

NO. 72925-0-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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

Plaintiffs,

v.

PORT OF BELLINGHAM, a Washington Municipal Corporation,

Defendant / Third-Party Plaintiff / Appellant,

v.

STATE OF ALASKA/DEPARTMENT OF TRANSPORTATION AND
PUBLIC FACILITIES – ALASKA MARINE HIGHWAY SYSTEM,

Third-Party Defendant / Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This case is a simple attempt to avoid the statutory immunity afforded an employer who is paying workers' compensation benefits to an injured employee. The Port of Bellingham ("Port") seeks to pierce the statutory immunity granted to the State of Alaska ("Alaska") as an employer providing no-fault benefits to an injured employee pursuant to workers' compensation laws. The Port seeks to assign fault to Alaska based on the claims made by Ms. Shannon Adamson, an Alaska employee, who has sued the Port and is seeking damages for an injury she alleges the Port negligently caused. The Port is making its claims against Alaska even though Alaska has met its obligations to pay no-fault workers' compensation to Ms. Adamson and is immune from the third-party tort and contract-based allegations in the Port's third-party complaint.

Procedurally, this is an appeal from a CR 12(b)(6) dismissal. When the Court conducts its *de novo* review, it will find that no set of facts, real or hypothetical, entitles the Port to the relief it seeks. This Court should affirm the trial court for two reasons: First, Alaska enjoys broad immunity from third-party fault-based claims arising from an industrial injury to one of its employees. Second, the Lease between Alaska and the Port does not support the Port's claims because (1) the Lease provides no waiver of Alaska's immunity; (2) the Lease does not address allocation of fault in

employee injury claims, and (3) the Alaska officials who entered into the Lease had no authority to expose Alaska to the claims made by the Port in this case.

Two aspects of this case are particularly novel. First, Ms. Adamson is a special type of seaman. Unlike almost all other seamen, she is not entitled to federal statutory or common law remedies in the event of an injury. The Alaska legislature has limited Alaska's waiver of sovereign immunity against federal statutory or common law claims arising from the injury of a state-employed seaman (which includes the crew of Alaska Marine Highway System ("AMHS") ferry vessels, like the one Ms. Adamson worked on at the time of her injury). Because of the limited waiver of sovereign immunity, unlike almost all other seamen, Alaska's state-employed seamen have an exclusive remedy under the Alaska workers' compensation scheme in the event of an industrial injury. Accordingly, pursuant to the extra-territorial provisions of Washington's workers' compensation laws (Title 51 RCW, a.k.a. Industrial Insurance Act or "IIA"), when Alaska's state-employed seamen work in Washington (when the AMHS ferries stop in Bellingham), they are included within those workers entitled to the protections (but also subject to the burdens) of the IIA. The Port misinterprets the IIA to exclude a visiting worker like Ms. Adamson, which defeats the IIA's inclusive purpose. Contrary to the

inconsistent position of the Port, Alaska's construction of the IIA affects its purpose of including all non-excluded workers in Washington.

The second novel aspect of this case is that the State of Alaska is a sovereign whose claim of sovereign immunity is implicated in this case. While Alaska has not asserted sovereign immunity in the context of the trial (or appellate) court's jurisdiction, its sovereign immunity is nevertheless an important issue in the analysis. The Port argues that the agency officials at the AMHS waived Alaska's sovereign immunity in the Lease and exposed Alaska to the Port's tort and contract claims that arise from Ms. Adamson's injury. As discussed in detail below, the Lease does not and could not accomplish what the Port claims it does.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Whether the trial court correctly dismissed the Port's claims pursuant to CR 12(b)(6) because the Port cannot prove any set of facts consistent with the Complaint that would entitle it to relief?
(Assignment of Error No. 1)

B. Whether the trial court appropriately exercised its discretion in denying the Port's Motion for Reconsideration, Clarification, or Certification for Appeal? (Assignment of Error No. 2)

III. STATEMENT OF THE CASE

A. Identification of Parties and Claim.

The Department of Transportation and Public Facilities (“DOT&PF”) is a department of the State of Alaska. Alaska Statute (“AS”) § 44.17.005(13). The Alaska Marine Highway System (“AMHS”) is an executive branch agency of Alaska within DOT&PF. *See* AS §§ 19.65.050, 19.65.080; 36.30.015; 44.17.020.

The Port is a Washington municipal corporation doing business in Whatcom County. CP 21 at ¶ 1.3. The Port operates a Terminal at which AMHS vessels regularly call. CP 22 at ¶¶ 3.1 - 3.3. The Terminal is located on navigable waters, *see e.g.*, 33 U.S.C. § 476 (referring to Puget Sound’s navigable waters), and in the State of Washington. WA Const. art. XXIV, § 1 (provision identifying the boundaries of the State of Washington). The Port, as Lessor, and the AMHS, as Lessee, are parties to a Lease that was in effect at the time of Ms. Adamson’s injury. CP 22 at ¶ 3.1; *see* CP 38-82 (Lease).

B. Statement of Facts.

1. Alaska’s Limited Waiver of Sovereign Immunity.

In 2003, the Alaska Legislature amended the State’s waiver of sovereign immunity to read:

... an action may not be brought if the claim ... (5) arises out of injury, illness, or death of a seaman that occurs or

manifests itself during or in the course of, or arises out of, employment with the state; AS 23.30 [the Alaska Workers' Compensation Act] provides the exclusive remedy for such a claim, and no action may be brought against the state, its vessels, or its employees under the Jones Act (46 U.S.C. 30104—30105), in admiralty, or under the general maritime law.

AS § 09.50.250. AMHS participates and pays into the Alaska workers' compensation insurance system. CP 84. Alaska is one of only a few states that direct their injured state-employed seamen into a workers' compensation system. *See Glover v. State, Dep't of Transp., Alaska Marine Highway Sys.*, 175 P.3d 1240, 1254 (Alaska 2008) (noting that “the federal government provides at least some of its employed seamen with federal workers' compensation, as do several other states”). Alaska treats its state-employed seamen in the same way as other state employees who receive full access to the workers' compensation system. *Id.* at 1256.

AS §§ 23.30 is Alaska's equivalent to the IIA. Just as the IIA precludes a third-party claim against an employer arising from an injury to the employer's employee (*see* RCW 51.04.010; *Hatch v. City of Algona*, 140 Wn. App. 752, 757, 167 P.3d 1175 (2007)), so does AS §§ 23.30:

The liability of an employer prescribed in AS 23.30.045 is exclusive and in place of all other liability of the employer ... to the employee, ... **and anyone otherwise entitled to recover damages from the employer ... at law or in admiralty on account of the injury or death.**

AS § 23.30.055 (emphasis added). Thus, the exclusive remedy provision applies not only to claims brought by the employee, but to all claims that arise from the employee's injury, including third-party claims. *Golden Val. Elec. Ass'n, Inc. v. City Elec. Serv., Inc.*, 518 P.2d 65, 69 (Alaska 1974); *Schiel v. Union Oil Co. of California*, 219 P.3d 1025, 1032 (Alaska 2009) (“Even though an employer who secured workers' compensation insurance was immune from suit under the former statute, it could agree in a contract to indemnify a potential third party for damages arising from a work-related accident.”).

2. Lease Terms.

A Lease between the Port and Alaska was negotiated and signed in 2009 for a term of 15 years. CP 43. The primary Lease provision at issue in this case reads as follows:

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 [the Port] or the state [Alaska]¹ 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 Lessor and the state, in which case the party's liability to the claimant or the other party, if any, will not exceed its proportionate degree of fault. ...

CP 50-51. The Lease does not otherwise define “third party”. The Lease contains an integration and merger provision. CP 55.

¹ CP 41.

3. The Incident.

Shannon Adamson was an officer on the M/V COLUMBIA² and an Alaska employee on November 2, 2012 when she was allegedly injured. CP 7. She was injured while operating the controls of the passenger ramp structure that serves as a passenger gangway for a ferry vessel moored at the Terminal. *Id.* The ramp allows access to and egress from the ferry vessel passenger deck. *Id.* The ramp unexpectedly fell a significant distance while Ms. Adamson was standing on it (*id.*), allegedly causing her injury.

After the incident, Ms. Adamson received medical care and disability payments from the Alaska workers' compensation system pursuant to AS § 23.30.011(a). CP 208.³ Ms. Adamson and her husband sued the Port on February 7, 2014, alleging negligence under Washington and/or general maritime law. CP 21-28. As an injured employee receiving workers' compensation benefits, Ms. Adamson exercised her statutory right to bring a suit against a third party at fault for her injuries. *See* AS

² The Port alleges in its Third-Party Complaint that Ms. Adamson was not a Jones Act seaman. CP 21 at ¶ 1.2. Ms. Adamson's correct status is a seaman, but not a seaman entitled to seek damages under the federal statute known as the Jones Act (46 U.S.C. § 30104) or other entitlements under maritime law. *See Glover*, 175 P.3d at 1243 (describing an injured AMHS ferry crewmember as a "state-employed seaman").

³ AMHS participates in Alaska's workers' compensation insurance system. *See* CP 84. Because Ms. Adamson's injury occurred in Washington, an Alaska official notified Washington and submitted proof of Alaska's status as a self-insurer pursuant to RCW 51.12.120 (Extraterritorial coverage) subsection 4(b). CP 86.

§ 23.30.015. Ms. Adamson did not sue Alaska as a result of her injury. *See* CP 6-13). Alaska is immune from claims by Ms. Adamson (and her husband) except to the extent of its workers' compensation obligations. *See* AS § 23.30.055.

C. Statement of Procedural Background.

The Port filed a Third-Party Complaint against Alaska on March 17, 2014, alleging causes of action under five different theories: (1) breach of contract; (2) negligence under Washington law; (3) negligence under general maritime law; (4) apportionment of fault under the Lease; and, (5) maritime indemnity. CP 21-28. Under each theory, the quantum of damages sought is the amount the Port will have to pay Plaintiff and her husband as a result of this lawsuit. *See id.*⁴ In every respect, the Port's alleged causes of action arise out of the injury to Alaska's employee. *See*

⁴ In the Appellant's Brief, the Port described its causes of action as "apportion fault under the 2009 Lease, contribution under common law, and for breach of Alaska's contractual duties under the 2009 Lease (i.e. failing to properly train Ms. Adamson and ensuring the ramp was operated safely and correctly, etc.)." Appellant's Brief at p. 2. However characterized, all the claims derive their measure of damages from the amount the Port must pay to Ms. Adamson and her husband as damages. With respect to the self-described "contribution" claim(s), the Port's Third-Party Complaint asserts no cause of action identified as contribution. Also, as a matter of black-letter law, there can be no contribution between concurrent tortfeasors unless they share a "common legal liability" toward the plaintiff. F. Harper, F. James, O. Gray, 3 *The Law of Torts* § 10.2 at 46 (2d ed. 1986); Prosser & Keeton on the Law of Torts § 50 at 339-40 (1984). A contribution action arises from the original obligation that the party cast in contribution owed to the plaintiff. "If there was never any such liability, as where the contribution defendant has the defense of ... the substitution of workers' compensation for common law liability, then there is no liability for contribution." W. Prosser & P. Keeton, *supra*, § 50 at 339-40. As explained in further detail below, Alaska's immunity to Ms. Adamson's claim means it is also immune to the Port's contribution claim(s). As a result, Alaska cannot be called upon to contribute to the Port's payments to Ms. Adamson arising from her injury.

id. The Port relies on the Savings to Suitors clause of 28 U.S.C. § 1333(1) and the Washington long-arm statute (RCW 4.28.185) to support this Court's subject matter and personal jurisdiction over its maritime tort and contract claims. CP 21 at ¶¶ 2.1 - 2.2.

IV. SUMMARY OF ARGUMENT

The Court's *de novo* review of the Civil Rule 12(b)(6) dismissal will conclude that no set of facts, real or hypothetical, entitles the Port to the relief it seeks. The Port's claims must be dismissed because Alaska is an employer paying its injured employee workers' compensation benefits and is entitled to immunity under general maritime law, Washington law, and Alaska law. Nothing in the Lease deprives Alaska of its immunity to the Port's claims, all of which relate to and derive from Ms. Adamson's injury.

The Lease does not, and indeed could not, waive Alaska's immunity to the Port's third-party claims arising from an employee injury. The terms of the Lease leave Alaska's statutory immunity to third-party claims arising from an employee injury intact, and do not expose Alaska to claims for damages arising from an employee injury.

The Alaska officials involved in executing the Lease had no authority to waive Alaska's sovereign immunity to claims arising from an employee injury. There is no clear expression of waiver in the Lease of

either Alaska's sovereign immunity barring the Port's claims or Alaska's exclusive remedy protections that also bar the Port's claims. The Port's attempt to circumvent Alaska's immunity and seek tort damages or Lease-based contract remedies from Alaska for some portion of Ms. Adamson's damages must be rejected and the Port's claims must be dismissed.

V. ARGUMENT

A. Standard of Review.

This Court reviews a CR 12(b)(6) dismissal *de novo*. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014). Dismissal under CR 12(b)(6) is appropriate in those cases where the plaintiff cannot prove any set of facts consistent with the complaint that would entitle it to relief. *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995). “[A]ny hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support the plaintiff’s claim.” *Bravo*, 125 Wn.2d at 756 (alteration in original) (*quoting Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978)). All facts alleged in the plaintiff’s complaint are presumed true. *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998). The complaint’s legal conclusions, however, are not required to be accepted on appeal. *Haberman v. Washington Pub. Power Supply Svs.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987). “If a plaintiff’s

claim remains legally insufficient even under his or her proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate.” *Gorman v. Garlock Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005). The first issue before this Court is the trial court’s rejection of the Port’s tort and contract claims against Alaska for some portion of the damages the Port might have to pay to Ms. Adamson, a state-employed seaman who is suing the Port. This was a narrow and defined controversy appropriate for dismissal because Alaska met its burden.

The Port’s second assigned error (regarding its Motion for Reconsideration) is subject to a more deferential standard of review. This Court reviews the trial court’s denial of a motion for reconsideration for a clear or manifest abuse of discretion. *Telford v. Thurston County Bd. of Comm’rs*, 95 Wn. App. 148, 166, 974 P.2d 886, *rev. denied*, 138 Wn.2d 1015 (1999). “Abuse of discretion occurs where the trial court’s decision rests on untenable grounds or untenable reasons.” *Id.* at 166. An appellate court can affirm on a different basis than that relied on by the trial court. *See LaMon v. Butler*, 112 Wn.2d 193, 200–01, 770 P.2d 1027 (“[A]n appellate court can sustain the trial court’s judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it.”), *cert. denied*, 493 U.S. 814 (1989). Here, there is simply no circumstance in which the Court could affirm the Rule

12(b)(6) dismissal and also remand or reverse on the motion for reconsideration issue. Therefore, Alaska will not further discuss this alternative issue and the abuse of discretion review. *See McMullen v. Wright*, 107 Wn. App. 1060 (2001) (affirming summary judgment and finding no error in denying plaintiff's motion for reconsideration).⁵

B. Consideration of Documents Outside of the Pleadings.

“Documents whose contents are alleged in a complaint but which are not physically attached to the pleading may also be considered in ruling on a CR 12(b)(6) motion to dismiss,” especially if “the parties do not dispute the authenticity of the documents the court considered and they do not constitute testimony.” *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 175 Wn. App. 840, 866, 309 P.3d 555 (2013) *review granted sub nom. FutureSelect Portfolio Mgt., Inc. v. Tremont Grp. Holdings, Inc.*, 179 Wn.2d 1008, 316 P.3d 495 (2014) and *aff'd*, 180 Wn.2d 954, 331 P.3d 29 (2014); *see also Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 726, 189 P.3d 168 (2008); *Berge v. Gorton*, 88

⁵ Alaska does not specifically rebut every factual or legal assertion in the Port's brief. Alaska does not concede the merit of any of the unanswered assertions, but instead focuses on the merits of the dismissal. For instance, the Port's argument that it is entitled to argue equitable estoppel should be rejected. The doctrine of equitable estoppel is available only as a shield, or defense; it is not available as a sword, or cause of action. *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 73-74, 110 P.3d 812 (2005), *citing Chemical Bank v. Wash. Pub. Power Supply Sys.*, 102 Wn.2d 874, 902, 691 P.2d 524 (1984) and *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 258-59, 616 P.2d 644 (1980). The Port improperly uses the doctrine to attempt to overcome Alaska's defense. Alaska makes no affirmative claims against the Port.

Wn.2d 756, 763, 567 P.2d 187 (1977). Significantly, along with its Motion to Dismiss, Alaska submitted the applicable Lease (referenced in the Port's Third-Party Complaint, CP 22 at ¶ 3.1) and proof that Alaska paid workers' compensation benefits to Ms. Adamson (also referenced in the Port's Answer, Affirmative Defenses and Third-Party Complaint at 20).⁶ There appears to be no authenticity dispute regarding either document.

C. The Port's Claims Lie in Admiralty.

A vessel gangway is "any ramp-like or stair-like means of access provided to enable personnel to board or leave a vessel, including accommodation ladders, gangplanks and brows." 29 C.F.R. § 1918.2. Tort claims arising from a seaman's injury on a gangway lie in admiralty. *See Victory Carriers, Inc. v. Law*, 404 U.S. 202, 207 (holding that a gangway is the dividing line between admiralty and state jurisdiction) (1971). Here, all of the Port's claims against Alaska arise out of Ms. Adamson's injury on the gangway and therefore lie in admiralty.

⁶ The Port has made other factual assertions (CP 241-363) that are appropriate for this Court's consideration because they represent the Port's version of hypothetical facts that the Court can consider in reviewing the dismissal. Alaska does not concede that the Port's factual assertions outside the pleadings are accurate but does agree that, for purposes of the Motion to Dismiss and this appeal, they are hypothetical facts that may be considered under the applicable standard of review.

D. The Applicable Substantive Law for Evaluating the Port's Claims Will Be General Maritime Law for Tort Claims and Washington Law for Contract Claims.

A state court's power to adjudicate admiralty claims derives from 28 U.S.C. § 1333(1). *Paul v. All Alaskan Seafoods, Inc.*, 106 Wn. App. 406, 411, 24 P.3d 447 (2001) ("state courts may adjudicate maritime cases, and ... each state is free to adopt 'such remedies ... as it sees fit,' so long as such remedies conform to governing federal maritime standards"), citing to *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-23 (1986). Generally, with admiralty jurisdiction comes the application of substantive admiralty law. *E. River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986); *Stanton v. Bayliner Marine Corp.*, 123 Wn.2d 64, 82-83, 866 P.2d 15 (1993). As this case lies in admiralty, federal maritime conflicts of law rules control. *See Aqua-Marine Constructors, Inc. v. Banks*, 110 F.3d 663, 670 (9th Cir. 1997).⁷

The substantive law applicable to contract and tort claims under maritime law are examined independently. *See Victory Carriers*, 404 U.S. at 205. "Except as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply." *Lauritzen v. Larsen*, 345 U.S. 571, 588-89 (1953) (considering

⁷ An issue-by-issue conflict of law analysis is unnecessary where the resolution of the issue pursuant to the competing substantive laws is the same. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 100-01, 864 P.2d 937 (1994).

issue of applicable law to foreign seaman's injury sustained in foreign waters); *Int'l Bus. Machines Corp. v. Bajorek*, 191 F.3d 1033, 1037 (9th Cir. 1999) (discussing the limited circumstances in which contractually agreed choice of law is not applied). Because the Lease specifically identified Washington law as governing "the construction, validity, performance and enforcement of this lease" (CP 56), this Court should apply Washington substantive law to deciding the Lease-based contract issues in this matter.

Federal maritime law governs a particular tort claim if the tort claim falls within the admiralty and maritime jurisdiction conferred on federal district courts. *Victory Carriers*, 404 U.S. at 204. Federal district courts have original jurisdiction over seaman's injuries on gangways leading to vessels on navigable waters. *See Scheuring v. Traylor Bros., Inc.*, 476 F.3d 781, 789-90 (9th Cir. 2007) ("the authorities are virtually unanimous that maritime liability encompasses the gangway"). Therefore, this Court, exercising jurisdiction over these tort claims pursuant to the Savings to Suitor's clause of 28 U.S.C. § 1333(1), should apply substantive general maritime law to the tort issues in this matter.

General maritime law does not address all potential claims or defenses. State law also applies to maritime commerce unless "it contravenes the essential purpose expressed by an act of Congress, or

works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.” *Paul* at 410-11 (applying state law to supplement general maritime law in case involving unpaid wages and wrongful withholding of wages). Application of state law to a claim is foreclosed only if the state law in question frustrates a fundamental tenet of admiralty law. *Id.* at 422. In this case, the Court should look to the law of Washington and/or Alaska to supplement general maritime law so long as doing so does not frustrate a “fundamental tenet of admiralty law.”

E. As an Employer Paying Workers’ Compensation Benefits, Alaska Is Protected by Statutory Exclusive Remedy Provisions and Immune to the Port’s Claims.

Under both general maritime law and Washington law, the Port is not entitled to avoid the exclusive remedy provisions of the applicable workers’ compensation schemes. Pursuant to common law and by statute, the Port’s attempts to assign fault to Alaska for damages arising from an injury to a state-employed seaman receiving workers’ compensation benefits must be denied.

1. General Maritime Law Respects an Employer’s Immunity Based on Workers’ Compensation Laws.

The U.S. Supreme Court addressed general maritime law’s accommodation of employers burdened with a workers’ compensation

obligation in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). The Supreme Court held that general maritime law respects an employer's immunity from liability based on workers' compensation laws:

[A] longshoreman's award in a suit against a negligent shipowner would be reduced by that portion of the damages assignable to the longshoreman's own negligence; but, as a matter of maritime tort law, the shipowner would be responsible to the longshoreman in full for the remainder, even if the stevedore's negligence contributed to the injuries. This latter rule is in accord with the common law, which allows an injured party to sue a tortfeasor for the full amount of damages for an indivisible injury that the tortfeasor's negligence was a substantial factor in causing, even if the concurrent negligence of others contributed to the incident.

443 U.S. at 259-260 (internal citations omitted). In *Edmonds*, the stevedore (employer) was immune to the shipowner's claim for contribution or indemnity.

Division 2 of the Washington Court of Appeals considered "where to draw the boundary between state workers' compensation laws and federal maritime law" in the case of *Maziar v. State, Dep't of Corr.*, 151 Wn. App. 850, 855-56, 216 P.3d 430 (2009). The *Maziar* court cited the Supreme Court case of *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922) as an example of an injury on the navigable waters involving an employer and employee participating in a workers' compensation program. 257 U.S. at 473-74. When the employee subsequently sued the

employer in federal court on a maritime claim, his case was dismissed because of the exclusive remedy provision of the workers' compensation law. 257 U.S. at 474. The Supreme Court reasoned that applying the workers' compensation laws would not "materially affect any rules of the sea." 257 U.S. at 477.

The *Maziar* court also discussed the Ninth Circuit decision in the case of *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1402–03 (9th Cir. 1994):

Chan worked for Society Expeditions, a company that marketed and chartered cruise ships from its Seattle office. He booked passage for himself aboard a ship chartered by Society Expeditions and was subsequently injured during the cruise when an inflatable raft overturned while ferrying him to an atoll. Chan sued his employer, alleging general maritime claims for negligence and unseaworthiness. The district court dismissed the claims in part, ruling that Washington's workers' compensation law barred Chan's claims against his employer. On appeal, the court reversed, holding that Chan, whether or not he was covered by the IIA, "still has a general claim in admiralty for negligence, and adjudication of that claim is governed by federal common law."

Maziar, 151 Wn. App. at 857-58 (internal citations omitted). What distinguishes *Chan* from this case is that Mr. Chan, the employee, retained his federal common law claims against his employer. The workers' compensation exclusive remedy provision was ineffective to prevent an injured employee with a viable general maritime law claim from making

that federal claim against an employer. 39 F.3d at 1402-03. In this case, Ms. Adamson has no federal statutory or common law claims to assert against her employer.⁸ Therefore, like the *Edmonds* and *Rohde* cases, the application of the workers' compensation exclusive remedy provision here will not offend and is completely consistent with general maritime law.⁹

Thus, an employer's immunity from suit is integrated into general maritime law, the applicable tort law here. There is no dispute that Alaska has paid, and continues to pay Ms. Adamson's workers' compensation benefits pursuant to Alaska law. There is also no dispute that Alaska law dictates that Alaska's potential liabilities arising from Ms. Adamson's injury are those called for under the workers' compensation scheme and are "exclusive and in place of all other liability of [Alaska] ... to [Ms.

⁸ The Port describes its claims as "apportion fault under the 2009 Lease, contribution under common law, and for breach of Alaska's contractual duties under the 2009 Lease (i.e. failing to properly train Ms. Adamson and ensuring the ramp was operated safely and correctly, etc.)." Appellant's Brief at p. 2. Two of these claims, if viable, arise under the Lease and are controlled by Washington law. The so-called contribution claim is a pure derivative claim and is not an independent claim. If Ms. Adamson has no federal claims against Alaska, neither does the Port.

⁹ As pled, the Port's claims against Alaska all arise from Ms. Adamson's injury. The Port has made no claim against Alaska independent of Ms. Adamson's injury and resulting claim for damages against the Port. No authority supports the proposition that in a case involving an injured worker suing a third-party for general maritime law negligence, the defending third-party can seek contribution or indemnity from the worker's employer despite the fact that the worker's exclusive remedy against the employer is pursuant to a workers' compensation law that bars, absent waiver, a third-party claim for contribution or indemnity. The application of the respective exclusive remedy provision typically turns on a determination of the application of the workers' compensation law to the employee and the presence (or not) of a waiver of the employer's protections. The Port's third-party claims derive from Ms. Adamson's claim and are unlike an employee claim under general maritime law that survived under *Chan*.

Adamson], ... and anyone otherwise entitled to recover damages from the employer ... at law or in admiralty on account of [Ms. Adamson's injury]." See AS § 23.30.055.¹⁰ Thus, the Alaska exclusive remedy provision and the reasoning articulated in the *Edmonds* case provide sufficient support to affirm the trial court's dismissal of the Port's claims arising from Ms. Adamson's injury,¹¹ though as Alaska will demonstrate below, there are also several other independent bases on which to affirm that dismissal.

2. General Maritime Law Also Respects a State's Limited Waiver of Sovereign Immunity.

Alaska is no ordinary defendant. It is a state that is entitled to sovereign immunity, a status recognized in the U.S. Constitution. *Alden v.*

¹⁰ The Port correctly points out that the Alaska exclusive remedy provision can be waived. The cases cited by the Port, however, demonstrate that an effective waiver must be express. In *Manson-Osberg Co. v. State*, 552 P.2d 654 (Alaska 1976), the Alaska Supreme Court found that a waiver of the protections of the exclusive remedy provision in a contract term that included the term "from any claims or amounts arising or recovered under the **workmen's compensation laws**." 552 P.2d at 657 (emphasis added). In *Nw. Airlines, Inc. v. Alaska Airlines, Inc.*, 343 F. Supp. 826 (D. Alaska 1972), the contract term at issue included the following: "Alaska agrees to hold harmless and indemnify Northwest, its officers, agents, contractors, servants and employees from all claims and liabilities for damage to, loss of, or destruction of any property of Alaska, its officers, agents, servants, and **employees**." 343 F. Supp. at 827 (emphasis added). The waiver language in both cited cases expressly recognized potential claims from the indemnifying party's employees. There is no similar or equivalent express waiver in this case.

¹¹ As a workers' compensation employer, Alaska enjoys the same protections as other employers in Alaska. The protection against third-party claims arising from an industrial injury applies to all employers. See AS § 23.30.055. One of the primary purposes of the exclusive remedy is to shield employers who are liable for paying worker benefits from negligence claims. *Schiel*, 219 P.3d at 1034. Alaska is not seeking special treatment, but the same protection other employers providing workers' compensation benefits to an injured employee.

Maine, 527 U.S. 706, 723-729 (1999) (“The Eleventh Amendment confirmed, rather than established, sovereign immunity as a constitutional principle; it follows that the scope of the states’ immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design.”).¹²

General maritime law respects state assertions of sovereign immunity. *See Ex parte New York*, 256 U.S. 490, 500 (1921) (“[T]he immunity of a state from suit *in personam* in the admiralty brought by a private person without its consent, is clear.”); *Gross v. Washington State Ferries*, 59 Wn.2d 241, 367 P.2d 600 (1961) (finding Washington authorized to condition waiver of sovereign immunity upon strict adherence to claims procedures even though in conflict with Jones Act and general maritime law remedies). In 2002, the Supreme Court re-affirmed the viability of State sovereignty in the admiralty setting, finding that a State is not subject to the jurisdiction of the Federal Maritime Commission:

This Court . . . has already held that the States’ sovereign immunity extends to cases concerning maritime commerce. *See, e.g., Ex parte New York*, 256 U.S. 490 . . . (1921). Moreover, *Seminole Tribe [of Florida v. Florida]*, 517 U.S. 44 . . . (1996) precludes us from creating a new “maritime commerce” exception to state sovereign immunity. . . .

¹² Here, Alaska has not asked the Court to enforce its claim of sovereign immunity directly as a jurisdictional issue. *See Nevada v. Hall*, 440 U.S. 410 (1979).

Thus, “[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.” *Id.*

Federal Maritime Com’n v. South Carolina State Ports Authority, 535 U.S. 743, 767-768 (2002). In claims arising from injuries to its state-employed seamen, Alaska’s assertion of sovereign immunity is clear and enforced. *See Glover*, 175 P.3d at 1249.¹³ An assertion of sovereign immunity by Alaska in the context of a maritime personal injury claim comports with general maritime law and bolsters the argument that this Court should apply general maritime law’s immunity afforded an employer complying with workers’ compensation obligations and paying no-fault benefits to an injured worker.

3. The IIA Also Applies to Provide an Exclusive Remedy Protection to Alaska.

a. With Few Exceptions, None of Which Apply Here, an Employee Injured on the Job in Washington Is Covered by the IIA.

The purpose of the Washington Industrial Insurance Act (“IIA”) is “to embrace all employments which are within the legislative jurisdiction of the state.” RCW 51.12.010; *Eclipse Mill Co. v. Dep’t of Labor & Indus.*

¹³ The Port’s argument that the limited waiver of sovereign immunity does not apply to third party claims ignores the reference in AS § 09.50.250(5) to AS §§ 23.30, which contains an exclusive remedy provision that specifically prohibits “any” damage claim against the employer. *See* AS § 23.30.055. As such, the waiver of sovereign immunity excludes third-party claims like the Port’s that arise from an injury to a state-employed seaman.

of Washington, 141 Wn. 172, 181, 251 P. 130 (1926) *aff'd sub nom. Sultan Ry. & Timber Co. v. Dep't of Labor & Indus. of State of Washington*, 277 U.S. 135 (1928) (The IIA “expressly declares that it is intended to apply ‘to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them, which are within the legislative jurisdiction of the state.’”). The IIA is a remedial statute that must be construed liberally “for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.” *Johnson v. Tradewell Stores, Inc.*, 95 Wn.2d 739, 743, 630 P.2d 441 (1981) (*quoting* RCW 51.12.010). In interpreting the statute, all doubts will be resolved in favor of the worker. *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467,470, 745 P.2d 1295 (1987).

Here, Ms. Adamson, the worker, is eligible for IIA benefits. The benefit of the doubt, if there is doubt, must be that Ms. Adamson’s injury is covered by the IIA and that Alaska, as her employer paying her workers’ compensation benefits, is entitled to the protections afforded by the IIA (and subject to the burdens of the IIA).

Courts considering the IIA have recognized for almost 100 years that workers entitled to federal remedies are not entitled to workers’ compensation benefits. *See Pac. Am. Fisheries v. Hoof*, 291 F. 306, 310 (9th Cir. 1923) (“It will thus be seen that by judicial construction and

express legislative enactment the Washington Compensation Act does not encroach upon admiralty jurisdiction; that the former ends where the latter begins; and that if a party has a remedy in admiralty the Compensation Act does not apply to him, his employer, his remedy, or his right of action.”). They have also recognized the converse – that workers without federal remedies are eligible for the benefits provided by workers’ compensation laws. *See Scott v. Dep’t of Labor & Indus.*, 130 Wn. 598, 604-05, 228 P. 1013 (1924) (“[T]he Compensation Act shall apply to employers and workmen engaged in maritime works or occupations only in cases and to the extent that the pay roll of such workmen may and shall be clearly separable and distinguishable from the pay roll of workmen employed under circumstances in which a liability now exists or may hereafter exist in the courts of admiralty of the United States”).

An employer in Washington under the IIA is defined as “any person, body of persons, corporate or otherwise, ... while engaged in this state in any work covered by the provisions of this title, by way of trade or business. ...” RCW 51.08.070. A worker means “every person in this state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment ...” RCW 51.08.180. An employee has the same meaning as “worker” when the context would so indicate, and shall include all officers

of the state, state agencies, counties, municipal corporations, or other public corporations, or political subdivisions. RCW 51.08.185.

The Bellingham waterfront is within the State of Washington. WA Const. Art. XXIV, § 1. Ms. Adamson was providing personal labor to her employer and thus was a worker in Bellingham on October 2, 2012. She is thus an IIA “employee” or “worker,” subject to the provisions and entitled to the protections of the IIA.

The IIA contemplates that, on occasion, non-resident employees will travel to Washington for work purposes and may suffer an injury. *See* RCW 51.12.120 (2),(4) (extraterritorial coverage provisions). Ms. Adamson is a worker who falls squarely within the extraterritorial protections of the IIA. Thus, the IIA applies to her injury.¹⁴

b. The Exclusion of “Crew” in RCW 51.12.100(1) Does Not Apply to Ms. Adamson.

The IIA contains an exclusionary provision - the IIA does not apply to “a master or member of a crew of any vessel, or to employers and workers for whom a right or obligation exists under the maritime laws or federal employees’ compensation act for personal injuries or death of such workers.” RCW 51.12.100(1). “In 1925, the legislature adopted [RCW

¹⁴ If Ms. Adamson or any other AMHS employee injured in Washington applied for workers’ compensation benefits in Washington (which has not occurred in this or any other instance to AMHS’s knowledge), Alaska expects that the Washington Dept. of Labor & Industries would accept the claim and work with AMHS, a self-insurer, regarding payment of the compensation pursuant to the IIA.

51.12.100(1)]'s general rule precluding claims by injured employees who had rights under maritime laws. *Gorman v. Garlock, Inc.*, 121 Wn. App. 530, 542, 89 P.3d 302 (2004) *aff'd*, 155 Wn.2d 198, 118 P.3d 311 (2005). The reason that language was inserted in the statute was to ensure that such workers¹⁵ did not obtain a “double recovery” – that is, collecting on both a state and federal remedy. *Esparza v. Skyreach Equip., Inc.*, 103 Wn. App. 916, 938, 15 P.3d 188 (2000). The IIA does not apply to employees covered by the Jones Act. *See* RCW 51.12.090, 51.12.100(1); *see Lindquist v. Department of Labor & Indus.*, 36 Wn. App. 646, 652, 677 P.2d 1134, *rev. denied*, 102 Wn.2d 1001 (1984) (“[T]he State Act by its terms excludes coverage for ‘workers for whom a right or obligation exists under the maritime laws for personal injuries or death of such workers[.]’”). As written, RCW 51.12.090 and .100 provide coverage to all workers for whom alternative federal coverage does not actually exist. *See MSM Hauling, Inc. v. Dep't of Labor & Indus.*, 112 Wn.2d 450, 455, 771 P.2d 1147 (1989). Accordingly, Ms. Adamson is not a “crew”[member] excluded by that provision, but should be deemed to be entitled to seek the protections set forth in the IIA.

¹⁵ In 1925, in light of the recent passage of the Jones Act, the reference to “master and crew” in RCW 51.12.100 was a precise way to distinguish and exclude from the IIA a subset of maritime workers over whom the state could not exercise legislative jurisdiction because those workers were universally entitled to federal remedies. Here, Alaska state-employed seamen, with no federal remedies, are easily distinguished from the masters and crews that the legislature in 1925 was seeking to exclude from IIA coverage.

The goal when determining the meaning of statutory language is to understand what the legislature intended and then carry out that intent. *Densley v. Dep't of Retirement Sys.*, 162 Wn.2d 210, 231, 173 P.3d 885 (2007). The starting point is the plain language and ordinary meaning of the language used, because if the meaning of the language is plain, then it must be given effect as an expression of the legislature's intent.¹⁶ *Id.* To determine plain meaning, a court should examine the statute in which the language in question appears, "as well as related statutes or other provisions of the same act in which the provision is found. *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 43 P.3d 4 (2002); see also, e.g., *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (the meaning of words in a statute are determined from "all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another"

¹⁶ Determining the meaning of plain language is not always easy. Consider the case of *Certification from U.S. Court of Appeals for Ninth Circuit v. Kachman*, 165 Wn.2d 404, 198 P.3d 505 (2008) in which the Washington Supreme Court analyzed the meaning of the terms "actually delivered" and "mailed" in RCW 48.18.290(1). The Court's examination of the statute was complex and context-specific; not nearly as black and white as the simple words "actually delivered" or "mailed" suggested. *Id.* In examining the statute, the court noted that "the plain meaning rule requires courts to consider legislative purposes or policies appearing on the face of the statute as part of the statute's context." *Id.* at 409. It concluded that a certified mailing did not satisfy the "mailed" prong of RCW 48.18.290 because that created additional burdens on the insured to obtain receipt of the notice. *Id.* at 411. It also concluded that use of certified mail would satisfy the "actually delivered" prong of the statute so long as there was a signed return receipt showing that the insured actually did receive the certified mailings. *Id.* at 412-13.

(quoting *State v. Huntzinger*, 92 Wn.2d 128, 133, 594 P.2d 917 (1979))).

Here, the IIA exclusion for “crew” does not include a state-employed seaman serving as an AMHS crewmember who is not eligible for federal remedies as a result of Alaska’s limited waiver of sovereign immunity. To hold that the IIA does not cover Ms. Adamson is to ignore the purpose of the statute to cover as many workers as possible.¹⁷

c. Declining to Impose the “Crew” Exclusion on Ms. Adamson Is Consistent with Federal Law.

The Jones Act and the Longshore and Harbor Workers Compensation Act (“LHWCA”) 33 U.S.C. § 901, *et seq.* are mutually exclusive federal remedies for injured maritime workers: the LHWCA provides relief for land-based maritime workers, and the Jones Act is restricted to “a master or member of a crew of any vessel.” *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 347 (1991). Because the remedies for an injured worker are very different under the Jones Act and LHWCA, there are frequent opportunities for courts to decide the status issue applicable to a particular worker and thus determine the remedy to which he or she is entitled.

Under federal law, the status of “master or member of a crew” restates who is a “seaman” under the Jones Act and thus an individual who

¹⁷ Ms. Adamson should be treated like all other Alaska state employees, many of whom are in Washington frequently on official travel and eligible for coverage under the IIA if injured here. *See* RCW 51.12.120.

is entitled to Jones Act remedies. *Id.* at 348. Like the LHWCA, the IIA excludes a “crew” member from its remedies because such a worker is entitled to Jones Act remedies. As discussed in detail above, Ms. Adamson specifically, and AMHS state-employed seamen generally, are seamen who are not entitled to Jones Act or other federal remedies. Declining to designate Ms. Adamson as a “crew” (and therefore not excluded from the IIA) is thus consistent with general maritime law.

d. Because the IIA Applies, the Port’s Tort Claims Are Prohibited by the IIA’s Exclusive Remedy Provision.

Like the federal industrial insurance/workers’ compensation scheme,¹⁸ the IIA provides an exclusive remedy against an employer arising from an employee’s work injury:

“... The state of Washington ... declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished”

RCW 51.04.010.¹⁹ The IIA precludes any “state tort claims if those claims arise out of an ‘injury’ ... that is compensable under the [IIA].” *Sharpe v.*

¹⁸ See 33 U.S.C. § 904 (LHWCA exclusive remedy provisions).

¹⁹ Alaska’s Workers’ Compensation exclusive remedy provision provides similar protection to employee and employer arising from a work injury in Alaska: “The liability

Am. Tel. & Tel. Co., 66 F.3d 1045, 1051 (9th Cir. 1995). The exclusive remedy provision is sweeping, comprehensive, and of the broadest, most encompassing nature. *Cena v. State*, 121 Wn. App. 352, 356, 88 P.3d 432 (2004).

And just like under federal law,²⁰ a third-party may not assert a tort claim in Washington against the employer in order to recover damages the third party pays to the injured employee covered by the IIA. *Spencer v. City of Seattle*, 104 Wn.2d 30, 32, 700 P.2d 742 (1985) (noting that the Washington Supreme Court “has consistently recognized and reinforced the exclusive remedy provisions” of the IIA).²¹ Thus, employers under both federal and Washington law enjoy broad protection against third-party claims arising from an employee’s injury. The Port’s claims in this lawsuit fit squarely within that limitation.

Here, the Port’s tort claims against Alaska are asserted against an

of an employer prescribed in AS 23.30.045 [workers’ compensation liability without regard to fault] is exclusive and in place of all other liability of the employer and any fellow employee to the employee, the employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employee at law or in admiralty on account of the injury or death....” AS § 23.30.055.

²⁰ See *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669, 671 (9th Cir. 1975) (holding that employer has no liability to the third-party vessel owner, either directly or indirectly, for personal injury damages incurred to employee in a covered accident).

²¹ Alaska law is the same. See *Arctic Structures, Inc. v. Wedmore*, 605 P.2d 426, 437 (Alaska 1979) (“In accomplishing the goal of securing adequate compensation for injured employees without the expense and delay inherent in a determination of fault as between the employee and employer, the legislature apparently also found it necessary to limit the total amount of the employer’s liability to the statutory award.”).

employer to recover the damages the Port would have to pay to an injured employee covered by the IIA. Thus, all of the Port's fault-based claims against Alaska were properly dismissed by the trial court because the claims are prohibited by the IIA. That dismissal should be affirmed.

4. General Maritime Law Discourages Gaps in Worker Coverage.

In the event of a personal injury or death to the master and members of the crew on an AMHS vessel, there exists no right or obligation under the maritime laws or federal employees' compensation act. *See AS 09.50.250(5); see Glover*, 175 P.3d at 1260 (rejecting a claim for relief under the Jones Act for an AMHS employee injured on navigable waters in Alaska). Here, despite the fact that Ms. Adamson works as a crewmember on a vessel engaged in interstate voyages, there is no alternate federal compensation available to her in the event of an injury. Thus, she is not excluded from Washington's IIA coverage.

The U.S. Supreme Court allows some concurrent coverage between federal and state remedies for maritime workers. *See Davis v. Department of Labor*, 317 U.S. 249 (1942) (recognizing a "twilight zone" in the coverage between the LHWCA and state workers' compensation schemes). The Supreme Court recognized that the uncertainty as to which compensation scheme applied defeated the purpose of providing "sure and

certain relief for [workers].” *Id.* at 254 (preferring concurrent coverage over a gap in coverage). The court held that in such circumstances, the respective state workers’ compensation was a valid remedy for workers in the “twilight zone.” *Id.* at 253; *see also Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 718 (1980) (recognizing that the *Davis* court “effectively established a regime of concurrent jurisdiction” within the twilight zone). Such a twilight zone still exists for longshore workers since the 1972 extension of federal jurisdiction under the LHWCA “supplements, rather than supplants, state compensation law.” *Sun Ship, Inc.* at 720.

The U.S. Supreme Court has never decided whether a twilight zone exists for workers whose activities may fall between a Jones Act remedy and a state workers’ compensation plan. *See* 4 A. Larson, *Workmen’s Compensation* § 90.41 at 16-495. To the extent the Port’s argument that the IIA does not apply to a worker like Ms. Adamson, who is otherwise without federal remedies in the event of an injury, is accepted, it would likely deprive future AMHS employees, if injured in Washington, of a remedy under Washington law. Such a result would be inconsistent with the public policies behind the IIA and the federal compensation schemes. *See Dir., Office of Workers’ Comp. Programs, U.S. Dep’t of Labor v. Perini N. River Associates*, 459 U.S. 297, 323 (1983) (a return to exclusive spheres of jurisdiction for workers injured upon the actual navigable

waters would be inconsistent with express congressional desire to extend LHWCA jurisdiction landward in light of the inadequacy of most state compensation systems.”). The effect of the Port’s argument would be a gap in coverage for a class of workers who have no federal remedies and who, according to the Port, should have no remedies in Washington either. The Court should reject the Port’s invitation to create such a class of workers.

F. Nothing in the Lease Waived Alaska’s Entitlement to Exclusive Remedy Protection.

The issues related to the Lease are five-fold. First, by its own terms, it does not waive the exclusive remedy protections under Washington law. Second, section 6.1 of the Lease does not waive the Port’s IIA exclusive remedy protections and therefore cannot require an allocation of fault in claims involving employee injuries. Third, in light of section 6.2, section 6.1 of the Lease cannot be read to allocate liability related to claims arising from employee injuries. Fourth, the Alaska officials executing the Lease were without authority to waive Alaska’s immunity to suit arising from an employee injury. Finally, even if hypothetically, there was authority to waive Alaska’s immunity from suit, the Lease contains no clear expression of waiver.

For reference, the Lease provision at issue in this case reads as

follows:

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 Lessor and the state, in which case the party's liability to the claimant or the other party, if any, will not exceed its proportionate degree of fault. ...

CP 50-51.

1. The Port's Contract Claims Fail to State a Claim Upon Which Relief Can Be Granted Because They Are Inadequate to Avoid the IIA Prohibition.²²

“No employer or worker shall exempt himself or herself from the burden or waive the benefits of [the IIA] by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be *pro tanto* void.” RCW 51.04.060. Thus, the provision on which the Port bases its claim that Alaska contracted away or waived its immunity from in Washington is void if it purports to waive IIA burdens or benefits.

Washington courts have created a limited exception to RCW 51.04.060 to allow employers to expressly waive IIA immunity from suit in a contract. *See Brown v. Prime Const. Co. Inc.*, 102 Wn.2d 235, 684 P.2d 73 (1984). Because such contracts run “contrary to the

²² As explained above in Section 5.D., the Port's contract-based claims are analyzed under Washington law.

foundation of the industrial insurance scheme,” they must meet strict criteria to be enforceable. *Id.* at 239. A third-party indemnification agreement purporting to waive IIA immunity from suit will only be enforced if it “clearly and specifically” waives the employer's immunity.²³ *Id.* A “clear and specific” waiver may be found from (1) express language to the effect that the employer has waived the immunity granted to it under the IIA; or (2) a provision “specifically stating that the [employer] assumes potential liability for actions brought by its own employees.” *Id.* at 240. Neither exists here and Alaska cannot possibly be said to have waived its IIA immunity in section 6.1 of the Lease.

A general indemnity provision is inadequate to waive IIA employer immunity. *Waters v. Puget Sound Power & Light Co.*, 83 Wn. App. 407, 409, 924 P.2d 925 (1996). A more recent Washington Court of Appeals case, citing *Brown*, focused on the need for an express waiver:

An employer’s waiver of its IIA immunity is enforceable only if it appears in writing in the contract at issue and is explicit. In other words, the contract must specifically waive the IIA immunity, in writing, “either by so stating or by specifically stating that the indemnitor assumes potential liability for actions brought by its own employees.” ... *Brown* requires that a waiver of IIA immunity be expressly written into the contract at issue for it to be enforceable.

²³ Alaska law contains a similar requirement that the parties to an indemnity agreement set forth “expressly” any agreement by which they intend to increase an employer's liability beyond the limits dictated by the workers’ compensation statute. *Golden Val. Elec.* at 69. The *Golden Val. Elec.* case also explains why the exclusive remedy provision of AS §§ 23.30 applies to (and precludes) third-party claims against an employer.

Hatch v. City of Algona, 140 Wn. App. 752, 760, 167 P.3d 1175 (2007), quoting *Brown*, 102 Wn.2d at 240.

This hurdle of specificity required to waive IIA immunity is a high one for any employer, including the private employer contemplated in these cases. But the hurdle is raised yet higher in the context of this case, where the employer is not private, but the State of Alaska, whose prohibition against such waiver is set by its own state's legislature. The Port, not Alaska, must show that the Lease language expressly waives the exclusive no fault remedy against Alaska in an action arising from an injury to an Alaska employee. *See Brown*, 102 Wn.2d at 239 (RCW 51.04.060 prohibits such agreements and they are disfavored). That is a heavy burden that the Port cannot meet.

On its face, section 6.1 makes no reference to potential claims by Alaska employees. It makes no reference to the immunity granted to employers in Washington under the IIA, or in Alaska under Alaska law. There is no mention of workers' compensation. It does not expressly promise indemnity. Under the *Brown* analysis, it is plain that the Port cannot meet its burden of demonstrating a clear or unequivocal waiver necessary to overcome the prohibition against contracting around the IIA's employer immunity. *See* RCW 51.04.060. Accordingly, no waiver was ever effectuated, and the Port's contract-based claims must be dismissed.

A consideration of what is required for contracting parties to overcome Washington's presumption against such agreements is important for two reasons. It shows that the Lease did not waive Alaska's IIA protections, but, just as importantly, it shows that the Lease did not waive the Port's IIA protections either.

2. Section 6.1 Does Not Waive the Port's IIA Exclusive Remedy Protections.

Looking back at the prior section's analysis, it is also apparent that the Lease, while contemplating that the Port would have employees performing duties pursuant to the Lease (*see* CP 51 at section 6.2(a)), did not include any language that would waive the Port's IIA exclusive remedy protections. *See Hatch*, 140 Wn. App. at 760. That is worth repeating – section 6.1 does not waive the Port's IIA exclusive remedy protections. If a Port employee sued Alaska as a result of an industrial injury at the Port's facility, Alaska would be prohibited by a clear application of the IIA's exclusive remedy provision from allocating fault to the Port. While the Port argues that section 6.1 applies to employee injuries, this analysis shows that there can be no allocation of fault in the event of an injury to a Port employee. The Port's argument renders section 6.1 meaningless in the event of an injury to a Port employee that gives rise to a claim against Alaska. If section 6.1 included employee claims among

the “third-party claims”, it would amount to an ineffective waiver under the *Hatch* test with respect to a claim involving a Port employee as a claimant. *See* RCW 51.04.060. Because section 6.1 is ineffective to waive the exclusive remedy provisions protecting the Port as an employer, there can be no allocation of fault in the event the “third-party” suing Alaska in section 6.1 is a Port employee. To avoid rendering section 6.1 meaningless, it must not apply to injury claims involving employees of either Alaska or the Port. Because section 6.1 does not apply to employee claims, the Port’s contract-based claims must be dismissed.

3. Section 6.1 Does Not Include Claims Arising from Employee Injuries.

Rules of contract construction require courts to give effect to all terms and avoid reading a contract term that would render another term meaningless. *Mayer v. Pierce Cnty. Med. Bureau, Inc.*, 80 Wn. App. 416, 423, 909 P.2d 1323 (1995) (“courts favor the interpretation of a writing which gives effect to all of its provisions over an interpretation which renders some of the language meaningless or ineffective”), *citing Newsom v. Miller*, 42 Wn.2d 727, 731, 258 P.2d 812 (1953). Contrary to this principle of statutory construction, the Port’s reading of the allocation of fault provision in section 6.1 to embrace claims arising from employee injuries is inconsistent with section 6.2(a). The only way to harmonize the

sections is to understand that section 6.1 does not apply to injuries to either the Port's or Alaska's employees.

The Lease made explicit reference to workers' compensation coverage in section 6.2(a):

Section 6.2 - Insurance: Without limiting indemnifications above, it is agreed that Lessor shall purchase at its own expense and maintain in force at all times during the term of this agreement policies of insurance as noted below. ... The following policies of insurance must be provided:

6.2(a) Workers' Compensation Coverage: All employees of the Lessor engaged in work under this agreement shall be covered under applicable Washington law relating to industrial insurance. ... Lessor agrees it has no rights of subrogation against the State of Alaska, its officers, agents, and employees in connection [sic] laws or coverages referenced in this subsection.

CP 51 (emphasis added). AMHS was statutorily required to participate in the Alaska Workers' Compensation program. *See* AS § 09.50.250(5); AS §§ 23.30. The State of Alaska is a self-insured participant in the Alaska workers' compensation program. CP 84. Section 6.2(a) of the Lease is consistent with the Port's obligation (under Washington law) to maintain workers' compensation insurance for all of its employees as well, thus ensuring all employees of both parties were covered by the applicable workers' compensation laws while conducting work pursuant to the Lease.

The Port misreads section 6.1 to apply to employee claims (like Ms. Adamson's) when doing so would directly contradict the terms of 6.2.

Section 6.2 starts off by stating that its terms do not limit section 6.1's allocation of fault provision. Importantly, section 6.2 goes on to specifically provide that the Port gives up its right to subrogate a loss arising from a workers' compensation claim in section 6.2. By doing so, the Port agreed that it was not entitled to recover from Alaska for any fault of Alaska that caused or contributed to an injury to a Port employee covered by workers' compensation. In other words, in section 6.2, the Port is giving up its potential right to allocate fault in a subrogation claim against Alaska arising from an injury to a Port employee. By its own terms, paragraph 6.2 specifically states that it does not limit the allocation of loss provision (section 6.1). If section 6.2 truly does not limit section 6.1, the appropriate conclusions are that (1) the term "third-party" in section 6.1 does not include the respective employees of the parties and (2) the allocation of fault provision in section 6.1 does not apply to fault-based claims arising from injuries to employees covered by workers' compensation insurance. To conclude otherwise would require the Court to ignore or render meaningless the discussed terms in section 6.2.

What is clear from this analysis is that neither the Port nor Alaska purposefully bargained or agreed to allocate fault in claims arising from an injury to an employee eligible for workers' compensation benefits. The liability of each party with respect to its own employees is the same - each

party is exposed to having to pay no fault compensation benefits to its own employees. Each party is also equally immune from fault-based claims arising from injuries to their own employees.

4. The Alaska Officials Involved in Forming the Lease Had No Authority to Waive Alaska's Immunity to Suit Arising From an Employee Injury.

Ultra vires describes an act taken without authority. *See Failor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wn.2d 488, 499, 886 P.2d 147 (1994). Alaska law provides that in an action arising from the injury to a state-employed seaman, the exclusive remedy is pursuant to Alaska's no fault workers' compensation statute. AS § 09.50.250(5); AS § 23.30.055. Alaska executive agency officials who executed the Lease had no authority to waive the legislatively-approved exclusive remedy provision. *See Glover*, 175 P.3d at 1245, *citing* AK Const. art. II, § 21 ("The legislature shall establish procedures for suits against the State."). The Port points to no provision in Alaska law that would empower an Alaska state agency to ignore the legislature's specific limitation on the waiver of sovereign immunity and purposefully expose Alaska to fault-based liability arising from an injury to an Alaska state-employed seaman. There is no such authority.

5. Even If the Officials Executing the Lease Had Authority to Waive Alaska's Immunity to Suit, There Is No Clear Expression of Waiver in the Lease.

The Port might argue that an AMHS official might hypothetically obtain authority to waive sovereign immunity. Even in that circumstance, the Port's claims fail. The effective waiver of a State's sovereign immunity in the context of jurisdiction is subject to a stringent test. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (finding waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.") (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). In the context of tribal sovereign immunity, the standard is that a waiver must be "unequivocally expressed." *Wright v. Colville Tribal Enter. Corp.*, 159 Wn. 2d 108, 115, 147 P.3d 1275, 1280 (2006) ("It is well settled that waiver of [tribal] sovereign immunity will not be implied, but must be unequivocally expressed."). A waiver of Alaska's immunity must be "unequivocally expressed." See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Native Vill. of Eyak v. GC Contractors*, 658 P.2d 756, 760 (Alaska 1983) (citing to *Martinez* with approval); *State v. Alaska Pub. Employees Ass'n, AFT, AFL-CIO*, 199 P.3d 1161, 1164 (Alaska 2008) (same).

Waiver of the exclusive remedy provision must also be express. Sophisticated entities like the Port and Alaska should be able to clearly express an intention to waive employer immunity (if doing so was their intent).²⁴ See *Golden Val. Elec.* at 67 (“We take judicial notice of the fact that Golden Valley owns extensive property interests, employs numerous employees and engages in frequent and substantial contracts. If such an enterprise wishes to alter the exclusive remedy provision of the Alaska Workmen's Compensation Act so as to require an employer contracting with it to indemnify Golden Valley against the tort claims of the employer's servants, it is not onerous to require that Golden Valley expressly so provide in the contract.”). Thus, even if the Court ignores the issue of the authority of those executing the Lease for Alaska, the answer remains the same. Looking at the Lease terms, neither party included employee claims among those that were subject to section 6.1’s allocation of fault provision. The Port’s claims fail because the Lease terms do not express the clear and unequivocal intent of Alaska to waive its sovereign immunity and further include no express waiver of the protections of the

²⁴ The Port argues that the allocation of fault provision in section 6.1 waives Alaska’s exclusive remedy defense to the Port’s claims in this case. If so, it must also waive other defenses as well (e.g., statute of limitation, discretionary functions). The Lease makes no mention of waiver of defenses. The Court should conclude that the omission of any waiver of defenses means that Alaska may assert defenses to the Port’s claims.

exclusive remedy provisions of both Alaska and Washington workers' compensation law. The Lease-based claims must be dismissed.

VI. CONCLUSION

To avoid dismissal here, the Port has tried to negotiate a labyrinth of statutory and common law rules designed to protect employers, generally, and the State of Alaska as an employer of state-employed seaman, specifically, from third-party claims arising out of an employee injury. Alaska has been paying and will continue to pay Ms. Adamson the no-fault benefits to which she is entitled. By law, Ms. Adamson is also entitled to an opportunity to obtain damages from a third-party that she alleges is liable for her injury. The Port, however, is not entitled to impose a fault-based remedy on Alaska based on the claims Ms. Adamson has made against the Port. General maritime law, Alaska law, and Washington law all protect an employer from such claims. Nothing in the Lease between Alaska and the Port for use of the Bellingham terminal waives or changes Alaska's ability to protect itself from a third-party claim arising from an employee injury. The Port's claim of waiver based on the Lease is wrong on two levels. Alaska, as a sovereign government, does not so easily waive its immunity to suit. Here, a limited waiver of sovereign immunity provides that workers' compensation is the exclusive remedy against Alaska arising from a state-employee seaman's injury. The Lease

term at issue in this case simply does not expose Alaska to the Port's claims arising from Ms. Adamson's injury. The Port's claims must be dismissed. The trial court's decision must be affirmed.

Respectfully submitted this 16th day of April, 2015.

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CERTIFICATE OF SERVICE

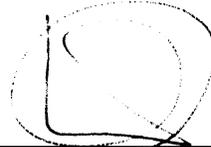
I certify that on the 16th day of April, 2015, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below:

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