No. 92362-1

SUPREME COURT OF THE STATE
OF WASHINGTON

DEAN WILCOX,

Petitioner,

v.

BARTLETT SERVICES, INC., and ELR CONSULTING, INC.

Respondents.

REPLY TO ANSWERS TO PETITION FOR REVIEW

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1. Petitioner Raised His Contract Argument in the Trial Court.

Respondent Bartlett Services, Inc. ("BSI") incorrectly claims that Petitioner "alleges that the borrowed servant defense is secondary to indemnification clauses in contracts," and that "[t]his issue was not brought up at the trial court[.]" BSI Answer at 12. Elsewhere it urges that Petitioner's "argument regarding express contractual terms is waived because this issue was never raised at the trial court." *Id.* at 9.

BSI incorrectly reduces and misstates Petitioner's contractual argument. That argument submits that the borrowed servant defense was contrary to the terms of the BSI-ELR and ELR-WCH contracts stating WCH did not employ Mr. Basehore, and that those terms trumped use of the common law defense. Contrary to BSI's assertions, Petitioner repeatedly presented that argument to the trial court:

> Precisely as BSI, ELR and WCH stated in their contracts with one another, there was no employment relationship between WCH and Mr. Basehore. The relationship between BSI and WCH was that of an independent contractor selling professional services – here, through a middleman, ELR. The only employment relationship was between BSI and Mr. Basehore. [CP 499]
>
> WCH, BSI, ELR and Mr. Basehore each affirmed in writing that Mr. Basehore was not an employee of WCH. BSI, ELR and WCH all agreed in writing that Mr. Basehore was acting as an independent contractor. Those writings correctly described the relationship. [CP 498 (internal citations omitted)]

> Mr. Basehore never became an employee of ELR, or an employee of WCH. He remained, exactly as he, BSI, WCH and ELR agreed: an employee of BSI. [CP 503-04]
>
> The "borrowed servant" doctrine does not apply here because BSI and Mr. Basehore's status with WCH was that of an independent contractor and not an employment relationship. The contracts between BSI, ELR, and WCH so state, and expressly disclaim that Mr. Basehore was an employee of any entity other than BSI or that any entity besides BSI bore responsibility for Mr. Basehore in any respect. [CP 507]

See also RP 928-29, RP 942-44. Petitioner's contract argument – that a party may not assert the borrowed servant defense when that party expressly agrees that the "servant" in question is not employed by the purported "borrowing" employer – was not waived.

Alternatively, in reliance on *Stocker v. Shell Oil*, 105 Wn.2d 546, 550, 716 P.2d 306 (1986), BSI claims it "is only when the parties have made an express contract that the agreement trumps common law defenses," and that *Stocker* does not apply here "because BSI never had a contract with WCH." BSI Answer at 10. That argument overlooks BSI's contract with ELR, which incorporated all terms of ELR's contract with WCH, including those stating Mr. Basehore was not a WCH employee. Ex. 34 at ELR000486, ELR000500; Ex. 222 at BSI-2, BSI-28; Ex. 5.

BSI makes this highly technical argument that because it had no contract with WCH, it cannot be bound by the terms in its contract with ELR stating WCH did not employ Mr. Basehore. Yet otherwise in its

borrowed servant analysis, it urges this Court to disregard the technicalities of the doctrine in favor of a pragmatic "this-is-how-business-is-done" approach. According to BSI, its failure to have loaned Mr. Basehore to WCH, and ELR's denial that it loaned him at all, are of no consequence – it still may assert the borrowed servant defense. BSI claims the three-way BSI-ELR-WCH transaction, far from being deceitful, was simply "the most efficient way" to obtain skilled workers. BSI Answer at 10.

That economic argument elides the issue presented here. There is nothing inherently wrong with multiple-party contracts regarding workers. As *Stocker* recognizes, parties may choose to allocate risk through contractual terms and thereby forego default common law rules – like the borrowed servant doctrine. *See also Tidewater Oil Co. v. Travelers Ins. Co.*, 468 F.2d 985, 987-89 (5th Cir. 1972) (cited by *Stocker*, 105 Wn.2d at 550). But when sophisticated players agree to contract terms that override default common law rules, they cannot then rely on those same common law rules to avoid liability for harm their employees cause.

2. Respondents' Positions are Contradictory, Exposing the Illogic of Applying the Borrowed Servant Defense Here.

The borrowed servant defense is "legal fiction." *Stocker*, 105 Wn.2d at 548. The defense immunizes an employer from liability for its

employee's negligence. It is thus a departure from "the ancient rule of respondeat superior, whereby an employer or principal is held liable for all such acts of his employee or agent as may be said to be the product of the service[.]" *Haverty v. Int'l Stevedoring Co.*, 134 Wash. 235, 241, 235 P. 360 (1925), aff'd, 272 U.S. 50 (1926).[1] When used by "an employer seeking a defense to a common law suit," the borrowed servant defense "results in the destruction of valuable common law rights to the injured workman." *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d 550, 554-55, 588 P.2d 1174 (1979).

Mr. Wilcox initially sued BSI (and two of its sister companies, as the exact Bartlett entity employing Mr. Basehore was unknown). CP 5. BSI then alleged in its Answers that ELR caused Mr. Wilcox's damages. CP 10-12; 15-17. Only then did Mr. Wilcox file an Amended Complaint naming ELR. CP 20.

BSI needed ELR in this action precisely because it did *not* loan Mr. Basehore to WCH. Even now, BSI must allege that ELR loaned Mr. Basehore to WCH, in order to preserve its claim to the borrowed servant defense. It states in its Answer to the Petition: "WCH contracted with

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[1] *See also, e.g., Packard Motor Car Co. v. N.L.R.B.*, 330 U.S. 485, 489, (1947) (respondeat superior" is "the ancient maxim of the common law." Respondeat superior has "ancient roots in Roman law." Dobbs' Law Of Torts at § 425 (2000).

ELR Consulting, Inc. to borrow Mr. Basehore for its project at building 336." BSI Answer at 4.

Yet that is directly opposite to ELR's position. ELR states: "Since ELR did not employ Mr. Basehore and Mr. Basehore was not ELR's agent, it was impossible to 'lend' him to WCH under the borrowed servant doctrine." ELR Answer at 9-10.[2] These contradictory positions reveal the illogic of applying the borrowed servant doctrine here. BSI did not loan Mr. Basehore to WCH; it claims ELR did so. ELR denies loaning Mr. Basehore to WCH. How, then, did Mr. Basehore come to be a borrowed servant employed by WCH?

The borrowed servant defense operates when "A loans his servant to B, under such circumstances that B assumes complete control and direction of the servant's work." *Nichols v. Pac. Cnty.*, 190 Wash. 408, 410, 68 P.2d 412 (1937). To apply this doctrine to the A→B→C transaction here was a fictitious use of a legal fiction. The attendant vacuum of logic resulted in a vacuum of responsibility, as ELR, BSI and WCH all benefitted from Mr. Basehore's work, while none was

[2] This has long been ELR's position. When seeking summary judgment dismissal, it stated: "this case contains even less evidence of a borrowed servant relationship than other cases where courts refused to apply the doctrine." CP 35.

accountable for his negligence.[3] Only our State's workers compensation system was left to pay for Mr. Wilcox's injuries.

3. ELR's Presence in the Case Demonstrates the Fallacy of Applying the Borrowed Servant Defense.

If Petitioner is correct that the borrowed servant fiction cannot apply here, then ELR's status reverts to what it was in fact: a seller of Mr. Basehore's professional safety planning services. In that capacity, ELR entered into a 37-page contract with WCH whereby it sold Mr. Basehore's professional services for $89 an hour, and, among other obligations, agreed to exercise "complete control" over him. Ex. 34 at ELR 000466. Then, when sued, ELR claimed it "never had a legally significant relationship with Mr. Basehore." CP 30, 31 at n.1, CP 36.

On the eve of trial, Petitioner renewed his argument that the borrowed servant defense could not apply because BSI lacked any agreement with WCH regarding Mr. Basehore, and had sold Mr. Basehore's services not to WCH but to ELR:

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[3] BSI's claim that the BSI-ELR and ELR-WCH transactions only allowed WCH "to avoid penalties" (BSI Answer at 6) is belied by the testimony it cites in the record. BSI's former Hanford Site Coordinator testified that if contractors such as WCH "meet the quota that's specified" for small business contracts, "then there's a bonus that they get." RP 646. Here, that bonus was $9,000,000. RP 17. The trial court granted ELR's motion to exclude that amount from evidence. RP 21-22.

> There's no written document between WCH and Bartlett of any type. No contract of any type. Bartlett says, "Basehore's our employee. We loaned him." Fine, but they loaned him, as they themselves say, to ELR. They couldn't have loaned him to WCH because they had no relationship there, and then they say ELR in turn loaned him on up to WCH.

RP 12-13. Petitioner emphasized that if BSI had loaned Mr. Basehore to anyone, it only could have loaned him to ELR, not WCH:

> *ELR* may want to say, "He was our employee, and we loaned him to WCH." That's *its* affirmative defense, which it did not plead, but Bartlett can't plead that defense on behalf of ELR. A party can't plead an affirmative defense on behalf of someone else . . . so, if Bartlett wants to assert the borrowed servant defense in this case it's welcome to do that, but it can only say what it has said. "We loaned him to ELR," but it can't come in here, [and say] "and we loaned him to WCH."

RP 13 (bracketed material and italics added).

The trial court misconstrued this argument. It stated (mistakenly) that Petitioner would attempt to prove ELR employed Mr. Basehore:

> I have to agree with the defense. If the plaintiff is successful in proving that he was an employee of ELR, then ELR gets to raise the Borrowed Servant Doctrine because it's ceded or according to its position ceded exclusive control of Mr. Basehore to Washington Closure Hanford. That, in my mind, is -- with what little involvement I've had in that case I've clearly understood, and so I'm sure the parties have just as clearly understood it and are prepared to try the case on that basis.

RP 14. The trial court's mistake was fundamental because ELR always averred, by contract, pleadings and testimony, that Mr. Basehore was *not* an ELR employee. Plaintiff never argued otherwise.

In fact, Petitioner urged the trial court to reject ELR's use of the borrowed servant defense *because* ELR denied employing Mr. Basehore and specifically denied that defense in its Answer. RP 10-12, 15; CP 27. The trial court dismissed Petitioner's argument, stating "I just told you that I find you've been on notice of it [the defense] all along," and re-stating its belief that Petitioner intended to prove ELR employed Mr. Basehore. RP 15.

ELR subsequently moved for a directed verdict dismissing Petitioner's claims under the borrowed servant doctrine, among other grounds. RP 927. When considering the motion, the trial court again focused (mistakenly) on whether ELR employed Mr. Basehore. The court asked Petitioner if he agreed Mr. Basehore was not an ELR employee; Petitioner so agreed. The court then granted ELR's motion to dismiss, stating:

> The rule of law is that a principal is not liable for the torts of the independent contractors. It's only liable for the torts of servants. That is those that are subject to the control of the principal. Both parties here agree that Mr. Basehore was not an employee and therefore not a servant of ELR.

RP 929 [misspellings in transcript corrected].

Petitioner then reminded the court that an agency relationship can "arise from the right to control, not the exercise of control." RP 930. The court responded that the "mere right is not enough without some exercise

of it" and "without the master/servant relationship, I don't even believe we get to control." RP 931. The trial court concluded, "I don't even think that ELR had any relationship with Mr. Basehore." RP 930.

Whatever its "relationship" with Mr. Basehore, ELR described its "role" as (1) a "conduit" through which WCH and BSI could do business, and (2) to "trigger various specialized federal benefits." CP 32, CP 212, 535; RP 953-54. Those "benefits" were not various or specialized; they were simply money: WCH spent small business dollars for Mr. Basehore's services and moved closer to its $9,000,000 bonus, while BSI gained access to the ample federal dollars spent at Hanford. ELR plainly admitted this. Referring to WCH as "Hanford," it stated:

> Bartlett and Hanford instead used ELR as an intermediary, which moved Hanford closer to obtaining a multi-million dollar bonus and allowed Bartlett to access "the market of federal government contracts for nuclear site clean-ups," which may be off-limits to large business such as Bartlett but open to small business such as ELR.

CP 212.

ELR's "role" required it to have a contract with WCH, a contract that gave it the right and obligation to control Mr. Basehore. Ordinarily, a right of control results in an agency relationship. *Cassidy v. Peters*, 50 Wn.2d 115, 120, 309 P.2d 767 (1957); *ITT Rayonier, Inc. v. Puget Sound Freight Lines*, 44 Wn.App. 368, 377, 722 P.2d 1310 (1986). As discussed

below in Section 4, ELR's argument that it did not retain that right of control rests on a selective and illogical reading of its contract with WCH.

The perplexing problem of ELR's relationship to Mr. Basehore underscores the misuse of the borrowed servant doctrine that occurred here. In order to obtain "federal benefits," BSI and WCH cloaked their business dealings behind contracts with ELR. This three-way transaction – in which a third party who did not employ Mr. Basehore and who denies loaning him is nevertheless supposed to have loaned him to WCH – is beyond the terms of the borrowed servant defense. However much such three-way transactions may be in vogue among the businesses earning federal money at Hanford – "savvy contracting," as ELR described it (CP 32; RP 959-60) – the borrowed servant defense should not be stretched beyond its terms to immunize those businesses from liability.

4. ELR's Contract with WCH Gave ELR a Right and an Obligation to Control Mr. Basehore.

Referring to its contract with WCH, ELR distinguishes between that contract's "General" and "Special" conditions. ELR Answer at 3. It notes that General Condition 2 states that ELR would "maintain[] complete control over . . . all of its lower tier suppliers and subcontractors" – a clause which indisputably includes Mr. Basehore. ELR then states that under the contract's Order of Preference clause, Special Conditions take

precedence over General Conditions. ELR Answer at 4. It then argues that its promise to maintain control over Mr. Basehore is rendered moot by Special Condition 13, which refers to a WCH "Subcontract Technical Representative" and states that person "retains ultimate authority over the technical aspects of the work."

The Order of Preference clause was intended to resolve disputes between the contract's signers. It states: "In "resolving conflicts, discrepancies, errors or omissions pursuant to the General Condition titled 'CONTRACT INTERPRETATION' the following order of preference shall be used[.]" The "General Condition titled 'CONTRACT INTERPRETATION,'" GC-5, provides that "[a]ll questions concerning interpretation or clarification of this Subcontract, including the discovery of conflicts, errors and omissions, or the acceptable performance by SUBCONTRACTOR, shall be immediately submitted in writing to CONTRACTOR for resolution." Ex. 34 at ELR000466.

The single Special Condition ELR relies upon – Special Condition 13 – addresses only technical-administrative requirements of the subcontract, not the technical work safety planning performed by Mr. Basehore. RP 552. The WCH "Subcontract Technical Representative," Kim Koegler, testified his duties concerned merely *administrative* aspects

of the subcontract, such as ensuring that invoices were correct. He did not supervise Mr. Basehore's work. RP 565-566; RP 576.

ELR's overstatement of Mr. Koegler's function aside, its argument is illogical, because several "Special Conditions" in its contract with WCH obliged it to ensure Mr. Basehore performed his work in a safe manner:

> SUBCONTRACTOR [ELR] shall have the sole responsibility for satisfying itself concerning the nature and location of Work and the general and local conditions. [Special Condition-10, Ex. 34 at ELR000485]
>
> The SUBCONTRACTOR [ELR], working closely with the CONTRACTOR [WCH], shall utilize multi-disciplinary teamwork and worker involvement to support the identification and analysis of work site hazards associated with work scope for this subcontract. This includes the development of "Work Packages" for specific project activities, performance of work in accordance with work package requirements, and use of "observational approach" during implementation for identification of hazards not initially recognized during the work package preparation. The Work Packages will be prepared collaboratively with the CONTRACTOR and detail the responsibilities and processes that must be followed to implement the field work scope. The SUBCONTRACTOR shall be held responsible for strict compliance with all of the applicable requirements defined in the Work package. [Special Condition-27, Ex. 34 at ELR000492]
>
> Subcontractor [ELR] is required to comply with Washington Closure Hanford LLC Environmental, Safety, Health and Quality Assurance requirements as long as Subcontractor's personnel are located on WCH controlled premises or works [sic] sites. [Special Condition-22, Ex. 34 at ELR000488]
>
> All work performed under this Agreement shall be performed in a safe, professional manner and consistent with principals

> [sic] found in the WCH Safety and Health plan Exhibit 'G'. [Special Condition-22, Ex. 34 at ELR000488]

ELR's reasoning – that the promise it made in General Condition 2 to maintain control over Mr. Basehore has no meaning because General Conditions are subordinate to Special Conditions – provides no basis to ignore these other Special Conditions.

ELR emphasizes how little it did with respect to Mr. Basehore. According to the Restatement (Third) of Agency, however, a party's failure to exercise a right of control does not eliminate that right:

> . . . a person may be an agent although the principal lacks the right to control the full range of the agent's activities, how the agent uses time, or the agent's exercise of professional judgment. A principal's failure to exercise the right of control does not eliminate it, nor is it eliminated by physical distance between the agent and principal.

Restatement (Third) Of Agency § 1.01 (2006) comment c.

ELR was complicit in the misapplication of the borrowed servant doctrine that occurred here. Without ELR's involvement, BSI could not make the false claim that ELR loaned Mr. Basehore to WCH. ELR claims it had no "legally significant relationship" with Mr. Basehore. But it sold his safety planning services for $89 an hour, pursuant to a 37-page contract in which it promised, among other things, to ensure those services were provided "in a safe, professional manner." Ex. 34 at ELR000488.

Surely that created a legally significant relationship – an agency relationship.

5. Conclusion

The Court of Appeals decision approving the use of the borrowed servant defense here was contrary not only to *Stocker*, but to all of this Court's decisions addressing the doctrine. The decision is a matter of substantial public interest, because it extends the use of the doctrine beyond its existing terms. That is particularly true given BSI's declaration that the practices at issue are widespread at Hanford, are "the most efficient way to obtain workers" with specialized skills, and allow businesses to "keep their own costs down." BSI Answer at 4, 10.

The use of small businesses as conduits for large business transactions may be economically efficient for those who thereby enjoy access to "federal benefits." It is not economically efficient for workers injured by those businesses' employees, or for our State's workers' compensation system. The borrowed servant defense should only immunize employers from liability for their employees' negligence when its use is in accordance with the doctrine's terms and this Court's precedents. At a minimum, that requires that the loaning "employer" actually employ the "servant" in question, and agree that it loaned that person to the purported "borrowing" employer.

RESPECTFULLY SUBMITTED this 12th day of November, 2015.

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CERTIFICATE OF SERVICE

That on November 12, 2015, I arranged for filing of the foregoing Reply to Answers to Petition for Review with the Supreme Court of the State of Washington, and arranged for service of a copy of the same on the parties to this action as follows:

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DATED this 12 day of November, 2015, at Seattle, Washington.

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Attached for filing into Case No. 92362-1 -- Wilcox v. Bartlett Services, Inc., ELR Consulting is Petitioner's Reply to Answers to Petition for Review, which is being submitted by Petitioner's attorneys, Mel Crawford, WSBA #22930 and David Whedbee, WSBA # 35977. Mr. Crawford's contact information is: Law Office of Mel Crawford, 705 2nd Avenue, Suite 1500, Seattle, WA 98104; 206-694-1614; melcrawford@melcrawfordlaw.com. Mr. Whedbee's contact information is: MacDonald Hoague & Bayless, 705 2nd Avenue, Suite 1500, Seattle, WA 98104; 206-622-1604; davidw@mhb.com.

As indicated in the Certificate of Service attached to the motion, Respondents' counsels of record, Mark Dynan, Maura McCoy, and Douglas Weigel, are being served a paper copy of the document via legal messenger.

Thank you,

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