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No. 66403-4

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

GARY MERLINO CONSTRUCTION COMPANY, INC., *Appellant*,

v.

CITY OF SEATTLE, *Respondent*.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
HONORABLE SUSAN BARNETT

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

Assignment of Error

The trial court erred in ruling that Danny Allen, when injured, was the employee of Gary Merlino Construction Company, Inc.

Issues Pertaining to Assignment of Error

1. Is Merlino the employer of Officer Allen under the Industrial Insurance Act (IIA)?

2. Is Officer Allen a self employed independent contractor under the IIA?

3. Does Officer Allen have qualified immunity while controlling traffic at or near Merlino's worksites?

4. Can the City delegate police powers to Merlino?

5. If the City delegates police powers to Merlino, is that delegation constitutional under Art. XI, § 11 of the Washington Constitution?

6. Was Officer Allen, when injured, outside the course and scope of his employment?

Standard of Review for Assignment of Error

When a superior court reviews a BIIA decision, it does so *de novo*. In doing so, it reviews solely the Certified Appellate Board Record (CABR). *Stelter v. Dep't of Labor & Indus.*, 147 Wn.2d 702, 707, 57 P.3d 248 (2002). Under the IIA, the BIIA's decision is *prima facie* correct.

The appellant must support its challenge to findings of fact by a preponderance of the evidence. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999); *see also* RCW 51.52.115.

When the Court of Appeals reviews the superior court's findings, it limits its review to the CABR to assess whether substantial evidence supports those findings of fact. *Ruse*, 138 Wn.2d at 5; *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996). The Court of Appeals is the arbiter of the law under the constraint of *stare decisis* (*Stare decisis et non quieta movere*). *Windust v. Dep't of Labor & Indus.*, 52 Wn.2d 33, 35, 323 P.2d 241 (1958).

II. STATEMENT OF THE CASE

Merlino's Contract with City of Seattle

Gary Merlino Construction Company, Inc. (Merlino) contracted with the City of Seattle (City) to repair City streets and sidewalks. [CP—CABR—Wiley 108/24-26; 109/1-6; Allen 8/25-26]. Under this contract, the City required Merlino have a plan to control traffic at its work site. [CP--CABR--Vancil 131/5-26, 132/1-2 & 10-14].¹

¹ Marilyn Vancil, a civil engineer, is a supervisor in the Seattle Department of Transportation. [CP—CABR—Vancil 126/26; 127/1]. She supervises the construction, special events, and detour section which reviews the traffic control plans for public and private projects within the City. [CP—CABR—Vancil 127/3-5].

As required, Merlino submitted its plan to the City. [CP--CABR--Vancil 131/5-26, 132/1-2]. Under this plan, as the City required, Merlino needed an off-duty, uniformed peace officer at its work site: (1) to countermand a traffic signal at an intersection; and (2) to direct traffic when a traffic signal is off or inoperative. [CP--CABR—Ex. No. 1 114-115; Wiley 107/5-11; Vancil 132/10-14; 145/7-10]. If any flagging is needed within a signalized intersection, said Marilyn Vancil, a City engineer, that flagger should be a uniformed officer. [CP—CABR—Vancil 132/10-14]. For this work, the City did not require that Merlino select a Seattle Police Department (SPD) officer. [CP—CABR—Vancil 136/20-25; 137/1-4].

SPD Assistant Chief Dick Reed

Dick Reed is an assistant chief with the SPD. [CP—CABR—Reed 72/6-7]. He testified about SPD protocols for off duty work. On duty work, he said, is assigned by the SPD for police services. Off duty work is assigned by the private employer with the SPD's approval. [CP—CABR—Reed 74/8-14; 76/3-7; Boone-Jakobsen 58/2-15].

The SPD specifies what kind of off duty work a SPD officer can perform. [CP—CABR—Reed 75/18-21]. To obtain SPD approval, SPD officers must submit an off-duty work permit, specifically listing the

contact name, duration of assignment, location of assignment, and type of work to be performed. [CP--CABR—Reed 77/15-26, 78/1-12].

The SPD may discipline an officer failing to submit an off duty (or secondary) work permit. [CP--CABR—Reed 79/14-18]. That off duty work permit helps the SPD to ensure that officers are not working too many hours, to prevent excessive fatigue and to regulate that the type of work being performed conforms to SPD policy. [CP--CABR--Reed76/8-21].

Officer Reed said that the SPD does not consider SPD officers to be acting as SPD officers during off duty work. [CP—CABR—Reed 83/18-21]. He also said that a uniformed SPD officer, working off duty, has the power to arrest. [CP—CABR—Reed 84/25-26; 85/1-6]. The SPD intends, he said, that when a SPD officer wears a uniform and carries a firearm in public, that officer thereby informs the public that he or she has the power to arrest those who disobey police commands. [CP—CABR—Reed 85/1-6; 92/14-26; 95/18-26].

Kathleen Boone-Jakobsen

To request an off-duty uniformed police officer, Merlino contacted Kathleen Boone-Jakobsen, a SPD parking enforcement officer. [CP—CABR--Boone-Jakobsen 34/6-22; 35/14-15; 46/3-19; Reed 82/7-12]. Ms. Boone-Jakobsen, as a parking enforcement officer, controlled traffic and

issued parking tickets. [CP—CABR--Boone-Jakobsen 34/6-22; Reed 82/7-12].

Apart from her SPD work, she coordinates with contractors to assign available off-duty patrol officers to control traffic at worksites. [CP—CABR--Boone- Jakobsen 36/5-25; 37/14-15]. She has no contract with Merlino or any other contractor. [CP—CABR--Boone-Jakobsen 42/15-19]. Contractors directly contact her to request such off-duty patrol officers. For her services, they pay her \$35 an hour per officer per day. [CP—CABR--Boone-Jakobsen 37/20-23]. For such services, the SPD expects her to file an off duty work permit. [CP—CABR—Reed 80/19-24].

She asks the uniformed officers directly about accepting specific off duty assignments. [CP--CABR--Boone-Jakobsen 40/8-16]. She prefers to assign a uniformed SPD officer, if available. [CP—CABR—Boone-Jakobsen 46/20-26].

The contractors pay the assigned SPD officers \$46 an hour. [CP-CABR-Boone- Jakobsen 44/13-21]. This rate is set by the SPD and the Seattle Police Guild. [CP--CABR--Reed 93/26, 94/1-14].

She herself has worked off duty for contractors controlling traffic at worksites. [CP—CABR—Boone-Jakobsen 49/12-16]. When she does,

she considers herself employed both by the contractor and by the City. [CP—CABR--Boone-Jakobsen 50/15-19].

Officer Danny Allen

The uniformed officer Ms. Boone-Jakobsen assigned to the Merlino work site was Danny Allen, a sworn SPD patrol officer. [CP--CABR--Allen-46/3-5]. The SPD had trained him to control traffic. [CP—CABR—Allen 21/20-25]. On his days off, he frequently controlled traffic for private entities. [CP—CABR--Allen 6/1-18].

Day of Accident--July 29, 2008

On July 29, 2008, Merlino began work under its City contract. [CP—CABR--Wiley 108/24-26, 109/1-6]. Merlino had scheduled Officer Allen to control traffic at or near its worksite from 7:00 a.m. to 3:00 p.m. [CP--CABR—Allen 9/21-23]. Officer Allen had been instructed by Ms. Boone-Jakobsen to report to Merlino at a location on [W] Armory [Way] just off 15th [Avenue W] in Seattle. [CP—CABR—Allen 10/17-20].

He arrived at the worksite about 6:00 a.m., checking in with Dan Trudeau, Merlino's work site supervisor. [CP--CABR--Allen 9/6-16]. At that time, Officer Allen considered Merlino his employer. [CP--CABR—Allen 17/6-14]. He did not punch a time card. [CP--CABR—Allen 9/24-26, 10/1-5]. He expected Jim Wiley, Merlino's traffic control supervisor, to complete his time card at day's end. [CP--CABR—Allen 9/24-26;

10/1-14; Wiley 101/18-22]. Merlino provides the City with a copy of that time card the next working day. [CP--CABR--Ex. No. 1 114-115]. Merlino, said Officer Allen, pays him and prepares his W-2 form. [CP—CABR—Allen 15/22-26; 16/1-4; Wiley 105/4-6].

Officer Allen was wearing, as the SPD requires, his SPD uniform, with official patches, name tag, hat, firearm, duty belt, police badge, and a fluorescent yellow vest emblazoned with words, SPD. [CP--CABR—Allen 9/6-16; 16/17-24; 17/21-26, 18/1-21; 23/23-26; Boone-Jakobsen 66/12-19; Reed 88/7-23; 89/17-21].

At the time, he considered himself a peace officer, not merely a flagger. [CP—CABR—Allen 21/13-19]. He had the authority of a peace officer. [CP—CABR—Allen 24/15-20; 25/3-9; 26/11-17; 27/1-12; Reed 95/18-26; 97/17-22]. He could legally write tickets. [CP—CABR—Allen 19/4-16; 20/3-5; 30/21-25; 31/3-4]. He could legally countermand traffic lights. [CP—CABR—Allen 19/4-16, 20/6-16; 22/2-20]. Importantly, he considered himself to have ultimate say about how he controlled traffic. [CP--CABR—Allen 24/15-20; 25/3-9; 26/11-17; 27/1-12]. The SPD monitored how he controlled traffic off duty. It could intervene if he failed to control traffic properly. [CP—CABR—Reed 81/15-18; 95/3-10; Allen 28/11-21]. Merlino, beyond directing Officer Allen to a particular

location, had no say about how he controlled traffic. [CP—CABR--Wiley 115/22-26; 118/4-11].

At the work site, Officer Allen began controlling traffic on [W] Armory [Way], where he closed a lane of traffic to keep vehicles from interfering with the workers repairing curbing. [CP—CABR—Allen 11/3-14]. After several hours, Mr. Trudeau requested that he control traffic in the intersection of 15th [Avenue W] and Gaylor [W. Galer] Street to ensure an orderly flow of traffic. [CP—CABR—Allen 10/21-24; 12/7-19]. This intersection had functioning traffic lights. [CP--CABR—Allen 12/7-19]. There he began directing traffic from Gaylor [W. Galer] Street onto northbound 15th [Avenue W]. [CP—CABR—Allen 12/22-25].

At some point, Mr. Wiley told Officer Allen that his work for Merlino was completed; his services were no longer needed. [CP—CABR—Wiley 111/1-11 & 20-26; 112/1-13]. Said Mr. Wiley, Officer Allen, acting on his own, continued to control traffic in the intersection. [CP—CABR—Wiley 111/3-5; 117/12-21].

While Officer Allen was in that intersection, he was struck by a vehicle, causing him physical injury. [CP—CABR—Allen 12/23-26, 13/1-7].

III. ARGUMENT

Summary of Argument On Assignment of Error

Officer Danny Allen, when injured, was not Merlino's employee. At that time, the City controlled how he performed his job at Merlino's worksite and he had not clearly consented to employment with Merlino. When injured, Officer Allen was controlled by the City and he had clearly consented to City employment. If, when injured, he was not a City employee, he was a self employed independent contractor.

Argument On Assignment of Error

A. Standard of Review

When an superior court reviews a Board of Industrial Insurance Appeals' (BIIA) decision, it does so *de novo*. In doing so, it reviews solely the Certified Appellate Board Record (CABR). *Stelter v. Dep't of Labor & Indus.*, 147 Wn.2d 702, 707, 57 P.3d 248 (2002). Under the IIA, the BIIA's decision is *prima facie* correct. The appellant must support its challenge to findings of fact by a preponderance of the evidence. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999); *see also* RCW 51.52.115.

When the Court of Appeals reviews the superior court's findings, it limits its review to the CABR to assess whether substantial evidence supports those findings of fact. *Ruse*, 138 Wn.2d at 5; *Young v. Dep't of*

Labor & Indus., 81 Wn. App. 123, 128, 913 P.2d 402 (1996). The Court of Appeals is the arbiter of the law under the constraint of *stare decisis* (*Stare decisis et non quieta movere*). *Windust v. Dep't of Labor & Indus.*, 52 Wn.2d 33, 35, 323 P.2d 241 (1958).

B. Employer-Employee Relationship

Under Washington industrial insurance law, an employment relationship exists if and only if: (1) the purported employer has the **right to control** how the worker performs his/her duties, **and** (2) the worker **consents** to this employment relationship. *Novenson v. Spokane Culvert & Fabrication Co.*, 91 Wn.2d 550, 553, 588 P.2d 1174 (1979); *Marsland v. Bullitt Co.*, 71 Wn.2d 343, 345, 428 P.2d 586 (1967); *Fisher v. Seattle*, 62 Wn.2d 800, 804, 384 P.2d 852 (1963).

1. Control Requirement

Factors that may determine control are, *inter alia*: (1) who controls how the work is done, (2) who determines the qualifications of the worker, (3) who sets pay and hours of work and issues paychecks, (4) who has the duty to supervise the worker day-to-day, (5) who provides work equipment, (6) who directs what work to do, and (7) who conducts safety training. *Bennerstrom v. Dep't Labor & Indus.*, 120 Wn. App. 853, 863, 86 P.3d 826 (2004) (Division I); *Sonnors v. Dep't of Labor & Indus.*, 101 Wn. App. 350, 358, 3 P.3d 756, *review denied*, 142 Wn.2d 1008 (2000)

(Division II); see *Brown v. Labor Ready Northwest, Inc.*, 113 Wn. App. 643, 647-649, 54 P.3d 166 (2002) (Division I); *Jones v. Halvorsen-Berg, et.al.*, 69 Wn. App. 117, 122-123, 847 P.2d 945 (1993) (Division III).

Here, on those criteria, Officer Allen was not Merlino's employee. True, Merlino paid him. But, beyond that, the City controlled him. The City trained him how to control traffic. The City provided his equipment. The City invested him with the power to control traffic. To the public, he appeared to be a City (SPD) employee. Controlling traffic at signaled intersections is a public or governmental function. The City supervised him. Neither the City nor Officer Allen recognizes any private entity as having the power to control how he controls traffic in a public place. The City clearly did not intend to privatize a police officer with official police authority.

Merlino is a contractor for the City, repairing public roadways and sidewalks. The City compels Merlino, if it wants to do that work, to hire a uniformed officer to control traffic at the worksite. Once Officer Allen is at the worksite, Merlino merely directs him to various public locations adjacent to its worksites where traffic needs to be controlled. Officer Allen, not Merlino, decides in his sole discretion, how he controls traffic at those locations. At the time, the City had invested him with the power of a police officer. He could use that power to coerce compliance with his

commands. Consistent with that, the SPD exercised a degree of control over him in the performance of his off duty work that mirrored its control over him in the performance of his on duty work. Whether or not the City could legally delegate its police powers to Merlino through Officer Allen, it did not appear to intend to do so.

Dual Employee

Was Officer Allen a **dual employee** of the City and Merlino? A worker may be the dual employee of a general employer and a special employer to whom he is loaned. But to be dual employers, both employers must have the right to control the worker's physical conduct and the worker must consent to the employer-employee relationship. *Lunday v. Dep't of Labor & Indus.*, 200 Wn. 620, 624, 94 P.2d 744 (1939); *Novenson v. Spokane Culvert & Fabrication Co.*, 91 Wn.2d 550, 553, 588 P.2d 1174 (1979); *Sonnens v. Dep't of Labor & Indus.*, 101 Wn App. 350, 355-356, 3 P.3d 756 (2000) (Division II).

Merlino did not control how Officer Allen controlled traffic in the signalized intersection where he was injured. So Merlino is not Officer Allen's employer.

2. Consent Requirement

The right of control is a necessary but insufficient condition for an employee-employer relationship. Another necessary condition (*conditio*

sine qua non) is that the putative employee and employer mutually agree to that relationship. *Novenson v. Spokane Culvert & Fabrication Co.*, 91 Wn.2d 550, 553-554, 588 P.2d 1174 (1979); *Fisher v. Seattle*, 62 Wn.2d 800, 804, 384 P.2d 852 (1963); *Jones v. Halvorsen-Berg, et.al.*, 69 Wn. App. 117, 121-122, 847 P.2d 945 (1993) (Division III).

The necessity of a mutual agreement was emphasized in *Fisher* at 804-05:

*** The important question, here, is: Did the workman consent with the "employer" to the status of "employee"? Unlike the common law, compensation law demands that, in order to find an employer-employee relation, a *mutual* agreement must exist between the employer and employee.

Regarding the necessity of such an agreement in cases involving workmen's compensation issues as compared to cases involving issues of vicarious liability, 1 Larson, Workmen's Compensation Law § 47.10 (1952) states:

"Compensation law, however, is a mutual arrangement between the employer and employee under which both give up and gain certain things. Since the rights to be adjusted are reciprocal rights between employer and employee, it is not only logical but mandatory to resort to the agreement between them to discover their relationship. To thrust upon a worker an employee status to which he has never consented would not ordinarily harm him in a vicarious liability suit by a stranger against his employer, but it might well deprive him of valuable rights under the compensation act, notably the right to sue his own employer for common-law damages. . . ."

Novenson, 91 Wn.2d at 553-554.

Consent must be “deliberate and informed” consistent with the general principle that “common law rights and remedies are not lost by stumbling unawares into a new contractual relation.” *Fisher v. City of Seattle*, 62 Wn.2d 800, 806, 384 P.2d 852 (1963); *Jones v. Halvorsen-Berg, et.al.*, 69 Wn. App. 117, 122, 847 P.2d 945 (1993) (Division III).

Officer Allen said that when he reported to its worksite to control traffic on July 29, 2008, he thought Merlino was his employer. But a worker's bare assertion that he works for this or that employer is insufficient to establish an employment relationship. *Bennerstrom v. Dep't Labor & Indus.*, 120 Wn. App. 853, 859, 86 P.3d 826 (2004) (Division I); *Jackson v. Harvey*, 72 Wn. App. 507, 519, 864 P.2d 975, *review denied*, 124 Wn.2d 1003 (1994) (Division I). Officer Allen also said he thought of himself that day as a police officer, not a mere flagger, with the power of a police officer, carrying a sidearm, to use force to coerce motorists to comply with his commands. In fact, as a sworn police officer, when in uniform carrying his sidearm, he is on duty no matter when and where it is.

Qualified Immunity

Moreover, while Officer Allen is controlling traffic in his uniform with his sidearm, with the power to detain or arrest a motorist, would he

have the rights and immunities of a SPD officer or would he have merely the rights of a private citizen?

Police officers have a qualified immunity under both federal law and common law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982); *Savage v. State*, 127 Wn.2d 434, 438, 899 P.2d 1270 (1995); *Staats v. Brown*, 139 Wn.2d 757, 764, 991 P.2d 615 (2000). The qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986).

For Officer Allen's own sake, he and the City would no doubt prefer that he have that bundle of rights and immunities of an on duty police officer, not those a mere private citizen.² So, knowing this, would Officer Allen have consented to employment with Merlino and thereby waived his qualified immunity? He would not have if rational.

Independent Contractor

The City argues that Officer Allen was not its employee. This is because, it argues, he was off work for the SPD when injured; he was paid

² The City is liable for Officer Allen's conduct only if a constitutional deprivation resulted from a city custom or policy. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978); *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 968, 954 P.2d 250 (1998). This process of the City permitting uniformed police officers to control traffic off duty is a City custom or policy.

by Merlino; and he thought Merlino was his employer on this worksite while off duty from the SPD.

If neither the City nor Merlino satisfy each necessary criteria of the *Novenson* test, then Officer Allen would be an employee of neither.³ What then is the decision rule where as to one purported employer, the first criterion is not satisfied but the second arguably is, but as to the other purported employer, the first criterion is satisfied but the second arguably is not? Or, stated differently, if neither employer satisfies both criteria, is neither the employer, and the worker merely an **independent contractor**?

All other things being equal (*ceteris parabis*), a self employed independent contractor is an employee under RCW 51.08.180⁴ if the

³ Was Officer Allen an employee of Ms. Boone-Jakobsen? That is, could Ms. Boone-Jakobsen be considered the owner of an employment agency, hiring out as her employees, off duty SPD officers, to private entities, such as Merlino? She probably is not an employer. She had no right to control how Officer Allen controlled traffic. Neither arguably overtly consented to an employer-employee relationship.

⁴ RCW 51.08.180 provides:

“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; also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title, whether by way of manual labor or otherwise, in the course of his or her employment, or as an exception to the definition of worker, a person is not a worker if he or she meets the tests set forth in subsections (1) through (6) of RCW 51.08.195 or the separate tests set forth in RCW

essence of the independent contract is his or her personal labor for an employer. White v. Dep't of Labor & Indus., 48 Wn.2d 470, 471-472, 294 P.2d 650 (1956); *Risher v. Dep't of Labor & Indus.*, 55 Wn.2d 830, 834-838, 350 P.2d 645 (1960); *Lloyd's of Yakima Floor Center v. Dep't of Labor & Indus.*, 33 Wn. App. 745, 747-748, 662 P.2d 391 (1982) (Division II); *Dana's Housekeeping, Inc. v. Dep't of Labor & Indus.*, 76 Wn. App. 600, 607, 886 P.2d 1147 (1995) (Division I).

In *White*, the Washington Supreme Court held:

We conclude that the statutory provision with which we are here concerned was intended to protect workmen (and to make contracting parties for whom the work is done responsible for industrial insurance premiums) in those situations where the work could be done on a regular employer-employee basis but where, because of the time, place, manner of performance, and basis of payment, it could be urged that the workman was an independent contractor rather than an employee.⁵ *White*, 48 Wn.2d at 474.

51.08.181 for work performed that requires registration under chapter 18.27 RCW or licensing under chapter 19.28 RCW: PROVIDED, That a person is not a worker for the purpose of this title, with respect to his or her activities attendant to operating a truck which he or she owns, and which is leased to a common or contract carrier.

⁵ In *White*, the Washington Supreme Court said:

[RCW 51.08.180] clearly indicates that it was not intended to cover an independent contractor (a) who must of necessity own or supply machinery or equipment (as distinguished from the usual hand tools) to perform the contract ... or (b) who obviously could not perform the contract without assistance ...

Under this test, Officer Allen was not Merlino's employee. Officer Allen could not control traffic at the signalized intersection near the Merlino worksite on a regular employer-employee basis for Merlino. He needed to be a uniformed officer. So the essence of Officer Allen's independent contract with Merlino is not his personal labor. The essence is what he brings with him--the police power the City conferred upon him to control traffic at a signalized intersection, which the City controlled. Through him, the City retains control of that intersection. He is not a mere flagger, but a uniformed police officer with the power to command motorists to do what he directs them to do. He brings with him *in essence* the City, with his SPD training, his SPD uniform, and his sidearm with the power that symbolizes.

In *Risher*, the Washington Supreme Court held:

or (c) who of necessity or choice employs others to do all or part of the work he has contracted to perform

White, 48 Wn.2d at 474.

In *White*, the Washington Supreme Court does not hold that these three criteria should be considered *necessary* or *exclusive* for finding that the essence of the independent contract is *not* the worker's personal labor for an employer. This concern is raised because Division II uses language that appears to strive to make them exclusive. See, e.g., *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 688, 162 P.3d 450 (2007) (Division II); *Jamison v. Dep't of Labor & Indus.*, 65 Wn. App. 125, 827 P.2d 1085 (1992) (Division II). If that is Division II's approach, it is overly restrictive.

We recognized, in the *White* case, that the decisive test by which to determine whether the relationship is employer-employee or independent contractor is whether the alleged employer has the right of direction and control over the alleged employee as to methods and details of doing the work

Risher, 55 Wn.2d at 834.

On this *decisive* test, Officer Allen is not Merlino's employee. Merlino had no right to control how he directed traffic near its worksite. *Camp v. Dep't of Labor & Indus.*, 55 Wn.2d 839, 840-841, 350 P.2d 641 (1960). Merlino had no right to usurp his police power to tell him how he should use that power within an intersection the City controlled. Like the purported employer, Mr. Warner, in *Risher* who merely directed Mr. Risher to locate the logs he would haul and told where to haul them, Merlino merely told Officer Allen at what worksites he was needed to control traffic to protect both workers and motorists using the adjacent roadways. Merlino did not control how he was to direct the traffic or how he was to enforce the laws of the road.

If the "independent contractor" otherwise qualifies as an "employee" under RCW 51.08.180, he or she may still not be another's "employee" because he or she falls within the exceptions of RCW

51.08.181⁶ or RCW 51.08.195.⁷ *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 681, 162 P.3d 450 (2007) (Division II).

Officer Allen clearly does not qualify under RCW 51.08.181. It is less clear that he fails to qualify under RCW 51.08.195. He qualifies under requirements (1) through (3) of RCW 51.08.195, but no evidence exists in the CABR about requirements (4) through (6).

Non-Delegable Police Power

On July 29, 2008, Officer Allen, *while controlling traffic within the City at a signalized intersection*, was invested with the authority of a sworn police officer. The City cannot constitutionally delegate that police power to a private entity, such as Merlino. If the City cannot delegate that police power to Merlino, Merlino cannot legally employ Office Allen in that capacity.

The City is local government. As such, through its executive body, it operates a police force for the safety of those within its boundaries. This power is granted by the Washington Constitution. Wash. Const. Art. XI, § 11 (2011).⁸

⁶ Please refer to Appendix I for the text of RCW 51.08.181.

⁷ Please refer to Appendix I for the text of RCW 51.08.195.

⁸ Wash. Const. Art. XI, § 11 (2011) provides:

The City, in operating that police force, is exercising its police power. May the City delegate this particular police power to a private entity, such as Merlino? The answer would appear to be, no.⁹ *In the Matter of the Application of the Puget Sound Pilots Association*, 63 Wn.2d 142, 145, 385 P.2d 711 (1963); *Storey v. City of Seattle*, 124 Wn. 598, 603-604, 215 P. 514 (1923); *Jeffers v. City of Seattle*, 23 Wn. App. 301, 309, 597 P.2d 899 (1979) (Division I).

In the Matter of the Application of the Puget Sound Pilots Association, the Washington Supreme Court noted:

"It is a general principle of law, expressed in the maxim '*delegatus non potest delegare*,' that a delegated power may not be further delegated by the person to whom such power is delegated. Apart from statute, whether administrative officers in whom certain powers are vested or upon whom certain duties are imposed may deputize others to exercise such powers or perform such duties usually depends upon whether the particular act or duty sought to be delegated is ministerial, on the one hand, or on the other, discretionary or quasi-judicial. Merely ministerial functions may be delegated to assistants whose employment is authorized, but there is no authority to delegate acts discretionary or quasi-judicial in nature. . . .'

Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.

⁹ The deprivatization of police power was a high water mark in the progress of Western civilization. See Aeschylus, *The Eumenides* in his *Oresteia*.

In the Matter of the Application of the Puget Sound Pilots Association, 63 Wn.2d at 145.

The duty of an officer is ministerial when it must be performed with such precision and certainty to leave nothing to discretion or judgment. *State v. Bepple*, 85 Wn.2d 378, 380, 535 P.2d 813 (1975).

Under this test, when Officer Allen was controlling traffic at a signalized intersection, he was not acting ministerially; he was exercising discretion and judgment. So the police power he was then exercising could not have been delegated by the City through him to Merlino. He was then still a City employee. On the same logic, he could not be an independent contractor even with the City's consent to his use of police power because the City could not delegate that power to him as a private citizen but only to him as a sworn police officer.

The City, as principal, requires its independent contractor (Merlino) to borrow a uniformed police officer, in this case a sworn SPD police officer (Allen), to perform specific work of a public nature, retaining control over how this employee performs this work. The independent contractor pays the City's employee directly for this work.¹⁰

¹⁰ The City could have just as well added the cost of renting the uniformed police officer to its consideration for the contract.

As a result, the City skirts its duty to pay its SPD employee overtime, thereby saving the City expense.

In other words, the City shifts its burden to provide the public with police services to the private sector. But to characterize this arrangement as private employment is to elevate form over substance. Only the City satisfies both of the *Novenson* criteria--the right to control and the mutual agreement of employment.

C. Outside Course and Scope of Employment

Assuming, for the sake of argument, that Officer Allen was Merlino's employee for some portion of the day of July 29, 2008, he was not within the course and scope of that employment when injured. RCW 51.32.010¹¹; *Dep't of Labor & Indus. v. Johnson*, 84 Wn. App. 275, 278, 928 P.2d 1138 (1996) (Division II); *Lunz v. Dep't of Labor & Indus.*, 50 Wn.2d 273, 278, 310 P.2d 880 (1957).

At some point, Mr. Wiley told Officer Allen that his work for Merlino was completed; his services were no longer needed. [CP—CABR—Wiley 111/1-11 & 20-26; 112/1-13]. Said Mr. Wiley, Officer Allen, acting on his own, continued to control traffic in the intersection. [CP—CABR—Wiley 111/3-5; 117/12-21]. Sometime later, Officer Allen was injured.

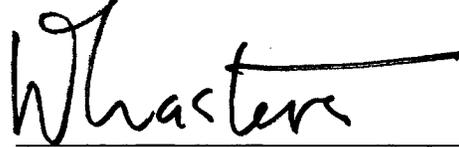
¹¹ Please refer to Appendix I for the text of RCW 51.32.010.

IV. CONCLUSION

For the preceding reasons, this Court should reverse the ruling of the trial court, vacate the judgment entered in favor of the City of Seattle and enter judgment in favor of Gary Merlino Construction Company, Inc.

Respectfully submitted this 22nd day of February 2011.

Wallace, Klor & Mann, P.C.

A handwritten signature in black ink that reads "W. Masters". The signature is written in a cursive style with a long horizontal stroke extending to the right.

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APPENDIX I

RCW 51.08.070

"Employer" means any person, body of persons, corporate or otherwise, and the legal representatives of a deceased employer, all while engaged in this state in any work covered by the provisions of this title, by way of trade or business, or who contracts with one or more workers, the essence of which is the personal labor of such worker or workers. Or as an exception to the definition of employer, persons or entities are not employers when they contract or agree to remunerate the services performed by an individual who meets the tests set forth in subsections (1) through (6) of RCW 51.08.195 or the separate tests set forth in RCW 51.08.181 for work performed that requires registration under chapter 18.27 RCW or licensing under chapter 19.28 RCW.

RCW 51.08.180

"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; also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title, whether by way of manual labor or otherwise, in the course of his or her employment, or as an exception to the definition of worker, a person is not a worker if he or she meets the tests set forth in subsections (1) through (6) of RCW 51.08.195 or the separate tests set forth in RCW 51.08.181 for work performed that requires registration under chapter 18.27 RCW or licensing under chapter 19.28 RCW: PROVIDED, That a person is not a worker for the purpose of this title, with respect to his or her activities attendant to operating a truck which he or she owns, and which is leased to a common or contract carrier.

RCW 51.08.181

For the purposes of this title, any individual performing services that require registration under chapter 18.27 RCW or licensing under chapter 19.28 RCW for remuneration under an independent contract is not a worker when:

- (1) The individual has been, and will continue to be, free from control or direction over the performance of the service, both under the contract of service and in fact;
- (2) The service is either outside the usual course of business for which the service is performed, or the service is performed outside all of the places of business of the enterprise for which the service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal place of business from which the service is performed;
- (3) The individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or the individual has a principal place of business for the business the individual is conducting that is eligible for a business deduction for federal income tax purposes other than that furnished by the employer for which the business has contracted to furnish services;
- (4) On the effective date of the contract of service, the individual is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting;
- (5) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, the individual has an active and valid certificate of registration with the department of revenue, and an active and valid account with any other state agencies as required by the particular case, for the

business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington;

- (6) On the effective date of the contract of service, the individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting; and
- (7) On the effective date of the contract of service, the individual has a valid contractor registration pursuant to chapter 18.27 RCW or an electrical contractor license pursuant to chapter 19.28 RCW.

RCW 51.08.185

"Employee" shall have 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 51.08.195

As an exception to the definition of "employer" under RCW 51.08.070 and the definition of "worker" under RCW 51.08.180, services performed by an individual for remuneration shall not constitute employment subject to this title if it is shown that:

- (1) The individual has been and will continue to be free from control or direction over the performance of the service, both under the contract of service and in fact; and
- (2) The service is either outside the usual course of business for which the service is performed, or the service is performed outside all of the places of business of the enterprise for which the service is performed, or the individual is responsible, both under the contract and in fact, for the costs of the principal

place of business from which the service is performed;
and

- (3) The individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or the individual has a principal place of business for the business the individual is conducting that is eligible for a business deduction for federal income tax purposes; and
- (4) On the effective date of the contract of service, the individual is responsible for filing at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting; and
- (5) On the effective date of the contract of service, or within a reasonable period after the effective date of the contract, the individual has established an account with the department of revenue, and other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington; and
- (6) On the effective date of the contract of service, the individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business which the individual is conducting.

RCW 51.32.010

Each worker injured in the course of his or her employment, or his or her family or dependents in case of death of the worker, shall receive compensation in accordance with this chapter, and, except as in this title otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever: PROVIDED, That if an injured worker, or

the surviving spouse of an injured worker shall not have the legal custody of a child for, or on account of whom payments are required to be made under this title, such payment or payments shall be made to the person or persons having the legal custody of such child but only for the periods of time after the department has been notified of the fact of such legal custody, and it shall be the duty of any such person or persons receiving payments because of legal custody of any child immediately to notify the department of any change in such legal custody.

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

GARY MERLINO CONSTRUCTION CO.,
INC.,

Appellant,

v.

CITY OF SEATTLE,

Respondent.

COURT OF APPEALS No. 66403-4

**DECLARATION OF SERVICE OF
APPELLANT'S BRIEF**

I hereby certify under penalty of perjury under the laws of the State of Washington that I caused the BRIEF OF APPELLANT to be served on the following:

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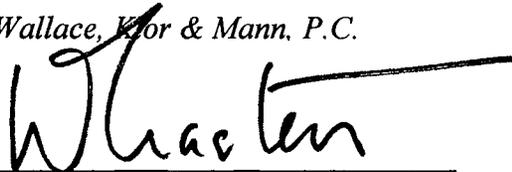
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SIGNED this 22nd day of February 2011.

Wallace, Kior & Mann, P.C.

A handwritten signature in black ink, appearing to read "W. Masters", with a long horizontal line extending to the right from the end of the signature.

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