No. 321797

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

DEAN WILCOX,

Appellant,

v.

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

Appellees.

RESPONSE BRIEF OF APPELLEE BARTLETT SERVICES, INC.

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I. INTRODUCTION

This case involves the borrowed servant defense, a defense that was necessitated by the *respondeat superior* exception to the common law principle that one who commits injury is responsible for the damages. When a worker is outside the control of the employer and not doing the work of the employer but the work of others, the employer should not be liable for the employee's negligence.

This appeal arises from Appellant Dean Wilcox's ("Wilcox") fall through a hatch in Building 336 on a large federal project at the Hanford Site. The federal project at issue is the 10-year River Corridor Closure Project. The project's mission is to demolish hundreds of buildings and clean up hundreds of waste sites and burial grounds in the area. The project is managed by Washington Closure Hanford, LLC ("WCH").

In August of 2008, Building 336 at Hanford was transferred to WCH. For years, WCH has served as the primary contractor at Hanford, a U.S. Department of Energy site, primarily to engage in demolition and like activities. Building 336 was scheduled for eventual deactivation, decontamination, decommission and demolition.

On or about July 1, 2009, during the project demolition preparation work, Wilcox worked as a millwright and was employed by WCH. Wilcox was working as part of a team that was preparing a bridge crane to be

removed from 336 as the first step of demolition. Access to the bridge crane was accomplished using a permanently installed metal wall ladder. Ascending or descending the ladder was performed using a full body harness attached to retractable fall arrest lanyards. To get to the catwalks workers had to climb the ladder to a wall-mounted landing approximately 25 feet up, disconnect from one lanyard, reconnect to a second lanyard, climb the remainder of the way and then pass through a hatch in the walk floor at the 50 foot level. Prior to any work being performed, all workers were instructed to be on the catwalk and the hatch was to be closed. No fall protection was required while on the catwalk due to permanently installed guard railings. As work on the catwalk was near completion, part of the team working with Plaintiff descended through the access hatch and down the ladder to the floor. The hatch was left open with the expectation that the remaining workers were preparing to descend. It was then brought to the workers' attention that an additional task remained and two workers still on the catwalk stayed to complete the task (one being Plaintiff). As these two workers were performing this additional task, each began to walk to opposite ends of the catwalk. Plaintiff fell through the open hatch on the catwalk landing on the floor.

The project required an Integrated Work Control Package. ("IWCP"). The IWCP is put together by the Project Director ("PD") and

the Responsible Manager ("RM"). The RM then appoints the Subject Matter Experts ("SME") to assist the Project Engineer, ("PE") and the Work Control Planner ("WCP"). Wilcox was an employee of WCH. WCH temporarily employed Steve Basehore ("Basehore") as a Work Control Planner ("WCP"). Appellee, Bartlett Services Inc. ("BSI") hires employees and arranges for them to be loaned to projects such as WCH, sometimes through small companies such as defendant ELR Consulting Inc. ("ELR"). As a result of the subject accident, Wilcox filed suit against Basehore, BSI, and ELR.

Contrary to Wilcox's claims, the jury was correctly instructed on the borrowed servant doctrine, who properly applied it to this case. After a two-week trial in Benton County Superior Court, the jury found, after hearing all of the evidence, that Steve Basehore was a borrowed servant and thus BSI was not liable. Wilcox appeals that decision as well as the court's decision to instruct the jury on the borrowed servant doctrine. Wilcox also appeals ELR's dismissal.

II. ASSIGNMENTS OF ERROR

BSI does not assign error to the trial court's judgment based on the jury instructions regarding the borrowed servant defense, or its dismissal of ELR.

III. STATEMENT OF ISSUES

BSI submits the following Statement of the Issues which more appropriately reflects the questions before this court:

1. Did the court have substantial evidence to support the jury instructions regarding the borrowed servant defense, when Basehore was working for WCH at the time of this accident?

2. Did the jury have substantial evidence to support its verdict that the borrowed servant defense was applicable when WCH controlled Basehore and all aspects of the job Basehore was performing for WCH?

3. Was the court correct in dismissing ELR from the case when plaintiff admitted ELR did not employ Steve Basehore?

IV. STATEMENT OF THE CASE

A. Statement of Facts.

1. BSI is a Supplier of Temporary Specialized Staff Augmentation Personnel and does not Control the Work of its Employees

BSI is a nationwide corporation supplying staff augmentation personnel in the nuclear industry since 1979. Ex 72 , 76. Under the BSI umbrella there are four distinct groups. Ex. 143. This case involves the BSI Nuclear group. *Id.* That group provides "staffing services, innovative solutions, and technology to ... government facilities." Ex 143, RP 394.

BSI's nuclear group finds and provides specialized personnel to contractors such as WCH who are involved in the deconstruction of nuclear plants. RP 345. BSI is not in the business of decommissioning nuclear sites, rather BSI's business is supplying labor for very specific jobs. RP 345. BSI provides temporary workers. RP. 860, 345. These workers are on site temporarily filling a need of the particular contractor. RP 860. The contractors benefit because they are not hiring permanent employees whom they would have to put on benefit packages. RP 393-94. The contractor needs people with a specialized skill set and this is a cost effective way of obtaining them. RP 491. BSI keeps the person as an employee for purposes of salary, wages, benefits, worker's compensation, and applicable taxes. Ex. 5. RP 350, 361,384. However, the contractor controls the worker's day-to day-activities. RP 561. The contractor directs theworker, has the power of promotion and termination, and provides all safety equipment and specialized training. RP 361,394-99, 416, 449, 505. The contractor also provides a work space, tools, and a contractor-based email address. *Id.* The contractor has no expectation that BSI will supervise the worker. *Id.*

BSI provides these workers at different sites throughout the country. Ex 143. Each site has particular rules in order for the worker to be employed by the contractor. RP 49. For example, WCH requires a planner

to be qualified under their plan before he or she can work at the Hanford site. RP 450, 628.

BSI's main office is in Plymouth, MA. RP 344. There may be a site manager on site to assist with payroll and benefits questions. RP 349. However, these managers do not direct the employee's work. RP 643. BSI has a general safety plan that applies only in the event a site-specific plan is not implemented. RP 425. In this case, the DOE provided a comprehensive site-specific plan, so BSI's plan did not apply. RP 399, 425-6, 650. BSI expects its employees to follow the client's "policies, rules, regulations or guidelines" and failure to do so can lead to termination. P. 2 Ex 46, RP 399.

BSI did have a Site Coordinator at Hanford, Roy Lightfoot. RP 642. However, Mr. Lightfoot did not direct work or supervise BSI employees on site. RP 643. He assisted in finding them housing and ensuring they got paid. RP 643. It was not in his job description to ensure that the work planners followed the contractor's policies. RP 644. He knew WCH treated work planners as employees. RP 680.

2. Steve Basehore was a BSI Employee on Loan to WCH at the Hanford Site.

Steve Basehore had been working for another contractor at Hanford before he was asked to come to work for WCH. RP 867. He had

prepared IWCPs for contractors at the Hanford site and other sites in the country. RP 35. Prior to that work he served in the U.S. Navy. *Id.* Basehore had taken classes to become a work planner but had to take additional training to work for WHC. RP 248, 628. Kim Koegler had asked that he come to work at WCH. RP 867. Mr. Koegler was one of Basehore's supervisors while he was at WCH. RP 218, 427, 552. Basehore came to WCH from BSI through ELR. RP 390. WCH must meet government requirements regarding small businesses or it may face a penalty. RP 491, 646. The use of ELR is designed to avoid government penalties for failure to use certain types of businesses in contracting, and not to obtain a bonus, as suggested by Plaintiff in his brief. *Id.* BSI believed it was loaning its employee to WCH. RP 390. There was not a contract between BSI and WCH. RP 409.

BSI's role as a work planner was to work with the SMEs and other people involved in the job. RP 35. His duties included recording engineer input on the work plan so that changes could be made as work progressed. RP 55, 726. Basehore relies on the SMEs, the Responsible Manager and others involved to define the work. RP 35, 55, 448. He set up walkdowns so the SMEs would see the area that was going to be worked on and identify potential problems. RP 112. The SMEs make all determinations on how things are to be done. RP 442. For example, the Safety Expert

decides on how a work area is lit and how workers gain access to catwalk areas. RP 91, 167.

Basehore was limited by government regulations and WCH safety rules on how to create an IWCP. RP 48, 443. The IWCP is created in WCH offices, using WCH computers and materials. RP 230. Basehore has to answer to WCH personnel while creating the IWCP. RP 170, 174, 183. WCH had authority to override Basehore's changes to the IWCP. RP 562. Basehore could not put anything into the IWCP without WCH approval. RP 553. Basehore's day-to-day activities were directed by WCH. RP 561. WCH gave Basehore a promotion. RP 671. Basehore followed WCH's holiday schedule, not BSI's. RP 658. Basehore could not conduct safety meetings or direct WCH workers. RP 563. WCH did not expect BSI to be on site to supervise Basehore. RP 505. Basehore's work activities were solely related to WCH's needs.

3. The IWCP is a WCH Document that is Created Under WCH's Direct Oversight and Control.

The procedure for creating the IWCP is set out in PAS-2-1.1. Ex 1. WCH's Project Director appoints a Responsible Manager. RP 48, 250. The RM then appoints the Project Engineer and the Subject Matter Experts who are required for a particular job. RP 173. The RM is the "manager directly responsible and accountable for the development,

implementation, and performance of the work...." Ex. 1 p. 3, RP 171. The PE provides technical direction and evaluates the work scope. RP 181. The SMEs ensure that the Job Hazard Analysis team's decisions are consistent with their knowledge of the subject matter. RP 183. Then, the Work Control Planner coordinates with these people and assembles the package. RP 184. A Work Supervisor also takes part in the walkdowns and conducts Pre-Evolution briefings to inform the workers. Ex. 1, p. 6. Workers are to stop work if there is a condition or hazard that was not anticipated by the IWCP. RP 210, 448, 500, 540. All of this is part of PAS-2-1.1. Ex. 1. RP 174-184.

In this case, Dan Elkins was the PD. RP 489. He appointed Tom Kisenweather as the RM. RP 441. The senior PE on the project was Kim Koelger. RP 548. Donna Yasek was the PE. RP 605. There were many SMEs, but Jim Evans served as safety SME. RP 208. Brett Bateman was senior WCP. RP 177. Basehore was WCP. RP 549. The WS, also known as Field Supervisor, was Brad Schilperoot. RP 684. With the exception of Bateman and Basehore all of these people were permanent employees of WCH. RP 178, 440, 491-2, 548, 605, 684.

4. The Evidence Provided at Trial Proved that WCH Provided Direct Control over Basehore's Work.

Dan Elkins interfaced with Basehore occasionally. RP 490. Tom Kisenweather directed Basehore about a Crosby clamp and its use on the project. RP 465. Kim Koegler was involved in hiring Basehore. RP 549. Mr. Koegler was also responsible for all technical aspects of the project. RP 551. He controlled the hours that Basehore worked. RP 559. Donna Yasek supervised and directed Basehore's work. RP 606. She approved his sick time and vacation time. RP 611. Yasek had the duty to discipline Basehore if he failed to do something. RP 611. She saw Basehore daily and expected him to follow the WCH procedures and safety plan. RP 611, 620. Ms. Yasek signed off on Basehore's timesheets. RP 609. Brad Schilperoot interacted with Basehore on the walkdowns including going to the top of the tank to view the catwalk. RP 693. He did not expect Basehore to be at the Pre-Evolution meeting when work started. RP 699-700. Mr. Schilperoot was the supervisor who changed the job to include cutting the rail on the second day of work. RP 749. He obtained approval from Jim Evans to proceed with the cutting and did not contact Basehore. RP 707 and 712.

5. The Circumstances Leading up to the Accident.

The crane removal project on Building 336 was months in the making. Ex. 2., Bates stamp 00839. Originally a high reach chopper crane was going to be used to pull the bridge crane from the building. RP 85. The chopper crane operator was concerned about pulling the bridge crane from the building. RP 87. A second plan was developed so that the bridge crane would be pulled from the building using the high reach and a cable. RP 88. The plan would require workers to gain access to the catwalk to prepare the crane for removal from the building. RP 88. The building was called "cold and dark", a term of art meaning it was without power. RP 29. In reality, the building had a large bay door that allowed in a vast amount of light. RP 821. Additionally, two stadium lights were brought in for extra lighting. RP 820. As this was the beginning of July, heat was a factor and the job was scheduled for the morning hours. RP 812.

There were at least two walkdowns involving the SMEs and other WCH personnel. RP 607. The group, including Basehore, went up a stairway on an adjacent tower to view the catwalk. RP 690, 693. The catwalk is designed to be a safe work platform when the hatch is closed. RP 168, 296, 826. A problem arose in accessing the catwalk in that a carabineer that clips a worker to the ladder was missing. RP 137. An exhaustive search did not turn up the carabineer. RP 766. The WHC

safety expert would not allow Basehore to go up the ladder without the carabineer. RP 39. For the workers, a system using a lanyard connected to the ladder was to be used. RP 137. The IWCP was signed off on June 30th by the RM and the work began. RP 166. After the first day of work it was discovered that the wheels of the crane were locked and millwrights were required to remedy the issue. RP 143.

On the second day, two millwrights, one of which was Wilcox, were called to the job. RP 708. Both millwrights were included in the safety meeting where the IWCP was presented. RP 809. Each millwright signed in and acknowledged that they understood the safety requirements of the job. RP 815. They were instructed in the use of the lanyard connected to the ladder. RP 699. The rule of team up and team down was explained to them. RP 708. That morning it was decided to cut the rail on the catwalk. RP 788, 832. The WCH safety expert, Jim Evans, was contacted and he approved the plan. RP 833. The interior crane rolled against the rail would have provided the necessary fall protection. PR 750. Four workers then proceeded together to the catwalk. RP 709. When the last man arrived on the catwalk the hatch was closed and they were in a safe working area. RP 296.

At some point an iron worker descended alone. RP 751. Schilperoot was in his office some 50 yards away. RP 713. After Wilcox's

fall, he was conscious and exclaimed that he could not believe he did that. RP 714. Emergency crews were called and they took Wilcox to the hospital. RP 714. Eventually Building 336 was razed with the use of the high reach . RP 690.

B. Procedural History.

A lawsuit was brought by Wilcox against BSI and Basehore alleging that Basehore was negligent in assembling the IWCP. CP 1-4. Later, ELR was added to the suit. CP 20-24. Just months before trial, plaintiff voluntarily dismissed the case against Basehore and Ms. Wilcox was dropped as a co-plaintiff. CP 564. In motion practice all parties brought motions for summary judgment. CP 30-37, 244-253, 481-504. The issue of borrowed servant was raised in each of the four motions. *Id.* (ELR renewed its motion close to trial.) In none of those motions did plaintiff raise the issue of the indemnity clause. CP 85-87, 89-91, 496-503, 518-529, 551-554, 566-573, 575-590, 592-612.

A jury trial was held in Benton County Superior Court. The judge instructed the jury on the borrowed servant doctrine. CP 106-107. Wilcox objected to the instruction being given but not to the verbiage. RP 942. Wilcox did not take exception to the court not giving his offered instruction on the issue. RP 943. At the end of trial, the court dismissed

the claims against ELR. CP 88. The jury then rendered a verdict in favor of the defendant, BSI. CP 119-121.

Plaintiff filed a post-trial motion for new trial on the issue of the borrowed servant doctrine instruction. The plaintiff did not include any argument about an indemnity clause. CP 615-20. The motion was denied by the trial court and plaintiff appealed.

V. ARGUMENT

1. The Standard of Review is to Determine if Substantial Evidence Supports the Verdict.

In this case Wilcox assigns error to entry of the judgment based upon a jury verdict. The proper standard of review is to determine if substantial evidence supports that verdict. *Winbun v. Moore*, 143 Wn.2d 206, 213, 18 P.3d 576 (2001). The court then looks at the case most favorable to the respondent and presumes the correctness of the verdict. *Collins v. Clark County Fire Dist. No. 5*, 155 Wn. App. 48, 81, 231 P.3d 1211 (Div. 2, 2010). The sufficiency of the evidence standard means that the appealing party is admitting the truth of the opposing parties' evidence and all inferences reasonably drawn therefrom. *Wylie v. Stewart*, 197 Wn. 215, 219, 84 P.2d 1004 (1938). The court should interpret the evidence most strongly against the moving party and in a light most favorable to the nonmoving party. *Holland v. Columbia Irr. Dist.*, 75 Wn.2d 302, 304, 450

P.2d 488 (1969). These rules apply even when the issue is an affirmative defense. The evidence is viewed most favorable to the prevailing party. *Benchmark Land Co. v. Battle Ground*, 146 Wn. 2d 685, 694, 49 P.3d 860 (2002).

Plaintiff also assigns error to the court for instructing the jury on the borrowed servant defense. Specifically, the plaintiff is appealing the giving of instructions 12 and 13 and the inclusion on the verdict form. If there is substantial evidence to support the trial court's giving a particular instruction a party is entitled to the instruction. *Herring v. Department of Social and Health Services,* 81 Wn. App 1, 25, 914 P. 2d 67 (Div. 1, 1996). This appeal is based on the facts and thus this court reviews for abuse of discretion. *Kappelman v. Lutz*, 167 Wn. 2d 1, 6, 217 P.3d 286 (2009). A jury instruction is proper if (1) the parties can argue their case; (2) the instruction does not mislead the jury; and (3) properly informs the jury of the law. *Herring,* 81 Wn. App at 22. The trial court must instruct on an issue when substantial evidence supports the instruction. *Ramey v. Knorr*, 130 Wn App 672, 688, 124 P. 3d 314 (Div. 1, 2005). The trial court abuses its discretion when there are not tenable grounds to support the giving of the instruction. *Hayes v. Wieber*, 105 Wn. App. 611, 615, 20 P.3d 496 (Div. 3, 2001). In this case, more than sufficient evidence supported the instructions.

2. Wilcox has Waived the Right to Argue that the Borrowed Servant Instruction was a Misstatement of the Law.

At trial Wilcox did not take exception to the court's failure to give one of his instructions. RP 944. While Wilcox did object to the giving of instructions 12 and 13, based on factual reasons not on the law. RP 942. Wilcox thus waived his right to appeal that the court's instruction misstated the law. *Herring,* 81 Wn. App. at 23. Wilcox failed to set out any objectionable wording in his brief and therefore he cannot be heard to complain about the wording. RAP 10.4(c); *Thomas v. French*, 99 Wn.2d 95, 100, 650 P.2d 1097 (1983). Plaintiff only objected to the giving of the instruction and raising the issue, not to the wording of the instruction. RP 943.

3. Plaintiff May not Argue that an Indemnity Clause Precludes Application of the Borrowed Servant Defense for the First Time on Appeal.

As part of his argument Wilcox alleges that the borrowed servant defense is subservient to indemnification clauses in contracts. See Appellant's Opening Brief pp. 28-30. This argument was never raised to the trial court. A new issue is not allowed on appeal. RAP 2.5. An issue raised for the first time on appeal will not be considered. *Pappas v. Hershberger*, 85 Wn. 2d 152, 153, 530 P.2d 642 (1975). The borrowed servant issue was before the trial court a number of times. Wilcox made a

motion to dismiss ELR's defense based on the doctrine. CP 85-87, 89-91. Wilcox discussed the issue in his trial brief. CP 551-554. He argued the issue in his motion for partial summary judgment. CP 496-503. He also argued the issue in his Reply in connection with the motion. CP 566-573. Wilcox also argued the issue in opposition to BSI's motion for summary judgment. Notably, Wilcox argued that the doctrine was a question for the jury. CP 518-529. Wilcox argued in opposition to both of ELR's motions for summary judgment as well. CP 575-590 and 592-612. Plaintiff brought the issue to the court's attention a final time in his Motion to Vacate Verdict. CP 615-620. Not once in any of these pleadings was the argument made about the indemnity clause. This may have been because plaintiff knew there was not a contract between BSI and WCH. See Opening Brief, p. 32.

A recent case on this issue did not allow a party to raise new arguments to require an interpreter even though other arguments had been made on that issue. *Farencak v. Department of Labor and Indus.*, 142 Wn. App. 714, 729,175 P. 3d 1109 (Div. 1, 2008). *Cf. Newcomer v. Masini*, 45 Wn. App. 284, 724 P. 2d 1122 (Div. 3, 1986) (a nonjury case where an issue was raised in a Motion to Reconsider but did not use the "key words"). The Court should not consider the new issue of indemnity

clauses as it was not argued to the trial court. *Washburn v. Beatt Equipment*, 120 Wn. 2d 246, 291, 840 P. 2d 860 (1992).

Even if Wilcox's indemnity argument were properly before this court, it does not preclude requesting a borrowed servant instruction at trial. Wilcox relies heavily on *Stocker v. Shell Oil Co.*, 105 Wn. 2d 546, 716 P.2d 306 (1986). *Stocker* supports BSI's position when it discusses the borrowed servant defense. However, Stocker involved a written contract that had an indemnity clause. The court held that "an express contractual agreement for indemnification must prevail over the tort defense of 'borrowed servant'." *Stocker*, 105 Wn. 2d at 549. As Wilcox has pointed out in his brief there was not a contract between Bartlett and WCH so no "express contractual agreement" exists. Indemnification agreements must be in writing. *Id.* Thus, even if Wilcox's argument is found not to be waived, there is no indemnity agreement to support its application. In any event, such argument should have been made to the trial court for its consideration.

4. The Jury was Properly Instructed on the Borrowed Servant Defense.

The borrowed servant defense has been applied in cases since the late 1800s. *Higgins v. W. Union Tel. Co.* 156 N.Y. 75, 50 N.E. 500 (1898). The concept grew from the exception to the general rule

that one who commits harm is responsible when a master-servant relationship exists. *Id.* The rule is intended to protect the master when he does not have control of the servant. Liability under the *respondeat superior* doctrine will apply only if the worker is in the work of the employer. *Id.* There is a difference if the one employer decides to do the work for another and has his employees do that work versus lending an employee to another to do work under that other employer's direction. *Standard Oil Co. v. Anderson*, 212 U.S. 215, 220-21, 29 S. Ct. 252, 253-54, 53 L. Ed. 480 (1909). In the first case the employer is an independent contractor. In the second case the first employer has lost control of his worker and should not be responsible for any negligent acts of that worker. *Id.* The doctrine is a principle of common law. *Sheimo v. Bengston*, 64 Wn. App. 545, 551, 825 P. 2d 343 (Div. 3, 1992).

Here, for the purpose of the job of assembling the IWCP, Basehore was under the control of WCH. Bartlett believed it had loaned Basehore to WCH. RP 390. It is not the business of Bartlett to create IWCPs but rather to find people to lend to others who do create IWCPs. RP 345. WCH is the employer who needed the IWCP per the federal guidelines under which WCH operates. RP 48. Basehore was working at WCH's offices, under its direct day-to-day control and

working under WCH supervisors. RP 606, 620. Basehore was personally selected to do the job by Kim Koegler, a WCH employee. RP 867. WCH's safety expert restricted Basehore's movements. RP 39. WCH controlled how Basehore could prepare the IWCP. RP 611. For the purposes of creating the IWCP, Basehore was under WCH's complete control for this job. RP 361, 400-401, 881.

It is true Basehore still had an employment relationship with BSI. RP 350. However, BSI did not supervise his work on this project nor did BSI contract to do the work for WCH. RP 396, 409. Basehore had the benefit of the WCH holidays. RP 658. WCH gave Basehore a promotion. RP 671. BSI could not promote Basehore in this job. RP 681-2. WCH approved Basehore's vacation and sick time. RP 611. BSI was not allowed to interfere with WCH human resources control over Basehore. RP 867. WCH provided Basehore with his equipment and protective gear. RP 395. WCH could terminate Basehore from this job. RP 399, 568. WCH could override anything Basehore wrote. RP 562. WCH signed off on Basehore's timesheets. RP 394, 609. Basehore had to follow WCH's safety plan. RP 399, 561, 650. The facts in this case thus support the application of the borrowed servant rule in which an original employer is not in control of its worker. *Standard Oil*, 212 U.S. at 221. Here, because Basehore was under

WCH's control, there was sufficient evidence to instruct the jury on the rule and allow the jury to decide the issue.

a. Application of the Borrowed Servant Doctrine is a Jury Question.

Whether the borrowed servant doctrine applies is typically a question for a jury. *Macale v. Lynch*, 110 Wn. 444, 188 P. 2d 517 (1920). A long line of the cases hold that the question of whether the borrowed servant defense applies is a question for the jury. *See*, *Macale*, 110 Wn. At 448; *Davis v. Early Const. Co.* 63 Wn.2d 252, 386 P. 2d 958 (1963); *Nyman v. MacRae Bros. Const. Co.*, 69 Wn. 2d 285, 418 P.2d 253 (1966).; *Anderson v. Red & White Const. Co.* 4 Wn. App. 534, 483 P. 2d 124 (Div.1, 1971). Here, the question was properly placed before this jury. The instructions were proper to allow the defense to argue its position.

Substantial evidence supports the giving of the instructions. The jury heard that WCH had its own safety program that Basehore had to follow, its own holidays Basehore received, that WCH promoted Basehore, could fire him from this job, could discipline him for not following their rules, directed his day to day activities, had him prepare the IWCP to their specifications, that WCH supervisors direct Basehore and could override Basehore's work, signed his time sheets, controlled his assignments, and ultimately approved the IWCP after Basehore had

completed his work on it. This evidence came from several witnesses, some of whom were BSI employees, some ELR employees and WCH employees. The evidence was thus sufficient for a jury to find that WCH controlled Basehore's work and was a borrowed servant. It is noteworthy that Wilcox argued that this was a jury question in response to the motion for summary judgment brought by BSI. CP 518-529. A trial court is required to give an instruction when there is substantial evidence to support it. *Stylie v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996).

b. Exclusive Control is not Required to Apply the Borrowed Servant Defense.

Contrary to Wilcox's position, application of the borrowed servant defense does not require exclusive control for all matters of employment but rather control for the work that is being done. (...the relationship of master and servant may exist for some matters and not others.) *Anderson,* 4 Wn. App at 542. Other circumstances such as payment of wages or power to discharge are not definitive factors. *Standard Oil,* 212 U.S. at 225. Washington courts have recognized that the loaned servant is still paid by the initial employer. *Campbell v. State*, 129 Wn. App. 10, 20-21, 118 P.3d 888, 892-93 (Div. 3, 2005). Washington courts have held that while the employee may still be acting for the benefit of his original

employer, he can be an employee of another. *Nyman*, 69 Wn. 2d at 288-89.

The narrow construction of "exclusive control" suggested by Wilcox is unwarranted. Many cases discuss exclusive control but they all are addressing the job being done. The lack of need to show exclusive control is clearly stated in *Brown v. Labor Ready*, 113 Wn. App. 643, 649, 54 P.3d 166, 170 (Div 1, 2002) *review denied,* 149 Wn.2d 1011 (2003): "exclusive control for all purposes is not required, as the facts of *Nyman* clearly demonstrate." 113 Wn. App at 651. One purpose for having augmentation staff is so the borrowing employer can avoid having to supply benefits to workers who are temporary. It is well-settled that workers on loan are employees of the new master, regardless of whether control is exclusive or not. *Higgins*, recognized that the worker would be the employee of another when on loan. 156 N.Y. at 79-80. Here, Basehore was under the complete control of WCH on their premises, some three thousand miles from BSI.

Wilcox also cites to *Davis v. Early Const. Co*, 63 Wn.2d 252 to support his argument. This reliance is misplaced. In that case the question arose as to who controlled that job, as Davis's foreman was in charge of the lifting of the glass. Defendant (Early) usually was in the business of construction so the job was one being done for Davis's employer, not

Early. Similar to most of the other cases, the *Davis* court left the question to the jury. 63 Wn. 2d at 259. *Cf. Olson v. Veness*, 105 Wn. 599, 601, 178 P. 822, 822 (1919) (court properly ruled as matter of law that worker was a borrowed servant.)

A closer look at *Brown v. Labor Ready* is warranted. That case involved Labor Ready, a temporary labor agency that loans workers to other companies in a similar, if not identical, manner as BSI. The inventory is of people to be hired by others to do their work. The *Brown* court considered the *Davis* opinion and held it was most instructive in a very similar situation. 113 Wn. App. 651. The *Brown* court clearly believed that exclusive control applied to the job being done. 113 Wn. App. at 652. In *Brown*, it was not the loaned servant who was injured. 113 Wn. App. at 646. Rather, it was the other company's worker asserting a suit against Labor Ready, who loaned the servant. 113 Wn. App. at 654. The *Brown* court discussed the two uses of the borrowed servant defense and found that consent of the loaned employee was not relevant. *Id.* The court focused on who was controlling the worker at the time of the injury. 113 Wn. App. at 652-3. The court also held that the fact that Brown was precluded from bringing a suit against her own employer did not create a cause of action against Labor Ready. 113 Wn. App. at 655. The court went on to hold that the trial court did not err in dismissing Brown's action for

vicarious liability. *Id.* If those facts were sufficient for summary judgment the facts in this case are more than sufficient to support a jury verdict.

c. The "Unknown Third Party" Aspect of the Rule Applies.

There are distinct applications of the rule. The first applies when the employee is the injured party. The other is applied when the master is being sued by an unknown third party. *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn. 2d 550, 553-54, 588 P.2d 1174 (1979). When the injured party is the worker then there is a need to establish consent by the worker to the relationship because it is the worker's rights that are in jeopardy. *Brown v. Labor Ready Nw., Inc.*, 113 Wn. App. at 653. However, when the question is one of vicarious liability, then consent is irrelevant. *Id.*

This is a case of a third party seeking to find liability against the master. Wilcox was the injured party and he was an unknown to BSI. Thus, it is an issue of vicarious liability. In this case, there was a legitimate dispute that Basehore's work was under WCH's control, which was properly submitted to the jury and the rule was properly applied.

d. The Nature of Basehore's Services do not Determine Whether the Doctrine Should be Applied.

Wilcox declares, without citation to authority, that the defense does not apply to highly specialized services done by independent contractors. See Appellant's Opening Brief at p. 34. Wilcox does not cite to any authority that the type of work determines whether the defense may be applied. The defense may be applied whether an employee is an elevator operator (*Higgins*), stevedore (*Standard Oil*), crane operator (*Nyman*), or work planner on a complex demolition project. The question is who controlled the work. However, Basehore was not acting as an independent contractor with respect to his work for WCH. An independent contractor is one who is not controlled by another. *Franklin v. Puget Sound Tug & Barge Co.* 21 Wn. App 517, 523-4, 586 P.2d 489 (Div. 1, 1978). An employee performs services under the control of a master. *Id.* Basehore was given special training by WCH to do his job for them. RP 505. He had to follow site-specific guidelines to assemble the IWCP. RP 48. He utilized their equipment and was directed by their supervisors. RP 441, 560. They could terminate his services for them at any time. RP 571. Basehore was thus an employee not an independent contractor. *White v. Department of Labor and Indus.* 48 Wn. 2d 470, 477, 294 P. 2d 650 (1956).

e. Case Law does not Require a Contract as Suggested by Wilcox.

The lack of a direct contract between BSI and WCH is not relevant to the issues on appeal. Whether a worker is on his own or loaned to another outside of the control of the employer is the key factor. "If the servant is doing his own work or that of some other, the master is not answerable for his negligence in the performance of it." *Standard Oil*, 212 U.S. at 220. The purpose behind the rule is to protect the master when the servant is not doing the master's work. *Higgins*, 156 N.Y. at 78. Basehore was not working for BSI, he was performing all work for WCH. BSI is only the supplier of the labor, just as Labor Ready might provide temporary workers for a construction project. The fact that a worker may "pass through" another company is irrelevant to whether the doctrine should be instructed to a jury. Wilcox argues that there was not a contract between BSI and WCH so the instruction on the borrowed servant defense was improper. Wilcox does not offer any authority for this proposition. However, there was overwhelming evidence at trial that Basehore was under the near-exclusive control of WCH. Basehore was not in BSI's control so BSI cannot be vicariously liable. Thus, the jury was properly instructed on the issue to fulfill the purpose of the rule. The verdict was

found on substantial evidence and the borrowed servant doctrine properly instructed and applied.

5. More than Substantial Evidence Supported the Jury's Verdict.

This court must review to determine if there was substantial evidence to support the verdict while considering the evidence in a light most favorable to the nonmoving party. *Herriman v. May*, 142 Wn. App. 226, 232, 174 P.2d 156 (Div. 3, 2007). As explained above there is more than sufficient evidence to support the jury's verdict. It is abuse of discretion to grant a new trial when substantial evidence supports the verdict. *McCune v. Fuqua*, 45 Wn.2d 650, 653, 277 P.2d 324 (1954).

Wilcox lists the entry of the judgment as an assignment of error at page five of his brief. However, he does not present any argument or citation to authority in his brief on the subject. Failure to present argument is waiver of an assignment of error. RAP 10.3(a)(5)-(6); *Milligan v. Thompson*, 110 Wn. App. 628, 635, 42 P.2d 418 (Div. 2, 2002). This court is precluded from reviewing this assignment of error.

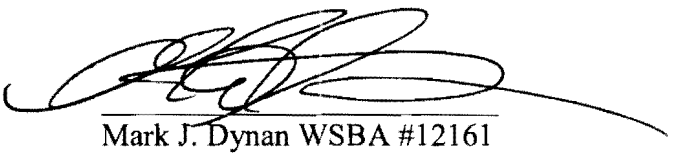
6. ELR's Dismissal was Proper.

The argument on this assignment of error is left to the counsel for ELR.

VI. CONCLUSION

BSI requests this court to uphold the giving of the instructions by the trial court and the verdict of the jury. There is more than sufficient evidence to support the giving of the instructions as well as the finding of the jury.

Respectfully Submitted this 2nd day of October, 2014.



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