FILED

JUL 31 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 92362-1

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 OPENING BRIEF

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

ATTORNEYS FOR APPELLANT

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I. INTRODUCTION

The borrowed servant doctrine is a legal fiction. Under that fiction, if Company A (the "general employer") transfers exclusive control of its servant S to Company B (the "special employer"), S becomes an employee of Company B and Company A may avoid liability for S's torts. It is axiomatic that only an employer may loan its servant; a third party who does not employ a person may not loan that person to someone else.

Here, the borrowed servant fiction was stretched far beyond its precedent and its logic. Company A sold its employee S's professional services to Company B – under an independent contractor agreement. Company B then sold S's professional services to Company C, also under an independent contractor agreement. Companies A, B and C all agreed – as did S – that S remained an employee of Company A and was not an employee of Company C.

When S's negligence injured Company C's employee, Company A claimed S *was* employed by Company C, and sought shelter behind the borrowed servant doctrine. But it was legally and logically impossible for Company A to have loaned S to Company C. Company A had not only agreed that S remained its employee; it lacked any contract or agreement with Company C regarding S. Further, it had sold S's services to Company B, which denied employing S and thus could not loan him to anyone.

*

Bartlett Services, Inc. ("BSI"), a Massachusetts corporation and a large national business, sells highly specialized work safety services to contractors at U.S. Department of Energy sites. One of BSI's employees was Work Control Planner Stephen Basehore. BSI sold Mr. Basehore's professional services to ELR Consulting, Inc. ("ELR") under an independent contractor agreement for $85.58 per hour. Over a two year period, BSI billed ELR $329,352.76 for Mr. Basehore's services.

ELR then sold Mr. Basehore's professional services to Washington Closure Hanford, LLC ("WCH"), prime contractor at the Hanford nuclear site, for $89 an hour, also under an independent contractor agreement. That agreement stated that ELR would maintain "complete control" over Mr. Basehore, and that Mr. Basehore would not be considered an employee of WCH. WCH paid ELR for Mr. Basehore's services with money designated for *small* businesses.

The reason for this A→B→C arrangement was unsavory. WCH had a multi-billion dollar contract with the U.S. Department of Energy ("DOE"). Under that contract, WCH would receive a $9,000,000 "incentive" if it subcontracted with small businesses, including "service disabled veteran owned" businesses. WCH wanted to purchase Mr. Basehore's professional services, and BSI wanted to sell them. BSI, however, was not a small business. Hence BSI and WCH had no direct relationship, and no contract with each other regarding Mr. Basehore.

Instead, they used ELR (a veteran-owned small business) as a pass-through. BSI sold Mr. Basehore's services to ELR, and ELR in turn sold those services to WCH. According to ELR, this allowed BSI access to "the market of federal government contracts for nuclear site clean-ups" which otherwise were "off-limits to large business such as Bartlett but open to small business such as ELR" and brought WCH "closer to obtaining a multi-million dollar bonus." ELR characterized its role in this scheme as a "conduit" whose task was "to trigger various specialized federal benefits."[1]

All went well for BSI and ELR until Plaintiff Dean Wilcox survived a 50-foot fall through an uninspected catwalk opening, and alleged that Mr. Basehore's negligent work safety planning caused his fall and serious injuries. Mr. Wilcox sued BSI, Mr. Basehore's employer.

BSI denied responsibility for Mr. Basehore's work and tried to cloak itself with the "borrowed servant" defense. Although it had no contract or agreement with WCH regarding Mr. Basehore, and had contractually agreed that Mr. Basehore was *not* a WCH employee, BSI claimed in this litigation it had loaned Mr. Basehore to WCH and that he thereby became a WCH employee. If Mr. Basehore *was* a WCH employee, and thus Mr. Wilcox's coworker, Mr. Wilcox's only remedy was under our State's workers' compensation system.

---

[1] A diagram illustrating the arrangement is at Appendix A.

Throughout the case, Mr. Wilcox argued that BSI could not assert the borrowed servant defense because BSI and ELR were, as their contracts stated, independent contractors, and because those contracts stated that Mr. Basehore was not a WCH employee, but remained employed by BSI. Mr. Wilcox also argued that BSI could not assert the defense because it had sold Mr. Basehore's professional services to ELR, not WCH. If BSI could assert the borrowed servant defense at all, it only could claim it loaned Mr. Basehore to ELR (although this would contradict its independent contractor agreement with ELR).

ELR denied being Mr. Basehore's employer. Accordingly, it could not loan him to anyone.

No Washington case describes a "double borrowing" in which Employer A loans its employee to Employer B who in turn loans the employee down the line to Employer C. Nor is there any reported case in which a party loaned someone who was not its own employee. The borrowed servant doctrine had no application to the facts of this case.

Even if the borrowed servant doctrine could have conceivably applied to these facts, it requires the borrowing employer to assume "exclusive control" over the employee. Yet the undisputed evidence at trial was that BSI never gave up exclusive control over Mr. Basehore. Thus the doctrine could not apply.

Trial was held from December 2 to December 13, 2013. Despite the clear language of the contracts stating that Mr. Basehore was not a

WCH employee, that BSI and ELR were "independent contractors," and that ELR would maintain complete control over Mr. Basehore, the trial court dismissed all claims against ELR and allowed BSI to argue to the jury that Mr. Basehore was a "borrowed servant" employed by WCH. The trial court rejected Plaintiff's repeated objections to application of the borrowed servant doctrine, and to the jury instructions that allowed its use.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in instructing the jury on the "borrowed servant" defense in Instruction Nos. 12 and 13 and in the Special Verdict Form. CP 92, 106, 107, 116, 119.

2. The trial court erred in entering its order dismissing ELR Consulting, Inc. CP 88.

3. The trial court erred in entering judgment against the Plaintiff. CP 166-67.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did the trial court err by instructing the jury on the "borrowed servant" defense when the purported "general employer," the purported "special employer," and a third party to whom the general employer sold the purportedly loaned employee's services, entered into *independent contractor* agreements stating that the purportedly loaned employee was *not* an employee of the purported "special employer"?

2. Did the trial court err by instructing the jury on the "borrowed servant" defense when the purported "general employer" did not loan its employee to the purported "special employer"?

3. Did the trial court err by instructing the jury it could apply the "borrowed servant" defense to an independent contractor's sale of professional services?

4. Did the trial court err by instructing the jury on the "borrowed servant" defense when the "general employer" admitted that it did not give up exclusive control over the purportedly loaned employee?

5. Should the trial court have dismissed ELR Consulting, Inc., when that entity had a contractual right to control an allegedly negligent actor, whose services ELR sold?

IV. STATEMENT OF THE CASE

A. Statement of Facts

1. Bartlett Services, Inc. Sells Sophisticated Professional Work Control Planning Services to Contractors at U.S. Department of Energy Nuclear Sites.

BSI is a Massachusetts company that promotes itself as the "Leading Provider of Technical and Professional Services" to contractors at U.S. Department of Energy ("DOE") nuclear sites such as Hanford. Ex. 137. BSI offers sophisticated "Work Control Planning" services. Ex. 136. "Work Control Planning" or "Integrated Work Control" is a term of art describing how projects are planned and carried out at DOE sites; federal regulation describes the elements of Work Control Planning and requires its use at those sites. 48 C.F.R. 970.5223–1(c); RP 28, 48-49, 466; Ex. 1 at pages 1-2 of 38. BSI's professional Work Control Planning services include highly specialized expertise in planning demolition and decommissioning ("D & D") projects. RP 345, 346-47; Ex. 74 at 4, Exs. 138, 139, Ex. 143 at 14.

BSI maintains a western and eastern region for the United States; each region has a Director of Operations. RP 348; Ex. 43 at 2. BSI also has site managers at individual DOE sites. RP 349. Because of the nature of the services they provide, BSI Work Control Planners must perform their work at DOE sites, rather than at BSI's Massachusetts headquarters. RP 404-405.

Although BSI first claimed it had three employees working at Hanford from 2008 to 2010, it later admitted it had seventy employees working there. RP 421-22. One of those was Stephen Basehore, a professional D & D Work Control Planner. RP 350, 359-361; Exs. 3, 5, 52, 119. BSI regarded Mr. Basehore's work as falling within the "professional, technical and administrative" services that comprised 33% of its "service offerings." RP 383, Ex. 143 at 4.

As a Work Control Planner, Mr. Basehore's job was to "full time ensure that the work is done in a way that is safe and doesn't put people in an unsafe or unanalyzed environment." RP 80-81. The end product of a Work Control Planner's work on any particular project is a "Work Package." Ex. 1 at 3 of 38; RP 49-50, 61. A Work Package is a document used to guide the actual performance of the work and tasks necessary to complete a particular project. Ex. 1 at 3 of 38.

BSI admitted that no writing stated that Mr. Basehore was a "borrowed servant" employed by WCH. RP 391. On the contrary, as described below, BSI's contract with ELR stated that Mr. Basehore was *not* employed by WCH, but remained a BSI employee. *See* Ex. 222 at BSI-28; Ex. 222 at BSI-2 (incorporating Mr. Basehore's "Acknowledgement of Employment Status," Ex. 5).

2. BSI Sold Mr. Basehore's Professional Services to ELR Via an Independent Contractor Agreement.

BSI sold Mr. Basehore's professional services to ELR, in accordance with a contract between those parties. RP 388; Ex. 222. The BSI-ELR contract identified ELR as the "Contractor" and BSI as the "Subcontractor." Ex. 222 at 1. Under a section titled "Scope of Work" it stated: "The Subcontractor shall furnish the services set forth herein and shall perform such services *as an independent contractor* and <u>not</u> as an employee of the Contractor" (underlining in original; italics added). *Id.*

Referring to Mr. Basehore, the contract stated BSI was "responsible for the employment and other employee-related services required to maintain this individual on the project, including any required training." *Id.* It provided that BSI was "responsible for payment of all state and federal taxes required *as an independent contractor*." *Id.* (emphasis added). And it stated ELR would pay BSI $85.58 an hour for Mr. Basehore's professional services. Ex. 222 at BSI-1-2.

The BSI-ELR contract incorporated portions of ELR's contract with WCH, including a term stating that any employees ELR provided to WCH "are not Employees of Washington Closure Hanford." Ex. 222 at BSI-28. It also included an "Acknowledgment of Employment Status, Benefits Consent, and Conflicts of Interest Form." Ex. 222 at BSI-2. That Form, signed by Mr. Basehore, stated in part:

> I, Stephen Basehore, have been advised, and hereby acknowledge that, during the period that I am serving as a subcontractor to Washington Closure Hanford, LLC, I shall remain an employee of Bartlett Services, Inc. for purposes of payment of any and all wages, salaries and benefits, including, but not limited to, paid absences, non-executive bonuses, medical and dental benefits, pension, 401(k) plans, life insurance, flexible spending, severance benefits, and all retirement benefits . . .
>
> Additionally, I understand and agree that Bartlett Services, Inc. is solely responsible for my workers' compensation coverage and any and all applicable taxes – local, state and federal. Accordingly, I agree and acknowledge that Bartlett Services is my sole and exclusive employer and as such is solely and exclusively responsible for payment of any of the foregoing and that I have no legal recourse or rights against WCH for such payments. I further agree that my employment with and compensation paid by Bartlett Services, Inc. is sufficient consideration for this consent and agreement.

Ex. 5. This Form also stated Mr. Basehore was required to give notice if he became aware of any conflict between his "employer's interests and WCH." *Id.*

Each week, Mr. Basehore completed a BSI form stating his hours worked. Exs. 6, 83. BSI then billed ELR for Mr. Basehore's services, at $85.58 and, later, $88.15 an hour. Ex. 83; RP 384-85, 387, 389. Over the two-year period of the BSI-ELR contract, BSI billed ELR $329,352.76 for Mr. Basehore's professional services. RP 389-90; Ex. 83 at final page.

3. ELR Sold Mr. Basehore's Professional Services to WCH, Also Via an Independent Contractor Agreement.

ELR is a "service disabled veteran small business." RP 889. Its president, Emmet Richards, testified that three percent of all federal contract dollars are required to go to veteran small business owners. RP 919.

ELR sold Mr. Basehore's professional services to WCH for $89 an hour. RP 904, Ex. 34 at ELR000495. It did so under a contract that identified WCH as the "Contractor" and ELR as the "Subcontractor." Ex. 34, at ELR000462. The contract stated in pertinent part:

> 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. SUBCONTRACTOR shall perform the Work hereunder in accordance with its own methods, subject to compliance with the Subcontract.

Ex. 34 at ELR 000466 (bracketed material and emphasis added). The contract specified that any person ELR provided to WCH was not a WCH employee:

> Subcontractor realizes that any and all employees provided by Subcontractor under this agreement are not Employees

> of Washington Closure Hanford, LLC or the Department of Energy.

Ex. 34 at ELR000486. ELR agreed to indemnify WCH for any harm caused "in whole or in part" by "any act, omission, fault or negligence whether active or passive of SUBCONTRACTOR, its lower tier suppliers, subcontractors or of anyone acting . . . in connection with or incidental to the performance of this Subcontract." Ex. 34 at ELR000470.

The ELR-WCH contract also included the "Acknowledgment of Employment Status, Benefits Consent, and Conflicts of Interest Form" that Mr. Basehore signed, stating that while "serving as a subcontractor to Washington Closure Hanford, LLC" he remained a BSI employee and was required to immediately give notice of any conflict between his "employer's interests and WCH." Ex. 34 at ELR000500; Ex. 5.

From its first appearance in the case, ELR denied employing Mr. Basehore and denied he was its borrowed servant. It alleged as an affirmative defense: "at no relevant time in this case was Mr. Basehore employed by or acting as an agent or borrowed servant of ELR." RP 10, CP 27. When seeking summary judgment dismissal of Plaintiff's claims, ELR stated: "Mr. Basehore was neither an employee nor a borrowed servant of ELR"; "Mr. Basehore was not a borrowed servant of ELR" and "ELR never had a legally significant relationship with Mr. Basehore." CP 30, 31 at n.1, CP 36. ELR's president testified that ELR did not employ Mr. Basehore, whom he said was a BSI employee. RP 916, 917. ELR

denied Mr. Basehore was its employee through the last day of trial. RP 927.

4. WCH and BSI Had No Contractual Relationship With One Another, in Order to Allow BSI to Access Work at Hanford and to Allow WCH to Progress Towards a $9,000,000 Bonus.

BSI had no contract with WCH. RP 409. In briefing and in-court statements, ELR explained why:

> Washington Closure Hanford in 2008 specifically wanted the services of Steve Basehore, they were familiar with his work and they wanted him to work for them. They contacted Bartlett Services to obtain those services. Bartlett Services is a Massachusetts corporation; they provide highly specialized professionals to nuclear energy sites around the country. Bartlett Services forwarded Steve Basehore's resume directly to Washington Closure Hanford; however, rather than hiring Basehore directly through Bartlett Services, Washington Closure used a company called ELR Consulting as a conduit and contracted with ELR Consulting for Basehore's services. The reason they did that was in order to satisfy a term of their contract with the Department of Energy. Washington Closure Hanford was required to award, I believe, 65 percent of its subcontracts to small business concerns. If they met that requirement, they were entitled to a certain monetary bonus.
>
> Bartlett Services is not a small business concern by any stretch of the imagination. They're a national company with hundreds of employees. ELR Consulting, by contrast, is a small business concern. In fact, they are a services disabled veteran-owned small business. By hiring Bartlett's employee, Steve Basehore through ELR, Washington Closure Hanford could count Basehore towards their 65

> percent small business goal and a separate 3 percent service disabled veteran-owned small business objective.

RP 953-54; *see also* CP 32.[2] ELR characterized its involvement as "strictly limited to this 'conduit' role." CP 32. Elsewhere, ELR stated that its role was to "trigger" federal benefits. 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. *Id at* 11. These indirect and trilateral characteristics of the contractual scheme are *prima facie* extrinsic evidence that the parties intended for ELR to be involved only to trigger various specialized federal benefits . . .

CP 212, 535. ELR summarized its conduct in these transactions as "savvy acts of contracting." CP 32; RP 959-60.

5. BSI's Work Control Planners Provide Highly Specialized Professional Services, Subject to BSI's Control over Safety.

BSI's Vice President of Human Resources stated that BSI provides "brains" – highly skilled workers, qualified and trained to provide professional services. RP 401-02. He testified that Mr. Basehore's primary job duties involved the exercise of independent judgment and discretion. RP 358-360. WCH's representative, too, testified that a Work

[2] The "certain monetary bonus" ELR referred to was $9,000,000. RP 17. The trial court granted ELR's motion to exclude from evidence the amount of the bonus. RP 21-22.

Control Planner's primary tool is his brain. RP 572. ELR's president testified that Work Control Planners are hard to find, in part because they are highly trained. RP 912-13.

BSI paid Mr. Basehore $58.71 per hour, and he earned over $100,000 in 2009. RP 355, 366-67. Mr. Basehore could participate in BSI's health insurance and, as a "long-term employee," was eligible for BSI's dental insurance. RP 379-80; Ex. 46 at 63,[3] Ex. 54. BSI provided him paid vacation. RP 379. It paid for training Mr. Basehore was required to have while providing professional services at Hanford, training Mr. Basehore could use in many different work settings, not only at Hanford. RP 918-919, 921-22.

BSI promotes safety as its "primary core value" and its "predominant concern." RP 348, 362; Exs. 140, 141, Ex. 72 at 4, Ex. 143 at 5. It provides safety training to its employees. RP 372-73; Ex. 141. It issues quarterly bulletins to its employees to communicate the safety principles it wants them to follow. Ex. 46 at 32, Exs. 72-81; RP 349-51.

BSI enforces its safety program via a 193-page Safety Manual, which all BSI employees must follow. RP 353, 416; Ex. 49. Failure to follow the Safety Manual is grounds for discipline or termination. RP 372-73, 403-04. Mr. Basehore was subject to the BSI Safety Manual while providing professional services on the Hanford site. RP 353, 429.

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[3] Page number references for Ex. 46 are to the numbers in the bottom corner of the pages.

BSI employees also must follow the rules set forth in BSI's 69-page Employee Handbook, Ex. 46, regardless of where they are physically performing their work. RP 352, 369. The Employee Handbook directs BSI employees to contact BSI if they find any conflict between a BSI rule and a rule of a BSI "customer." Ex. 46 at 6; RP 363, 366. The Handbook advises BSI employees that they may be terminated for any number of reasons, including violation of BSI safety rules. Ex. 46 at 2, 9, 25, 36, 39, 45-48, 54, 56, 58, 59; RP 372-73, 412. Mr. Basehore was subject to the BSI employee handbook while providing professional services at Hanford. RP 352.

Bartlett directs its employees to contact the BSI "home office" in Massachusetts if they have questions or concerns, particularly regarding safety. Ex. 46 at 6, 7, 10, 33, Ex. 49 at 3, 9, 15, 41, 70; RP 363, 366, 368-69, 419. BSI employees are in fact "obligated" to contact the BSI home office if they need such help or guidance. Ex. 46 at 6; RP 648. If BSI employees working at a DOE site feel unable to do their job safely, or that their ability to perform their work is impeded by a BSI customer, they are to contact the BSI home office or Site Manager. RP 363-65, 368-69, 402.

Roy Lightfoot was BSI's Site Manager at Hanford while Mr. Basehore was providing professional services there. RP 641-43; 647-648. As a BSI Site Manager, Mr. Lightfoot was responsible for implementation of BSI's Safety Program, among other duties. RP 649; Ex. 49 at 3, 10, 15-17, 24, 41, 55. If Mr. Basehore had safety concerns while working at

Hanford, he could address them to Mr. Lightfoot. RP 653; Ex. 46 at 3, 6-8, 33.[4]

BSI provides periodic summaries of its safety record, announcing the frequency of injuries and accidents. *See, e.g.*, Ex 75 at 3, Ex. 77 at 3, Ex. 81 at 3, Ex. 143 at 5; RP 378-79. It included Mr. Basehore in its count of employees for these purposes. RP 378-79, 381. During the two years Mr. Basehore was providing professional services at Hanford, BSI reported him as one of its employees to the federal government and to various state and local government agencies. RP 380.

BSI's President testified that, *with respect to safety,* BSI does *not* give up exclusive control over its employees when they are in the field providing services. RP 412, 417.

6. There Was Evidence Mr. Basehore Negligently Provided His Professional Services and That His Negligence Was a Cause of Plaintiff's 50-foot Fall and Damages.

Work Packages contain "Task Instructions" – step-by-step instructions describing how work is to be carried out. RP 57, 62-63, 77-78; Ex. 1 at 14 of 38, 33 of 38. A Work Control Planner must ensure that those Task Instructions do "not place personnel, equipment, or the environment in a condition that is unsafe or unanalyzed, either during the

[4] Mr. Basehore wrote Mr. Lightfoot many times regarding his employment. Exs. 41, 43, 47, 48, 53, 64, 66, 99, 145, 146. When Mr. Lightfoot resigned as BSI's Hanford Site Manager, he was replaced by Leo Larocque, to whom Mr. Basehore then wrote regarding employment matters, including his own resignation. Ex. 78 at 2; RP 672-73; Ex. 38.

performance of the work or at final configuration, after the work has been completed." RP 79-80; Ex. 1 at 33 of 38.

Mr. Basehore developed and assembled the Work Package for the demolition of Building 336 at Hanford. RP 66; Ex. 2. As expected of a Work Control Planner, he led a Job Hazard Analysis of the Building, to identify hazards the demolition would present and determine how to minimize those hazards. RP 59, 114-15, 125, 167-68. He wrote the Task Instructions for the demolition. RP 57, 62-63, 77-78.

Building 336 had a catwalk 50 feet overhead, accessed by a ladder. Ex. 33. Although Mr. Basehore knew work had to be performed on the catwalk in order to demolish Building 336, he never went up on the catwalk, nor had anyone else do so, in order to see what that work would entail or what hazards that work environment presented. RP 38-40, 60-61, 107, 136-140. Because he never went on the catwalk, Mr. Basehore did not know important aspects of how it was configured, much less plan for some of the work that would be performed at that height. RP 132, 134-35, 140-42, 147.

The catwalk had an opening where a 50-foot ladder accessed it – and Mr. Basehore mistakenly assumed there were safety chains around that opening to protect against falls. RP 35, 90-91; Ex. 33. He did not know that the opening had a hatch door that could open and close. RP 35. Unaware of that hatch door, Mr. Basehore did not know it would pinch a safety line if it was closed. RP 134-35.

Even after he conducted a second Job Hazard Analysis walkdown in Building 336, Mr. Basehore still didn't know there was a hatch in the catwalk. RP 128, 130. He also didn't know what specific work needed be done on the catwalk. RP 134-35, 141-42. Not knowing what work had to be done, he was not able to write complete Task Instructions describing how work on the catwalk would be safely performed.

Mr. Basehore wrote Task Instructions that required workers to access the catwalk to perform some of the demolition tasks. RP 106. He admitted that he failed to recognize the fall risks presented by work on the catwalk. RP 123-24. He also admitted that the lighting in Building 336 was inadequate, because the building was "cold and dark," meaning all electric power was shut off. RP 28-29, 90-92, 115, 124.

Mr. Basehore admitted that if he had gone up on the catwalk before work began, he would have been able to see the work environment there and, presumably, the hazards in that environment including the hatch through which Mr. Wilcox later fell. RP 36-37. He admitted that if there been chains around the catwalk opening as he thought, Mr. Wilcox would not have fallen through the open hatch. RP 228.

On July 1, 2009, workers, including Mr. Wilcox, climbed up the ladder and onto the catwalk in the inadequately lit Building 336. After working for some time, Mr. Wilcox stepped through the open hatch that Mr. Basehore mistakenly believed was guarded by chains. RP 147. He fell 50 feet to the concrete floor below.

B. Procedural History

1. Plaintiff Repeatedly Sought Rejection of the Borrowed Servant Defense.

Mr. Wilcox filed suit against BSI and Mr. Basehore, alleging that Mr. Basehore's negligent work control planning caused his fall and injuries. CP 21-23.[5] He later voluntarily dismissed Mr. Basehore. CP 564 [Superior Court Dkt. No. 196].

From the outset, Plaintiff asked the trial court to reject the borrowed servant defense. On June 27, 2012, he filed a motion for partial summary judgment, stating that the borrowed servant doctrine "does not apply to the facts at issue here because the relationship of BSI (and Mr. Basehore) to WCH was that of an independent contractor and not an employment relationship." CP 481, 497-500. The court denied the motion. CP 530-531.

When BSI moved for summary judgment, Plaintiff again argued the borrowed servant defense could not apply, given the independent contractor relationships between ELR, BSI and WCH, and those parties' contractual agreement that Mr. Basehore was not to be considered an employee of WCH. CP 505-508, 518-520. He urged this again in his Amended Trial Brief. CP 550.

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[5] Plaintiff initially sued BSI (and two of its sister companies, as the exact identity of Mr. Basehore's employer was unknown). CP 5. BSI's Answers alleged that WCH and ELR caused Plaintiff's damages. CP 10-12; 15-17. Plaintiff therefore filed an Amended Complaint naming ELR as a defendant. CP 20.

On the first day of trial, December 2, 2013, Plaintiff renewed his argument that the borrowed servant doctrine could not apply, because BSI lacked any agreement with WCH regarding Mr. Basehore, and had in fact sold Mr. Basehore's services to ELR:

> [N]o one disputes Basehore is Bartlett's employee. They admit that. That's not in dispute. What they say is that he became a borrowed servant . . . – who did they loan him to? They had absolutely no contractual relationship with WCH. . . .
>
> 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. Plaintiff 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 Plaintiff would attempt to prove Mr. Basehore was employed by ELR:

> 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.

Plaintiff also urged the trial court to reject ELR's use of the borrowed servant defense, because ELR denied employing Mr. Basehore and had specifically *denied that defense in its Answer*, which stated "at no relevant time in this case was Mr. Basehore employed by or acting as an agent or borrowed servant of ELR." RP 10-12, 15; CP 27. The trial court dismissed Plaintiff's argument that ELR could not assert the borrowed servant defense. It stated "I just told you that I find you've been on notice of it [the defense] all along," and again stated (mistakenly) that Plaintiff would attempt to prove Mr. Basehore was an ELR employee. RP 15.

2. The Trial Court Believed ELR Lacked "Any Relationship" to Mr. Basehore and Granted its Motion for Directed Verdict.

Although it alleged as an affirmative defense that Mr. Basehore was *not* its borrowed servant, CP 27, ELR moved for a directed verdict dismissing Plaintiff's claims, under, among other grounds, the borrowed servant doctrine. RP 927. Opposing that motion, Plaintiff again argued that the doctrine had no application: "we brought a motion to this court very early on saying Borrowed Servant Doctrine didn't even belong in this

case. This was a case about independent contractors. That's what the contracts say." RP 928. Plaintiff also filed his own CR 50 motion to strike ELR's use of the borrowed servant defense. CP 85-86.

When considering ELR's motion, the trial court again focused on whether Mr. Basehore was an ELR employee. The court asked Plaintiff's counsel if he agreed Mr. Basehore was not an ELR employee; counsel so agreed. The court then granted ELR's motion to dismiss, stating:

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

RP 929 [misspellings in transcript]. Plaintiff then reminded the court that an agency relationship can "arise from the right to control, not the exercise of control. We've seen through the contracts that ELR had a right 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. It granted ELR's motion. CP 165.

3. Plaintiff Objected to the Trial Court Instructing the Jury it Could Find Mr. Basehore a Borrowed Servant of WCH.

The trial court instructed the jury that if it found "Steve Basehore was a borrowed servant of Washington Closure Hanford, your verdict should be for the defendant." Instruction Nos. 12, 13; CP 106, 107, 116.

Plaintiff objected to the jury being given any borrowed servant instruction "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" and because "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." RP 943. Plaintiff also objected to "the inclusion of the mention of the defense of borrowed servant, which is not applicable, in the special verdict form." RP 943-44.

The first question on the Special Verdict Form was "Do you find that Steve Basehore was a borrowed servant of Washington Closure Hanford?" CP 116. The jury answered the question "yes" and returned the verdict form. CP 119. Judgment was entered for BSI. CP 166-67.

Plaintiff timely appealed. CP 159.

V. ARGUMENT

A. Because the Borrowed Servant Defense "Results in the Destruction of Valuable Common Law Rights" a Jury Should Be Instructed on the Doctrine Only When the Facts are Within its Terms.

In its most recent case discussing the borrowed servant doctrine in any detail, *Stocker v. Shell Oil Co.,* 105 Wn.2d 546, 716 P.2d 306 (1986),[6] the Washington Supreme Court explained:

> The borrowed servant defense is a legal fiction, long recognized in Washington, which expands the concept of respondeat superior. Under the rule of respondeat superior, an employer is vicariously liable to third parties for his servant's torts committed within the scope of employment. An employer, however, may loan his servant to another employer. When a servant's general employer loans his servant to the borrowing, or "special" employer, the servant then becomes the "borrowed servant" of the special employer to perform a particular transaction. If it can be established that the servant had borrowed servant status at the time of performance of such transaction, the servant's general employer can escape liability for damage or injuries flowing from the transaction.

105 Wn.2d at 548 (internal citations omitted). The doctrine has not changed over the years. In 1920, the Court described it as follows:

> It is, of course, well-settled law that one who is in the general employ and pay of one person may be loaned or hired, by his employer to another, and, when he undertakes

[6] The only Supreme Court case since *Stocker* to mention the borrowed servant doctrine is *Snohomish Cnty. Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc.*, 173 Wn.2d 829, 835, 271 P.3d 850 (2012), which cited *Stocker* for the proposition that a contractual agreement to indemnify trumps the borrowed servant defense.

> to do the work of the other he becomes the servant of such other, to perform the particular transaction. *Standard Oil Co. v. Anderson*, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480; *Olsen v. Veness*, 105 Wash. 599, 178 Pac. 822. The controlling facts in these cases, and in all others which support the rule, is that the servant must have been in the exclusive control of the one to whom he is loaned, and, if so, such servant becomes pro hac vice the servant of him to whom the exclusive control so passes, and not otherwise.

Macale v. Lynch, 110 Wash. 444, 448, 188 P. 517 (1920). *See also, e.g.*, *Nichols v. Pac. Cnty.*, 190 Wash. 408, 410, 68 P.2d 412 (1937) ("there is a well-established rule to the effect that, if A loans his servant to B, under such circumstances that B assumes complete control and direction of the servant's work, B becomes his master for the time being, even though his wages are paid by A"); *B. & B. Bldg. Material Co. v. Winston Bros. Co.*, 158 Wash. 130, 134, 290 P. 839 (1930).

The borrowed servant 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).[7] When used by "an employer seeking a defense to a common law suit," the borrowed

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[7] *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).

servant doctrine "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).

Because it is in derogation of the fundamental premise of respondeat superior, and can destroy an injured worker's common law tort remedies, the borrowed servant instruction should only be given when the facts at issue fall within its terms.

B. Because the Facts of This Case Do Not Fall Within the Terms of the Borrowed Servant Doctrine, It was Error to Instruct the Jury on that Defense.

The trial court erred in instructing the jury on the borrowed servant defense. That instruction contradicted and overrode the express terms of the contracts BSI, ELR and WCH entered into, and ignored the fundamental premise that only an employer may loan an employee. Further, the borrowed servant doctrine could not apply to an independent contractor's sale of professional services, and could not apply because BSI admitted it did not resign exclusive control over Mr. Basehore.

1. It Was Error To Instruct The Jury On The "Borrowed Servant" Defense When BSI, ELR and WCH Entered Into Independent Contractor Agreements Rather Than Employment Agreements, Agreed Mr. Basehore Was Not a WCH Employee, and Provided for Allocation of Risk Through Indemnification Provisions Should Mr. Basehore Injure Anyone.

BSI, ELR and WCH each stated in their agreements with one another that their relationships were as independent contractors, *and* that

no employment relationship was created between WCH and Mr. Basehore. The ELR-WCH contract, whose terms are incorporated in the BSI-ELR contract, recited that "any and all employees provided by Subcontractor under this agreement *are not Employees of Washington Closure Hanford, LLC*." Ex. 34 at ELR000486, Ex. 222 at BSI-28 (emphasis added). The contracts also included the "Acknowledgment of Employment Status, Benefits Consent, and Conflicts of Interest Form," where Mr. Basehore acknowledged that while "serving as a subcontractor to Washington Closure Hanford, LLC" *he remained an employee of BSI*. Ex. 34 at ELR000500, Ex. 222 at BSI-2, Ex. 5.

Consistent with these terms specifying that Mr. Basehore was not an employee of WCH, the parties allocated to ELR liability for any harm Mr. Basehore might cause. The contracts state that ELR "shall indemnify, defend and hold harmless" WCH from any suits or actions "in any manner directly or indirectly caused . . . in whole or in part, or claimed to be caused . . . in whole or in part" by "any act, omission, fault or negligence whether active or passive of SUBCONTACTOR [ELR], its lower tier suppliers [BSI], subcontractors or of anyone acting . . . in connection with or incidental to the performance of this Subcontract [Mr. Basehore]" including "injury to . . . employees of CONTRACTOR [WCH]." Ex. 34 at ELR000470, Ex. 222 at BSI-13 (bracketed material added). Further, BSI, ELR, WCH and Mr. Basehore agreed that Mr. Basehore's workers'

compensation remedy, should *he* be injured while working at the Hanford site, was through BSI, i.e., in Massachusetts, not Washington. Ex. 5.

When sued, BSI adopted a litigation strategy that utterly contradicted the terms of its contract with ELR. It alleged Mr. Basehore was WCH's employee, and that WCH was responsible for his negligence. By instructing the jury on the borrowed servant doctrine, the trial court re-wrote the contracts between BSI, ELR and WCH, removing the terms providing that their relationships to one another were as independent contractors, that Mr. Basehore was not WCH's employee but remained BSI's employee, and that ELR would indemnify WCH for harm caused by Mr. Basehore.

The trial court erred. When contractual terms are contrary to the borrowed servant defense, those terms must be given effect over the defense:

> Given that the contractual indemnity agreement in this case is enforceable, and that a borrowed servant defense is generally maintainable, what is the result when these contract and tort concepts clash? *We hold that an express contractual agreement for indemnification must prevail over the tort defense of "borrowed servant".*

Stocker, 105 Wn.2d at 549 (emphasis added).

Stocker's holding is based on the function of the borrowed servant doctrine: to re-assign liability to someone other than a person's employer, as an exception to the "ancient rule" of respondeat superior. There is no need for the doctrine when parties enter into agreements stating whether a

person is to be regarded as an employee of one party or another, and how liability should be allocated. The parties have *already chosen* who to regard as the person's employer and how to assign liability. As in *Stocker*, the "express contractual agreement[s]" BSI, ELR and WCH made "must prevail over the tort defense of 'borrowed servant.'" 105 Wash. 2d at 549.

This principle – that contractual agreements trump the borrowed servant defense – was established long ago. In *Hartell v. T.H. Simonson & Son Co.*, the court held:

> 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, 113 N.E. 255 (1916) (emphasis added). In *Pearson v. Arlington Dock Co.*, 111 Wash. 14, 189 P. 559 (1920), our Supreme Court endorsed *Hartell*, referring to it as one of "the more important cases generally supporting the conclusion to which we have come" regarding the borrowed servant doctrine. 111 Wash. at 25.

Here, BSI, ELR and WCH – all sophisticated actors – chose to enter into *independent contractor agreements*, agreed Mr. Basehore was a BSI employee, and allocated liability according to their own interests. They entered into these agreements so that BSI, a large national company, could access the lucrative market of government contracts (and earn

"small business" dollars), WCH could reap its $9,000,000 bonus and ELR could earn $3.42 for every hour Mr. Basehore worked, even though ELR claims it was neither his employer nor principal. RP 904. It was error for the trial court to disregard the express terms in these agreements and instruct the jury on a defense the defendants themselves precluded by contract.

2. It Was Error to Instruct the Jury on the Borrowed Servant Defense Because Only a "General Employer" May Loan a Servant, and BSI Did Not Loan Mr. Basehore to WCH.

A fundamental element of the borrowed servant defense is that it is the servant's employer that must do the lending. That is made clear in every Supreme Court case discussing the doctrine in any depth. *See Stocker*, 105 Wn.2d at 548 ("employer, however, *may loan his servant* to another employer"); *Ackerman v. Terpsma*, 74 Wn.2d 209, 212, 445 P.2d 21 (1968) ("one who is in the general employ and pay of one person may be loaned, or hired, *by his employer* to another"); *Davis v. Early Const. Co.*, 63 Wn.2d 252, 257, 386 P.2d 958 (1963) (same); *Clarke v. Bohemian Breweries*, 7 Wn.2d 487, 496, 110 P.2d 197 (1941) (employee "may be loaned or hired, *by his employer* to another"); *B. & B. Bldg. Material Co.*, 158 Wash. at 134 ("one who is the general servant of another may be lent or hired *by his master* to another"); *Macale v. Lynch*, 110 Wash. at 448 (one who is in the general employ and pay of one person may be loaned or hired, *by his employer* to another") (all emphasis added).

It is undisputed that Mr. Basehore was in the general employ and pay of BSI. Thus, only BSI could loan Mr. Basehore to another. *But BSI did not and could not loan Mr. Basehore to WCH*, with whom it lacked any agreement of any type. The only entity with whom BSI had any agreement regarding Mr. Basehore was ELR, to whom BSI sold Mr. Basehore's professional services. ELR itself denied that it was Mr. Basehore's employer or that it loaned him. CP 27.

The facts necessary to support the borrowed servant defense – "A loans his servant to B, under such circumstances that B assumes complete control and direction of the servant's work," *B. & B. Bldg. Material Co.*, 158 Wash. at 134 – were not present here.

No Washington case holds that a party may loan someone whom it does not employ, or that the borrowed servant doctrine applies when A sells his servant's services to B, who sells those services to C. No case holds that an employee can be loaned twice, or loaned in a sequential or serial fashion.

BSI did not loan Mr. Basehore to WCH; it sold his services to ELR. ELR denied employing Mr. Basehore and thus could not loan him.

The circuitous route by which Mr. Basehore ending up providing BSI's professional services to WCH – a route taken in order that BSI could avoid a direct relationship with WCH and reap hundreds of thousands of "small business" dollars – is beyond the boundaries of the borrowed servant doctrine.

3. It was Error to Instruct the Jury That an Independent Contractor's Sale of Highly Specialized Professional Services Could Fall Within the Borrowed Servant Doctrine.

The borrowed servant doctrine is "legal fiction," *Stocker,* 105 Wn.2d at 548, long viewed with caution. Our Supreme Court has referred to cases decided under the doctrine as "quite a Pandora's package," *Nyman v. MacRae Bros. Const. Co.*, 69 Wn.2d 285, 418 P.2d 253 (1966), and noted that the doctrine "leads us into a branch of the law where the dividing lines are often exceedingly dim." *Pearson v. Arlington Dock Co.*, 111 Wash. at 22; *see also Anderson v. Red & White Const. Co.*, 4 Wn.App. 534, 539, 483 P.2d 124 (1971) (referring to the "persistent and troublesome problem of the loaned servant doctrine"); Benjamin N. Cardozo, *A Ministry of Justice,* 35 Harv. L.Rev. 113, 121 (1921) ("The law that defines or seeks to define the distinction between general and special employers is beset with distinctions so delicate that chaos is the consequence.").

In *Standard Oil Co. v. Anderson*, the Supreme Court observed that the "simplest case" involving the borrowed servant defense "was where horses and a driver were furnished by a liveryman. In such cases the hirer, though he suggests the course of the journey, and, in a certain sense, directs it, still does not become the master of the driver, and responsible for his negligence, unless he specifically directs or brings about the negligent act." 212 U.S. 215, 222 (1909); *see also, e.g., Davis*, 63 Wn.2d

at 255; *Macale*, 110 Wash. at 448 (acknowledging *Standard Oil* as authoritative on the borrowed servant doctrine). The doctrine typically has been applied to situations involving laborers, drivers or machine operators. *See Stocker*, 105 Wn.2d 546 (pipefitter); *Ackerman*, 74 Wn.2d 209 (backhoe operator); *Nyman*, 69 Wn.2d (crane operator); *Davis*, 63 Wn.2d 252 (fork lift operator); *Clarke*, 7 Wn.2d 847 (driver); *B & B Building Material*, 158 Wash. 130 (driver); *Macale*, 110 Wash. 444 (driver).

A doctrine developed for situations presented when one employer needed the use of another employer's driver or machine operator does not apply when *independent contractors* sell highly specialized professional services. While providing Work Control Planning services at Hanford, Mr. Basehore was not performing work he ordinarily performed on BSI's own premises. He was providing the brainpower BSI sells. He was acting in direct furtherance of BSI's interests and was acting within the scope of his employment by BSI. *Dickinson v. Edwards*, 105 Wn.2d 457, 467, 716 P.2d 814 (1986).

The trial court's application of the borrowed servant doctrine here means that BSI may sell it professional services across the nation, without accountability, and outsource the obligation to compensate anyone its employees injure onto other state's workers' compensation systems. This is a misuse of the doctrine for numerous reasons, not least because parties' contractual terms trump the defense, and because the defense is not

available to independent contractors. *Stocker*, *Hartell*, *supra*. Otherwise, independent contractors anywhere could provide professional services in a negligent manner, injure others – and escape all liability for doing so, as long as they engage in sufficiently "savvy contracting." RP 959-60, CP 32. No case holds that is the law, and there is no reason to expand the doctrine's terms to include such schemes.

4. It Was Error to Instruct the Jury On the "Borrowed Servant" Defense When BSI Admitted It Never Yielded Exclusive Control Over Mr. Basehore.

Even if the borrowed servant defense could conceivably be asserted by BSI despite its agreement that Mr. Basehore was not a WCH employee but remained a BSI employee, despite its lack of any direct relationship with WCH, despite the fact that BSI and ELR sold Mr. Basehore's services under independent contractor agreements, and despite the fact that ELR could not and did not loan Mr. Basehore to WCH, it was error to instruct the jury on the defense because BSI admitted it never gave up exclusive control over the core of Mr. Basehore's work – safety.

The Supreme Court has repeatedly and consistently held that, in order for a person to become a borrowed servant, the borrowing employer must have **exclusive control** over the employee. *See Am. Sign & Indicator Corp. v. State*, 93 Wn.2d 427, 434, 610 P.2d 35 (1980) ("for the loaned servant doctrine to apply, the borrower must have exclusive control over the employee"); *Ackerman v. Terpsma*, 74 Wn.2d at 212 (same);

Davis v. Early Const. Co., 63 Wn.2d at 258 (same); *Clarke v. Bohemian Breweries*, 7 Wn.2d at 497-98 ("exclusive control" required; "loaned servant doctrine applies only where the power of control exists in the special master, having been for the time being resigned by the original master, a partial control by the special master not being sufficient"); *Macale,* 110 Wash. at 448 ("servant must have been in the exclusive control of the one to whom he is loaned, and, if so, such servant becomes pro hac vice the servant of him to whom the exclusive control so passes, and not otherwise.") *See also, e.g., Campbell v. State*, 129 Wn. App. 10, 21, 118 P.3d 888 (Div. III 2005) ("key factor is that the servant be in the exclusive control of the special employer at the time of the transaction."); *Smick v. Burnup & Sims*, 35 Wn. App. 276, 278, 666 P.2d 926 (Div. III 1983) (borrower must "have exclusive control over the employee in order for an employment relationship to exist.")

Mr. Basehore's primary duty when planning the demolition of Building 336 was to ensure safety. He was required to ensure that the Task Instructions he wrote did not "place personnel, equipment, or the environment in a condition that is unsafe or unanalyzed . . . during the performance of the work[.]" RP 80; Ex. 1 at 33 of 38. As Mr. Basehore acknowledged, a "Work Control Planner's job is to full time ensure that the work is done in a way that is safe and doesn't put people in an unsafe or unanalyzed environment." RP 81.

Plaintiff alleged that Mr. Basehore negligently performed, or failed to perform, the fundamental safety tasks of a professional Work Control Planner; that he negligently prepared the Work Control Package for the demolition of Building 336; and that, as a result, Plaintiff ended up in an unsafe and unanalyzed environment performing unplanned work. CP 21-23.

Safety is the core of a professional Work Control Planner's work, and BSI's President admitted *BSI did not give up exclusive control over Mr. Basehore "as it pertains to safety."* RP 417. That admission negates the "exclusive control" the doctrine requires. Even if the trial court could legally and logically have applied the borrowed servant instruction to the facts here – and it could not – it erred in giving the borrowed servant instruction when BSI did not resign exclusive control over Mr. Basehore's work control planning.

C. It Was Error to Dismiss ELR When ELR Had A Contractual Right to Control Mr. Basehore and Sold His Services.

Agency relationships exist beyond employer-employee relationships. Whether an agency relationship exists is determined by the principal's right to control its agent, rather than any actual control. *ITT Rayonier, Inc. v. Puget Sound Freight Lines*, 44 Wn.App. 368, 377, 722 P.2d 1310 (1986). "It is not the actual exercise of the right of interfering with the work but the right to control which constitutes the test." *Cassidy v. Peters*, 50 Wn.2d 115, 120, 309 P.2d 767 (1957). An agency

relationship may attach between a person and two co-principals. *Nyman*, 69 Wn.2d at 285; *see also Thompson, Swan & Lee v. Schneider*, 127 Wash. 533, 535, 221 P. 334 (1923), *overruled on other grounds* by *Martin v. Seigel*, 35 Wn.2d 223, 224, 212 P.2d 107 (1949) (agent may have two or more principals).

ELR sold Mr. Basehore's professional Work Control Planning services to WCH for $89 an hour, and promised it would "maintain[] complete control over its employees and all of its lower-tier suppliers and subcontractors." Ex. 34 at ELR000466. Those lower-tier suppliers and subcontractors included BSI and Mr. Basehore. ELR thus had a right to control Mr. Basehore, whether or not it exercised that right.

The trial court's conclusion that ELR did not have "any relationship with Mr. Basehore" is incorrect. ELR had a contractual right to maintain control over Mr. Basehore, and it billed WCH hundreds of thousands of dollars for his services. The jury should have been allowed to determine whether Mr. Basehore was an agent of ELR while ELR was selling his professional services to WCH.

VI. 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 30TH day of July, 2014.

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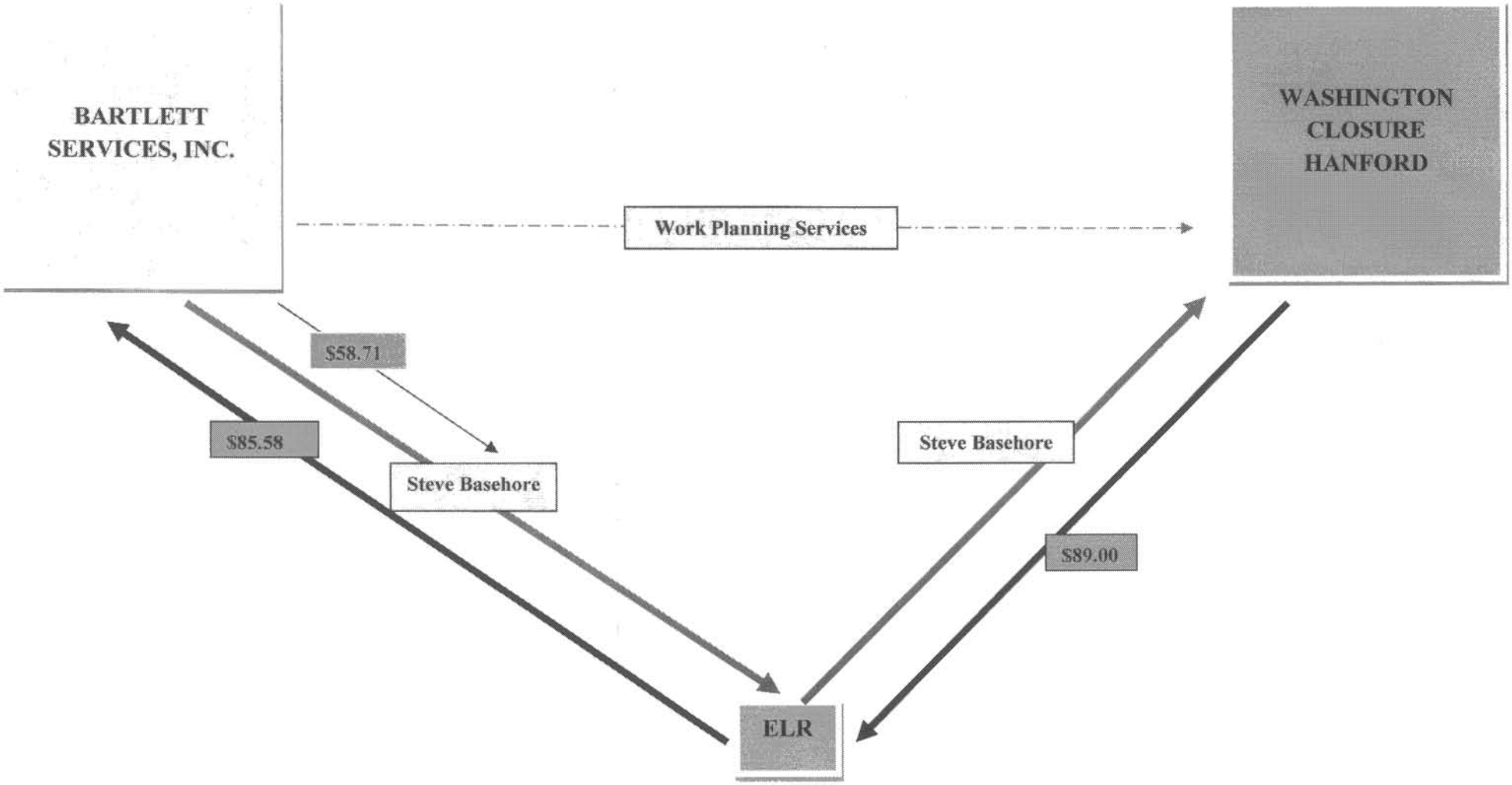
Mel Crawford, WSBA #22930
Attorney for Appellant


BARTLETT SERVICES, INC.
WASHINGTON CLOSURE HANFORD
Work Planning Services
$58.71
$85.58
Steve Basehore
Steve Basehore
$89.00
ELR

APPENDIX A

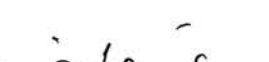
DECLARATION OF SERVICE

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

That on July 30, 2014, I arranged for filing an original and one copy of the foregoing Appellant's Opening 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 30th day of July, 2014, at Seattle, Washington.



Terri Flink, Legal Assistant