

No. 41765-1-II

DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

IGNACIO CANO-GARCIA and MARIBEL CANO, husband and wife,  
and the marital community comprising thereof,

Appellants/Plaintiffs

v.

KING COUNTY, WASHINGTON, a local government entity in the State  
of Washington and JACOBS CIVIL INC., a Missouri corporation,

Respondents/Defendants

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT  
(Hon. Elizabeth Martin)

**BRIEF OF RESPONDENT JACOBS CIVIL INC.**

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## I. INTRODUCTION

Respondent King County retained Kenny/Shea/Traylor (“KST”) to be the general contractor on one phase of a multi-billion dollar regional wastewater treatment facility construction project. King County gave KST sole authority over the manner in which it completed the work and jobsite safety, including compliance with the Washington Industrial Safety and Health Act (“WISHA”), RCW 49.17.060. Because KST was only one of eight general contractors working on different aspects of this massive project, King County hired Jacobs Civil Inc. (“Jacobs”), a contract management services firm, to monitor the various general contractors and make sure they stayed on-schedule, on-budget and otherwise complied with the terms of their contracts with King County.

Appellant Ignacio Cano-Garcia (“Cano-Garcia”) was an employee of KST who was injured while pouring concrete at the jobsite. On the day he was injured, like every other day he was on the job, Cano-Garcia worked under the direction and control of KST foremen and supervisors, who also were responsible for making sure that he and other employees were properly trained and equipped for safety. Apparently not satisfied with his workers’ compensation benefits, and unable to sue KST, Cano-Garcia (and his wife) sued King County and Jacobs, alleging that they were liable for his injuries under WISHA and the common law.

Because Jacobs was not the general contractor or Cano-Garcia's employer, it owed no duty to Cano-Garcia under WISHA or the common law unless it retained control over the manner in which KST performed its work. There was no such control here. Jacobs' authority was limited to monitoring KST for contract compliance, which courts have consistently found insufficient to satisfy the "retained control" doctrine. There is no evidence that Jacobs controlled KST's work or employees; no evidence that Jacobs directed KST on safety or WISHA compliance; and no evidence that Jacobs provided safety instruction or equipment to KST's employees. Jacobs could only observe and report on KST's performance and progress, but KST always remained in exclusive control of its work and jobsite safety. The trial court properly dismissed Cano-Garcia's claims against Jacobs, and this Court should as well.

## **II. COUNTERSTATEMENT OF THE ISSUES**

As it relates to Jacobs, the only relevant issue on appeal is whether Jacobs owes a duty to Cano-Garcia under WISHA or the common law where the undisputed evidence shows that (1) Jacobs was not Cano-Garcia's employer, (2) Jacobs was not the general contractor of the construction site where Cano-Garcia was injured, (3) Jacobs did not have or retain control over the manner in which KST, the general contractor and

Cano-Garcia's employer, completed its work, and (4) Jacobs' sole function was limited to performing contract compliance services.

### III. COUNTERSTATEMENT OF THE CASE

#### A. **King County's General Contractor KST Is Given Sole Control Over The Brightwater-East Project And Jobsite Safety.**

King County contracted with KST to be its general contractor for the construction of the Brightwater Conveyance System – East (the "Project"), part of a new \$1.8 billion regional wastewater treatment facility system that will serve portions of King and Snohomish counties. CP 148 (Maday Decl., ¶ 2). KST was in charge of constructing portions of the pipeline being built in underground tunnels throughout the region. CP 149 (Maday Decl., ¶¶ 2 & 3). Cano-Garcia was an employee of KST and, as discussed below, was injured while working under KST's supervision at the Project jobsite. *Id.* (¶ 3). KST substantially completed its contract in July 2010. CP 299 (Maday Depo. at 41:10-17).

KST had complete control over the manner in which it managed and completed the Project, and sole responsibility to control and supervise the day-to-day work of its employees and its subcontractors. CP 149 (Maday Decl., ¶¶ 5 & 7). This was reflected expressly in the contract between King County and KST, which provided:

The Contractor shall supervise and be solely responsible for the proper performance of the Work in accordance with the Contract, including the construction means, methods,

techniques, sequences, procedures, and for coordination of all portions of the Work.

CP 159 (§ 3.1(A)). KST's control included exclusive authority over jobsite safety and sole responsibility to ensure adherence with health and safety laws. Here too, the KST contract was unambiguous:

The Contractor shall be responsible for conditions of the Site, including safety of all persons and property, during performance of the Work. The Contractors shall maintain the Site and perform the Work in a manner which meets all statutory and common law requirements ... for the provision of a safe place to work and which adequately protects the safety of all persons and property on or near the Site.

CP 437 (§ 3.19(A)). KST was "responsible for initiating, maintaining and supervising all safety precautions and programs, including adequate safety training, in connection with the work"(*id.* (§ 3.19(B))), and for conducting a "weekly safety meeting with all Subcontractors and others on the Site ... to discuss general and specific safety matters ..." CP 114 (§ 3.21(B)).

Indeed, the KST contract had a "Health and Safety" addendum that "specifies procedures for complying with applicable requirements, laws, and regulations related to worker and the public safety and health." CP 163 (§ 1.01(A)). That section reiterated that KST was "solely responsible for identifying and determining all safety codes, standards and regulations that are applicable to the work," and "employing adequate safety measures and taking all other actions reasonably necessary to protect the life, health

and safety of the public ....” *Id.* (§ 1.01(B) & (D)). This was also reflected in yet another section of the parties’ contract, which provided:

The Contractor shall have the “**right to control**” and bear the sole responsibility for the job site conditions, and job site safety. The Contractor shall comply with all applicable federal, state, and local safety regulations governing the job site, employees and subcontractors. The Contractor shall be responsible for subcontractor’s compliance with these provisions.

CP 113 (§ 1.09; bold in original). KST appointed a Health and Safety Officer, created an accident prevention plan and a site specific health and safety plan. CP 441-442 (§§ 1.03-1.06). King County incentivized KST to create a safe jobsite through a safety incentive program. CP 219-223.

At the same time, King County’s contract with KST made it clear that, “[i]t is not the intent of the County to develop, manage, direct, and administer the safety and health programs of contractors or in any way assume the responsibility for the safety and health of their employees.” CP 163 (§ 1.01(A)). The contract spelled this out again in connection with the “Safety Program” that KST was required to maintain for the Project:

The Contractor shall prepare and provide to the County a written site specific “Safety Program” demonstrating the methods by which all applicable safety requirements of this Contract will be met. The Contractor shall ensure its Subcontractors and Suppliers have a written “Safety Program” or formally adopt the Contractor’s site specific “Safety Program.” ... *The County’s review of such programs shall not be deemed to constitute approval or acceptance thereof and shall not relieve or diminish the Contractor’s sole responsibility for Site safety.*

CP 114 (§ 3.21(A); bold added). The KST contract likewise specified that, “[t]he County’s inspection of the Work or presence at the Site does not and shall not be construed to include review of the adequacy of the Contractor’s safety measures in ... the Work.” CP 334 (§ 3.19(A)).

Cano-Garcia’s testimony confirmed KST’s control and supervisory authority over the Project and employee safety. Cano-Garcia testified that KST held a meeting each morning at which KST foremen would instruct the employees where they were to work that day. CP 416-417 (Cano-Garcia Depo. at 76:20-25; 77:1-8). KST also held safety meetings each morning, which were run exclusively by KST. CP 418 (*id.* at 78:3-14). Once the employees got to their particular worksite for the day, it was KST supervisors and crew leaders who told them what to do. CP 417 (*id.* at 77:12-21). If employees needed safety equipment, it was KST personnel who would provide it. CP 415-416 (*id.* at 75:19-76:7). And, if employees were doing something unsafe, it was KST foremen who would correct the issue. CP 417-418 (*id.* at 77:22-78:2).

**B. King County Hires Jacobs To Perform Contract Management Services On The Brightwater-East Project.**

Because construction of the Brightwater treatment facility is a highly complex, multi-site, multi-contract project, King County retained Jacobs, an engineering and construction management firm, to ensure KST’s compliance with the Project contract. CP 149 (Maday Decl., ¶ 6);

CP 118 (Critchfield Decl., ¶ 2); CP 296 (Maday Depo. at 31:1-7). King County also hired Jacobs to perform the same management function with respect to many of its other Brightwater contracts, each of which entails a different general contractor building different aspects of the conveyance system and facility. CP 247; CP 298 (Maday Depo. at 38:11-40:10).

Jacobs did not supervise KST's (or subcontractors') employees or control the manner in which KST accomplished its work on the Project; it merely monitored the work to ensure that it proceeded as scheduled and conformed to the contract. CP 119 (Critchfield Decl., ¶¶ 2 & 3); CP 149 (Maday Decl., ¶ 6). Unlike KST's contract—which gave KST the “right to control” and “sole responsibility” over jobsite safety—Jacobs was only required to monitor KST's compliance with those provisions:

[Jacobs'] safety expert will make periodic visits to project work sites, attend monthly safety meetings and work with the construction contractors' safety staff to insure compliance with all safety requirements of the contracts.

CP 235; CP 371 (Critchfield Depo. at 85:6-14).<sup>1</sup> Jacobs' other duties included cost control and estimating, design review, community relations,

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<sup>1</sup> The contract between King County and Jacobs required Jacobs to create a safety program for King County and Jacobs employees. CP 235. That responsibility did not extend to KST or its subcontractors. CP 328 (Maday Depo. at 173:24-174:21); CP 356-357 (Critchfield Depo. at 25:1-27:1); CP 367-368 (*id.* at 69:21-70:17). In contrast, the contract between King County and KST required KST to create a safety plan that covered not only KST's employees, but the employees of every entity on site.

schedule tracking, contract and field inspection services. CP 118-119 (Critchfield Decl., ¶ 2); CP 355 (Critchfield Depo. at 10:11-11:19); CP 225-245 (King County / Jacobs contract).

While Jacobs' duties included inspections, the inspections focused exclusively on whether KST complied with the terms of King County's contract. CP 119 (Critchfield Decl., ¶ 3); CP 356 (Critchfield Depo. at 24:1-25). As it related to jobsite safety, if Jacobs' inspectors saw an issue, they could point it out to KST supervisors on-site and recommend action, but—subject to the limited exception discussed below—all they could do was observe and document the issue in a safety report that was subsequently transmitted to King County. CP 315 (Maday Depo. at 110:16-111:8); CP 465-468 (Critchfield Depo. at 31:24-32:20; 41:6-42:12); CP 371 (*id.* at 85:6-14); *e.g.*, CP 265-280.<sup>2</sup>

Under no circumstance did Jacobs have authority to enforce any safety requirement or direct KST to take action; it was up to KST to decide whether to address an issue, if at all. Only in the rare case where an issue risked imminent injury or death could Jacobs or King County direct KST to stop work on the Project until KST took action to address the issue. CP 468 (Critchfield Depo. at 42:8-19); CP 368-369 (*id.* at 73:9-

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<sup>2</sup> KST submitted plans and other required documentation to King County through an networked project communication system called "Constructware." CP 306-307 (Maday Depo. at 73:15-74:2).

77:18); CP 325-326 (Maday Depo. at 163:16-168:6); CP 330 (*id.* at 182:22-183:17); CP 347-348 (Krier Depo. at 67:19-70:7).<sup>3</sup> Finally, and similarly, Jacobs had no authority to determine whether KST properly trained and equipped its employees, or reported safety incidents. CP 468-470 (Critchfield Depo. at 42:6-20-44:18).

Cano-Garcia confirmed that he saw Jacobs representatives doing inspections from time to time, but nothing else. CP 419 (Cano-Garcia Depo. at 79:11-15). If the inspectors saw a safety issue (such as an employee not wearing safety glasses), they would point it out to KST and raise the issue at KST's safety meetings, but "[t]hey did not give us any orders." CP 420 (*id.* at 80:1-19); CP 415 (*id.* at 75:6-18). By the same token, if KST employees had a safety issue to report, they would go to a KST supervisor or safety person, not to any Jacobs inspector that happened to be on-site that day. CP 454 (*id.* at 80:20-23).

Similarly, Jacobs could review KST's documentation (including those related to site safety) to determine if they complied with contract requirements and could comment on KST's plans, but Jacobs had no authority to accept or reject any plans—only King County had that authority. CP 395-396 (Maday Depo. at 62:16-63:1; 63:19-22); CP 305

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<sup>3</sup> Indeed, on one occasion, when Jacobs pointed out a safety issue to a KST supervisor, he responded that he would "protect his employees any way he sees fit." CP 341-342 (Krier Depo. at 45:22-47:17).

(*id.* at 70:16-72:24); CP 461-465 (Critchfield Depo. at 27:2-31:23). Even then, however, neither King County nor Jacobs could revise KST's plans; if King County rejected a plan or requested a revision, it was still exclusively up to KST to determine how to address the issue, if at all. CP 397-399 (Maday Depo. at 64:24-65:8; 68:3-19); CP 463-465 (Critchfield Depo. at 29:22-31:4); CP 337 (Krier Depo. at 24:14-19).

**C. Cano-Garcia Is Injured Pouring Concrete Under KST's Supervision At The Brightwater-East Project.**

Cano-Garcia suffered injuries while pouring concrete at the Project jobsite on December 5, 2008. CP 57. KST supervisor Joe Romo oversaw the concrete work that day and showed Cano-Garcia and other employees what to do. CP 401-405 (Cano-Garcia Depo. at 39:16-25; 40:19-42:2; 43:9-14). Romo was "in charge." CP 407 (*id.* at 45:11). Cano-Garcia was equipped with boots and rain pants provided by KST, but asked Romo whether he could use longer waders; Romo told Cano-Garcia he didn't have a key to the room where they were stored, so the employees simply duct taped the top of their boots to their pants. CP 408-409 (*id.* at 46:14-48:2). After giving instructions, Romo left the scene—leaving the employees without supervision. CP 406 (*id.* at 44:3-25).

Cano-Garcia didn't realize that the concrete had penetrated his clothes until after the work was done and he had removed his clothes. CP 411 (*id.* at 49:11-24). After Cano-Garcia went home, and realized the

extent of his injuries, he called KST's safety personnel for help. CP 377-378 (*id.* at 52:9-54:4). When Cano-Garcia went to work the next day, a KST supervisor ordered a KST employee to take him to the hospital. CP 379 (*id.* at 58:20-59:6). Indeed, Jacobs didn't learn about the incident until days later, and Jacobs knew the details only from an incident report which KST prepared. CP 342-343 (Krier Depo. at 49:9-50:10); CP 359-360 (Critchfield Depo. at 37:19-38:4); CP 122-124 (KST incident report).

**D. Cano-Garcia Files Suit Against King County And Jacobs.**

Even though KST controlled the jobsite generally and employee safety specifically, and KST's supervisor directly oversaw Cano-Garcia's activities the day he was injured, Cano-Garcia could not sue KST. *See* RCW 51.04.010 *et seq.* (Industrial Insurance Act). So Cano-Garcia sued King County and Jacobs instead. CP 54-65 (First Amended Complaint). Cano-Garcia alleged that King County and Jacobs performed the functions of a general contractor and retained the right to control the manner in which KST's employees completed their work and, therefore, King County and/or Jacobs were liable for violation of WISHA and common law negligence. *Id.* Both defendants denied liability CP 74-85; CP 86-97.

King County and Jacobs separately moved for summary judgment on identical grounds. CP 98-108; CP 127-139. The defendants pointed out that while KST owed WISHA and common law duties to Cano-Garcia,

as both general contractor and Cano-Garcia's employer, the same was not true for King County or Jacobs; neither functioned as a general contractor, nor did they retain control or supervisory authority over the worksite or the manner in which KST performed its work or ensured worker safety. *Id.* Cano-Garcia opposed the motions simultaneously, arguing that there were sufficient facts from which a jury could find that King County and Jacobs had the right to control KST's work and the "innate supervisory authority of a general contractor." CP 165-188.

The trial court heard argument on the motions, and agreed with King County and Jacobs. In granting the motions, the court stated:

I'm granting summary judgment for both King County and Jacobs. I do not believe there are material issues of fact as to the retained control over the manner and means by which safety is implemented.

The contract has express language to that effect. Moreover, there are no facts from Mr. Cano-Garcia or that I saw in the record that would indicate that either King County or Jacobs asserted actual control over his safety.

All safety meetings were conducted by KST. They're the ones that provided the personal protective equipment.

They're the ones he looked to for his safety. They are the general contractor in this scenario.

RP (2/4/2011) at 27. The Court entered orders granting both defendants summary judgment, and dismissing all claims against King County and Jacobs. CP 478-479; CP 480-482. Cano-Garcia appealed.

#### IV. ARGUMENT

##### A. The Standard Of Review Is *De Novo*.

This Court reviews a summary judgment *de novo*, engaging in the same inquiry as the trial court and viewing all facts and reasonable inferences in the light most favorable to the nonmoving party. *Neil v. NWCC Invest. V, LLC*, 155 Wn. App. 119, 124, 229 P.3d 837 (2010) (citing *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 394, 823 P.2d 499 (1992)). Summary judgment is appropriate when the pleadings, affidavits, depositions, and admissions show that there is no genuine issue of material fact and reasonable minds can reach only one conclusion from the record. *Id.* at 124-125; CR 56(c). The appellate courts have affirmed summary judgment where, as here, the plaintiff fails to show that the defendant retained sufficient control over the jobsite to create a duty under WISHA or the common law. *Id.* at 132; *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 52 P.3d 472 (2002). This Court should do the same.

##### B. The Trial Court Properly Concluded That Jacobs Owed No Statutory Duty To Cano-Garcia Under WISHA.

Jacobs owes no duty to Cano-Garcia under WISHA because Jacobs was not the general contractor of the Project, nor did it have control or supervisory authority over KST's work or jobsite safety. King County hired Jacobs to carry out contract management services on a multi-site, multi-contract and multi-billion dollar public construction project. Those

limited contract compliance responsibilities do not and should not subject Jacobs with far-reaching WISHA liability.

**1. Only General Contractors And Entities That Exercise Analogous Control And Supervisory Authority Over The Jobsite Owe WISHA Duties To Employees.**

General contractors have a non-delegable duty to all employees at a jobsite to ensure compliance with WISHA regulations. *See Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 457-58, 788 P.2d 545 (1990); RCW 49.17.060(2).<sup>4</sup> This is so because general contractors “have greater practical opportunity and ability to insure compliance with safety standards” and, therefore, stand “in the best position, financially and structurally, to ensure WISHA compliance or provide safety equipment to workers.” *Kamla*, 147 Wn.2d at 124 (*quoting Stute*, 114 Wn.2d at 462) (internal quotes and citation omitted). As a result, “jobsite owners may reasonably rely on the contractors they hire to ensure WISHA compliance because those jobsite owners cannot practically instruct contractors on how to complete the work safely and properly.” *Id.* at 124-125.

In *Kamla*, the Supreme Court concluded that the *Stute* rule does not automatically apply to owners and others at the jobsite. It reasoned:

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<sup>4</sup> Subcontractors and other employers on a jobsite also owe concurrent duties under WISHA to their own employees. *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 912 P.2d 472 (1996); *Stute*, 114 Wn.2d at 457; RCW 49.17.060(1). This duty is not implicated in this case; Cano-Garcia was not an employee of either King County or Jacobs.

[J]obsite owners ... do not necessarily have a similar degree of knowledge or expertise about WISHA compliant work conditions. ... Because jobsite owners may not have knowledge about the manner in which a job should be performed or about WISHA compliant work conditions, it is unrealistic to conclude all jobsite owners necessarily control work conditions.

*Id.* at 124. The *Kamla* court therefore held that if an owner “does not retain control over the manner in which an independent contractor completes its work, the jobsite owner does not have a duty under WISHA[.]” *Id.* at 125. Before and after *Kamla*, courts have consistently refused to impose WISHA duties on owners, developers and others who, unlike a general contractor, lack “innate supervisory authority” over the jobsite. *Neil*, 155 Wn. App. at 132; *Morris v. Vaagen Bros. Lumber, Inc.*, 130 Wn. App. 243, 125 P.3d 141 (2005); *Shingledecker v. Roofmaster Prods. Co.*, 93 Wn. App. 867, 971 P.2d 523 (1999); *Craig v. Wash. Trust Bank*, 94 Wn. App. 820, 976 P.2d 126 (1999).

The *Stute* rule extends beyond general contractors only in the limited situation where an owner, developer or other business entity functions as a general contractor or otherwise has the same degree of authority over a contractor’s work. *Doss v. ITT Rayonier, Inc.*, 60 Wn. App. 125, 803 P.2d 4 (1991); *Weinert v. Bronco Nat. Co.*, 58 Wn. App. 692, 795 P.2d 1167 (1990). “[T]he question is whether the business entity retains such control or supervisory authority over the performance of the

subcontractor's work as to be analogous to a general contractor.” *Afoa v. Port of Seattle*, --- Wn. App. ---, 247 P.3d 482, 489 (2011). Drawing on reasoning developed from the common law, discussed below, courts refuse to find such authority where, as here, the defendant's duties were limited to monitoring contract compliance. *Neil*, 155 Wn. App. at 129.

**2. Jacobs Did Not Have Control Or Supervisory Authority Over The Manner In Which KST Completed Its Work Or Determined Jobsite Safety.**

The undisputed facts show that Jacobs had insufficient control or supervisory authority over the manner in which KST performed its work to be deemed analogous to a general contractor, and that Jacobs' duty was limited to monitoring KST's contract compliance. There is no evidence that Jacobs directed KST's work or employees; no evidence that Jacobs directed KST regarding jobsite safety or WISHA compliance; and no evidence that Jacobs provided safety instruction or equipment to employees generally or Cano-Garcia specifically. Jacobs could only observe, report and comment on KST's work and safety plans, but KST—as both general contractor and Cano-Garcia's employer—retained exclusive control over work and safety on the Project.

King County's contract with KST gave KST sole responsibility in both respects. KST was required to “supervise and be **solely responsible** for the proper performance of the Work[.]” CP 159 (emphasis added). At

the same time, KST was “responsible for ... safety of all persons and property, during performance of the Work,” and to “perform the Work in a manner which meets all statutory and common law requirements[.]” CP 437. Indeed, the parties’ intent could not be clearer; using language taken from Washington case law, they specified that:

[KST] shall have the **“right to control”** and bear the sole responsibility for the job site conditions, and job site safety. The Contractor shall comply with all applicable federal, state, and local safety regulations governing the job site, employees and subcontractors.

CP 113 (bold in original). King County’s contract with Jacobs contained no similar terms; Jacobs had no authority over how KST performed the work and, regarding safety, Jacobs’ authority was limited to monitoring KST’s compliance with the safety requirements of KST’s contract with King County. CP 235 (Jacobs will “work with [KST’s] safety staff to insure compliance with all safety requirements of the [KST] contracts”).

Undisputed testimony from King County and Jacobs confirmed this clear division of authority. Jacobs did not control the manner in which KST did its work or oversaw jobsite safety. CP 119 (Critchfield Decl., ¶¶ 2 & 3); CP 149 (Maday Decl., ¶ 6). Jacobs could review KST’s safety plans and other contract documentation, but had no power to accept, reject or revise those plans. At most, Jacobs could make notes to King County (on the Constructware program) as to whether KST’s plans were

consistent with its contractual obligations, but only King County could reject KST's plans or request revisions. Even when King County did not accept a plan, it could not tell KST what to do; KST remained solely responsible for determining how to address the issue or revise the plan, if at all. CP 305 (Maday Depo. at 70:16-72:24); CP 461-465 (Critchfield Depo. at 27:2-31:23); CP 337 (Krier Depo. at 24:14-19).

The inspection process was the same. As part of its job to monitor KST's contract compliance, Jacobs observed and reported to King County KST's progress on the Project and jobsite safety. While Jacobs could make recommendations to KST supervisors, it is undisputed that Jacobs could not, and did not, direct KST to take any particular action to address a safety issue; that responsibility remained with KST. CP 315 (Maday Depo. at 110:16-111:8); CP 325-326 (*id.* at 163:16-168:6); CP 465-470 (Critchfield Depo. at 31:24-32:20; 41:6-44:18); CP 369 (*id.* at 76:3-77:18); CP 347-348 (Krier Depo. at 67:19-70:7). Only if Jacobs saw a safety violation that posed an imminent risk of death or injury could it direct KST to stop work (something that never happened)—but, even then, it would be up to KST to determine how to resolve the issue. *Id.*

Cano-Garcia offered no testimony from KST or anybody to show that Jacobs “retain[ed] control over the manner in which [KST] completes its work,” as was his burden. *Kamla*, 147 Wn.2d at 125. Indeed, Cano-

Garcia's testimony showed that KST exclusively controlled work and safety on the Project. He testified that KST told employees where to work and what to do each day; KST oversaw job safety and ran the safety meetings; KST provided safety equipment; and Jacobs' inspectors could make recommendations, but "did not give us any orders." CP 415-420 (Cano-Garcia Depo. at 75:6-78:14; 80:1-19; 80:20-23). Of course, it was KST who supervised Cano-Garcia's work and safety, and to whom Cano-Garcia looked for help, the day he was injured. CP 401-411 (*id.* at 39:16-42:2; 43:9-45:11; 46:14-48:2; 49:11-24); CP 377-378 (*id.* at 52:9-54:4). In short, Cano-Garcia failed to bring forward any facts to show that Jacobs acted as a general contractor, or controlled work or safety at the Project.

Finally, not only are there insufficient facts to support imposing WISHA duties on Jacobs here, but doing so would be bad public policy. Municipalities, like King County, rely on contract management firms to help administer large and complex public works projects because they lack the resources or expertise to do so themselves. When a municipality hires a company like Jacobs, there is no expectation that the municipality or its consultant will supplant the general contractor's exclusive control over jobsite safety. After all, the general contractor is still "in the best position, financially and structurally, to ensure WISHA compliance[.]" *Kamla*, 147 Wn.2d at 124 (*quoting Stute*, 114 Wn.2d at 462). This much is clear from

KST's contract, which repeatedly notes that King County's (or its consultants') inspections and reviews for contract compliance "shall not relieve or diminish [KST's] sole responsibility for Site safety." CP 114 (§ 3.21(A); *also* CP 163 (§ 1.01(A); CP 334 (§ 3.19(A).

A municipality should be free (and, perhaps, encouraged) to retain contract management firms—for the benefit of the public works, if not the public fisc—without risk of subjecting itself or its consultant to potential liability. It is unnecessary to impose WISHA duties on the municipality or the consultant to ensure jobsite safety where, as here, a general contractor has exclusively assumed that role and the consultant's function is limited to contract compliance. Indeed, if WISHA liability could extend to King County and Jacobs in this case, it may have the perverse effect of making jobsites *less safe*; that is, municipalities (and other site owners/developers) may refrain from scrutinizing the general contractor's compliance with safety requirements to avoid inadvertently assuming responsibility for those same requirements themselves. The result would be less oversight—contrary to the very policies underlying the *Stute* rule. Cano-Garcia's WISHA claim fails for this reason as well.

**C. The Trial Court Properly Concluded That Jacobs Owed No Common Law Duty To Cano-Garcia.**

In addition to WISHA, Cano-Garcia alleged that Jacobs was liable for common law negligence. CP 62-63. It is well-established that an

entity that hires an independent contractor is not liable for the injuries of the contractor's employees because the entity does not control the manner in which the contractor directs its employees. *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 330, 582 P.2d 500 (1978). Like WISHA, however, an exception exists where the entity "retains control" over some part of the contractor's work. *Id.* at 330. The test for control is:

... whether there is a retention of the right to direct the manner in which the work is performed, not simply whether there is an actual exercise of control over the manner in which the work is performed.

*Kamla*, 147 Wn.2d at 121; *also Kelley*, 90 Wn.2d at 330-331. "When determining whether the right to control exists, a court can consider such factors as the parties' conduct and the terms of their contract." *Morris*, 130 Wn. App. at 251; *also Hennig v. Crosby Group, Inc.*, 116 Wn.2d 131, 134, 802 P.2d 790 (1991) (terms of the parties' contract and conduct showed that owner did not retain control over independent contractor).

There is, however, a critical distinction between the right to control the contractor's work and the right to monitor the contractor for contract compliance. The former, but not the latter, imposes common law liability. "The retention of the right to inspect and supervise to insure the proper completion of the contract does not vitiate the independent contractor relationship." *Hennig*, 116 Wn.2d at 134 (citation omitted). In *Kamla*, the Supreme Court adopted the Restatement's approach:

[T]he employer must have retained at least some degree of control over the manner in which the work is done. ***It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations.*** Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

147 Wn.2d at 121 (*quoting* Restatement (Second) of Torts § 414, cmt. c (1965)) (emphasis added); *see also* *Bozung v. Condo. Builders, Inc.*, 42 Wn. App. 442, 447, 711 P.2d 1090 (1985) (the “right to order the work stopped or to control the order of the work or ... to inspect the progress of the work do[es] not mean that the general contractor controls the method of the subcontractor’s work”).

For the same reasons discussed above, Jacobs did not retain control over the manner in which KST did its work, much less did it “undertake responsibility for the safety of [KST’s] employees.” *Hennig*, 116 Wn.2d at 134. The undisputed evidence shows that KST had sole control over its work and jobsite safety. Jacobs’ role, on the other hand, was “to inspect its progress ..., [and] to make suggestions or recommendations which need not necessarily be followed,” none of which gives rise to common law duties as a matter of law. *Kamla*, 147 Wn.2d at 121. The same is true for the one instance where Jacobs could actually order KST to do

something—to stop work to prevent imminent death or injury. *Id.* (“[i]t is not enough that he has merely a general right to order the work stopped”); *Bozung*, 42 Wn. App. at 447 (same). This Court should also affirm the trial court’s dismissal of Cano-Garcia’s common law claim.

**D. Washington Caselaw Does Not Support Extending WISHA Or Common Law Duties To A Contract Management Firm.**

No Washington case has extended the *Stute* rule or common law duties regarding jobsite safety to a contract management firm, like Jacobs, hired by a jobsite owner to monitor a contractor’s compliance with the terms of its separate contract with the owner. Indeed, no Washington case has imposed WISHA or common law duties on an owner where, as here, the owner hired a general contractor who—by contract and operation of the *Stute* rule—had sole control over the work and jobsite safety. On the contrary, every case in which a duty to ensure jobsite safety was extended beyond the plaintiff’s employer, the evidence showed that the defendant retained control over the means and methods of the employer’s work.

Specifically, courts have imposed WISHA or common law duties on jobsite owners who—in the *absence* of a general contractor—assumed the role of, and retained the same control as, a general contractor. *See Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 247, 85 P.3d 918 (2004) (owner “retained control over the manner in which [contractor] completed its work, especially in the area of safety”); *Phillips v. Kaiser*

*Aluminum & Chemical Corp.*, 74 Wn. App. 741, 752-753, 875 P.2d 1228 (1994) (owner “was in charge of the way in which the work was done” and “routinely gave direction to the workers on safety related matters”); *Doss*, 60 Wn. App. at 128 (“owner of the site ... had innate supervisory authority that gave it control over the workplace”); *Weinert*, 58 Wn. App. at 697 (owner’s “position is so comparable to that of the general contractor in *Stute* that the reasons for the holding in *Stute* apply here”). As discussed above, no evidence supports such a finding here.

This case is also easily distinguished from *Afoa v. Port of Seattle*, *supra*, upon which Cano-Garcia relies. In *Afoa*, the court of appeals found genuine issues of material fact on whether the Port retained control over its independent contractor. But, unlike here, the parties’ contract required the contractor to follow the Port’s regulations regarding the details of the contractor’s operations. Those regulations required employees to “comply with written or oral instructions issued by the [Port],” and provided that the Port was “empowered to issue such other instructions as may be deemed necessary for the safety and well-being of Airport users or otherwise in the best interests of the Port.” Finally, the employee and his supervisor both testified that the Port retained “exclusive control” over the work area, and that they had to obey Port directives. 247 P.3d at 486-88.

There is no similar evidence here—and no testimony from KST or Cano-Garcia that Jacobs had any kind of control over the work area or safety.

This case is more like *Neil v. NWCC Investments, supra*. In *Neil*, the owner, NWCC, hired B&B to be general contractor on a development project. After an employee of one of the project’s subcontractors, Green Valley, was injured, he sued both NWCC and B&B. B&B settled, and the trial court dismissed the claims against NWCC. In affirming, the court of appeals held that plaintiff presented no evidence that NWCC retained the right to control the manner in which Green Valley or plaintiff performed their work. 155 Wn. App. at 128. Rather, “the undisputed evidence shows that B&B Construction controlled [plaintiff’s] jobsite performance and that NWCC ... was solely concerned with contract compliance.” *Id.* at 129. This case is no different: the undisputed evidence shows that KST, as general contractor, controlled work and safety on the jobsite, while Jacobs was solely concerned with contract compliance. For this reason too, the trial court’s grant of summary judgment should be affirmed.

**E. Cano-Garcia Waived His Business Invitee Theory.**

Although the trial court did not consider the issue, Cano-Garcia also raises as an issue on appeal, “whether King County and Jacobs breached duties owed by a possessor of land to a ‘business visitor’ invitee.” Appellants’ Br. at 4. Cano-Garcia directs his entire argument on

this issue to King County, and does not once argue that Jacobs owed any such duty to Cano-Garcia. *Id.* at 45-47. Because Cano-Garcia has made no argument, nor cited any authority, to support a premises liability claim against Jacobs, Cano-Garcia has waived that issue as to Jacobs on appeal. *See* RAP 10.3(a)(6); *Collins v. Clark County Fire Dist. No. 5*, 155 Wn. App. 48, 95-95, 231 P.3d 1211 (2010).

Indeed, Cano-Garcia waived the issue generally by failing to raise it below. Cano-Garcia devoted a single, conclusory, allegation in his complaint to premises liability, as against both King County and Jacobs. CP 62-63, ¶¶ 6.16, 6.24. But when King County and Jacobs moved for summary judgment on all claims, Cano-Garcia did not oppose summary judgment on this theory (or even mention it in his brief), nor did he submit any testimony or other evidence to support such a claim. CP 165-384. Since Cano-Garcia did not argue or support this claim in the trial court, he abandoned it, and cannot raise it for the first time on appeal. RAP 2.5(a); *Green v. Normandy Park*, 137 Wn. App. 665, 687, 151 P.3d 1038 (2007) (contention that was pled, but not raised in opposition to summary judgment, cannot be considered for first time on appeal). Cano-Garcia's abandoned business invitee theory provides no basis for reversal.<sup>5</sup>

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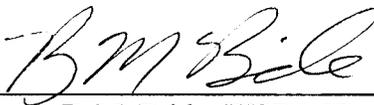
<sup>5</sup> Cano-Garcia's brief also includes discussion of several ancillary issues—such as whether Jacobs was an agent of King County (Appellants' (continued . . .))

## V. CONCLUSION

The trial court properly concluded that Jacobs owed no duty to Cano-Garcia under WISHA or the common law because Jacobs did not retain control over KST's work or jobsite safety. Jacobs' responsibility was limited to monitoring contract compliance, which cannot give rise to such liability as a matter of law. Cano-Garcia abandoned his business invitee theory by not preserving the issue below and, in any event, he does not assert that theory against Jacobs on appeal. The order granting Jacobs summary judgment should be affirmed.

RESPECTFULLY SUBMITTED this 13th day of May, 2011.

LANE POWELL PC

By   
Ryan P. McBride, WSBA No. 33280  
*Attorneys for Respondent Jacobs Civil Inc.*

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(. . . continued)

Br. at 24-26), whether Cano-Garcia's injuries resulted from specific WISHA violations (*id.* at 37-38), and apportionment of fault (*id.* at 47-49)—that were not litigated, considered or decided by the trial court and are not relevant to the issues on appeal. Indeed, these issues would only be relevant if King County and/or Jacobs owed a duty to Cano-Garcia under WISHA or the common law—which the trial court refused to find. This Court need not and should not reach these issues.

**CERTIFICATE OF SERVICE**

I hereby certify that on May 13, 2011, I caused to be served a copy of the attached on the following person(s) in the manner indicated below at the following address(es):

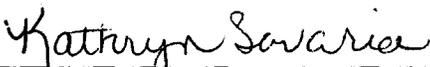
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