter of law under FRCP 50(a), without a written motion, ER 481-98, and Judge Pechman denied that motion. ER 498. The Port resurfaced its duty issues post-trial, and the district court denied the Port's Rule 50(b) and 59 motions. On the duty issue, the district court's order is tart and to the point, noting the case was "heavily litigated over the course of eighteen months," and tried over eight days, stating the Port delayed resolution of the case by seeking "to revisit, after the fact, essentially every major decision made against it over the course of that litigation." ER 2.

the jury on the law, and it returned a verdict in favor of both Adamsons. ER 162. The jury specifically found the Port negligent in response to the question: “Was the Port of Bellingham negligent?” ER 161, and it also addressed three other separate, distinct bases for the Port’s negligence:

QUESTION 1A: Was the Port of Bellingham negligent with regard to the duty it owed to Ms. Adamson as a business invitee?

QUESTION 1B: Was the Port of Bellingham negligent as a landlord?

QUESTION 1C: Was the Port of Bellingham negligent in failing to perform its promise to perform repairs under the contract?

*Id.* It answered yes to each. *Id.* It concluded that neither the State of Alaska (AMHS), nor Shannon, was negligent. ER 162.<sup>14</sup>

#### D. SUMMARY OF ARGUMENT

Relying on cases that have been distinguished by this Court’s more recent treatment of premises liability issues and inapposite treatises, the Port attempts to stitch together an argument that contradicts black letter Washington law on the duty of a premises owner to a person utilizing its premises.

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<sup>14</sup> The Port *concedes* in its brief at 9 that if *any* of the three “liability theories” is viable, the jury’s overall verdict *must* be sustained.

The district court's WPI-based instructions outlined black letter rules of premises liability in instructing the jury. The jury found the Port 100% at fault for Shannon Adamson's injuries and exonerated AMHS and Shannon from *any* fault, a point the Port hopes this Court will not notice.

The district court correctly concluded that the Port owed Adamson duties under Washington law, whether such duties arose as a premises owner or as a landlord. Although the Port did not relinquish "exclusive possession" of the ramp to AMHS under the terms of the lease or in practice by virtue of giving AMHS "priority use" of a portion of the Terminal premises, as the jury effectively concluded in reaching its verdict, the Ninth Circuit's fixation on AMHS's "exclusive" as opposed to "priority" use does not alter the duties owed by the Port to Shannon.

The Port owed an overarching common law duty to Shannon, an invitee, to discover dangerous conditions on its premises and to warn about them or repair them as may be reasonably necessary to protect her even where it leased the premises. That common law duty extended specifically to particular aspects of the premises over which it retained control like the ramp here that caused Shannon's harm, and more generally for any hazards encompassed within the scope of Shannon's invitation to be on the Port's premises.

The Port was obligated to obey WISHA in its operation of the

Terminal. It owed a *non-delegable* duty to Shannon with regard to its Terminal premises, a multi-employer workplace with Port personnel and various contractors like AMHS, and the public being present, to provide a safe workplace where it specifically provided the instrumentality of Shannon's harm, the passenger ramp. That duty is unaffected by whether AMHS's use is "exclusive" or "priority."

As a landlord, despite its lease of a portion of the Port's Terminal to AMHS, the Port owed Shannon a duty of care with regard to its covenanted repair responsibility and its obligation to keep the ramp free of structural/mechanical defects. It owed Shannon a duty as a landlord to warn her of latent defects in the ramp. Those "landlord" duties are unaffected by the scope of AMHS's leased right to use the passenger ramp.

This Court should answer the first certified question YES, and the second question NO for the reasons enumerated in detail *infra*.

#### E. ARGUMENT

The Ninth Circuit order at 4 focuses on the Port's *defenses* to liability, first, and then asserts "The plaintiffs claimed and the district court held... that under the lease the Port was liable as a possessor of land for damages occurring on the ramp." For reasons that will be articulated *infra*, the panel's order at 6-9 offers an erroneous understanding of Washington premises liability law generally and simply fails to note at all the Adamson's

argument on the Port's liability as a premises owner with multiple employers on its premises. Each theory will be addressed in turn. Once appropriately addressed, this Court can conclude from the analysis of those duties that whether AMHS's use of the passenger ramp was "exclusive" or "priority" does not alter the jury's verdict. And, in fact, the Port had responsibility for the safety hazard in the passenger ramp to its operators like Shannon.

(1) The Port Owed Shannon an Overarching Common Law Duty of Care as the Port's Invitee When the Passenger Ramp Collapsed

The district court correctly instructed the jury on the Port's overarching common law duty of care as a premises owner in Instructions 26 and 27. ER 139-40.<sup>15</sup> See Appendix. The Ninth Circuit panel's order starts from an incorrect initial premise. Order at 7 ("As we understand Washington law, 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.")<sup>16</sup> The district court clearly understood in giving Instructions 25 and 27 that the overarching principle in Washington

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<sup>15</sup> Instruction 26 is derived from WPI 120.06. The Port nowhere suggests in its brief that this is not the overarching common law duty of care owed by a Washington premises owner.

<sup>16</sup> The panel's understanding of where Washington law imposes premises liability on a property owner regardless of the lease of the property, order at 7-8, is also flawed for reasons to be discussed *infra*.

law is that a possessor of premises owes a duty to public or business invitees who are on its premises. That overarching principle animates the analysis of the Port's duty to Shannon and any exceptions to that duty. Any restriction on that overarching principle such as a lease of the premises is *an exception or defense* to that overarching duty. The Port would have this Court start from the *exception*, not the general duty. The overarching common law rule animates the specific duty issues to be discussed *infra*.

Washington law has *long* followed the rule that a possessor of land owes a duty to avoid injuring a person who is permissively on the land by the possessor's affirmative acts of negligence. *Potts v. Amis*, 62 Wn.2d 777, 384 P.2d 825 (1963). *See Restatement (Second) of Torts* § 328E (defining possessor of land). Washington has adopted the common law duty of a premises owner established in the *Restatement (Second) of Torts* §§ 343, 343A. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 139, 875 P.2d 621 (1994) (adopting § 343A); *Degel v. Majestic Mobile Manor*, 129 Wn.2d 43, 49-50, 914 P.2d 728 (1996) (adopting § 343). The premises owner's duty in Washington varies on the basis of whether the injured person was a trespasser, licensee, or invitee.<sup>17</sup>

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<sup>17</sup> *E.g., Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 131-32, 606 P.2d 1214 (1980); *Younce v. Ferguson*, 106 Wn.2d 658, 662-66, 724 P.2d 991 (1986); *Iwai v. State*, 129 Wn.2d 84, 90-91, 915 P.2d 1089 (1996); *Musci v. Groach Assocs. Ltd. P'ship No. 12*, 144 Wn.2d 847, 854-55, 31 P.3d 684 (2001).

Premises owners owe invitees a duty of reasonable care requiring them to affirmatively discover dangerous conditions on their land and to make such repair, safeguards, or warnings as may be reasonably necessary for the protection of invitees under the circumstances. *Afoa v. Port of Seattle*, 176 Wn.2d 460, 469, 296 P.3d 800 (2013) (“*Afoa I*”); *Egede-Nissen*, 93 Wn.2d at 132; *Tincani*, 124 Wn.2d at 139; *Jarr v. Seeco Constr. Co.*, 35 Wn. App. 324, 326, 666 P.2d 392 (1983). Invitees entering the premise expects that they will be *safe*, and the premises owner must inspect its premises “to discover their actual condition and any latent defects, followed by such *repair, safeguards, or warning* as may be reasonably necessary for his protection under the circumstances.” *Degel*, 129 Wn.2d at 53 (emphasis added).<sup>18</sup>

The Ninth Circuit order does not address Shannon’s status as a Port invitee, except in passing,<sup>19</sup> although the district court ruled, and instructed the jury, that Shannon was the Port’s business invitee in Instruction 25. ER

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<sup>18</sup> Under the *Restatement* § 343, “[r]easonable care requires the landowner to inspect for dangerous conditions, ‘followed by such repair, safeguards, or warning as may be reasonably necessary for [a tenant’s] protection under the circumstances.’” *Tincani*, 124 Wn.2d at 139. Under § 343A, the landowner even has an obligation to specifically apprise invitees of known or obvious hazards on the premises, if that landowner should have anticipated that the invitee or its guest/employee would use the premises despite the hazard. *Id.* at 139-40 (distraction, forgetfulness, or foreseeable reasonable advantages from encountering the danger are factors supporting the § 343A duty).

<sup>19</sup> The panel’s order at 6 notes the Port’s argument that when the M/V COLUMBIA was in Port, Shannon was no longer a Port invitee, but somehow transformed into an AMHS invitee only.

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Recognizing the weakness of its position on Shannon's status, the Port does not dispute that she was an invitee, arguing instead that it was not a possessor of land. Br. of Appellant at 12-13. Indeed, the Port repeats its contention that Shannon was solely AMHS's invitee, albeit in a footnote. *Id.* at 13 n.10. But the Port's analysis is plainly flawed under Washington law.

This Court has long applied § 332 of the *Restatement (Second) of Torts*, recognizing that a person may be either a public or business invitee. *McKinnon v. Wash. Fed. Sav. & Loan Ass'n*, 68 Wn.2d 644, 650, 414 P.2d 773 (1966). Washington treats both concepts *broadly*. A public invitee is a member of the public invited to be on the premises for the purpose for which the premises were held open to the public. *Id.* A business invitee is one who is on the premises for a business purpose, conferring some economic benefit on the premises owner. *McKinnon*, 68 Wn.2d at 649-50. In *Afoa I*, this Court had no difficulty in perceiving that Afoa, employed by the licensee of one of its airline contractors to provide baggage handling services to the airplanes at SeaTac Airport, was an invitee of the Port of Seattle *as a matter of law*: "The Port is in the business of running an airport, and Afoa was doing airport work." 176 Wn.2d at 468. The Court *rejected* an argument similar to the one the Port advances here that the Seattle port's

contractor, not the Port, invited Afoa to the site. *Id.* at 469 (“The Port operates a complex commercial enterprise from which it substantially benefits, and contractors like [Afoa’s employer] are part of that enterprise.”). The Adamsons noted the long list of Washington cases where courts determined as a matter of law that persons were invitees in their Ninth Circuit brief at 27 n.11.

Shannon was an invitee as she was on the Port’s premises for the very public purpose of assisting in the operation of a public transportation system for AMHS, the Port’s commercial tenant; hers was not a “social” purpose for being there – she was working. Obviously, the Port is in the business of running a ferry terminal, and Adamson was doing work at the Terminal, preparing the passenger ramp in order to load and unload passengers. She provided the security required by federal statutes and regulations, 46 U.S.C. § 70103; 33 C.F.R. § 104.292, while on the Port’s property. *Restatement (Second) of Torts* § 345(1). Shannon was actually working as the vessel’s security mate when was injured, ER 615-16, 858-85; SER 133, and was within the scope of the Port’s invitation for that purpose. The district court was correct that Shannon was the Port’s business invitee as a matter of law.

Even where a premises owner leases the premises, it is not absolved of its common law duty to invitees so long as the invitees are acting within

the scope of the invitation. That duty extends beyond common areas or aspects of the premises over which it retained control. In *Ford v. Red Lion Inns*, 67 Wn. App. 766, 840 P.2d 198 (1992), *review denied*, 120 Wn.2d 1029 (1993), Ford's employer leased 30 rooms and a designated portion of the parking lot from a hotel. The designated parking lot area had been barricaded for Ford's employer's exclusive use. Snow and ice made the lot slippery. Ford, helping to remove the barricades to allow his employer's vehicles into the designated area, fell and was injured. Although the rooms and an area of the parking lot was reserved for Ford's employer's exclusive use, the court held that Ford was *the hotel's business invitee*. *Id.* at 770. Notwithstanding the hotel's lease of a part of the parking lot to Ford's employer, Ford was the hotel's invitee, *not his employer's*.<sup>20</sup>

Similarly, in *Afoa I*, the Port of Seattle leased its airport facilities to

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<sup>20</sup> A public invitee case, *Brunton v. Ellensburg Washington Lodge No. 1102 of Benev. & Protective Order of Elks*, 73 Wn. App. 891, 872 P.2d 47, *review denied*, 124 Wn.2d 1023 (1994) is also instructive. There, the court held that where the Elks leased their hall for a wedding and a guest fell, injuring herself, the guest of a tenant was an "implied invitee" of the Elks as the landlord. *See Restatement* § 359, illus. 3:

3. A leases his wharf to the B Steamship Company. The wharf is in a dangerous condition of disrepair, as A knows or by a reasonable inspection could have discovered. Some months after the steamship company takes possession, C, a passenger of the steamship company, is hurt by the bad condition of the wharf. A is subject to liability to C.

*See also, Fitchett v. Buchanan*, 2 Wn. App. 965, 472 P.2d 623, *review denied*, 78 Wn.2d 995 (1970) (landlord was liable to the plaintiff, a public invitee, for the risk of a wheel coming off a race car and flying into the grandstand even where lessor claimed that lessee had the duty to make the race track premises safe).

airlines. In turn, EAGLE contracted with the airlines for ground services like loading and unloading, but was licensed as well by the Port to work on the premises. Afoa worked for EAGLE when he was injured. 176 Wn.2d at 465. This Court *rejected* the notion that the Port's elaborate legal relationship with its airlines and EAGLE precluded it from owing a duty to the plaintiff, and specifically concluded that the Port could owe a common law duty to the plaintiff as a business invitee. *Id.* at 469. There is not even *a hint* in *Afoa I* supporting the Port's theory here that a premises lease invalidated Afoa's status as the *Port's* invitee. Afoa's dealings with the Seattle port were connected with its business interests and did not matter that the port leased the premises to airlines.<sup>21</sup>

Here, the Port operated its Terminal as a public business. Without ships, vehicles and passengers, the Terminal is useless. Thus, Shannon's actions in preparing to load passengers and providing security were integral to the Port's "business and inuring directly to its benefit" just as in *Ford* and *Afoa I*. The Port and AMHS had a mutual business interest in loading passengers at the Terminal; the Port knew AMHS employees would operate

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<sup>21</sup> Invitees retain their status as such so long as they remain in the area of invitation. *Tincani*, 124 Wn.2d at 140-41. In a commercial context, an invitee need not be present in an "common area." The only requirement is to be in the area of invitation. Neither Ford nor Afoa were in "common areas" as that term is understood. Afoa was in the secured tarmac area, and Ford was in a barricaded portion of a parking lot leased for the exclusive use of his employer.

the ramp so that Shannon was within the scope of the Port's invitation. Shannon was on the Port's property in relation to a mutual business interest; she was *the Port's* invitee as a matter of law.

In sum, the Port had an overarching duty to make its premises, including the passenger ramp, safe for an invitee like Shannon.

(2) The Mere Fact that the Port Leased a Portion of Its Terminal to AMHS Does Not Eliminate the Duty It Owed to Shannon

The district court determined that there were three distinct sources for a duty owed by the Port to Shannon. 2016 WL 362251 (identifying Port's duties under "owner liability" involving WISHA compliance, "premises liability," and "landlord liability." ).<sup>22</sup> The court subsequently instructed the jury accordingly, and the jury ruled on those bases in the Adamsons' favor. *None* of those theories is affected by the fact that AMHS had "priority use" of a portion of the Terminal.

(a) As the Terminal Owner with Multiple Employers Working There, the Port Owed Shannon a Duty of Care Particularly Where It Created the Ramp Hazard

The Port owed Adamson a duty of care as a possessor of the Terminal premises with multiple employers on those premises. The district court, citing *Afoa I*, had little difficulty in its order on the post-trial motions

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<sup>22</sup> Notably, the court stated: "The Court does not find that, as a matter of law, the Port has established that the 'priority use' rights granted by their lease with AMHS are the legal equivalent of 'exclusive control' or 'exclusive possession.'" *Id.* at \*5.

rejecting the Port's contention that it had no duty to Shannon under WISHA where it provided the very hazard that harmed her. ER 12-15. The court properly instructed the jury on WISHA in Instruction 30. ER 143. *See* Appendix.

The multi-employer worksite duty issue is nowhere mentioned in the Ninth Circuit's order, but the WISHA-based duty of an owner of premises on which multiple parties are working is an important facet of the Port's duty to Shannon as a premises owner.

The Adamsons presented substantial evidence at trial that the Port's terminal was a multi-employer premises. At least four different employers had employees working in the facility. The ramp itself was operated by longshore union members, the Port's employees, Puglia's employees, and the AMHS's employees. SER 48-49. Moreover, Bellingham police officers provided security in the parking lot. Ex. 7. The travelling public obviously utilized the Terminal on a daily basis. Shannon's expert, Richard Gleason, a certified workplace safety specialist who teaches WISHA/OSHA workplace safety classes and a University of Washington marine terminals safety course, SER 146-47, testified that because the Port owned both the facility and specifically the ramp, the Port is a "controlling employer" with responsibility for the facility. SER 157-58. Furthermore, as an employer involved in a multi-employer site: "you can't create a hazard

for somebody else. You have a responsibility to correct hazards if they're identified." SER 157. He opined that the Terminal was a multi-employer worksite. SER 158-59. The Port offered no expert testimony on this issue, leaving that testimony *unrebutted*.

The Adamsons also adduced evidence that the Port breached its duty regarding the ramp at issue. Gleason testified that the Port lacked a functioning workplace safety program. SER 151-52. He said that the Port should have systematically followed up the 2008 incident, but it did not. SER 153-54, 160, 165-66. If the Port had adhered to the workplace standard of care, the control panel's dangers would have been eliminated. SER 165-66. The Port listed Captain Anthony Ford, a retired Coast Guard officer, to testify on workplace safety issues. Dkt. No. 129 at 8. The Port did not call Captain Ford. Gleason's testimony was uncontradicted.

The Port gives scant attention in its brief<sup>23</sup> to the fact that under Washington law a premises owner with multiple employers working on its premises has a duty to provide a safe workplace by eliminating any hazard it created through instrumentalities it provided; it may be liable to employees of those employers injured while working on its premises.

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<sup>23</sup> The Port acknowledges in its brief at 7 that this was an issue before the jury, but it tries to avoid the issue by its subsequent regrouping of the issues the jury decided. Br. of Appellant at 7-8. Thereafter, the Port is silent on the issue in its brief despite the fact that it is an issue of premises owner liability.

Instead, it engages in rank speculation, asserting in its brief at 19-20 that the Ninth Circuit panel must have determined that the Port was entitled to judgment as a matter of law on this theory. Of course, the Ninth Circuit panel's order *nowhere* says that. And the Port mischaracterizes the Adamsons' argument on this point. As a facet of its duty as a premises owner where multiple employers were present, the Port had a duty not to provide defective instrumentalities to those working there. In fact, it *admits* as much. Br. of Appellant at 35 ("To be sure, a landlord remains subject to liability for injuries caused by equipment remaining within the landlord's control that is necessary to the tenant's use of the leased premises."). By its misdirection, it hopes to distract the Court from the *non-delegable* duty it owed Shannon.

Washington has long recognized a *distinct* common law and statutory duty on the part of a property owner to employees working on the owner's premises.<sup>24</sup> In *Kelley v. Howard S. Wright Construction Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978), this Court recognized that a general contractor owed an employee of a subcontractor a duty based on WISHA,

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<sup>24</sup> Workplace safety even enjoys a constitutional status in Washington law. Article II, § 35 of the Washington Constitution mandates that 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." *See* RCW 49.17.010 (WISHA's public policy workplace safety, implementing article II, § 35).

RCW 49.17. *See also, Afoa I*, 176 Wn.2d at 470. That duty is *non-delegable* to ensure that workplace safety regulations applicable to a general contractor’s employees, as well as the subcontractor’s were met, and extends to persons who were not a party to a contract between the general and the subcontractor, *i.e.* the employees of the subcontractor. 90 Wn.2d at 333. These cases often addressing general contractor or the premises owner’s equivalent liability have focused on the degree of control exercised by the premises owner over work on a job site.<sup>25</sup>

A distinct basis for a premises owner’s liability in the multi-employer workplace context involves the situation where the owner provided the instrumentality of the plaintiff’s harm. Here, *the Port provided the ramp, the instrumentality of Shannon’s harm*. Under the multi-employer worksite doctrine, where the premises owner creates the hazard at issue, the owner must remedy it. Under the OSHA specific duty clause, 29 U.S.C. § 654(a)(2), federal circuit courts have adopted the multi-

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<sup>25</sup> *See, e.g., Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 126, 52 P.3d 472 (2002). *But see, Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 85 P.3d 918 (2004). In *Afoa I*, this Court discussed an owner’s control of the premises. 176 Wn.2d at 472. In *Afoa v. Port of Seattle*, 191 Wn.2d 110, 121, 421 P.3d 903 (2018) (“*Afoa II*”), this Court reaffirmed that jobsite owners have a *non-delegable* duty to comply with WISHA workplace safety mandates if they exercise “a sufficient degree of control over the work.” Specifically, the Court reiterated that where a jobsite owner has a right to exercise control over a facility, it has a duty, within that scope of control, to provide a safe workplace. *Id.* Here, the Port’s counsel *admitted* the Port controlled the ramp. SER 262. This Court could readily determine that the Port breached its non-delegable workplace safety duty to Shannon Adamson, but it need not do so.

employer 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.” *Martinez Melgoza & Assocs. v. Dep’t of Labor & Indus.*, 125 Wn. App. 843, 848-49, 106 P.3d 776, *review denied*, 155 Wn.2d 1015 (2005).<sup>26</sup> It was a question of fact for the jury as to whether the Port created the hazard. *Id.* at 850-51.

In *Goucher v. J.R. Simplot*, 104 Wn.2d 662, 671, 709 P.2d 774 (1985), this Court looked to OSHA cases to interpret WISHA, holding that an employer like the Port that creates the safety hazard (*i.e.* the ramp here), is liable to employees of another employer. In *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 459-64, 788 P.2d 545 (1990), the Court reaffirmed *Goucher* and applied the multi-employer worksite doctrine to an employer who *controlled* a safety hazard in a construction worksite *created by another employer*, concluding that it is “the general contractor’s responsibility to furnish safety equipment or to contractually require subcontractors to

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<sup>26</sup> See also, *Beatty Equipment Leasing, Inc. v. Secretary of Labor, U.S. Dep’t of Labor*, 577 F.2d 534, 536-37 (9th Cir. 1978) (imposing liability on a subcontractor that creates a hazard or has control over a condition on a multi-employer worksite); *Krueger v. Vaagen Bros. Lumber, Inc.*, 849 F.2d 1476 (9th Cir. 1988) (applying Wash. law); *Universal Construction Co., Inc. v. OSHA*, 182 F.3d 726, 728 (10th Cir. 1999) (multi-employer doctrine applies to employer that creates a workplace hazard).

furnish adequate safety equipment relevant to their responsibilities.” *Id.* at 464.<sup>27</sup>

In *Afoa I*, this Court also reaffirmed the principle that a premises owner with multiple employers on its premises owes a duty to persons on those premises who are injured by a hazard it creates. 176 Wn.2d at 472 (“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.”). This Court found issues of fact with regard to the Port of Seattle’s creation of the hazard that injured Afoa. *Id.* at 474.

This duty is reinforced by WAC 296-155-040(1) that requires a jobsite owner to provide a workplace “free of recognized hazards” likely to cause injury. Moreover, that same jobsite owner must not “[f]ail or neglect to everything reasonably necessary to protect the life and safety of employees.” WAC 296-155-040(6)(d). Similarly, WAC 296-800-11010–

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<sup>27</sup> As to a specific hazard created by an entity on a multi-employer work site, overall site control is unnecessary for liability to attach. In *Ward v. Ceco Corp.*, 40 Wn. App. 619, 699 P.2d 814, *review denied* 104 Wn.2d 1004 (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 as against falls as required. Ward, the general contractor’s employee, 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. This Court cited *Ceco* with approval in *Stute*. 114 Wn.2d at 461.

11030<sup>28</sup> makes clear that the Port had an independent, specific WISHA-based duty as a premises owner to provide safe equipment on the jobsite for Shannon’s use. *See Western Oilfields Supply v. Wash. State Dep’t of Labor & Indus.*, 1 Wn. App. 2d 892, 408 P.3d 711 (2017) (under WISHA, employers have a duty to abate “recognized hazards” on the job by employing feasible and useful means to do so). Here, the Port knew of the ramp hazard from the Geiger report and could have abated the ramp’s hazard by the simple expedient of installing a wire, requiring only a small expense of a few minutes of an electrician’s time.

As noted *supra*, the Port’s duty as a premises owner to ensure workplace safety where multiple employers are present is *non-delegable*. *Afoa II*, 191 Wn.2d at 139-42.<sup>29</sup> Thus, whether the Port conferred “priority” or “exclusive” use over a portion of its Terminal premises is *irrelevant* to the duty it owed Shannon. Because ample evidence supported the jury’s determination that the Port created the ramp hazard that injured Shannon

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<sup>28</sup> WAC 296-800-11010 tells employers that they must provide and use safety devices and safeguards that are adequate to ensure workplace safety. WAC 296-800-11020 prohibits employers from allowing employees onto unsafe workplaces. WAC 296-800-11030 prohibits a premises owner from constructing an unsafe workplace. Critically, “this rule applies to employers, owners, and renters of property used as a place of employment.”

<sup>29</sup> *See, e.g., Millican v. N.A. Degerstrom*, 177 Wn. App. 881, 897, 313 P.3d 1215 (2013), *review denied*, 179 Wn.2d 1026 (2014) (WISHA compliance is non-delegable; general contractor’s agreement with subcontractor that subcontractor would comply with WISHA did not discharge the general’s primary responsibility for workplace safety compliance).

and it failed to correct that hazard, this Court can readily answer the Ninth Circuit's first question: YES.

(b) As AMHS's Landlord, the Port Owed Shannon a Duty of Care

The Ninth Circuit panel's order starts from the erroneous premise that Washington law always exonerates a landlord from any premises owner liability upon the leasing of the premises. Order at 7 ("...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."). That is a *vast* oversimplification of the limited defense afforded landlords to Washington general common law premises liability.

The Port argues that as a landlord it had no duty to Shannon, except under exceedingly narrow circumstances. Br. of Appellant at 25-28. It also argues that AMHS "priority use" of the Terminal is effectively "exclusive" control. *Id.* at 28-36. But the Port is wrong *factually* as to AMHS's alleged "exclusive" control of the ramp, as the jury at least implicitly determined in rendering its verdict. The Port is also wrong *legally* in its argument that its lease of the Terminal exonerated it from its overarching common law duty as a premises owner.

Factually, the Port's contention that where its lease of a portion of the Terminal premises to AMHS as a "priority use" actually constituted

“exclusive control” by AMHS is baseless. The parties were explicit in the lease in differentiating between what AMHS was to exclusively possess and for what it was to have priority usage. ER 340. AMHS had exclusive use of four specific areas. *Id.* Priority use meant just what it said: AMHS had “superior but *not exclusive* right of use to the identified areas.” *Id.* (emphasis added). As noted *supra*, the areas at issue over which AMHS had priority use represented but a small portion of the Terminal for a small portion of the week. Under the plain language of these provisions, AMHS did “not [have] exclusive right of use to the identified area[]” of the passenger ramp. *Id.* That plain language is dispositive of the certified question. Notwithstanding the Port’s contention that a course of dealing somehow changed “priority” to “exclusive” use by AMHS, the plain language of the parties’ agreement controls over the parties’ course of performance or dealing. *Badgett v. Security State Bank*, 116 Wn.2d 563, 572, 807 P.2d 356 (1991) (“a course of dealing does not override express terms in a contract”); *Seattle-First National Bank v. Westwood Lumber, Inc.*, 65 Wn. App. 811, 820, 829 P.2d 1152, *review denied*, 120 Wn.2d 1010 (1992). The existence (or non-existence) of another tenant cannot change the terms of the lease granting AMHS priority, but not exclusive, use of the ramp.

Simply because the Port granted AMHS “priority use” of 125 spaces

in the parking lot next to the vehicle ramp, the vehicle ramp, the passenger ramp, and the ship berth for a short period during the week, the Port did not relinquish complete possession and control over those Terminal areas. ER 340. The Port's counsel *admitted* that the Port controlled the facility. SER 262. Terminal manager Warter said that he would unilaterally close the passenger ramp if he thought it was dangerous. ER 855 ("I will not hesitate to shut this ramp down if it is deemed unsafe."). AMHS's actions on the day of Shannon's injury are seen in exhibit 7, the surveillance video showing the ramp's collapse. The video shows that the "priority use" parking lot is wide open to the public, with no fences, passenger cars driving through the area, and police cars parked there. The Port's argument concerning "exclusive" possession and control of the priority use areas is simply, as a factual matter, untrue for the many reasons already set forth *supra*.

For its legal argument, the Port resorts to a recitation of what "many jurisdictions" do, rather than what this Court has actually found to be Washington's rule on premises liability and any exception to that overarching common law rule for landlords. It is noteworthy that many jurisdictions, unlike Washington, have not adopted the pertinent provisions of the *Restatement (Second) of Torts* such as § 357. See cmt. a to *Restatement* § 357.

The Port urges this Court to enshrine the principles of *caveat emptor* as a basis for what it describes as “landlord tort immunity.” Br. of Appellant at 26-27. That anti-consumer rule has been rejected in commercial transactions<sup>30</sup> and it has no place in modern Washington premises liability law, despite the Port’s reactionary argument. For its position, the Port relies on *Hughes v. Chehalis Sch. Dist. No. 302*, 61 Wn.2d 222, 377 P.2d 642 (1963), a case more than 50 years old, that long predates this Court’s full development of premises liability law. The *Hughes* court articulated a harsh, now archaic, principle that a tenant is subject to principles of *caveat emptor*, taking the property essentially as is. The landlord had no duty regarding hazards on the premises. *Id.* at 225.<sup>31</sup>

But this Court has subsequently ameliorated the harshness of any rule purporting to exonerate a premises owner from its liability with regard to the premises merely because it leases them. As will be discussed in more

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<sup>30</sup> *E.g., Atherton Condo. Apt. Owners Ass’n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 517-18, 799 P.2d 250 (1990) (noting that in new home sales the anachronistic doctrine of *caveat emptor* has given way to the “winds of contemporary realities.”).

<sup>31</sup> But the Port even *overstates* the scope of the rule as of the time that *Hughes* was filed. As will be noted *infra*, prior to *Hughes*, landlords could be held responsible for common areas, covenants to repair, and latent defects on leased premises. Moreover, Washington has long held that exculpatory clauses in leases seeking to relieve landlords of their duty to maintain common areas or areas over which they retain control are unenforceable. *Feigenbaum v. Brink*, 66 Wn.2d 125, 127-28, 401 P.2d 642 (1965); *McCutcheon v. United Homes Corp.*, 79 Wn.2d 443, 450, 486 P.2d 1093 (1971).

detail *infra*, there is little question that under modern Washington premises law, the lease exception to the overarching principles of premises liability do not apply, for example, with regard to:

- situations where the landlord covenanted to repair or maintain the premises;
- hazards present in common areas leased to a tenant; or
- latent defects present on the premises at the time the premises owner leased them to a tenant.

Under well-settled principles of Washington law, the Port, as a landlord, had a duty to a tenant or a tenant’s employee like Shannon,<sup>32</sup> with respect to hazards that it contractually undertook to address, hazards in common areas, or latent hazards on the premises that were unknown to Shannon. The district court correctly rejected the Port’s efforts to claim it had no duty to Shannon. Each will be discussed in turn *infra*.

(c) Covenant to Maintain/Repair the Premises

The Port attempts to diminish the responsibility it covenanted to meet under the lease terms by dismissively describing its undertaking as a “mere assumption of a duty to maintain and repair.” Br. of Appellant at 37. But, as related *supra*, the Port’s undertaking was *far more*. It covenanted to *solely* keep the premises in good repair (§ 4.1). It agreed to maintain the

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<sup>32</sup> It is black letter law in Washington that a landlord owes the same duties to a tenant’s employee as it does to the tenant. WPI 130.05.

premises free of structural or mechanical hazards to prevent *accident hazards* (§ 4.7). It could access the passenger ramp at all reasonable times to address its hazard (§ 5.1). It agreed to create a ramp operations manual that its users were bound to follow (§ 4.5). These were not “mere” activities, but rather, taken together, the jury was entitled to conclude from them that the Port was responsible for the Terminal’s passenger ramp hazard.

Washington has long observed the rule that a landlord owes a duty to a tenant and/or the tenant’s employee/guest to repair the premises where the landlord covenanted to do so, and the landlord may be liable for injuries to tenants or the tenant’s guests resulting from the improper performance of the covenanted obligations. *Mesher v. Osborne*, 75 Wash. 439, 134 P. 1092 (1913); *Estep v. Security Savings & Loan Soc.*, 192 Wash. 432, 73 P.2d 740 (1937); *Rossiter v. Moore*, 59 Wn.2d 722, 370 P.2d 250 (1962). In *Teglo v. Porter*, 65 Wn.2d 772, 399 P.2d 519 (1965), this Court made clear that notwithstanding any lease of premises, the landlord has an *ongoing* duty reflected in the *Restatement (Second) of Torts* § 357<sup>33</sup> to address both latent

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<sup>33</sup> § 357 states:

A lessor of land is subject to liability for physical harm caused to his lessee and others upon the land with the consent of the lessee or his sublessee by a condition of disrepair existing before or arising after the lessee has taken possession if:

- (a) the lessor, as such, has contracted by a covenant in the lease or otherwise to keep the land in repair, and

defects and conditions on the premises it covenanted to address. *Accord*, *Restatement (Second) of Property, Landlord & Tenant* § 17.5.<sup>34</sup> *See also*, *Tucker v. Hayford*, 118 Wn. App. 246, 75 P.3d 980 (2003). The district court specifically instructed the jury on a landlord’s duty of care associated with a maintenance or repair covenant in Instruction 28. ER 141. This instruction is again based on a pattern instruction, WPI 130.01.01. *See* Appendix.

The question of the scope of the Port’s repair/maintenance duty under § 4.1 of the lease and their breach were *questions of fact* for the jury. *Restatement (Second) of Torts* § 357 cmt. a (landlord “is liable only if his failure to [meet the repair/maintenance covenant obligation] is due to a lack of *reasonable care* exercised to that end.”) (emphasis added). Deciding

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(b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor’s agreement would have prevented, and

(c) the lessor fails to exercise reasonable care to perform his contract.

<sup>34</sup> § 17.5 states:

A landlord is subject to liability for physical harm caused to the tenant and others upon the leased property with the consent of the tenant or his subtenant by a condition of disrepair existing before or arising after the tenant has taken possession if:

- (1) the landlord, as such, has contracted by a promise in the lease or otherwise to keep the leased property in repair;
- (2) the disrepair creates an unreasonable risk to persons upon the leased property which the performance of the landlord’s agreement would have prevented; and
- (3) the landlord fails to exercise reasonable care to perform his contract.

reasonableness is inherently a jury function. *See Tucker*, 118 Wn. App. at 254 (reasonableness of landlord’s maintenance a fact issue); *Monohon v. Antilla*, 130 Wn. App. 1010, 2005 WL 2746675 (2005), *review denied*, 157 Wn.2d 1013 (2006) (tenant entitled to jury instruction on landlord’s repair duty). Similarly, a fact question was present to whether the Port breached its duty under § 4.7, obligating it to eliminate accident hazards by keeping the premises free of mechanical/structural defects.

Recognizing the weakness of its position on its actual covenanted obligation regarding the passenger ramp, particularly after the jury rejected its effort to interpret away that obligation after Shannon’s injury, the Port resorts to the argument that there must be “something more” than its covenants to repair/maintain its premises and to keep those premises free of mechanical/structural defects. Br. of Appellant at 36-40. This argument has no support in the case law cited above. In fact, the one foreign case it cites, *id.* at 37, is from a state – Missouri – that rejects § 357 of the *Restatement*, and in that case, the Missouri Supreme Court concluded that the landlord was liable, having retained sufficient control by having the right to enter the premises at any time and make repairs as needed. *Lemm v. Gould*, 425 S.W.2d 190, 196 (Mo. 1968).<sup>35</sup>

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<sup>35</sup> The issue of requisite landlord control is a question of fact for a jury in Missouri. *Stephenson v. Countryside Townhomes, LLC*, 437 S.W.3d 380, 384 (Mo. App.

The one Washington case cited by the Port, *Resident Action Council v. Seattle Housing Authority*, 162 Wn.2d 773, 174 P.3d 84 (2008), *nowhere* suggests “something more” is necessary beyond the explicit lease repair/maintenance covenant to establish landlord liability. In fact, the case has exactly nothing to do with landlord liability at all. It addresses the question of what limits a housing authority may place on tenants posting signs.

Even if this Court were to adopt the Port’s unsupported “something more” analysis, this lease did not confine the Port’s duty as to the ramp to merely repairing/maintaining it. The Port could enter the premises at “all reasonable times” to examine the premises to meet its covenanted obligations (§ 5.1(8)), it agreed to provide an operator manual for its ramp (§ 4.5), and it agreed to keep the ramp free of structural/mechanical defects to avoid accidents (§ 4.7). If there was any question about Port control of the ramp, Warter dispelled that when he made clear that as the Terminal manager *he had the right to unilaterally close the ramp if it was dangerous*, ER 855, and when the Port’s counsel admitted the Port controlled the ramp. SER 262.

The Port’s discussion of its lease covenants represents a tortured

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reading of the actual lease language and glides over *all* of the terms in §§ 4.1, 4.5, and 4.7 that establish its covenanted obligation.<sup>36</sup> § 4.1 of the lease indicated the Port’s repair obligation was *broad*: “The term ‘repair’ includes repairs of any type including but not limited to exterior and interior, structural and nonstructural, routine or periodic, except as in case of damage arising from the negligence of the state’s agents or employees.” ER 343. Moreover, separate from its obligation to keep the premises tenantable and in good repair, the Port was obligated under § 4.7 to eliminate accident hazards by remedying structural/mechanical hazards on the premises, including the ramp, to prevent accident hazards. The Port was obliged to instruct ramp operators on its use (§ 4.5).

Here, the jury’s determination was amply supported. The lease imposed clear-cut duties on the Port with regard to the ramp. The Port was on notice of the hazardous condition of the ramp from the Geiger report; the

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<sup>36</sup> Notwithstanding the Port’s effort in its brief at 28-39, to conflate its distinct covenanted obligations, the concepts of “maintenance” and “repair,” too, are distinct, each with a separate meaning. Moreover, the lease here had two *distinct* provisions on the Port’s retained obligation with regard to the ramp – to maintain and repair it (§ 4.1) *and* to keep it free of structural/mechanical hazards to avoid accident hazards (§ 4.7). ER 343, 345. The Port seeks to collapse these distinct obligations into a single obligation, contrary to Washington contract law. In interpreting the contract, an interpretation that gives effect to *all* provisions of a contract is favored over one that renders provisions ineffective. *Snohomish County Pub. Transp. Benefit Area Corp. v. FirstGroup America, Inc.*, 173 Wn.2d 829, 840, 271 P.3d 850 (2012). As between two large sophisticated entities, courts must also give the words of the agreement a commercially reasonable interpretation. *Wilson Court Ltd. P’ship v. Tony Maroni’s, Inc.*, 134 Wn.2d 692, 705, 952 P.2d 590 (1998).

ramp was truly hazardous, not just an inconvenience to its operators.

Although the Port argues that such “maintenance and repair” requirements in the lease did not extend to what it describes as ramp “upgrades” as a matter of law, br. of appellant at 21-22,<sup>37</sup> the jury properly rejected that *factual* argument, particularly in light of the Port’s contractual duty to maintain and repair ramp hazards and to keep it free of any mechanical hazard, something the jury was entitled to conclude encompassed the interlocking of the ramp controls.<sup>38</sup>

At trial, the Port’s counsel seemed to indicate a “repair” was at issue

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<sup>37</sup> This Court should reject the Port’s blatant effort to interject its argument on parol evidence, br. of appellant at 23-24, an issue that is outside the duty issues certified to this Court by the Ninth Circuit. Just as in *Allen v. Dameron*, 187 Wn.2d 692, 389 P.3d 487 (2017), this Court should decline the Port’s blatant attempt to reformulate the certified questions from the Ninth Circuit where that request “is actually a request for the court to answer a completely different question.” *Id.* at 702. The Ninth Circuit panel did not pose evidentiary questions to this Court, but rather *duty* issues. This Court should not address the Port’s issue.

In any event, the Port sought to misrepresent the state of Washington law on subjective extrinsic evidence of the contracting parties’ intent as to contract language. *See* Ninth Cir. br. of appellees at 48-51.

<sup>38</sup> Industry standards and Washington law required the elimination of the collapse risk by way of interlocking the cables and pins. Wendling, the Port’s engineer, agreed that the first remedy to a workplace hazard is to “engineer out” the danger. SER 106-07. Since the 1920s, American industry has followed the rule that once a workplace safety hazard is identified, the first line of defense is to change the machine. SER 249-52. The American approach is called “Safety by Design.” *Id.* Applying this industry standard, Dr. Gill concluded that the controls had to be interlocked. *Id.* Dr. Gill testified that ASTM 1166, Standard Practice for Human Engineering Design for Marine Systems, Equipment and Facilities, is the national consensus industry standard that applied to the Port’s marine facilities. Ex. 71; SER 241-45. Because it was such a simple fix, ASTM 1166 required the pins and cables to be interlocked to eliminate the danger. *Id.* These industry standards are required by WISHA.

when he told the court that a post-accident “repair” was completed. SER 40. Moreover, he told the court that the Port’s executive director ordered that the control panel be fixed. SER 177-78. The Port’s executive director said: “I have had enough; *just get the thing fixed* ... I don’t want someone else hurt...” SER 178 (emphasis supplied).

The Port’s counsel also argued that the Port could “maintain” what it acknowledged was a hazardous condition in its ramp, notwithstanding the workplace safety policy of WISHA described *supra*:

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 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.

RT (3/23/16):625-26. The district court expresses incredulity at such a position:

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 makes no sense to me.

RT (3/25/16):876.<sup>39</sup>

Moreover, interlocking the controls did not require an “upgrade.”<sup>40</sup> SER 196-208. Many aspects of the ramp’s controls were already interlocked before the ramp collapsed. Already installed on the ramp were “proximity switches,” which are metal detectors that sense when a piece of metal is close to them. The panel was also already equipped with a limit switch, LS-6. Because the limit switch and the proximity switches were already existent, all that needed to be done to interlock the pins and the cables, and to absolutely prohibit a collapse, was to make a simple wire connection change. *Id.* One wire could have done the job. SER 200-05, 322, 328. It would have taken an electrician 15 minutes to do the work. *Id.* Shannon’s expert testified: “Had this modification been done, the pins interlocked with the alignment, the accident that occurred in 2012 could not have occurred.” SER 204. That testimony is unrebutted.

After the 2008 incident, the ramp required “repair” because it failed

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<sup>39</sup> If it were to allow the ramp’s known collapse hazard to stand for years unabated, without any warnings on its hazard to its users, the Port’s conduct (and its argument) plainly contravenes WISHA’s safe workplace public policy discussed *supra*. Contractual provisions in violation of Washington law are unenforceable. *Jordan v. Nationstar Mortgage, LLC*, 185 Wn.2d 876, 883, 374 P.3d 1195 (2016).

<sup>40</sup> The Port cites *Prudential Ins. Co. v. L.A. Mart*, 68 F.3d 370 (9th Cir. 1995) in support of its “upgrade” argument. Br. of Appellant at 21. There, in contrast to the minor repair expenditure to interlock the ramp control, this Court determined a \$3 million seismic retrofit was not a repair.

to function properly.<sup>41</sup> Moreover, the Port needed to act to keep the ramp free of a mechanical/structural hazards. Given the expert testimony noted above and because changing one wire to make a connection between preexisting components, thereby preventing a severe injury or death, was so simple, the jury legitimately concluded that was a repair, not an “upgrade,” or an action to keep the Port’s premises free of a mechanical or structural hazard.

The jury correctly applied Instruction 28 to conclude the Port was liable to Shannon. Whether AMHS’s use of the passenger ramp was on a “priority” or “exclusive” basis is ultimately irrelevant to the Port’s obligations with respect to the passenger ramp *that it specifically agreed in the lease to address*. By contract, the obligation to address passenger ramp hazards was the Port’s. The Court can answer the certified question YES, given the Port’s covenanted obligations under the lease.

(d) Defects in Common Areas

This Court has long held that a landlord owes a duty with regard to hazards in common areas that result in harm to others.<sup>42</sup> In *McCutcheon*,

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<sup>41</sup> The Port seems to contend that it was entitled to “maintain” a hazard “as is” on its premises, ER 658-59, a hazard waiting to injure persons operating its ramp. The jury had little difficulty rejecting such an absurd argument.

<sup>42</sup> *E.g., Andrews v. McCutcheon*, 17 Wn.2d 340, 345, 135 P.2d 459 (1943) (when landlord reserves control over stairway, a question of fact, landlord must maintain it in safe condition and is liable to tenant’s invitee for failure to do so); *Geise v. Lee*, 84 Wn.2d 866,

this Court relied on *Restatement (Second) of Torts* § 360<sup>43</sup> to find landlord liability for an injury to tenants occurring in common areas. 79 Wn.2d at 445. Comment d to § 360 makes clear that “[t]he rule stated in this Section

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868, 529 P.2d 1054 (1975); *Degel*, 129 Wn.2d at 49; *Iwai*, 129 Wn.2d at 91 (snow, ice accumulations in parking lot); *Musci*, 144 Wn.2d at 855.

The basis for such a duty is rooted in the traditional premises liability principles of the *Restatement* §§ 343/343A. This Court has recognized that a premises owner has a *Restatement* §§ 343/343A duty when it retains control of a common area or a part of the premises. The *Iwai* court specifically applied §§ 343, 343A duty principles, not landlord duty principles, in a case involving a tenant’s guest (woman visiting state agency’s leased premises). 129 Wn.2d at 88. *See also*, *Musci*, *supra* (same); *Sjogren v. Properties of Pacific Northwest, LLC*, 118 Wn. App. 144, 75 P.3d 592 (2003) (§ 343A applies to open, obvious hazard in common area); *Bruce v. Holland Residential, LLC*, 195 Wn. App. 1053, 2016 WL 4508247 (2016) (§§ 343/343A apply to slip/fall in parking lot).

<sup>43</sup> § 360 states:

A possessor of land who leases a part thereof and retains in his own control any other part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sublessee for physical harm caused by a dangerous condition upon that part of the land retained in the lessor’s control, if the lessor by the exercise of reasonable care could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe.

*Accord*, *Restatement (Second) of Property, Landlord & Tenant* § 17.3. § 17.3. states:

A landlord who leases a part of his property and retains in his own control any other part the tenant is entitled to use as appurtenant to the part leased to him, is subject to liability to his tenant and others lawfully upon the leased property with the consent of the tenant or a subtenant for physical harm caused by a dangerous condition upon that part of the leased property retained in the landlord’s control, if the landlord by the exercise of reasonable care could have:

- (1) discovered the condition and the unreasonable risk involved therein;
- and
- (2) made the condition safe.

applies not only to the hall, stairs, elevators, and other approaches to the part of the land leased to the lessee,...but also to such other parts of the land or building to the use of which by the express or implied terms of the lease the lessee is entitled, usually in common with other lessees...” The comment focuses on the right of others to use a portion of the leased premises in common with the tenant. That a plaintiff may be a tenant’s employee does not negate the lessor’s duty of care. Thus, the Court should reject as irrelevant the Port’s argument that others have not shared that portion of the leased premises during the lease term. Similarly, the fact that the “common” use of the ramp by others is a temporal right, rather than a geographic one, should not undermine the policy behind this rule – a landlord’s retention of some control over a portion of the lease premises undermines the tenant’s exclusivity and thus imposes upon the landlord the primary duty to maintain that portion of the premises.<sup>44</sup>

Nor does it matter that a plaintiff is a tenant’s employee. *See Highland v. Wilsonian Inv. Co.*, 171 Wash. 34, 17 P.2d 631 (1932). “The general trend in the case law” is to allow employees of commercial lessees

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<sup>44</sup> If a landlord leased 90% of the rentable space in an office to a single tenant, and the remaining 10% of the space remained vacant during the lease term, the Court would not absolve the landlord of the common law duty to maintain the stairs, elevator, and lobby (even in the absence of an express lease term) based on nothing more than the fact that there is only one tenant using them.

to sue lessors for defects in premises. *Sauve v. Winfree*, 985 P.2d 997, 1002 (Alaska 1999).

While landlord-tenant law provides support for the Port's tort duty to maintain and repair the ramp as a common area, the common law duty of a wharf owner to keep all areas used by the public in good repair is even more specific.<sup>45</sup> Here, however, the ramp providing access from the wharf to the M/V COLUMBIA falls squarely within the area and instrumentalities that one would expect a crew member or member of the public to use.

The public interest in the safety of publicly owned docks and waterfront facilities offers an additional policy basis to find that the Port retained an interest and duty in maintaining the ramp in a safe condition for the purpose to which it was naturally used.<sup>46</sup>

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<sup>45</sup> “[T]he owner or operator of a dock or wharf is under a positive duty to maintain it in a reasonably safe condition for use.” *Nelson v. Booth Fisheries Co.*, 165 Wash. 521, 524-25, 6 P.2d 388 (1931) (dock owner liable for slip and fall on slippery surface unprotected by guard rail); *Gregg v. King County*, 80 Wash. 196, 141 P. 340 (1914) (dock owner liable for injury caused by loose and unsecured fender pile). Where a wharf owner accepts payment for moorage, guests and employees of the tenant engaged in such mooring are considered the wharf owner's invitees. *Enersen v. Anderson*, 55 Wn.2d 486, 488-89, 348 P.2d 401 (1960); 94 C.J.S. Wharves § 49 (“The owner or occupant of a pier or wharf must exercise reasonable care to keep it in a safe condition so that those having a lawful right can go on it without incurring risk of injury.”).

<sup>46</sup> See, e.g., *Harvey v. Old Dominion S.S. Co.*, 299 F. 549, 550 (2nd Cir. 1924) (“There is an implied license to men engaged in unloading vessels which are moored to enter and occupy the piers built into and lying adjacent to moored vessels.”); *Campbell v. Portland Sugar Co.*, 62 Me. 552, 564 (1873) (affirming judgment in favor of wagon driver injured when he stepped in hole on wharf; lease of public wharf to business “where, as here, by express stipulation between the lessors and lessees, the former were to make all necessary repairs...” To exonerate wharf owner “would be contrary to public policy and substantial justice, for it would not unfrequently operate to deprive the injured party of all

That AMHS retained some level of control through the priority use provisions of the lease does not defeat the Port's obligation as owner and lessor. As the New York Court of Appeals stated, "A landlord who has the right to come and go upon the leased premises as he pleases for the purpose of inspection and repair and who is at liberty to correct any defect as soon as it is found, must be regarded as having thereby reserved a privilege of ownership, sufficient to give rise to liability in tort....[E]vidence designed to demonstrate that the tenant exercised some control of the pier, is totally indecisive, and completely beside the point, as to whether the landlord shared such control with the tenant." *De Clara v. Barber S. S. Lines*, 309 N.Y. 620, 630, 132 N.E.2d 871, 876 (1956).

The wharf cases only reinforce the Port's liability in the absence of a lease provision granting to AMHS exclusive control over, and a duty to repair, the ramp. The jury effectively rejected the Port's contention that the lease gave AMHS implicit "exclusive" control over the passenger ramp. This Court can again answer the certified question YES.

(e) Latent Defects on the Premises

A Washington landlord has a duty to its tenants and the tenants'

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remedy except against an irresponsible tenant through whom a negligent landlord would reap the profits, without bearing the responsibilities of his proprietorship. Like all who are engaged in business which involves the personal safety of large numbers, proprietors of wharves should be held to the exercise of the strictest care.").

employees in connection with latent hazards on the premises of which it is aware or should have been aware. This Court addressed this point as long ago as 1937 in *Estep*, where it determined that a landlord is liable for tenant injuries if the landlord agrees to keep the premises in repair, just as here; the landlord has an antecedent duty to make a reasonable inspection of the premises for latent defects affecting the premises' safety for ordinary use, and to correct such a hazard. Similarly, in *Regan v. City of Seattle*, 76 Wn.2d 501, 504, 458 P.2d 12 (1969), this Court held that a landlord owes common law duty to public invited onto premises when landlord leases the premises with a latent defect and an invitee is injured by it. In *Frobig v. Gordon*, 124 Wn.2d 732, 735, 881 P.2d 226 (1994), the Court held that a landlord is liable to tenant and third parties for harm occasioned by latent defects on the premises existing at the time of the leasehold's creation of which the landlord had knowledge and failed to inform the tenant.<sup>47</sup> This duty as to latent defects is not confined to common areas or areas over which the landlord retained control. The *Frobig* court made clear that a landowner or landlord has a duty of care to tenants in connection with latent hazards on the premises where that landlord fails to apprise the tenant of the hazards

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<sup>47</sup> A landlord's constructive knowledge of a defect ("should have known") is sufficient to establish liability. *Thomas v. Housing Authority of City of Bremerton*, 71 Wn.2d 69, 426 P.2d 836 (1967) (landlord failed to apprise tenant of scalding hot water tank problem and child is injured); *Tucker*, 118 Wn. App. at 255 (contaminated well).

and to take necessary steps to address such hazards. 124 Wn.2d at 735-36. *Accord, Degel*, 129 Wn.2d at 50-51 (fast flowing creek adjacent to mobile home park); *Martini v. Post*, 178 Wn. App. 153, 167, 313 P.3d 473 (2013) (defective window). The *Restatement (Second) of Torts* § 358 emphasizes that for a tenant to be charged with knowledge of a condition on the rented premises, the tenant must not only know of the condition, but the explicit risk or hazard associated with that condition. *Thomas*, 71 Wn.2d at 74 n.1.

Critically, the question of whether a defect is latent (or whether an open and obvious defect may sustain a § 343A duty) is to be a *question of fact* for the jury under Washington law. *Thomas*, 71 Wn.2d at 75. *Accord, Younger v. United States*, 662 F.2d 580, 582 (9th Cir. 1981); *Pinckney v. Smith*, 484 F. Supp. 2d 1177 (W.D. Wash. 2007) (the court denied summary judgment to a landlord in connection with a latent defect on leased premises. The Port's counsel *agreed* the issue was one for the jury. ER 661.

The district court gave Instruction 29, ER 142, taken directly from WPI 130.01, to the jury on the Port's specific duty with respect to latent defects on its leased premises. *See Appendix*. But the Port claims that it did not owe Shannon a duty because the ramp's defect was not latent as a matter of law because it allegedly warned AMHS about it. Br. of Appellant at 17-18. That *factual* argument is not only baseless, it was argued at trial by the Port and *rejected* by the jury.

Recognizing the weakness of its argument on this landlord duty long recognized in Washington law, the Port yet again falls back on speculation in lieu of legal analysis. It asserts, without any support in the Ninth Circuit panel's actual order, that the panel must have ruled in its favor as a matter of law. Br. of Appellant at 16-19. This Court should not fall prey to the Port's disingenuous argument.

The record before the jury amply documented that neither AMHS nor Shannon knew of the specific latent defect in the passenger ramp controls. What information was provided by the Port to ramp operators failed to apprise them of the its hazard. After the 2008 incident, AMHS asked the Port to write step-by-step instructions for the ramp's operation. Rather than creating a training program for ramp operators, Tritz merely prepared the requested instructions. ER 854-55; SER 270.<sup>48</sup> It is undisputed that neither the ramp's control panel nor the ramp's instructions warn of the collapse danger. SER 270-71.<sup>49</sup> Tritz could not warn of the collapse danger in the instructions because he did not know about it when he wrote the instructions. *Id.* Warter oversaw the creation of the

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<sup>48</sup> Despite its responsibility under § 4.5 of the lease referenced *supra* to prepare an "operations manual" for ramp users, ER 344, the Port never provided AMHS such an operator manual for the passenger ramp. SER 57-58. Tritz's instructions were not the lease-compliant operator manual for the ramp that injured Shannon. *Id.*

<sup>49</sup> Such a warning would have been easy for the Port to accomplish. SER 67.

instructions, SER 51, but admitted that there was no warning of the collapse danger in them, and that he could think of no reason for omitting such a warning. SER 51-53.

The Port's ramp instructions were poorly written. SER 210-17. They were riddled with both typos and confusingly misspelled words. ER 887-89. According to Shannon's expert, Gerald Schaefer, "the instructions are self-contradictory and mutually exclusive, such that if you consider every one of these instructions you cannot do them." SER 214. The instructions also violated the industry standard for instructions, American National Standards Institute Standard ("ANSI") Z535, SER 238, and were dangerously misleading because they did not warn of the collapse danger; thus, the operator was lulled into a false sense of security that the ramp was safe. SER 260-61.

The ramp's operator's station is covered by a roof so that the ramp operator cannot see the cables from the control panel. ER 814-18. The Port's chief electrician, Jeff Gray, said that he was trained to leave the control panel and check the cables before the pins were pulled. ER 704-05. He agreed that it would be important to have the cable checking step in any instructions. *Id.* The instructions completely omitted that crucial step. ER

887-89. Shannon relied on these flawed instructions.<sup>50</sup>

After the 2008 incident, none of the Port's managers knew that it had been a near collapse. Warter, the Port's Terminal manager, knew all of the details of the 2008 incident, but he did not realize that the ramp could collapse. SER 58-59. Simply looking at the ramp's controls did not raise in anyone's mind the possibility of a collapse.<sup>51</sup> Warter had operated the controls around 40 times before he received the Geiger report. SER 63. Before he received that report, it never crossed his mind that the ramp could collapse. *Id.*

Preston, AMHS's Chief Mate and a former USCG Captain, was not aware of the collapse hazard; he was unaware of any damage in the 2008 incident, or that he had been involved in a near collapse. RT (3/23/16):449-50.

After the 2008 near collapse, none of the Port's highly skilled workers independently discovered the collapse danger, ER 701; SER 270, 278, nor did the head of the Port's safety committee. SER 80-81. Stahl, a

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<sup>50</sup> Shannon testified that it was her habit to read such instructions. SER 124. Schaefer testified that it takes about one minute to read through the instructions. RT (3/22/16):212. The surveillance video of the collapse shows Shannon standing at the controls for approximately 1.25 minutes before the ramp collapsed, sufficient time to review the instructions. Ex. 7.

<sup>51</sup> The Geiger engineer who discovered the collapse hazard was MIT-trained and had to employ complex mathematical equations and computer modeling to discover it. SER 192-95, 246.

former ship's officer, testified that there was nothing obviously dangerous about the ramp or its controls. SER 94. Shannon herself had no inkling of the collapse danger. SER 124-25, 253; RT (3/21/16):118.

The Port did not warn any of the ramp's users of its potential hazard. Tritz, a Port employee trained to operate the controls in 1989 and who had operated the controls at least a 100 times, did not learn of the ramp's collapse danger until it collapsed under Shannon. SER 270. The Port never warned AMHS that Preston had been involved in a near collapse in 2008, or that the controls could cause the ramp to collapse. SER 86-88; RT (3/25/16):926. Although AMHS's Captain Falvey regularly talked to his Port counterpart, he was not told about the 2008 near collapse, or the ongoing collapse danger. SER 25-29.<sup>52</sup> The Port never warned the captains

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<sup>52</sup> Captain Falvey did not see Geiger's report until August, 2015. SER 5. Because the Port did not provide a copy of the Geiger report to the AMHS, Falvey did not know that the Port had an engineering report telling the Port of a near-collapse in 2008. SER 43-46, 57. He did not know that with as little as six more inches of cable slack the force on the cables would be 8.5 times the cable's limits. *Id.* He did not know that the ramp was heavy enough to break the cables. *Id.* The Port did not tell him that an interlock system would eliminate the danger. *Id.* He did not know that the ramp's cables were six inches from disaster in 2008. *Id.* Nobody from the Port warned Falvey that by operating the ramp's controls his employees "were exposed by the control system to the unexpected and uncontrolled release of stored energy." SER 32. The Port never asked AMHS about interlocking the controls to prevent a collapse. SER 33. He expected the Port to tell him of the collapse danger. SER 27. With knowledge of the collapse danger, training was not the answer; the collapse danger should have been engineered out. SER 34. Moreover, as the Port never told AMHS about the collapse danger, it was impossible to train his workers to guard against it. *Id.* Shannon's experts agreed that because the Port never told the AMHS about the ramp's collapse danger, it was impossible to train AMHS employees to guard against the risk. SER 169-71, 249, 266-67.

who regularly sailed into Bellingham that Preston had had a near miss and that the ramp was subject to collapse. RT (3/25/16):923-24.

Based upon the foregoing, Dr. Richard Gill, Shannon's expert, a retired University of Idaho mechanical engineering professor with a specialty in human factors, testified that the lack of an interlock was a *functionally hidden, life-threatening hazard*. SER 244-47. He stated the "Alaska Marine Highway System had no knowledge of the functionally hidden hazard." SER 257. He described that the collapse danger "is what is called a functionally hidden life-threatening hazard" that is "a hidden hazard to the typical operator." SER 246-47. That testimony was unrebutted.<sup>53</sup>

The Port contends that it apprised AMHS of the Geiger report, thereby exonerating it from liability. Br. of Appellant at 17-18. The jury plainly *rejected* the Port's factual argument on notice to AMHS when it found the Port liable as landlord, ER 161, and exonerated AMHS from any liability. *Id.* The jury's verdict was supported. In fact, neither AMHS's *operational* staff nor persons like Shannon operating the ramp ever received

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<sup>53</sup> Dr. Gill noted that the control panel was poorly laid out, SER 235-37, and that the control panel's instructions, written by the Port after the 2008 incident, violated ANSI Standards and were misleading because they did not warn and should have warned of the collapse danger. SER 237-38. Based on a human factors analysis, there was no basis upon which to fault Shannon. SER 253-54. The Port listed a human factors expert, Dr. Thomas Ayres, as a potential witness, Dkt. No. 129 at 8, but the Port did not call him. Dr. Gill's testimony was uncontradicted.

a specific warning. The Port did not send Geiger's report to the Alaska Department of Administration ("Department") to warn of the ramp's collapse danger. Diane McClain, the Port's risk administrator, SER 138-44, processed a claim against AMHS for damage from the 2008 incident. *Id.* The Department asked her to document the Port's claim. *Id.* As documentation for repair costs, she sent a copy of the Geiger report to the Department in Juneau. *Id.* When she sent the letter to Juneau, she did not intend it as a safety warning, as she knew the person to whom it was sent in Juneau was not involved with workplace safety. *Id.* She did not provide a copy of Geiger's report to the Port's workplace safety committee. *Id.* Although the lease required that any notices from the Port to AMHS be sent to its Ketchikan headquarters, ER 355-56, McClain sent the Geiger report to the Department in Juneau. All of the AMHS managers are in Ketchikan, not Juneau. SER 97.

Brad Thompson, Alaska's risk manager, reviewed the Geiger report. Dkt. No. 169 (Thompson dep. at 6-7, 10). Thompson did not understand the report to be a safety warning. *Id.* at 12-14. He read the report as the Port had intended it – as support for a property damage claim. *Id.* Thompson had never served as a merchant seaman, never operated a ramp, and had no role in workplace safety for AMHS. *Id.* at 24. Indeed, risk management employees have no training as mariners, and are not in the

AMHS chain of command; risk management has no AMHS operational role. SER 36. Thompson did not tell Falvey, his peer, about Geiger's discussion of interlocking. SER 40.

On October 24, 2008, Warter sent an email to AMHS concerning the ramp incident. ER 854-55. The email could not warn of the collapse danger or the risk of severe injury or death because Warter did not know about the collapse danger when he sent it. SER 58-59. The unrebutted expert testimony is that the email did not warn of the collapse danger and the associated risk of severe injury or death. SER 256-57. In subsequent emails to AMHS concerning misoperation of the ramps, Warter admitted that he did not warn AMHS of the collapse danger. SER 52-54. Warter and Stahl admitted that they never warned AMHS of the collapse danger. SER 48-50, 86-88. It would have been a simple matter to do so – they could have provided the report directly to the ship's officers, or emailed a copy to AMHS. SER 67, 86-89.

Based upon the Port's emails concerning ramp operations, AMHS sent correspondence to the vessels encouraging the crews to pay attention to the ramp. These directives were related to *property damage*, not personal injury to the crew. ER 803-04; RT (3/29/16):1472-73.

In sum, the Port knew of the hazard it created and the Port never apprised AMHS's operational staff or ramp operators like Shannon of the

passenger ramp's specific collapse risk. It was for the jury to decide if the ramp hazard was latent and if the Port properly remedied that hazard and ample evidence supported the jury's verdict that the Port did not. Here again, the question of whether AMHS had "priority" or "exclusive" use of the passenger ramp was irrelevant to the Port's duty as a landlord to specifically apprise Shannon of the passenger ramp's latent collapse risk, known to it, but unknown to her. The Court should answer YES to the certified question.

F. CONCLUSION

This Court should conclude that the Port owed Shannon a duty of care as a premises owner, an owner of property on which multiple employees were working, or as a landlord. The Court should answer the certified questions YES, and NO. The jury's verdict should be upheld. Costs on appeal should be awarded to the Adamsons.

DATED this 18th day of October, 2018.

Respectfully submitted,



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# APPENDIX

Instruction 25:

A business invitee is a person who is either expressly or impliedly invited onto the premises of another for some purpose connected with a business interest to the owner.

Shannon Adamson was a business invitee of the Port of Bellingham at the time of her injury.

ER 138.

Instruction 26:

Duty to a Business Invitee

The Port owed Plaintiff Shannon Adamson, as a business invitee, a duty to exercise ordinary care for her safety. This includes the exercise of ordinary care to maintain in a reasonably safe condition those portions of the premises that the invitee is invited to use or might reasonably be expected to use.

ER 139.

Instruction 27:

Duty as a Landlord

An owner of premises like the Port is liable for any injuries to its business invitee caused by a condition on the premises if the owner:

(a) knows of the condition or fails to exercise ordinary care to discover the condition and should realize that it involves an unreasonable risk of harm to the business invitee like Shannon Adamson;

(b) should expect that the business invitee will not discover or realize the danger or will fail to protect themselves against it; and

(c) fails to exercise ordinary care to protect them against the danger.

ER 140.

Instruction 28:

Duty of Landlord under a Contract

A landlord is subject to liability for physical harm to its tenant or others who come upon the land with the consent of the tenant caused by a condition of disrepair existing on the land, if:

(a) the landlord has contracted in the lease to keep the land or premises in repair;

(b) the landlord fails to exercise reasonable care to perform the contract; and

(c) the disrepair creates an unreasonable risk to persons upon the land or premises which the performance of the landlord's agreement would have prevented.

ER 141.

Instruction 29:

A landlord who knew or should have known of a latent or obscure defect on the premises at the time of renting the passenger ramp to the State has a duty to notify the tenant of its existence if the tenant has no knowledge of the defect and is not likely to discover it by a reasonably careful person.

ER 142.

Instruction 30:

The violation of an administrative regulation such as a WISHA regulation is not necessarily negligence, but may be considered by you as evidence in determining negligence.

ER 143.

NOW, THEREFORE, for and in consideration of the terms, conditions, covenants, and other provisions hereinafter set forth, the state and Lessor agree as follows:

#### **ARTICLE 1: PREMISES**

**Section 1.1 – General Description:** The premises are located on the site know and commonly referred to as the Bellingham Cruise Terminal. The premises consists of approximately six acres, all as more particularly described and depicted on Exhibit "A", which is attached and made a part of this lease.

**Section 1.2 – Leased Premises:** The Lessor hereby leases to the state and the state hereby leases from the Lessor the premises described and depicted on Exhibit "A", hereinafter referred to as the "leased premises." The Premises consist of Agreed Rentable Areas as follows:

- (a) Exclusive use of the Reservation and Ticketing Office consisting of approximately 552 square feet; and
- (b) Exclusive use of the Bellingham Cruise Terminal Manager's office consisting of approximately 280 square feet, and
- (c) Exclusive use of the Warehouse space located in Warehouse No. 4, consisting of approximately 9780 square feet, and
- (d) Exclusive use of the Staging and purser booth consisting of approximately 48 square feet; and
- (e) Priority use of approximately 125 parking spaces, and
- (f) Priority use of the Marine Facilities, including the vehicle ramp, passenger ramp and Berth 1 – Pier and Dolphins

**Section 1.3 – Exclusive Use of Portion of Leased Premises:** The state shall have exclusive use of Areas outlined in Section 1.2 (a) through (d). The term "exclusive use" shall mean the sole possession and control of the Areas subject only to the terms and conditions of this Lease.

**Section 1.4 – Priority Use of Portion of Leased Premises:** The State shall have priority use, not exclusive use, of Areas outlined in Section 1.2 (e) and (f). The term "priority use" shall mean the Lessee is entitled to superior but not exclusive right of use to the identified areas. The Lessor may allow other uses of the priority use areas so long as such use does not unreasonably interfere with Lessee's use.

**Section 1.5 – Lessor's Warranty Obligation:** The Lessor warrants that upon payment of rent and performance of all other obligations due hereunder, the state shall peaceably and quietly have, hold and enjoy the leased premises for the term of this Lease.

**Section 1.6 – State of Washington, Department of Natural Resources (DNR):** Lessee understands that a portion of the Premises is owned by the State of Washington Department of Natural Resources (DNR), and that DNR has granted Lessor exclusive authority to manage such property as specified in the Port Management Agreement entered into by and between the Lessor and DNR dated July 1, 1997, a copy of which is attached hereto as Exhibit C, including all present amendments or modifications. Lessee understands that the portion of the Premises owned by DNR is subject to all terms and conditions of the PMA and that the rights and obligations contained in this lease are subject to the Port Management Agreement.

**Section 1.7 – Passenger Facility Charge:** It is agreed that the lessor will not, directly or indirectly, impose a Passenger Facility Charge for AMHS passengers and vehicles that arrive or depart at the Port of Bellingham terminus. The term "Passenger Facility Charge" shall mean a charge levied on a per passenger or per vehicle basis for debarking or embarking AMHS vessels at the Bellingham Cruise Terminal but shall not mean other charges such as parking charges, standby power charges and other charges.. The purpose of this section is to ensure passengers or persons owning property traveling aboard an AMHS vessel (a) pay a single fare or carriage fee to AMHS and (b) are immune from any fee or surcharge the Port of Bellingham might otherwise assess on the basis of travel or carriage on an AMHS vessel.

## **ARTICLE 2: TERM OF LEASE**

**Section 2.1 – Period of Lease:** The term of this lease shall be for a period of fifteen (15) years beginning on October 1, 2009 through September 30, 2024 unless sooner terminated as provided herein.

## **ARTICLE 3: RENT**

**Section 3.1 – Rent:** The term "Rent" as used herein includes Base Rent, Additional Rent, applicable Washington lesseehold excise tax, and other fees and charges assessed herein. Except as expressly provided elsewhere herein, Rent and all other sums payable by Lessee pursuant to this Lease shall be paid without the requirement that Lessor provide prior notice or demand.

3.1(a) Base Rent: The annual Base Rent due under this lease is five hundred seventeen thousand dollars (\$517,000) for the use of the leased premises by the state. Lessee will pay the Base Rent in twelve (12) equal installments on the first day of each month.

3.1(b) Change in Base Rent: The Base Rent shall remain fixed for the first two years, and shall increase annually, each year thereafter beginning on October 1, 2011, as prescribed in Table 3.1.1.

3.1(c) State of Washington Leasehold Excise Tax: The Lessee shall pay the Washington State leasehold excise tax, if applicable, which is currently 12.84% of the Base Rent. The Lessee is not obligated to pay the leasehold excise tax if, due to the Lessee's governmental status the State of Washington grants the Lessee an exemption.

3.1(d) Additional Rent (Operating Expenses): Additional Rent charge consists of the costs of providing utilities and services to the state as set out in Section 4.4 and Section 4.10 and the cost of paying taxes as set out in Section 11.15. The term "Operating Expenses", as used herein, shall mean the sum of the following:

- i. All costs and expenses incurred by Lessor with respect to the ownership, management, maintenance, landscaping, routine repair, or replacement of the Building and the real property which serves the Building, including, without limitation, the heating, ventilation, air conditioning (HVAC) systems, sidewalks, landscaping, service areas, driveways, parking areas, walkways, Building exterior, signs, and directories, repairing and replacing roofs, walls, etc.
- ii. All management, janitorial and service agreement costs related to the Building.
- iii. All supplies, materials, labor, equipment and utilities used in or related to the operation and maintenance of the Building.
- iv. Costs of all supplies, all service contracts, all insurance premiums, and deductible payments made by Lessor incident to insured losses, which are paid for by Lessor and which pertain to the Premises and/or Building.

The annual Additional Rent for operating expenses due under this lease is TWO HUNDRED FIFTY NINE THOUSAND TWO HUNDRED NINETY THREE DOLLARS (\$259,293). Lessee will pay the Additional Rent in twelve (12) equal installments on the first day of each month. The Additional Rent shall increase 3% annually, each year thereafter beginning on October 1, 2010.



4.1(c) The Lessor shall provide proper containers for trash and garbage and shall keep the leased premises free and clear of rubbish, debris, and litter at all times.

**Section 4.2 – State Correction of Defects:** If the state believes that the Lessor failed to perform maintenance or repair work required under this lease, and if the Lessor, after thirty (30) days prior written notice to the Lessor of such deficiencies, fails to correct the deficiencies, or initiate good faith efforts to remedy the situation, the state may, without terminating this lease request arbitration as provided in Section 11.9 below.

**Section 4.3 – Utilities and Services:** With the exception of telephone services and warehouse electricity, Lessor will provide all utilities and services required on the premises and leased space, including electricity, heat, air conditioning, sewage, potable water, trash removal, snow clearance and removal, janitorial cleaning, and security services. The Lessor must make available to the lease premises, at the Lessor's expense, transmission facilities capable of supplying the electrical needs of the State as such needs exist as of the date of this Lease.

4.3(a) Regarding the needs of its vessels, Lessee is responsible for the cost of potable water and of disposing waste water, waste fuel/oil services, and trash. Such water, waste water and waste fuel/oil services and trash removal may be contracted for by either the State or the Lessor. In the event the Lessor contracts for any such services for Lessee, Lessee will reimburse Lessor for actual costs of the services, with no mark-up applied by Lessor.

4.3(b) Lessor shall not be liable for failure to furnish utilities or services on the leased premises when the failure results from causes beyond the Lessor's reasonable control, but in case of the failure, the Lessor will take all reasonable steps to restore the interrupted utilities and services.

**Section 4.5 – Operations Manuals:** The Lessor will ensure Lessee has full, true, and complete copies of the Car and Passenger Ramp operations manual on or before the renewal date of this Lease. The Lessor shall provide to the state any subsequent amendments or supplements to such manuals which may be provided to the Lessor as owner of the leased premises and any accompanying equipment. The state shall operate the Car and Passenger Ramp in compliance with procedures, specifications and other requirements contained in such operations manuals, as the same may be revised by the publisher thereof from time to time and furnished to Lessee by Lessor.

**Section 4.6 – Fire Prevention:** The Lessor will maintain the premises in keeping with applicable fire codes. The state reserves the right at reasonable times to enter and make fire prevention and fire protection inspections of the building and space occupied. If the State believes there is a violation of applicable fire code that creates a fire hazard at the leased premises, it will be reasonably addressed by the Lessor.

**Section 4.7 – Accident Hazards:** The Lessor will maintain the leased premises free of structural or mechanical hazards and in accordance with applicable building codes. If the State believes that there is a violation of an applicable building code that creates an accident hazards it will be reasonably addressed by the Lessor

**Section 4.8 – Liens:** The state shall pay or cause to be paid, when due, all sums of money which may become due for any labor, services, materials, supplies, utilities, furnishings, machinery, or equipment furnished to, in, upon, or about the leased premises at the request or upon the order of the state or with the state's consent or at the request of one of the state's contractors or subleases or at the request of any other person using the leased premises under an agreement with the state and which are or may be secured by such lien against the leased premises or the state's interest therein. The state shall fully discharge and obtain the release of any lien against the leased premises or the state's interest therein that arises out of action taken pursuant to an agreement with the state, and shall also fully discharge and obtain the release of any lien against the leased premises or the state's interest therein that is created with the consent of the state.

**Section 4.9 – Untenantability:** The Lessor agrees that the leased premises provided in this lease are tenantable and that they comply with all laws pertaining to tenantability and performance of this provision is ensured by the Lessor agreeing to pay the cost of any building alterations or other alterations which may be needed during the period of the lessee's occupancy for purposes of correcting any violation of the law cited by regulatory agency of government not directly a result of the state's occupancy. In the event the Lessor fails to correct violations in time interval prescribed by law, the state will be free to terminate the lease. If during the term of this lease, the premises or any part thereof be rendered untenable by public authority, or by fire or the elements, or other casualty, a proportionate part of the rent according to the extent of such untenability will be abated and suspended until the premises are again made tenantable and restored to their former condition by the Lessor; and if the premise or a substantial part thereof are thereby rendered untenable and so remain for a

period of 30 (thirty) days, the state, may, at its option, terminate the lease by written notice to the Lessor. This 30 (thirty) day period will not be so restrictively construed that the lessee is bound to remain in the leased facility of the state's business cannot be safely executed. If justified because of unsafe conditions, the state is free to move elsewhere. Any dispute concerning untenable condition described herein shall be resolved in accordance with Section 11. 9. Aside from rent abatement, the right to terminate the Lease is the sole remedy for untenantability.

Section 4.10 – Janitorial Services and other Miscellaneous Services: The Lessor agrees to perform the following services in the offices and public areas of the leased premises:

**4.10(a) Daily Services:**

- (i) Empty and wipe clean all waste baskets.
- (ii) Secure trash from waste baskets in plastic garbage bags and dispose of garbage bags away from the premises in a Lessor furnished dumpster. After disposal, close and secure the container lid(s)/ door(s).
- (iii) Clean all drinking fountains and bathroom fixtures with liquid disinfectant.
- (iv) Maintain all bathroom fixtures and drinking fountains in a clean, sanitary condition.
- (v) Fill all paper, sanitary napkin, toilet seat cover, soap and other dispensers with products of proper size and type.
- (vi) Maintain all paper, sanitary napkin, toilet seat cover, soap and other dispensers in a clean and useable condition.

**4.10(b) Weekly Services:**

- (i) Clean all mirrors and interior glass or Plexiglas, including exhibit cases. Leave all interior glass in a clean and streak-free condition.
- (ii) Clean all entry glass doors.
- (iii) Vacuum all carpeted floors.
- (iv) Clean spots from all carpeted floors with carpet products and techniques recommended by carpet manufacturer.

- (v) Mop all public restroom tiled floors with liquid detergent and water, rinse tiled floors with clean water then mop tiled floors dry.
- (vi) Buff public restroom tiles floors.
- (vii) Clean dirt and smudge marks from public areas walls, furniture, and fixtures.
- (viii) Maintain all entry mats in a clean, dirt-free, and functional condition.
- (ix) Pick up and dispose of outdoor litter on the site.
- (x) Dispose of trash from outdoor trash containers on the site.

**4.10(c) As Required Services:**

- (i) Replace plastic waste basket liners.
- (ii) Replace light fixture lamps.
- (iii) Furnish men and women's restrooms with mirrors and dispensers for soap, toilet tissue and paper towels.

**4.10(d) Other Requirements:**

- (i) Maintain janitor's closet in a neat and orderly condition at all times.
- (ii) Outside doors are to be kept locked at all times except when the building is normally open to the public or otherwise being used with the permission of the Lessor.

**4.10(e) Snow Removal Services:** Included as the Lessor's responsibility is the removal of snow and ice from the sidewalks and all parking areas and outside storage areas of the entire site in a reasonably timely fashion and to an extent which will render these areas safe to pedestrian and vehicle traffic and automobile operation.

**ARTICLE 5: OBLIGATIONS OF THE STATE**

**Section 5.1 – State's Responsibilities:** The state's responsibilities under this lease are:

- (1) To pay said rent on or before the 1<sup>st</sup> day of every month of the lease term at an address designated by the Lessor.
- (2) To use and occupy the premises in a careful and proper manner.

- (3) Not to use or occupy the premises for any unlawful purposes.
- (4) To neither assign lease nor underlet the premises or any part thereof, without the written consent of the Lessor provided, however, that such consent will not be unreasonably withheld.
- (5) Not to use or occupy the premises or permit the same to be occupied for any purpose or business deemed extra hazardous on account of fire or otherwise.
- (6) To make alterations or additions in or to the premises only with the written consent of the Lessor, which consent will not unreasonably be withheld.
- (7) To leave the premises at the expiration or prior termination of this lease or any renewal or extension thereof, in as good condition as received, excepting reasonable wear and tear
- (8) To permit the Lessor to enter upon the premises at all reasonable times to examine the condition of same.

**Section 5.2 – Fixtures:** All fixtures and /or equipment of whatsoever nature that will have been installed in the premises by the state, whether permanently affixed thereto or otherwise, will continue to be the property of the state and may be removed by the state at any time, provided however, the state will, at its own expense, repair any injury to the premises resulting from such removal.

**Section 5.3 – Improvements:** The state shall have the right to make alterations, additions and improvements to the leased premises as defined in section 1.2, subject to the written consent of the Lessor, which consent will not be unreasonably withheld. The State shall maintain responsibility for maintenance and repair of any alteration, addition and improvement made by the state to the leased premises unless otherwise agreed to in writing by the parties.

**5.3 (a)** The Lessor will not make any alterations, additions or improvements to the leased premises as defined in section 1.2 above that unreasonably interfere with the state's operations or use of the premises.

#### **ARTICLE 6 : ALLOCATION OF FAULT; INSURANCE**

**Section 6.1 –Allocation of Fault:** In the event a third party asserts a claim for damages against either Lessor or the state in connection with this lease, the parties agree that either may take those steps necessary for the fact finder to make an allocation of comparative fault between

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

SHANNON C. ADAMSON and  
NICHOLAS ADAMSON, Husband  
and Wife,  
*Plaintiffs-Appellees,*

v.

PORT OF BELLINGHAM, a  
Washington Municipal  
Corporation,  
*Defendant-Appellant.*

No. 16-35314

D.C. No.  
2:14-cv-01804-MJP

SHANNON C. ADAMSON and  
NICHOLAS ADAMSON, Husband  
and Wife,  
*Plaintiffs-Appellants,*

v.

PORT OF BELLINGHAM, a  
Washington Municipal  
Corporation,  
*Defendant-Appellee.*

No. 16-35368

D.C. No.  
2:14-cv-01804-MJP

ORDER  
CERTIFYING  
QUESTION TO  
WASHINGTON  
STATE SUPREME  
COURT

Filed August 14, 2018

Before: Ronald M. Gould and Sandra S. Ikuta, Circuit Judges, and John R. Tunheim,\* Chief District Judge.

Order

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**SUMMARY\*\***

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**Certified Question to Washington Supreme Court**

The panel certified the following question of state law to the Supreme Court of Washington:

Is party A (here the Port of Bellingham) liable as a premises owner for an injury that occurs on part of a leased property used exclusively by party B (here the Alaska Marine Highway System – the “Ferry”) at the time of the injury, where the lease has transferred only priority usage, defined as a superior but not exclusive right to use that part of the property, to party B, but reserves the rights of party A to allow third-party use that does not interfere

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\* The Honorable John R. Tunheim, Chief United States District Judge for the District of Minnesota, sitting by designation.

\*\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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with party B's priority use of that part of the property, and where party A had responsibility for maintenance and repair of that part of the property?

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### **COUNSEL**

Michael Barr King (argued), Jason W. Anderson, and Rory D. Cosgrove, Carney Badley Spellman P.S., Seattle, Washington; Frank J. Chmelik and Seth A. Woolson, Chmelik Sitkin & Davis P.S., Bellingham, Washington; for Defendant-Appellant/Cross-Appellee.

Philip A. Talmadge (argued), Talmadge/Fitzpatrick/Tribe, Seattle, Washington; James Jacobsen and Joseph Stacey, Stacey & Jacobsen LLP, Seattle, Washington; for Plaintiffs-Appellees/Cross-Appellants.

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### **ORDER**

We respectfully ask the Washington State Supreme Court to answer the certified question presented below, pursuant to Revised Code of Washington § 2.60.020, because we have concluded that maritime law does not apply to these claims, and therefore “it is necessary to ascertain the local law of [Washington] state in order to dispose of [this] proceeding and the local law has not been clearly determined.”

This case involves a tort claim under Washington law for which a jury awarded approximately \$16,000,000 in damages to Sharon Adamson, the plaintiff. Adamson's damages arose when a passenger ramp that she was operating at the Port of

Bellingham (“the Port”) fell about 15 feet, snapping the cables that supported it, and causing her severe injuries. The Port claimed that it was not liable for the damages, because the ramp was under the exclusive control of its tenant, the Alaska Marine Highway System (“the Ferry”), at the time of the accident. On the Port’s theory, it was liable only for notifying the Ferry of hidden defects, and had no duty as a possessor of land. *See* Restatement (Second) of Torts §§ 328E, 343, 343A, 356, 360. The plaintiffs claimed and the district court held, in contrast, that under the lease the Port was liable as a possessor of land for damages occurring on the ramp.

## I

We summarize the material facts. At the time of the accident, Adamson, an employee of the Ferry, was operating a passenger ramp at the Port’s Bellingham Cruise Terminal facility. The ramp was designed to be raised and lowered with three-quarter inch thick cables. But once the ramp was in the proper position for passengers to board or disembark from a ship, hydraulic pins would be inserted to hold the ramp in place, rather than requiring the cables to bear the weight of people crossing the ramp.

There was, however, a flaw in this system: Once the pins were in place, it was still possible to continue to unspool the cables. Although the pins would prevent the ramp from descending, slack would build up in the cables. And then if the pins were removed while there was slack in the cables, the ramp would drop precipitously until the cables caught the slack—assuming that the cables could withstand the force of the ramp’s fall.

While she was operating the ramp, Adamson attempted to lower the ramp while the pins were in place, putting slack in the cables. She then removed the pins and the ramp dropped about 15 feet, severing the cables, and causing Adamson's extensive injuries. Available evidence showed that the ramp could have been modified at little cost to prevent slack in the cables when the pins were in place, thus preventing the serious type of injury that occurred in this case. Evidence also showed that the Port was aware of the potential risk because a similar incident had occurred previously, but fortunately without any resulting injuries.

The district court held as a matter of law that based on the agreement between the Port and the Ferry, the Port had not conveyed exclusive possession to the Ferry and that the Port faced liability as a possessor of property. The district court instructed the jury in accordance with this holding, and the jury returned a verdict in favor of Adamson and against the Port.

The agreement between the Port and the Ferry contains the following provisions that are relevant to the issues on appeal:

- (1) Section 1.2 describes the leased premises. It notes that the Ferry will have "exclusive use" of the "Reservation and Ticketing Office," the "Bellingham Cruise Terminal Manager's office," "the Warehouse space located in Warehouse No. 4," and "the Staging and pursuer booth." The Ferry will have "priority use" of "approximately 125 parking spaces" and "the Marine Facilities, including the vehicle ramp, passenger ramp, and Berth 1—Pier and Dolphins." The passenger ramp was the location of the injury.

- (2) Section 1.3 defines “exclusive use” to mean “the sole possession and control of Areas subject only to the terms and conditions of this Lease.”
- (3) Section 1.4 defines “priority use” to mean “the [Ferry] is entitled to superior but not exclusive right of use to the identified areas. The [Port] may allow other uses of the priority use areas so long as such use does not unreasonably interfere with [the Ferry’s] use.”
- (4) Section 4.1 of the agreement states that “[t]he lessor will be solely responsible for keeping the leased premises in good repair and tenantable condition. The term ‘repair’ includes repairs of any type including but not limited to exterior and interior, structural and nonstructural, routine or periodic, except as in case of damage arising from the negligence of the [Ferry’s] agents or employees.”
- (5) Section 5.1 of the lease allows the Ferry “to make alterations of additions in or to the premises only with written consent of the Lessor, which consent will not unreasonably be withheld.”

## II

On Appeal the Port contends vigorously that under Washington law, whenever the Ferry was in port, exclusive control of the ramp passed to the Ferry, and the Port was no longer liable to the Ferry’s invitees. In support of this conclusion, the Port argues, first, that the priority use provision meant, as a practical matter, that the Ferry had exclusive control over the ramp whenever it was in port; only

one ship could be docked at the ramp at a time. And the Port argued second, that it never allowed a third party to use the ramp for docking purposes, so, in fact, only the Ferry ever used the ramp.<sup>1</sup>

As we understand Washington law, 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. *See* Restatement (Second) of Torts § 328E (1965); *Regan v. City of Seattle*, 76 Wash. 2d 501, 504 (1969) (“the lessee takes the property subject to all apparent defects; and, with some exceptions, the lessor is not liable for injuries caused by apparent defects after exclusive control of the property has passed to the lessee . . . a lessor owes no greater duty to invitees, guests or sublessees of his tenant than he does to the tenant himself”); *Clemmons v. Fidler*, 58 Wash. App. 32, 38 (1990). But where property is given over to the use of a tenant, some parts of the property can be the responsibility of the tenant, while other parts of the property remain the responsibility of the landlord. *See Andrews v. McCutcheon*, 17 Wash. 2d 340 (1943) (upholding jury’s conclusion that a landlord maintained control of a stairway that provided access to the leased premises and was liable for an injury occurring in the stairway, despite the fact that normally a stairway to the leased premises used exclusively by the tenant would be considered part of the leased premises and hence the responsibility of the tenant). As a general rule, the landlord has a responsibility “to exercise reasonable care to maintain common areas in a safe condition,” *Mucsi v. Graoch Assocs. Ltd. P’ship No. 12*,

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<sup>1</sup> Adamson cross-appealed, urging us to sustain the jury’s verdict under a federal maritime negligence theory. We have rejected this argument in an opinion filed concurrently herewith.

144 Wash. 2d 847, 863 (2001), but not areas where “other tenants and the general public have no right of access.” *Resident Action Council v. Seattle Hous. Auth.*, 162 Wash. 2d 773, 780–81 (2008).

Also, as we understand Washington law, property can become the responsibility of a lessee, even if rented only for a short period of time. *Hughes v. Chehalis Sch. Dist.*, 61 Wash. 2d 222, 224 (1963) (holding that a landlord tenant relationship had been created even where the property was only leased for an evening). And property can be the responsibility of the lessee even if the agreement between the parties includes some reservations regarding use. *See Regan*, 76 Wash. 2d at 504 (“If this control has passed, even though the use is restricted by limitations or reservations, then a landlord-tenant relationship is established”).

But we find little guidance in the Washington precedents on how to assess which parts of the property given over to the use of a tenant count as parts of the property transferred into the tenant’s control, rather than portions of the property “the tenant is entitled to use as appurtenant to the part leased to him.” Restatement (Second) of Property: Landlord & Tenant, § 17.3 (1997). Here, for instance, the question of usage is mixed. As a practical matter, only the Ferry used the passenger ramp, and the priority use provision effectively gave the Ferry exclusive control of the ramp when it was in Port—no other ship could dock at that time. But the agreement also gave the Port control over the ramp when the Ferry was not in port. For example, the Port could allow third parties to use the ramp without material restriction when the Ferry was not there. The Port also had responsibilities for maintenance and repair of the ramp, and could have had access to the ramp to make such repairs at any time

throughout the lease term when the Ferry was not docked. And the Ferry could not unilaterally alter the ramp without the Port's consent.

Under these circumstances, this case offers the Washington State Supreme Court the opportunity to provide more clarity about the conditions under which a lessor is absolved of responsibility for injuries occurring on a part of the property subject to a mixed use by both lessor and lessee. Especially relevant here is the apportionment of responsibility where the lessee, as a practical matter, has exclusive use of a part of the property for intermittent periods of time, short of the entire term of the lease agreement.

Because we have concluded that this important question of Washington law is not entirely settled and involves matters of policy best left to resolution by the State of Washington's highest court, certification of a question to the Washington State Supreme Court is the most appropriate course of action. If the Washington State Supreme Court concludes that a lessee's right to priority usage of a part of a facility is sufficient to transfer responsibility for injuries entirely away from the lessor, we will reverse the district court with instructions to hold a new trial that appropriately instructs the jury on bases of liability not premised on the assumption that the Port is liable as a premises owner. If, however, the Washington State Supreme Court decides that a priority usage agreement does not absolve a landlord of liability as a possessor of property, we will affirm the district court.

### III

In light of the foregoing discussion, and because the answer to this question is "necessary to ascertain the local law

of this state in order to dispose” of this appeal, RCW § 2.60.020, we respectfully certify to the Washington State Supreme Court the following question:

Is party A (here, the Port) liable as a premises owner for an injury that occurs on part of a leased property used exclusively by party B (here, the Ferry) at the time of the injury, where the lease has transferred only priority usage, defined as a superior but not exclusive right to use that part of the property, to party B, but reserves the rights of party A to allow third-party use that does not interfere with party B’s priority use of that part of the property, and where party A had responsibility for maintenance and repair of that part of the property?

Perhaps stated more broadly, the question of Washington law presented is whether priority use can be considered to give exclusive control, and if so in what circumstances?

We do not intend our framing of this question to restrict the Washington State Supreme Court’s consideration of any issues that it determines are relevant. If the Washington State Supreme Court decides to consider the certified question, it may in its discretion reformulate the question. *Broad v. Mannesmann Anlagenbau AG*, 196 F.3d 1075, 1076 (9th Cir. 1999).

If the Washington State Supreme Court accepts review of the certified question, we designate appellant Port of Bellingham as the party to file the first brief pursuant to

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Washington Rule of Appellate Procedure (“WRAP”) 16.16(e)(1).

The clerk of our court is hereby ordered to transmit forthwith to the Washington State Supreme Court, under official seal of the United States Court of Appeals for the Ninth Circuit, a copy of this order and all relevant briefs and excerpts of record pursuant to Revised Code of Washington §§ 2.60.010, 2.60.030 and WRAP 16.16.

Further proceedings in our court are stayed pending the Washington State Supreme Court’s decision whether it will accept review, and if so, receipt of the answer to the certified question. This case is withdrawn from submission until further order from this court. The panel will resume control and jurisdiction on the certified question upon receiving an answer to the certified question or upon the Washington State Supreme Court’s decision to decline to answer the certified question. When the Washington State Supreme Court decides whether or not to accept the certified question, the parties shall file a joint report informing this court of the decision. If the Washington State Supreme Court accepts the certified question, the parties shall file a joint status report every six months after the date of the acceptance, or more frequently if circumstances warrant.

It is so **ORDERED**.

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the *Brief of Respondents* in Supreme Court Cause No. 96187-5 to the following:

James Jacobsen, WSBA #16331  
Joseph Stacey, WSBA #12840  
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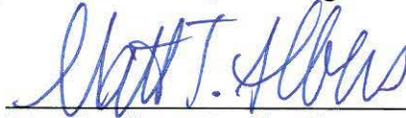
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Original E-filed with:  
Supreme Court Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 18, 2018, at Seattle, Washington.



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Matt J. Albers, Paralegal  
Talmadge/Fitzpatrick/Tribe

**TALMADGE/FITZPATRICK/TRIBE**

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