No. 321797

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

DEAN WILCOX,

Appellant,

v.

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

Appellees.

APPELLANT'S REPLY BRIEF

Mel Crawford, WSBA #22930
MacDONALD HOAGUE & BAYLESS
705 2nd Avenue, Suite 1500
Seattle, WA 98104
(206) 622-1604

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

I. INTRODUCTION

Defendants fail to respond to the core of Plaintiff's arguments demonstrating that the borrowed servant defense could not apply to the facts of this case and that the trial court thus erred in instructing the jury on the defense. Defendants fail to explain why they should not be held to the express terms of their contracts stating that Mr. Basehore was not a WCH employee, and stating that they stood as independent contractors to one another. They do not answer Plaintiff's argument that, as independent contractors, the borrowed servant doctrine could not apply to their transactions. Defendants do not answer Plaintiff's argument that BSI did not loan Mr. Basehore to WCH, but only sold his services to ELR. They do not explain how ELR, which did not employ Mr. Basehore, could have loaned him to WCH. They simply ask this Court to re-write the borrowed servant defense beyond its established terms.

Unable to counter Plaintiff's substantive arguments, Defendants allege that Plaintiff's appeal is marred by various procedural problems, and detour into a myriad of facts regarding events and people at Hanford. But their procedural arguments do not withstand scrutiny, and the litany of facts Defendants recite would be relevant only if the borrowed servant doctrine applied.

Plaintiff's appeal is not premised on the particular wording of the trial court's borrowed servant instructions. The crux of his appeal is that the jury should not have been instructed on the doctrine at all.

II. ARGUMENT

A. At Issue is Not Whether Substantial Evidence Supported the Jury's Verdict, But Whether Advising the Jury of the Borrowed Servant Defense Was an Error of Law Which Misled the Jury.

The standard for review of jury instructions is straightforward:

> Jury instructions are reviewed de novo for errors of law. Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law. If any of these elements are absent, the instruction is erroneous. An erroneous instruction is reversible error only if it prejudices a party. Prejudice is presumed if the instruction contains a clear misstatement of law; prejudice must be demonstrated if the instruction is merely misleading.

Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 860, 281 P.3d 289 (2012) (internal citations and quotation marks omitted).

As set forth in Appellant's Opening Brief, the borrowed servant defense could not apply to the transaction at issue here, when BSI, ELR and WCH contractually agreed that Mr. Basehore was not a WCH employee; BSI, ELR and WCH contractually agreed that their relationships were as independent contractors, not employers; BSI sold Mr. Basehore's professional services to ELR, not WCH; and ELR denied it employed Mr. Basehore and thus could not loan him.

The issue is not, as Defendants allege, whether substantial evidence supported the jury's verdict. It is whether the borrowed servant defense was available to BSI at all. Because the defense could not apply,

Instructions 12 and 13, and that portion of the Special Verdict Form addressing the defense did not "properly inform the trier of fact of the applicable law," and misled the jury. *Anfinson*, 174 Wn.2d at 860. The instructions plainly prejudiced Plaintiff, as they resulted in judgment against him.

B. Defendants' Procedural Arguments Fail.

1. The Trial Court Was Apprised of the Nature and Substance of Plaintiff's Objections.

Judge Spanner heard three summary judgment motions in which Plaintiff objected to application of the borrowed servant defense. CP 33; 242-43, 530-31. The objections were renewed on the first day of trial, when Plaintiff argued that BSI could have loaned Mr. Basehore only to ELR, not to WCH – and that ELR could not have loaned Mr. Basehore to WCH because it didn't employ him. Plaintiff argued:

> . . . who did [BSI] loan [Mr. Basehore] to? They had absolutely no contractual relationship with WCH. . . . 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.
>
> . . . 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] "we loaned him to WCH." . . . a very important part that I don't think the defense has ever made clear to the court is who they really loaned this person to.

> . . . only an employer can loan a servant. ELR denies being Mr. Basehore's employer. So, we don't see how we could possibly -- how it could loan someone it denies was their own employee.

RP 12-13, 15.

On the late afternoon of December 12, 2013, opposing ELR's motion for directed verdict, Plaintiff argued "the Borrowed Servant Doctrine does not apply to independent contractors. That's how these parties defined their relationship when they contracted with one another." RP 929. The following morning, when Plaintiff objected to the jury being instructed on the borrowed servant defense, he reiterated these points:

> . . . plaintiff respectfully takes exception to Instruction Eight, Instruction Twelve with its inclusion of the borrowed servant defense, Instruction Thirteen, the borrowed servant defense -- we don't believe the defense belongs in this case at all -- and to the form of the special verdict with the mention of borrowed servant at the outset.
> . . .
>
> Respectfully, Instruction Number Twelve, your Honor, the plaintiff objects to the reference there to borrowed servant. It objects to any reference to borrowed servant here on the grounds that first there's been already an admission by the president of Bartlett that he did not surrender exclusive control over safety. I think with that admission as a matter of law the borrowed servant defense does not belong in this case.
>
> Second, there is no direct relationship of any type that's been demonstrated between defendant Bartlett Services, Inc., and Washington Closure Hanford. There's no contractual relationship. There's been no evidence of any agreement of any type. Absent that agreement, we do not believe the borrowed servant defense is applicable here,

> and for that reason we also object to the instruction as a whole, which was Number Thirteen. To the inclusion of the mention of the defense of borrowed servant, which is not applicable, in the special verdict form.

RP 942-44.

"The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection." *Crossen v. Skagit Cy.*, 100 Wash.2d 355, 358, 669 P.2d 1244 (1983). The trial court was apprised of the nature and substance of Plaintiff's objection to the borrowed servant defense.

2. Plaintiff Complied with RAP 10.4(c).

RAP 10.4(c) states that when "an issue . . . *requires study* of a . . . jury instruction . . . the party should type *the material portions* of the text out verbatim or include them by copy in the text" (emphasis added). Plaintiff complied with this rule. With respect to the core issue of this appeal – the trial court's error in instructing the jury that it could find Mr. Basehore was a borrowed servant – Plaintiff quoted the material portion of Instruction 12, omitting only the words "or the defendant proves that" before typing out the relevant language "Steve Basehore was a borrowed servant of Washington Closure Hanford, your verdict should be for the defendant." Opening Brief at 24; CP 106. Plaintiff also provided the full text of that portion of the Special Verdict Form to which he objected ("Do you find that Steve Basehore was a borrowed servant of Washington Closure Hanford?") Opening Brief at 24; CP 116.

Plaintiff did not provide the full text of Instruction 13, because he does not object to any specific language in that instruction, which may adequately state the law regarding the borrowed servant defense and does not "require[] study." Plaintiff maintains now, as at trial, that the borrowed servant defense could not apply when BSI and ELR contractually agreed that Mr. Basehore was not an employee of WCH and their relationships were as independent contractors; that it could not apply because BSI did not loan Mr. Basehore to WCH, and because ELR could not loan Mr. Basehore to WCH. His objection to Instruction 13 was not to its particular terms, but, as with that part of Instruction No. 12 addressing the borrowed servant defense, and the Special Verdict Form question, that the jury was instructed *at all* on the defense. Plaintiff did not thwart "expeditious and orderly appellate procedure," *Thomas v. French*, 99 Wn.2d 95, 100, 659 P.2d 1097 (1983) by not including the full text of Instruction 13 in his Opening Brief, when that text did not require study.

3. Plaintiff's Citation of *Stocker v. Shell Oil Company* as Support for His Argument that BSI and ELR Must be Held to the Terms of Their Contracts is Not an Error Raised For the First Time on Review.

Under RAP 2.5(a), this Court may "refuse to review any claim of error which was not raised in the trial court." The rule, however, does not bar citation of new authority for an argument that was in fact made in the trial court. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Amirpanahi*, 50 Wn. App. 869, 872 n.1, 751 P.2d 329 (1988) ("Although appellants did

not argue *Sullivan* to the trial court, they did argue the basic reasoning . . . This court can review these issues despite lack of citation to the crucial case law and treatises."); *Walla Walla Cnty. Fire Prot. Dist. No. 5 v. Washington Auto Carriage, Inc.*, 50 Wn. App. 355, 358 n.1, 745 P.2d 1332 (1987) ("There is no rule preventing an appellate court from considering case law not presented at the trial court level.").

Defendants claim that Plaintiff's citation of *Stocker v. Shell Oil Company,* 105 Wn.2d 546, 549, 716 P.2d 306 (1986), for the principle that "[w]hen contractual terms are contrary to the borrowed servant defense, those terms must be given effect over the defense," Opening Brief at 29, raises a new issue in contravention of RAP 2.5(a). BSI Response at 16; ELR Response at 34. Defendants are wrong. Plaintiff repeatedly argued before Judge Spanner, in three summary judgment motions, and on ELR's motion for a directed verdict, that terms of the BSI-ELR and ELR-WCH contracts were contrary to the borrowed servant defense, and that BSI and ELR should be bound by those terms:

> • "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. . . .
>
> The 'borrowed servant' doctrine does not apply to the independent contractor relationship that BSI, ELR and WCH created and enjoyed. BSI's borrowed servant defense should accordingly be stricken." CP 499-500.

- "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. The relationship WCH enjoyed with BSI and Mr. Basehore was precisely as BSI, ELR and WCH stated in their contracts: an independent contractor relationship, not an employment relationship." 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.

- "From the outset of this case we brought a motion to this court very early on saying [the] Borrowed Servant Doctrine didn't even belong in this case. This was a case about independent contractors. That's what the contracts say, and there's been ample testimony to support that." "[T]he Borrowed Servant Doctrine does not apply to independent contractors. That's how these parties defined their relationship when they contracted with one another." RP 928, 929.

Stocker stands for exactly this principle – the primacy of express contractual terms over the borrowed servant tort defense. The specific

contractual term in *Stocker* was an indemnification clause, but the larger principle is that contractual terms trump the defense.[1] Contractual terms *must* do so when they address the very issue presented by the borrowed servant defense: who employs a particular person. Here, the contract term stating that Mr. Basehore was not a WCH employee trumped any borrowed servant defense alleging the opposite. Plaintiff's citation of *Stocker* in support of that principle is not barred by RAP 2.5(a).

C. Defendants Do Not Answer Plaintiff's Core Arguments.

1. Defendants Fail to Explain Why They Should Not Be Bound By Their Express Contractual Agreement That Mr. Basehore Was Not a WCH Employee and That Their Relationships Were As Independent Contractors.

ELR and BSI contractually agreed that Mr. Basehore was not an employee of WCH. The ELR-WCH contract states: "any and all employees provided by Subcontractor under this agreement *are not Employees of Washington Closure Hanford, LLC.*" Ex. 34 at ELR000486 (emphasis added). The terms of the ELR-WCH contract are incorporated into the BSI-ELR contract. Ex. 222 at BSI-28. Further, both contracts include Mr. Basehore's "Acknowledgment of Employment Status,

---

1 BSI's claim that "there is no indemnity agreement" here is incorrect. *See* BSI Response at 18. The BSI-ELR contract incorporated ELR's contract with WCH (*see* Ex. 222 at BSI-2) which provided that ELR would indemnify WCH for harm caused by ELR's "lower tier suppliers, subcontractors or of anyone acting . . . in connection with or incidental to the performance of this Subcontract." Ex. 34 at ELR000470.

Benefits Consent, and Conflicts of Interest Form," affirming that while "serving as a subcontractor to Washington Closure Hanford" *he remained an employee of BSI.* Ex. 34 at ELR000500, Ex. 222 at BSI-2, Ex. 5.

ELR and BSI each agreed that their relationship to one another and to WCH were as independent contractors. The BSI-ELR contract stated: "The Subcontractor [BSI] shall furnish the services set forth herein and shall perform such services *as an independent contractor* and not as an employee of the Contractor [ELR]" (underlining in original; bracketed material and italics added). Ex. 222 at 1. The ELR-WCH contract stated:

> SUBCONTRACTOR [ELR] shall act as an independent contractor and not as the agent of CONTRACTOR [WCH] in performing this Subcontract, maintaining complete control over its employees and all of its lower-tier suppliers and subcontractors. Nothing contained in this subcontract or any lower-tier purchase order or subcontract awarded by SUBCONTRACTOR shall create any contractual relationship between any lower-tier supplier or subcontractor and either CONTRACTOR or OWNER.

Ex. 34 at ELR 000466 (bracketed material added).

As Plaintiff argued to the trial court (see Section B.3, above), BSI and ELR should have been bound by these express contractual terms. When contractual terms are contrary to the borrowed servant defense, those terms must be given effect over the defense. *Stocker*, 105 Wn.2d at 549. Because BSI and ELR agreed Mr. Basehore was not a WCH

employee, they were not able to assert a tort defense plainly contradicting that agreement. *Id.*

BSI and ELR also should have been bound by their agreement that they stood as independent contractors to one another. In his Opening Brief, Plaintiff quoted *Hartell v. T.H. Simonson & Son Company* for this principle:

> A servant in the general employment of one person, who is temporarily loaned to another person to do the latter's work, becomes, for the time being, the servant of the borrower, who is liable for his negligence. *But if the general employer enters into a contract to do the work of another, as an independent contractor, his servants do not become the servants of the person with whom he thus contracts*, and the latter is not liable for their negligence.

218 N.Y. 345, 349, 113 N.E. 255 (1916) (emphasis added). *Hartell* is one of "the more important cases" regarding the borrowed servant defense. *Pearson v. Arlington Dock Co.*, 111 Wash. 14, 25,189 P. 559 (1920).

Defendants provide no contrary authority holding that a person may contract to do the work of another as an independent contractor, and yet invoke the borrowed servant defense. They do not explain why they should be relieved of their agreement that Mr. Basehore was not a WCH employee.[2] Rather, as described above, Defendants only claim,

---

2 At trial, BSI's Vice President of Human Resources testified he was unaware of Mr. Basehore's "Acknowledgement of Employment Status." RP 344, 391-93.

incorrectly, that Plaintiff's citation of new *authority* supporting his argument that the contract terms must govern is a new *issue*.

2. Defendants Do Not Answer Plaintiff's Argument that the Three-Way Transaction at Issue Was Beyond the Terms of the Borrowed Servant Defense.

Plaintiff argues here, as below, that the borrowed servant defense is not available to BSI, because it did not loan Mr. Basehore to WCH, but sold his professional services to ELR. ELR denied being Mr. Basehore's employer. There was thus no employer who loaned Mr. Basehore to WCH. This three-way transaction – created precisely so that BSI and WCH could *avoid* entering into a business relationship with one another – was beyond the terms of the borrowed servant defense.

Defendants ignore the threshold question of whether the defense applies to their A→B→C scheme and jump ahead to the reasons why Mr. Basehore is purportedly a borrowed servant, devoting much of their briefs to a detailed, and at times inaccurate, account of events and people.[3] But nothing of that account is relevant if the doctrine did not apply.

---

3 Examples of those inaccuracies include the following: that WCH provided Mr. Basehore's "tools," BSI Response at 5, when it was the U.S. Department of Energy that provided the limited equipment Mr. Basehore used (a computer and camera), RP 511-12 (and his primary "tool" to provide his professional services was anyway his brain, RP 401-02, RP 572); that Ms. Yasek "supervised and directed Basehore's work," BSI Response at 10, when she took part in neither job hazard analysis walk down, RP 607, did not write the Work Package at issue and had to rely on Mr. Basehore's expertise with Work Packages, RP 620-22; that there was "a vast amount of light" in Building 336, BSI Response at 11, when Mr. Basehore himself testified the lighting was "inadequate" and

The borrowed servant doctrine does not provide that if "A sells his servant's services to B, who sells those services to C, A shall avoid liability for his servant's work." It does not provide that when "A, B and C enter into independent contractor agreements stating that A's servant shall not be an employee of C, then A, if sued for the servant's negligence, may claim the servant was an employee of C." And the test is not, as BSI urges while citing a New York case, whether "the original employer is not in control of its worker." BSI Response at 19, 20.

Under Washington law, the doctrine applies "if 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). That did not happen here. Even if BSI loaned Mr. Basehore to ELR – which it did not, given ELR's denial that it employed Mr. Basehore or exercised any control over him – ELR could not have loaned Mr. Basehore to WCH. Only an employer can loan an employee – a principle stated in nearly every case that addresses the doctrine. *See* Appellant's Opening Brief at 31-32. To hold otherwise would require re-writing the doctrine.

---

that he needed a flashlight, RP 91-92 (and BSI successfully excluded the Building's lighting measurements from evidence). RP 273-89.

Citing an 1898 New York case, BSI claims the purpose of the borrowed servant defense is "to protect the master when he does not have control of the servant." BSI Response at 19. Whatever New York's 19th Century policy to protect masters may have been, Washington recognizes that 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).[4] Because the defense is in derogation of valuable common law rights, it cannot be expanded beyond its terms.

BSI did not loan Mr. Basehore to WCH; it sold his services to ELR. ELR did not loan Mr. Basehore to WCH; it did not employ him. The borrowed servant defense does not apply to the series of transactions by which Mr. Basehore ended up providing professional services at WCH.

D. Defendants' Substantive Arguments Are Flawed.

1. BSI is Not "Similar if not Identical" to Labor Ready.

BSI states that it "is not in the business of decommissioning nuclear sites, rather BSI's business is supplying labor for very specific jobs." BSI Response at 5. Indeed, BSI did not have the prime contract

4 The defense destroys those rights whether the loaned servant is injured, in which case his consent to be loaned is required, or as here, when the purportedly loaned servant injures another, in which case consent does not matter. BSI's observations about the irrelevance of "consent," BSI Response at 25, are themselves irrelevant.

with the U.S. Department of Energy regarding Hanford; WCH held that contract. But BSI was certainly involved in decommissioning the Hanford site, through Mr. Basehore and the 69 other employees, including "site managers," it had working there from 2008 to 2010. RP 349, 421-22. *See* Ex. 143 at 14 (BSI promoting its expertise in "Decontamination and Decommissioning" nuclear sites); *see also* Ex. 139: ("a leading provider of D&D . . . services to . . . other nuclear contractors"; "BSI provides deactivation, decontamination, decommissioning, demolition and environmental remediation services in the areas of project and program management"); Ex. 136 (BSI "has been supporting the Department of Energy for the past 28 years with technical and professional solutions," has "had contracts supporting every major DOE-Office of Environmental Management site closure projects" and is "currently working" at the Hanford Site).

Likewise, despite BSI's present claim that it supplies "staff augmentation personnel," that its employees are "temporary workers" and that its business is to "find people to lend to others," BSI Response at 4, 5, 19, those terms do not appear in BSI's promotional materials or its communiqués to its employees. Rather, BSI tells its employees it wants to be "a company of loyal long-term employees who are dedicated to the

company because it offers them a safe place to work and financial security,"[5] and tells customers that its "workforce includes senior personnel located at client locations and technical experts providing project support from our corporate office." Exs. 72, 138.

BSI crowns its claim to be merely a professional servant loaner by citing *Brown v. Labor Ready Northwest, Inc.*, 113 Wn. App. 643, 54 P.3d 166 (Div. I 2002). It likens itself to Labor Ready, which Division I described as a "provider of temporary manual labor employees." *Id.* at 645. BSI claims that Labor Ready "loans workers to other companies in a similar, if not identical, manner as BSI." BSI's Response at 24. Apart from the irony of likening highly trained and highly paid professional work safety control planners who exercise independent judgment and discretion while providing services at nuclear sites to "temporary manual labor employees," there is a fundamental error in the analogy BSI tries to create. *Labor Ready sold its servant's services to CMI, the borrowing employer in Brown.* 113 Wn. App. at 645. BSI did not sell Mr. Basehore's services to WCH, the purported borrowing employer here.

---

5 Because BSI considered Mr. Basehore to be a "long-term employee," he was eligible for BSI's dental insurance, in addition to the many other employee benefits BSI offered or provided him, including health insurance, paid vacation, disability insurance, life insurance and travel expenses. RP 379-80, 656-57; Ex. 46 at 63; Ex. 54.

BSI *could* have sold Mr. Basehore's services to WCH. It deliberately chose not to, in order to further its financial interests and those of WCH. As ELR described, BSI, by selling Mr. Basehore's services to ELR, gained access to "the market of federal government contracts for nuclear site clean-ups" which otherwise was "off-limits to large business such as Bartlett but open to small business such as ELR," and WCH, by paying ELR for Mr. Basehore's services, was able to come that much "closer to obtaining a multi-million dollar bonus."[6] CP 212, 535; see also CP 32, RP 953-54, RP 17-18.

BSI's decision to sell Mr. Basehore's services to ELR allowed BSI to obtain hundreds of thousands of dollars in "small business" money for Mr. Basehore's services. RP 389-90; Ex. 83 at final page. But that decision foreclosed BSI's ability to sell Mr. Basehore's services to WCH – and thus its ability to invoke the borrowed servant defense. The issue is not whether there was a *written* contract between BSI and WCH, but whether there was a direct relationship between those companies whereby it could accurately be said that "A loans his servant to B, under such circumstances that B assumes complete control and direction of the

---

6 BSI's claim that the three-way BSI-ELR-WCH arrangement let WCH avoid a financial penalty, rather than gain a bonus, is a distinction without a difference. BSI Response at 7. Either way, WCH had a $9,000,000 incentive to subcontract with "small business" enterprises such as ELR, rather than large businesses such as BSI. RP 953-54, RP 17-18.

servant's work[.]" *Nichols* 190 Wash. at 410. BSI chose to forego such a relationship with WCH, and thus removed itself from the terms, and any legitimate application, of the borrowed servant defense.

BSI is not "a provider of temporary manual labor." It is "a leading provider of D&D . . . services to . . . nuclear contractors." Exs. 136, 139. When Mr. Basehore was working at Hanford, using his independent judgment and discretion to prepare work safety packages, RP 358-60, he was providing the professional D & D services BSI sells. BSI is not "nearly identical" to Labor Ready, and any marginal similarity is obviated by the simple fact that, unlike Labor Ready, BSI did not sell Mr. Basehore's services to the purportedly borrowing employer here.

2. The Borrowed Servant Defense Does Not Present a Jury Question if the Defense is Legally Barred.

BSI cites *Macale v. Lynch*, 110 Wash. 444, 188 P.2d 517 (1920), and other Washington cases, to argue that "whether the borrowed servant doctrine *applies* is typically a question for the jury." BSI Response at 21 (emphasis added). But *Macale* does not say that, and none of the other cases BSI cites do either. It is correct that if the defense *can* apply – if it is not legally barred, for example, by express contractual terms – then

whether a person is a borrowed servant is typically an issue of fact.[7] But that threshold question – whether the defense *could* apply – is a legal matter to be determined before the jury considers whether facts support the defense.

For all the reasons set forth in Plaintiff's Opening Brief and above, the defense could not apply. While there were facts from which the jury could find that aspects of Mr. Basehore's work were controlled by WCH, if BSI could not legally loan him to WCH, those facts were irrelevant.

3. BSI's Admission That It Did Not Give Up Exclusive Control Over Mr. Basehore Negates the Defense.

Both Defendants cite *Brown v. Labor Ready*, *supra*, for the proposition that "exclusive control for all purposes is not required" when determining borrowed servant status, only exclusive control "by the borrowing employer for the transaction causing injury." 113 Wn. App. at 651. *Brown* does not lessen the impact of BSI's admission that it did not give up exclusive control over Mr. Basehore "as it pertains to safety." RP

7 In support of his own summary judgment motion, Plaintiff argued that the borrowed servant defense had no application here. CP 481, 497-500. In opposition to Defendants' summary judgment motions, Plaintiff made the same argument, and argued, alternatively, that the defense presented factual disputes. CP 505-508, 518-520. By the close of trial, however, Plaintiff maintained one consistent position: the jury should not be instructed on the defense at all. RP 942-44. BSI's observations that Plaintiff acknowledged that the defense – when proper – rests on disputed facts, BSI Response at 22, is irrelevant here. So too is its incorrect claim that Plaintiff did not except to the Court giving *his* "offered instruction" on the borrowed servant defense. BSI Response at 13. Plaintiff urged that *no* instruction be given at all on the defense.

417. *Because the transaction at issue was Mr. Basehore's work safety planning*, BSI's admission negated the relevant "exclusive control" and it was error to instruct the jury it could consider the defense.

4. ELR's Contractual Argument is Illogical, Because Several "Special Conditions" Gave It a Right To Control Mr. Basehore and That Right Was Not Eliminated by ELR's Inaction.

A right of control creates an agency relationship. *ITT Rayonier, Inc. v. Puget Sound Freight Lines*, 44 Wn.App. 368, 377, 722 P.2d 1310 (1986); *Cassidy v. Peters*, 50 Wn.2d 115, 120, 309 P.2d 767 (1957). ELR promised in its contract with WCH to "maintain[] complete control over its employees and all of its lower-tier suppliers and subcontractors," a clause which all agree includes Mr. Basehore. Ex. 34 at ELR000466.

In an effort to extinguish that obligation and thus its agency relationship to Mr. Basehore, ELR claims that because the term is a "General Condition" of the ELR-WCH contract, it is subordinate to one of the 27 "Special Conditions" in that contract. ELR Response at 11-12. Yet 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" whom ELR now claims had "ultimate authority to control Mr. Basehore's work," Kim

Koegler, actually testified that 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 Special Condition 13 and Mr. Koegler's function aside, ELR's argument is illogical, because there are several *other* "Special Conditions" in ELR's contract with WCH that obliged ELR to ensure Mr. Basehore performed his work in a safe manner. Those include the following:

> • "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; and
>
> • "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 obliging ELR to oversee Mr. Basehore's work.

The trial court did not, as ELR suggests at page 21 of its Response, dismiss ELR based on Special Condition 13. That dismissal was based only on the fact that ELR did not employ Mr. Basehore:

> The rule of law is that a principle [sic] 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 principle [sic]. Both parties here agree that Mr. Basehore was not an employee and therefore not a servant of ELR.

RP 929. Because ELR did not employ Mr. Basehore, the trial court refused to consider whether ELR's right of control created an agency

relationship ("without the master/servant relationship, I don't even believe we get to control"). *See* RP 930-31.

That is incorrect. Principal-agent relationships do not require a master/servant employment relationship. And the right of control is sufficient to create a principal-agency relationship. *ITT Rayonier, Inc., Cassidy v. Peters, supra.*

"The requirement that the principal must exercise control over the agent means that there must be facts or circumstances that establish that one person is acting at the instance of and in some material degree under the direction and control of the other." *Washington Imaging Servs., LLC v. Washington State Dep't of Revenue*, 171 Wn.2d 548, 562, 252 P.3d 885 (2011) (internal citations and quotation marks omitted). There was evidence from which the jury could have found that Mr. Basehore was "acting at the instance of and in some material degree under the direction and control" of ELR. ELR's President, Emmet Richards, reviewed Mr. Basehore's BSI resume, Ex. 3, before Mr. Basehore began work, and understood the general nature of a Work Control Planner's services. RP 899, 901, 912-13. He acknowledged that ELR was paid, in part, to make "*sure that the client was satisfied with the services that Mr. Basehore was providing.*" RP 904. Mr. Richards received "feedback" from WCH on

"how Basehore was doing." RP 918. He was kept apprised of Mr. Basehore's training and presence at Hanford. RP 911, 921-22; Exs. 38, 41, 42, 43, 47, 48, 53, 64, 66, 145, 146.

ELR did this under a contract providing – in the "Special Conditions" which ELR emphasizes – that it would satisfy itself concerning the nature of Mr. Basehore's work, work closely with WCH to support the identification and analysis of work site hazards including development of Work Packages, and ensure that all work performed under the contract was performed in a safe, professional manner. Ex. 34 at ELR000485, 488, 492.

ELR, and the trial court, focused on how *little* ELR did with respect to Mr. Basehore. But that turns the matter on its head. Under its contract with WCH, ELR had a right, *and an obligation*, to control Mr. Basehore or at least ensure his work was "performed in a safe, professional manner." Ex. 34 at ELR000488. ELR's failure to fulfill that obligation did not destroy its right to control Mr. Basehore, and ELR remained Mr. Basehore's principal even though it didn't control his exercise of independent judgment and discretion, RP 358-360:

> . . . 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.[8]

The jury might have concluded that Mr. Basehore would have worked more carefully if ELR had exercised control and oversight over his work, as ELR agreed to do in its contract. It might have found, as Plaintiff alleged in his Complaint, that Mr. Basehore was "acting as an agent of . . . ELR Consulting, Inc. when he was preparing the . . . work package for the 336 Building" and that "ELR Consulting, Inc. failed to competently and/or reasonably . . . supervise" Mr. Basehore regarding that work package. CP 22.

III. CONCLUSION

The Order dismissing ELR Consulting, Inc., should be reversed.

The judgment should be reversed, and the case remanded for trial with direction that the jury not be given a borrowed servant instruction.

RESPECTFULLY SUBMITTED THIS 3rd day of November, 2014.

MacDONALD HOAGUE & BAYLESS

Mel Crawford, WSBA #22930
Attorney for Appellant

8 Washington adopts the Restatement including § 1.01. *See, e.g., Washington Imaging Servs.*, 171 Wn.2d at 562.

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 3, 2014, I arranged for filing an original and one copy of the foregoing Appellant's Reply Brief with the Court of Appeals, Division III; and arranged for service of a copy of the same on the parties to this action as follows:

Office of Clerk Court of Appeals – Division III 500 N. Cedar St. Spokane, WA 99201	☐ ☐ ☐ ☒	Facsimile Messenger U.S. Mail Federal Express
Mark J. Dynan Dynan & Associates, P.S. 2102 North Pearl Street, Suite 400, Bldg. D Tacoma, WA 98406-2550 Phone: 253-752-1600 Fax: 253-752-1666	☐ ☐ ☒ ☐	Facsimile Messenger U.S. Mail E-Mail
Douglas K. Weigel Floyd, Pflueger & Ringer P.S. 200 W. Thomas Street, Suite 500 Seattle, WA 98119-4296 Phone: 206-441-4455 Fax: 206-441-8484 Email: dweigel@floyd-ringer.com	☐ ☐ ☒ ☐	Facsimile Messenger U.S. Mail E-Mail

DATED this 3rd day of November, 2014, at Seattle, Washington.

Terri Flink, Legal Assistant