IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SUPREME COURT NO. 92362-1

COURT OF APPEALS NO. 32179-7

DEAN WILCOX,
Petitioner,

vs.

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

ANSWER TO PETITION FOR REVIEW

Mark J. Dynan, WSBA #12161
Maura McCoy, WSBA#48070
DYNAN & ASSOCIATES, P.S.
Suite 400, Building D
2102 North Pearl Street
Tacoma, WA 98406-1600
(253) 752-1600
mdynan@dynanassociates.com
Attorneys for Respondent Bartlett Services, Inc.

TABLE OF CONTENTS

TABLE OF CASES AND OTHER AUTHORITIES

State Cases

Federal Cases

Court Rules

I. IDENTITY OF RESPONDENT

The respondent is Bartlett Services, Inc. represented by Mark Dynan and Maura McCoy of Tacoma, Washington.

II. INTRODUCTION

This case initially began when Plaintiff Dean Wilcox injured himself on the job on July 1, 2009. At the time, plaintiff was working for Washington Closure Hanford (WCH). After his injury, plaintiff sued Bartlett Services, Inc., Steven Basehore, and ELR Consulting, Inc. on the theory that Mr. Basehore was negligent in performing his job at the work site which resulted in plaintiff's injury. Plaintiff further alleged that Bartlett Services, Inc. or ELR Consulting, Inc. were vicariously liable for Mr. Basehore's actions as his employer.

In an effort to safely disassemble the Hanford site, WCH has been the primary contractor engaging in deactivation, decontamination, decommission and demolition. In order to complete these projects WCH uses its own employees, subcontractors, and staff augmentation in an effort to keep their own costs down when a job requires a specialized professional. Staff augmentation allows WCH to hire workers for a specific project.

Mr. Basehore is one of these specialized workers. Mr. Basehore was an employee of Bartlett Services, Inc (BSI). However, in order to aid in the 336 Building project, WCH contracted with ELR Consulting, Inc. to borrow Mr. Basehore for its project at building 336. While Mr. Basehore

worked on this project, WCH had sole control over Mr. Basehore's daily activities. They provided managerial oversight, retained full control over the project, and gave Mr. Basehore the necessary equipment to perform his job. Although Mr. Basehore was still an employee of Bartlett Services, Inc., the jury found and the Court of Appeals affirmed that Mr. Basehore was also an employee of WCH as a borrowed servant.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the decision of the Court of Appeals is in conflict with a previous decision of the Supreme Court?

2. Whether the holding of the Court of Appeals involves an issue of substantial public interest that should be determined by the Supreme Court?

IV. STATEMENT OF THE CASE

a. BSI Supplies Temporary Specialized Staff and does not Control the Work of its Employees.

Bartlett Services, Inc. is a national corporation that supplies specialized personnel to nuclear power facilities. Ex. 72, 76. Their employees include a broad range of specialized personnel. Ex. 72. There are four distinct groups that make up BSI's personnel. Ex. 143. Mr. Basehore was in the nuclear group which finds and provides specialized personnel to contracts such as WCH who are involved in the deconstruction of nuclear plants. RP 345. BSI provides temporary workers who fill in particular needs on the project. RP 860.

This structure serves to benefit both parties: the contractors are not forced to hire permanent employees and BSI provides an effective way to obtain workers with a specialized skill set. RP 393-94; RP 491. BSI did not relinquish all control over Mr. Basehore, they still paid his salary, gave him benefits, etc. RP 361. However, his day-to-day duties, all his responsibilities and supervision were being done by WCH. RP 361. Simply, at the time of this accident Mr. Basehore was an employee of both BSI and WCH, with WCH controlling his daily activities. RP 401.

b. Steve Basehore was a Member of the Nuclear Group.

Mr. Basehore was sought after by WCH due to his experience as a work planner. RP 35. Kim Keogler asked that Mr. Basehore come to WCH in order to develop a work package. RP 867; 35. Mr. Basehore came to WCH from BSI through ELR. RP 390. WCH must meet certain government regulations regarding small businesses or it could face penalties. ER 646. They are mandated to provide a certain portion of their business to small businesses. *Id.* The use of ELR is an attempt to avoid penalties by the government for failure to use certain types of businesses. *Id.*

As part of his job at WCH, Mr. Basehore was expected to work with Subject Matter Experts to identify hazards then they provide the controls that he puts into a work package. RP 35. Mr. Basehore was directed by government regulations, WCH safety rules, and input from Subject Matter Experts and the Responsible Manager in creating the

Integrated Work Control Procedure (IWCP). RP 48, 443. Anything that was done by Mr. Basehore could have been overridden by WCH. RP 562. He also could not put anything into the IWCP without prior approval from WCH. RP 553.

Mr. Basehore's daily activities were conducted and supervised according to WCH's rules and supervisors. RP 561. WCH gave Mr. Basehore a promotion. RP 676. He followed their holiday schedule instead of BSI's. RP 658. WCH approved his vacation time. RP 670. BSI was not expected to supervise Basehore and his work activities were solely related to WCH's needs. RP 505. WCH was essentially treating Mr. Basehore as though he was their employee. RP 680.

c. Mr. Basehore's Daily Work Activities and the IWCP were Controlled by WCH.

While he worked at WCH, Mr. Basehore was supervised by Kim Koegler who was an employee of WCH. RP 218. Mr. Basehore's responsibilities at WCH were to develop the IWCP. RP 48. The procedure for creating the IWCP is set out in PAS-2-1.1. Ex. 1. WCH completes IWCPs by creating a team. The Project Director, among other things, appoints a Responsible Manager and ensures that they are properly trained. RP 173. The Responsible Manager is then responsible for selecting the Planning Team members and appointing the Project Engineer. RP 175. This team includes the Subject Matter Experts (SME). RP 175.

On this specific project there was also a lead planner who Mr. Basehore would go to first if he had an issue on the project. RP 178. In all of these various roles, Dan Elkins was the Project Director. RP 489. As part of his responsibilities he appointed Tom Kisenwether as the Responsible Manager. RP 441. Kim Koegler was the senior Project Engineer on this site and Donna Yasek was a Project Engineer. RP 548; 605. There were multiple Subject Matter Experts; Jim Evans was assigned as safety SME on this project. RP 208. The field supervisor for this project was Brad Schilperoot. RP 684. With the exception of the two Work Control Planners on this project, Mr. Basehore and Brett Bateman, all of these individuals were permanent employees of WCH. RP 178, 440, 491-2, 605, 684.

During trial it was further proven through testimony that Mr. Basehore's daily activities were controlled by the above-mentioned WCH employees. Mr. Keogler was involved in hiring Mr. Basehore; he also controlled the hours that Mr. Basehore worked. RP 559, 606. Ms. Yasek supervised and directed Basehore's work; she also approved his sick and vacation time. RP 606, 611. Ms. Yasek had the responsibility of disciplining Mr. Basehore, if necessary. During this time period, she had the opportunity to visualize and encounter Mr. Basehore's work on a daily basis. RP 611.

V. SUMMARY OF ARGUMENT

Under Rule of Appellate Procedure 13.4(b), a petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or,

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or,

(3) If a significant question of law under the Constitution of the State of Washington or of the United State is involved; or,

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Here, Plaintiff cites (1) and (4) as factors supporting review. Petition at 7. Thus, Plaintiff must concede that factors (2) and (3) are not to be considered in its Petition.

Plaintiff claims that because the Court of Appeals expands the borrowed servant defense, it is in conflict with this Court's precedent. As stated above, the Court of Appeals Opinion is not in conflict with *Stocker v. Shell Oil Co., supra.* Plaintiff cites no authority stating that expansion equals conflict. The original purpose of the borrowed servant defense is to protect the master when he does not have control over the servant. Here, that purpose was affirmed in the Court of Appeals' Opinion.

The plaintiff's argument regarding express contractual terms is waived because this issue was never raised at the trial court. RAP 2.5.

Nevertheless, plaintiff contends that the Court of Appeals decision in this matter conflicts with this court's holding in *Stocker v. Shell Oil Co.* Plaintiff complicates the issue and relates the holding to public interest concerns. The holding in *Stocker* is much simpler. The Court of Appeals stated in its Opinion that the issue in *Stoker* was whether the borrowed servant defense could be defeated by an express indemnity clause. *Stocker*, 105 Wn.2d 546, 546-47, 716 P.2d 306, 307 (1986); Opinion at 30.

It is only when the parties have made an express contract that the agreement trumps common law defenses. *Stocker*, 105 Wn.2d at 550, 716 P.2d at 309; Opinion at 31. Here, this holding is not applicable because BSI never had a contract with WCH. In addition, this holding would only be relevant in a situation where WCH brought suit against ELR for indemnification. Opinion at 31. The duty would not apply here in a suit brought by an employee of WCH against ELR or BSI. Opinion at 31. Thus, even if Wilcox's argument is found not to be waived, there is no express agreement between those two parties to support its application.

In support of his petition, Plaintiff argues that the Court of Appeals Opinion raises an issue of public interest when it comes to government contracts. Plaintiff claims that arrangements, such as those between ELR, BSI, and WCH are guided by deceit. To the contrary, this practice is the most efficient way to obtain workers with a specialized skill set such as Mr. Basehore.

V. ARGUMENT

a. The Decision of the Court of Appeals is in Accord with Decisions of this Court.

The plaintiff argues that because there is no reported case with a "double borrowing" situation the Court of Appeals expanded the doctrine and is therefore in conflict with this Court's precedent. There is no conflict here. In support of his argument, plaintiff points to no authority showing that the Court of Appeal's decision is in conflict with a decision of this Court. Petition at 9. There is also no cited authority for the proposition that expansion equals conflict.

Plaintiff argues that the Court of Appeals Opinion expands the well-established rule of the borrowed servant defense. However, the overall purpose of respondeat superior and the borrowed servant defense is to protect the employer if the employee is not furthering its business. *See e.g. Kuehn v. White*, 24 Wn.App. 274, 277, 600 P.2d 679, 681 (Div. 1, 1979) ("A master is responsible for the servant's acts... in furtherance of the master's business"); *McQueen v. People's Store Co.*, 97 Wash. 387,388, 166P. 626, 627 (1917) ("the act complained of must have been done while the servant was engaged in doing some act under authority from his master..."); *Foote v. Grant*, 55 Wn.2d 797, 801, 350 P.2d 870, 872 (1960) ("The true test of liability is whether the servant was engaged

in his master's business..."). The Court of Appeals Opinion protects this well-established doctrine. Opinion 19-20.

The authority to control a worker is the determining factor in liability. *Olson v. Veness*, 105 Wash. 599, 601, 178 P. 822, 822 (1919). Here, it does not matter if there were two, three, or four entities involved. At the time of this accident, Mr. Basehore was furthering the business of WCH and not under the control of BSI. To hold BSI liable would be in direct conflict with the established doctrine of respondeat superior, the borrowed servant defense, and the precedent surrounding it.

b. BSI and WCH did not have a Contract thus no Express terms were Present.

In his second argument for review, plaintiff alleges that the borrowed servant defense is secondary to indemnification clauses in contracts. Petition at 10. This issue was not brought up at the trial court and is improper. RAP 2.5. Plaintiff brought up this issue for the first time at the Court of Appeals. The Court of Appeals decided to hear the issue because it was "arguably related to issues raised in the trial court..." Opinion at 30. After considering this issue, the Court of Appeals held that neither case cited by plaintiff supported his arguments that indemnity language precludes a borrowed servant defense. Opinion at 30.

Plaintiff cites to *Stocker v. Shell Oil Co.*, to support his contention that any express agreement prevails over a common law tort defense. Petition at 10. In *Stocker*, the agreement between P.M. Northwest and

Shell Oil was for P.M. to provide labor and equipment on an as-needed basis for work at the oil refinery in Skagit County. 105 Wn.2d 546, 547, 716 P.2d 306 (1986). Their express agreement included a clause requiring P.M. to indemnify Shell for any liability arising out of the contract. *Id.* The Washington State Supreme Court held that when an express contractual indemnity agreement clashes with a tort defense, the express agreement must prevail. *See Stocker,* 105 Wn.2d 546, 551, 716 P.2d 306, 309.

Plaintiff argues that because WCH expressly contracted that they did not employ Mr. Basehore according to *Stocker*, this written agreement should prevail over the borrowed servant defense. Petition at 11. There are multiple concerns with this argument. First of all, *Stocker* did not involve a contract such as this; rather it involved a specific indemnity clause. *Stocker*, 105 Wn.2d 546, 547, 716 P.2d 306.

In addition, the only contract that existed was between BSI and ELR, there BSI did not have a contract with WCH. RP 409. Plaintiff is alluding to an employee acknowledgement form that was filled out by Mr. Basehore after he had already started working at WCH. This was not a contract between BSI and WCH. Plaintiff's argument that express contractual terms should prevail fails simply because there is no contract between these parties.

Secondly, it is clear from Washington case law that a worker can be "loaned" and the original supplier is then temporarily not controlling

the worker's day-to-day activities. *See Brown v. Labor Ready Northwest, Inc.* 113 Wn.App. 643, 647, 54 P.3d 166, 169 (2002). ("Under the borrowed servant doctrine, a worker in the general employ and pay of one person may be loaned or hired to another"); *Stocker v. Shell Oil Co.*, at 548 ("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."). Contrary to plaintiff's argument, it does not matter who contractually was Mr. Basehore's employer, what ultimately matters is whose control he was under at the time the incident occurred.

Plaintiff incorrectly asserts that *Tidewater Oil Co. v. Travelers Ins. Co.* also holds that express contractual terms prevail over common law tort defenses. 468 F.2d 985 (5th Cir., 1972). *Tidewater* states that traditionally a furnished worker is a borrowed servant. 468 F.2d 985, 988. However, suppliers of labor can expressly allocate risk through indemnity agreements. *Id.* The holdings of both *Stocker* and *Tidewater* are specific and relate only to express contractual terms of indemnity. Neither holds that, in general, any express contractual term will negate a common law defense. *See Tidewater*, 468 F.2d 985, 988; *Stocker*, 105 Wn.2d 546, 550, 716 P.2d 306, 309 (1986).

c. *Brown v. Labor Ready* is applicable.

The Plaintiff argues in his Petition, that the use of *Brown v. Labor Ready Northwest, Inc.* by the Court of Appeals was misguided because it

involved a different contractual relationship. Petition at 12. Although *Brown* did not involve a three-way employment relationship, its holding is applicable to this case. The Plaintiff in *Brown* was an employee of CMI Northwest, a company that regularly used Labor Ready as a supplier of temporary labor. *Brown,* 113 Wn.App. 643, 645, 54 P.3d 166, 167 (2002). Plaintiff was injured by an employee of Labor Ready. *Id.* There, the Court held that the proper test for applicability of the borrowed servant defense is whether the master accepted and controlled the service that led to the injury. *Id.* at 649, 54 P.3d at 170.

In support of its holding that the borrowed servant defense applied, the Court differentiated between cases where the borrowed servant is injured and those where the plaintiff attempts to hold the lending employer liable. *Id.* at 654, 54 P.3d at 172. Contrary to plaintiff's arguments, *Brown* is remarkably similar to the case at hand. Both cases involve plaintiffs taking action against the lending employer. The determining factor in *Brown* was whether or not the master "controlled the service that led to the injury." *Id.* at 649, 54P.3d at 170. The same issue applies here.

d. The Court of Appeals Opinion does not Raise an Issue of Public Interest.

Plaintiff contends that this case should be granted review because it concerns a matter of public interest. Petition at 12. Specifically, plaintiff argues that the Court should take issue with the relationship between ELR, BSI, and WCH. Petition at 7. Contrary to plaintiff's argument, the practice

used by companies such as ELR, BSI, WCH and the like has many benefits and is not guided by deceit. Mr. Roy Lightfoot testified at trial that many companies use staff augmentation companies, like ELR, because they cannot find a suitable candidate in their community. RP. 645. The reason they do not usually solicit applications directly from workers is because it is temporary work and to hire someone knowing they will be laid off in a year or less is unfair. *Id.* While plaintiff may question these practices they are not relevant to the issue at hand. The true issue is the preservation of the borrowed servant rule protecting an employer who does not have control over his employee.

WCH is required to provide a certain percentage of their business to small businesses. RP 646. ELR qualifies as a small business. The arrangement between these parties was not about bonuses as plaintiff alleges but companies like WCH would also be penalized for not using small businesses. RP. 647. The reason that BSI initially contracted with ELR is because they asked for a contract. BSI's President Nicholas Dimascio did not know that this arrangement would be helping out WCH financially. RP. 410.

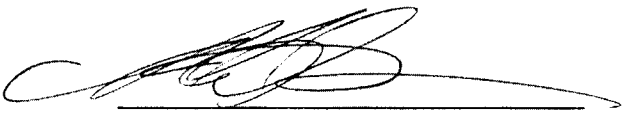
Mr. Kisenwether from WCH stated that they use staff augment people because they do not have enough resources to perform their scope of work and they must bring in specialized personnel. RP 449. In addition, Dan Elkins, who requests these services, stated that he just makes the request and although there maybe a penalty regarding work for small

businesses, it is not his focus. RP 491. There is no motive to steal public money that is meant for small businesses, but rather WCH's main goal is to perform its duties as efficiently as possible, which at times requires the use of staff augmentation. Further, as plaintiff states in his Petition, parties are allowed freedom of contract.

VI. CONCLUSION

The overall issue in this case was who had control over Mr. Basehore's daily activities while he worked at WCH. The trial court, the jury and the Court of Appeals correctly found that WCH had this responsibility at the time of the accident. This Petition should be denied because the Court of Appeals is not in conflict with its precedent or this Court. This case does not raise an issue of public concern as neither of the respondents was guided by deceit. Based on the foregoing reasons, BSI respectfully request that this Court deny Plaintiff's Petition for Review.

Respectfully submitted this 28th day of October 2015.



MARK J. DYNAN, WSBA # 12161
MAURA MCCOY, WSBA # 48070

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 29, 2015, I caused to be served upon the following parties, a copy of the document entitled ANSWER TO PETITION FOR REVIEW:

Melton L. Crawford
Law Office of Mel Crawford
705 2nd Ave., Suite 1500
Seattle, WA 98104-1796
(206) 622-1604 Telephone
(206) 343-3961 Fax
melcrawford@melcrawfordlaw.com
[X] Via ABC Legal

David Whedbee
MacDonald Hoague & Bayless
705 Second Avenue, Suite 1500
(206) 622-1604
(206) 343-3961
davidw@mhb.com
[X] Via ABC Legal

Douglas K. Weigel
Amber L. Pearce
Floyd, Pflueger & Ringer, PS
200 West Thomas St., #500
Seattle, WA 98119-4296
(206) 441-4455 Telephone
(206) 441-8484 Fax
dweigel@floyd-ringer.com
apearce@floyd-ringer.com
[X] Via ABC Legal

I certify under penalty of perjury under the Laws of the State of Washington that the foregoing is true and correct.

Dated at Tacoma, Washington, this 29th day of October 2015.

By: Taylor Kindred
Print Name: Taylor Kindred, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Taylor Kindred
Cc: Mark Dynan; Maura McCoy; Annie Akamatsu
Subject: RE: Our File No.: 5940; Filing by Attachment to E-mail; Answer to Petition for Review

Received on 10-29-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Taylor Kindred [mailto:tkindred@dynanassociates.com]
Sent: Thursday, October 29, 2015 3:16 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Mark Dynan <mdynan@dynanassociates.com>; Maura McCoy <mmccoy@dynanassociates.com>; Annie Akamatsu <aakamatsu@dynanassociates.com>
Subject: Our File No.: 5940; Filing by Attachment to E-mail; Answer to Petition for Review
Importance: High

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SUPREME COURT NO.

COURT OF APPEALS NO. 32179-7

DEAN WILCOX,
Petitioner,

vs.

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

ANSWER TO PETITION FOR REVIEW

Mark J. Dynan, WSBA #12161
Maura McCoy, WSBA#48070
DYNAN & ASSOCIATES, P.S.
Suite 400, Building D

2102 North Pearl Street
Tacoma, WA 98406-1600
(253) 752-1600
mdynan@dynanassociates.com
Attorneys for Respondent Bartlett Services, Inc.

J. Taylor Kindred
Legal Assistant

DYNAN & ASSOCIATES
2102 North Pearl Street | Suite D - 400 | Tacoma, WA 98406-2550
☎: (253) 752-1600 | 🖷: (253) 752-1666 | 🌎: www.DynanAssociates.com
☎ Toll Free: (877) 797-1600