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No. 96187-5

(Ninth Circuit No. 16-35314)

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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

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

*Plaintiffs-Appellees,*

v.

PORT OF BELLINGHAM, a Washington Municipal  
Corporation,

*Defendant-Appellant.*

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**PORT OF BELLINGHAM'S ANSWER TO AMICUS CURIAE  
BRIEFS**

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## I. INTRODUCTION

Contrary to the arguments made by amici curiae Inland Boatmen's Union (IBU) and Washington State Association for Justice Foundation (WASJF), this Court is not asked to apply the principle of "caveat emptor." Nor is this Court asked to decide any issue pertaining to jobsite-owner liability, as argued by IBU and the Washington State Labor Council (WSLC). The certified question is narrow and focus. It asks this Court to decide, under established principles of premises-liability and landlord-tenant law, whether the Port possessed the passenger ramp when Adamson was injured, given the existence of a priority-use provision and repair covenants in the subject lease. As prior briefing has addressed, and as the Port will further discuss in this brief, "possession" as a matter of well-established Washington law turns on whether the Port could exercise control when the Ferry System was exercising its use rights. Because, as the Ninth Circuit expressly recognized in its Certified Question Order, the Port could not do that, the Port did not have possession.

The Port adopts the arguments made by the Washington Public Ports Association (WPPA) and by the International Council of Shopping Centers, Washington Retail Association, and Building Owners and Managers Association of Seattle-King County ("ICSC, *et al.*"). The Port agrees that, as argued by these groups, answering the certified question as Adamson proposes would wreak havoc in multiple industries, upending settled expectations under long-established forms of leases and lease provisions. Most profound from the Port's perspective would be the effect on

Washington’s maritime ports, including the largest ports in our state, which lease port facilities on a priority-use basis.

## II. ANSWERING ARGUMENT

### A. **None of the amici curiae cites any authority that abrogates the general rule of non-liability of landlords under the law governing the rights and obligations of a possessor of land.**

No authority supports IBU’s or WSAJF’s arguments challenging the notion of a general rule of landlord nonliability. In a premises-liability case such as this, the law of premises liability applies regardless of whether the premises are subject to a lease. But under that law, only a “possessor” of land is subject to liability for injury resulting from a condition on the land.<sup>1</sup> *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 49-50, 914 P.2d 728 (1996) (citing RESTATEMENT (SECOND) OF TORTS § 343 (1965)). This rule ensures that the duty rests with the person who is in the best position to prevent harm—the one in control.<sup>2</sup>

The expression that there is a general rule of landlord non-liability merely reflects this basic principle of premises liability. Because a lease by definition passes exclusive possession of the premises to the tenant, so, too, passes the obligation to protect persons entering the land against harm. *Regan v. City of Seattle*, 76 Wn.2d 501, 504, 458 P.2d 12 (1969); *Hughes v. Chehalis Sch. Dis. No. 302*, 61 Wn.2d 222, 224, 377 P.2d 642 (1963);

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<sup>1</sup> The scope of a possessor’s duty varies according to the traditional classifications of invitee, licensee, or trespasser. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 49 914 P.2d 728 (1996).

<sup>2</sup> Despite challenging the notion that there is a general rule of landlord nonliability, both IBU and WSAJF accept that the existence of a duty on the part of a landlord depends on control. *See IBU Brief* at 7-10; *WSAJF Brief* at 6-7.

*Pruitt v. Savage*, 128 Wn. App. 327, 330-31, 115 P.3d 1000 (2005). Consistent with premises-liability law, a landlord is subject to liability for injuries resulting from a condition on the leased premises only where the landlord retained possession of a portion of the premises and was in a position to prevent the injury through the prudent exercise of the power to control associated with that possession, or where one of the long-established exceptions to the general rule applies (such as the duty to disclose hidden defects). See *Regan*, 76 Wn.2d 504; *Hughes*, 61 Wn.2d at 225.

The principle of caveat emptor (“let the buyer beware”), attacked by IBU and WSAJF as archaic, is a red herring. To be sure, this Court has referenced that principle in the context of landlord liability for torts. See *Teglo v. Porter*, 65 Wn.2d 772, 773-74, 399 P.2d 519 (1965); *Hughes*, 61 Wn.2d at 225. But contrary to IBU’s and WSAJF’s arguments, this Court has not used it to characterize the basic rule of premises liability invoked here—*i.e.*, the rule that the existence of a duty follows possession.

When this Court has referenced caveat emptor, it has done so in explaining that, absent a covenant to repair, a tenant is responsible for all apparent defects, *i.e.*, those known to it or ascertainable by reasonable inspection. See *Teglo*, 65 Wn.2d at 773-74; *Hughes*, 61 Wn.2d at 225. A landlord’s duty to disclose hidden defects and a tenant’s responsibility for apparent defects are not pertinent to the certified question. Had the Ninth Circuit concluded that substantial evidence supported a finding that the Port had failed to disclose a hidden defect to the Ferry System, then no certified question would have been necessary because the Ninth Circuit could have

affirmed the judgment on that basis. No issue of failure to disclose is before this Court and, thus, neither is caveat emptor.

Moreover, even assuming this Court were inclined to revisit the basic principles of premises liability and their applicability in the landlord-tenant context, those issues are not before this Court, either. *See Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 676, 10 P.3d 371 (2000). The Ninth Circuit did not certify to this Court a question asking whether Washington adheres to the general rule of landlord nonliability. The Ninth Circuit asked whether, under that established rule and the related legal principles, the Port possessed the passenger ramp when Adamson was injured. Consistent with this Court's precedents, the answer to that question should be "no."

**B. A landlord who lacks control when and where injury occurs is not subject to liability as a possessor.**

IBU and WSAJF conflate exclusive use and exclusive possession. Contrary to their arguments, the provisions giving the Ferry System priority use of certain areas and exclusive use of others do not speak to whether the Ferry System has exclusive *control* and thus *possession* of those areas when it is using them. As WPPA observes, possession depends on a right of *control*, not a right of *use*. *See Regan*, 76 Wn.2d 504; *WPPA Brief* at 6-7. Priority use of an area will result in *nonexclusive* possession by a tenant only if the landlord expressly reserved a right of control.

Both IBU and WSAJF rely on cases involving common areas. *See IBU Brief* at 9-10 (citing *Anderson v. Reeder*, 42 Wn.2d 45, 48, 253 P.2d

423 (1953); *WSAJF Brief* at 12 (citing *McCutcheon v. United Homes Corp.*, 79 Wn.2d 443, 445, 486 P.2d 1093 (1971); *Geise*, 84 Wn.2d at 871). But a common area is an area designated for *shared* use. *Geise v. Lee*, 84 Wn.2d 866, 868-69, 529 P.2d 1054 (1975). Priority use, by definition, cannot be shared use. Indeed, the lease here expressly forbade the Port from allowing other uses of the Marine Facilities to interfere with the Ferry System's use and, as a practical matter, simultaneous use by multiple tenants was impossible.<sup>3</sup> ER 580-81. The Ninth Circuit has determined that the Ferry System had exclusive possession and control of the Marine Facilities during its periodic use of those facilities, *Certification Order* at 8, and that factual determination is controlling in this proceeding. See *Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 579 n.1, 397 P.3d 120 (2017); *Broad*, 141 Wn.2d at 676; *In re Fountainebleau Las Vegas Holdings*, 267 P.3d 786, 794 (Nev. 2011).

IBU's hypothetical of a "party room" that can be reserved and used by one tenant at a time demonstrates its confusion about leases and common areas. *IBU's Brief* at 17. The tenants in the hypothetical would likely obtain only a *license* to use the room, similar to a guest staying in a hotel room. But assuming the tenants had exclusive possession and control of the party room, the scenario would be indistinguishable from *Hughes*, where the Orthopedic Guild leased a school cafeteria for one evening per year. See *Hughes*, 61 Wn.2d at 223-24. Even though others obviously could use the

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<sup>3</sup> The Port and the Ferry System plainly distinguished between common areas, such as the public spaces of the Terminal, and the Marine Facilities. The passenger ramp was behind a locked door controlled by the Ferry System. ER 581.

cafeteria at other times, there was no notion of the cafeteria being a common area. The Guild had contracted for exclusive possession of the cafeteria during its use of the facility, and thus the Guild, not the school district, was liable for injury resulting from a trip hazard during the course of the Guild's event. *Id.* at 225-26. The party room is no different, if the tenants had exclusive possession, and neither is the passenger ramp.

Tellingly, none of the amici attempt to distinguish factually either *Hughes* or *Barnett v. Lincoln*, 162 Wash. 613, 299 P. 392 (1931). As WPPA recognizes, *Barnett* is particularly on point. *See WPPA Brief* at 7-9. Attempting to summarily dispense with *Hughes* and *Barnett*, WSAJF states that “[w]hether a landlord-tenant relationship exists is not at issue[.]” *WSAJ Barnett v. Lincoln*, 162 Wash. 613, 299 P. 392 (1931)*Brief* at 15. But that is indeed the issue. *Hughes* and *Barnett* address whether the parties created a landlord-tenant relationship by transferring exclusive possession and control from the landlord to the tenant. The issue here is whether the landlord-tenant relationship between the Port and the Ferry System—the transfer of exclusive possession and control—extended to the Marine Facilities. It did.

IBU contends that one provision of the lease would be “superfluous” if the priority-use portions of the premises were under the Ferry System's exclusive control. *IBU Brief* at 12-13. IBU refers to section 6.1, which does not support its position. Section 6.1 allows either the Port or the Ferry System, in the event of a third-party claim for damages, to “take those steps necessary for the fact finder to make an allocation of comparative fault

between the Lessor and the state[.]” ER 348-49. IBU forgets that the Port could be subject to liability to a third party if it breached a duty to the tenant (such as by failing to disclose a hidden defect or maintain a common area) and that breach of duty was a proximate cause of injury. Section 6.1 is not superfluous.<sup>4</sup>

Also providing no support for IBU’s position are the cases involving landlord liability for injury to members of the public using wharves. *See IBU Brief* at 15 (citing *Enerson v. Anderson*, 55 Wn.2d 486, 348 P.2d 401 (1960); *Nelson v. Booth Fisheries Co.*, 165 Wash. 521, 6 P.2d 388 (1931); *Gregg v. King County*, 80 Wash. 196, 141 P. 340 (1914)); *see also Port’s Reply Brief* at 12 n.8. As WPPA explains, the Port does not operate the Marine Facilities as a public dock; instead, they are subject to the Ferry System’s exclusive control when a ferry is in the berth. *WPPA Brief* at 12 n.2. Adamson was using the Marine Facilities (operating heavy marine-industrial equipment) within the scope of her employment with the Port’s tenant, not as a member of the public using the ramp to board a ferry.

**C. A duty to repair or maintain does not amount to retention of control over the premises, as would be necessary to subject a landlord to liability as a possessor.**

WSAJF is confused about the relevant possession for purposes of premises liability. WSAJF asserts that “[c]ontrol over the passenger ramp

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<sup>4</sup> And again, IBU presumes by the making of its argument concerning section 6.1 that the issue of exclusive control is open for debate in this proceeding. It is not open for debate, because of the Ninth Circuit’s finding in its order of exclusive control by the Ferry System when exercising its use rights, which is controlling in this proceeding. *See Certification Order* at 8; *Brady*, 188 Wn.2d at 579 n.1; *Broad*, 141 Wn.2d at 676; *In re Fountainebleau Las Vegas Holdings*, 267 P.3d at 794.

where and when injury occurred is not the determining factor,” and Adamson can be deemed the Port’s invitee if it possessed the ramp “for a sufficient amount of time to fulfill its contracted duties to perform necessary repairs and maintain the passenger ramp free of mechanical hazards.” *WSAJ Brief* at 16, 18. In other words, according to WSAJF, the Port should be subject to liability as an owner in possession if it ever performed repairs or maintenance as the lease requires. This reasoning is nonsensical and would result in many commercial landlords being virtual guarantors against tort liability, given the ubiquity of repair and maintenance clauses in modern commercial leases.<sup>5</sup>

Contrary to WSAJF’s argument, the relevant possession is possession “where and when” the plaintiff’s injury occurred. *See Hughes*, 61 Wn.2d at 225 (holding that a tenant who had possession for one evening was responsible); *Jarr v. Seeco Constr. Co.*, 35 Wn. App. 324, 327-28, 666 P.2d 392 (1983) (holding that a real-estate agent was a possessor while showing a house); *Regan*, 76 Wn.2d at 504 (holding that the tenant “was granted sufficient control, *at least to that portion of the premises in which plaintiff was injured*,” to give rise to a landlord-tenant relationship (emphasis added)). The Ferry System—not the Port—was in control where and when Adamson was injured. And according to the Ninth Circuit, that control was complete and exclusive. *Certification Order* at 8.

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<sup>5</sup> Whether the Port breached the repair and maintenance clauses in the lease is not before this Court, but will be determined in a new trial, should this Court answer the certified question in the Port’s favor. *See Port’s Opening Brief* at 20-24.

A landlord does not assume control of the premises by making repairs. As WPPA explains, any other rule would require every landlord that has a repair obligation to supervise the tenant at all times and presume to dictate how it uses the premises. *WPPA Brief* at 10-14. Significantly, a landlord cannot eliminate all risk, including from misuse of equipment. Nor is it practicable for a landlord to protect itself by reserving the right to train and control tenants' employees. As discussed by WPPA, that is untenable, especially in the maritime context. *See WPPA Brief* at 10-14.

WSAJF fails in its attempt to distinguish *Resident Action Council v. Seattle Housing Auth.*, 162 Wn.2d 773, 175 P.3d 84 (2008). This Court expressly held in that case that “maintenance is not tantamount to asserting a right of control.” *Id.* at 781. WSAJF fails to explain how it should make any difference that the duty to maintain in *Resident Action Council* was statutory rather than contractual. *See WSAJF Brief* at 19. It makes no difference. The issue is whether the landlord retains a right to control the use of the premises. *See Resident Action Council*, 162 Wn.2d at 780-81; *see also Gabaldon v. Erisa Mortg. Co.*, 990 P.2d 197, 204 (N.M. 1999). Because the Port undisputedly had no such right over the Ferry System, the Port is not subject to liability as a possessor by virtue of its repair and maintenance duties.

**D. The certified question raises no issues pertinent to liability theories not dependent on possession, including jobsite-owner liability.**

Like the Adamsons, IBU and WSLC seek to broaden the scope of the certified question to pertain to liability theories that do not depend on

whether the Port possessed the Marine Facilities. These arguments are meritless. Plaintiffs had five independent liability theories; there were thus five independent grounds to affirm. The Ninth Circuit asked a certified question that will determine who possessed the ramp when Adamson was injured. That the Ninth Circuit asked a question that will determine possession means that it determined that the judgment cannot be affirmed based on any liability theory that does not depend on possession. Otherwise, there would be no need for this certified-question proceeding.

Jobsite-owner liability falls squarely into the category of issues not before this Court. The notion that the Port is subject to liability as a jobsite owner, advanced by IBU and WSLC, was never properly in this case, has been ruled out by the Ninth Circuit, and is not pertinent to the certified question. Jobsite-owner liability is based on an owner's retention of "the right to control the movements of all workers on the site to ensure safety." *Afoa v. Port of Seattle ("Afoa I")*, 176 Wn.2d 460, 479, 296 P.3d 800 (2013). As emphasized by ICSC, *et al.*, "pervasive control" will give rise to a duty. *ICSC Brief* at 3 (citing *Afoa I*, 176 Wn.2d at 481). Had the Ninth Circuit concluded that substantial evidence supported a finding that the Port retained such control at the Bellingham Cruise Terminal, then no certified question would have been necessary because the Ninth Circuit could have affirmed the judgment on that basis. As the Adamsons admit, "[t]he multi-employer worksite duty issue is nowhere mentioned in the Ninth Circuit's order[.]" *Respondents' Brief* at 24. Nevertheless, IBU and WSLC seek to

inject the issue of jobsite-owner liability into this proceeding, when it plainly has no place here.

IBU bases its jobsite-owner liability argument on the premise that “the Port did not give its tenant AMHS exclusive control over the passenger terminal and ramp.” *IBU Brief* at 18. IBU points to the Ninth Circuit’s inquiry “whether priority use can be considered to give exclusive control” and suggests that this shows that the Ninth Circuit left open the possibility that the Port may be subject to liability as a jobsite owner. *Certification Order* at 10. IBU is wrong.

Even assuming the Port had possession and control over the Marine Facilities for purposes of premises liability, that would not necessarily result in jobsite-owner liability. As explained by ICSC, *et al.*, the “retained control” that is relevant to jobsite-owner liability is not control over the work site, but rather control over the manner of performance of work. *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 52 P.3d 472 (2002); *see ICSC Brief* at 5. The Port undisputedly did not employ the Ferry System as a contractor and, in any event, retained no control whatsoever over the manner in which the Ferry System performed work at the Marine Facilities. The Port established based on undisputed evidence that the Marine Facilities were not a common work area and that the Port lacked any right to control how the Ferry System used those facilities, including the passenger ramp. IBU’s analogy to *Afoa I* fails because, unlike the Port here, the jobsite owner in that case—the Port of Seattle—expressly retained

control over all work performed in the area where the plaintiff was injured. 176 Wn.2d at 465-66.

IBU takes the reference to “exclusive control” in the certified question out of context. That reference does not suggest that the Port could be found to have retained control over the Ferry System’s manner of performing work. The question the Ninth Circuit asks is whether the intermittent nature of the Ferry System’s control over the *Marine Facilities* means that the Port is subject to liability as a possessor, under premises-liability law. That inquiry does not pertain to potential liability as a jobsite owner who retains control over work being performed by a contractor.

WSLC focuses its arguments on regulations adopted under WISHA, chapter 49.17 RCW, which generally prohibit providing an unsafe workplace. WISHA requires that each “employer” comply with regulations adopted under the Act. RCW 49.17.060(2). This Court addressed application of RCW 49.17.060(2) to a jobsite owner in *Kamla*. This Court concluded, “If a jobsite owner does not retain control over the manner in which an independent contractor completes its work, the jobsite owner does not have a duty under WISHA to ‘comply with the rules, regulations, and orders promulgated under [chapter 49.17 RCW].’ RCW 49.17.060(2).” 147 Wn.2d at 125.

*Kamla* controls here, not the federal cases cited by WSLC, or even *Afoa I*. None of those cases involved a premises over which exclusive control passed to the tenant’s employer under a lease and where the landlord had no right to control the use of the premises or equipment provided. As

pointed out by WPPA and ICSC, *et al.*, this Court in *Afoa I* recognized the “unique” circumstances of that case. 176 Wn.2d at 481; *WPPA Brief* at 16; *ICSC Brief* at 3. Unlike the Port of Seattle in *Afoa I*, the Port here had no right to control which Ferry System crew or contractors operated the Marine Facilities or what training they received. *See WPPA Brief* at 16. Because there is no colorable argument that the Port retained control over the manner in which the Ferry System performed work, the Port owed Adamson no duty, nondelegable or otherwise, under WISHA or regulations adopted under its authority.

### III. CONCLUSION

This Court should answer the narrow question posed by the Ninth Circuit and decide that the Port did not possess or control the passenger ramp when Adamson was injured.

Respectfully submitted this 12th day of February, 2019.

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## CERTIFICATE OF SERVICE

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

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DATED this 12<sup>th</sup> day of February, 2019.

  
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