

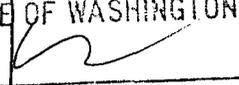
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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

No. 43894-1-II

Pierce County Superior Court Cause No. 11-2-07869-3

BY   
DEPUTY

**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

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LANDSTAR INWAY, INC.,

Appellant,

v.

FRANK SAMROW and JANE DOE SAMROW and the marital  
community comprised thereof, OASIS PILOT CAR SERVICE LLC and  
CJ CAR PILOT, INC.,

Respondents.

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**BRIEF OF RESPONDENT**

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**I. RESTATEMENT OF THE CASE**

Landstar Ranger, Inc., Landstar Inway, Inc., and Landstar Ligon, Inc. ("Landstar") entered into a six-month "Master Independent Contractor Agreement" ("Agreement") with defendant Oasis Pilot Car Service, LLC ("Oasis"), a Washington limited liability company, signed on July 20, 2009. CP 60-64. Oasis is identified as "the 'Contractor'" in the Agreement. *Id.* The contract was signed on behalf of Contractor Oasis Pilot Car Service, LLC by defendant Frank Samrow, who indicated that his title in the company was "Partner." CP 64. The Agreement signature block executed by Mr. Samrow is set out below:

**CONTRACTOR**

Company: OASIS PILOT CAR SERVICE LLC  
Signature: [Handwritten Signature]  
Print Name: FRANK SAMROW  
Title: Partner  
(Address) \_\_\_\_\_

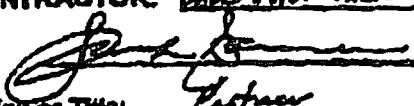
\_\_\_\_\_  
509-707-4493  
(Telephone Number)  
509-707-0043  
(Fax Number)  
26-1489960  
(Federal I.D. Number)  
OASISPILOT@NWJ.NET  
(E-mail Address)

CP 64.

The Federal identification number of Oasis is set out, as is the contact information for Oasis. No references to Mr. Samrow personally or to any other business entity appears in the signature block or within the Agreement itself.

The Agreement provided that Oasis would, if requested by Landstar, “perform escort services” for oversize truck loads being transported by Landstar. CP 60. Pursuant to the Agreement, Oasis had “complete control over the means and method of providing services required to be performed” under the Agreement. *Id.*

A separate "Route Survey Indemnity Addendum to Master Independent Contractor Agreement" was executed by the same parties at the same time. CP 65. Oasis is identified as “the ‘Contractor’” in the Addendum, and Mr. Samrow signed on behalf of Oasis, indicating that his “Office or Title” was “Partner.” *Id.* The Addendum signature block executed by Mr. Samrow is set out below:

CONTRACTOR: OASIS Pilot Car Services LLC  
By:   
Office or Title: Partner

CP 65.

Under the Addendum, Oasis agreed to indemnify and hold Landstar harmless from claims and judgments “resulting from, in whole or in part, any route survey services undertaken by the Contractor” for Landstar. CP 65. There were, however, no route survey services provided by Oasis for in the trip during which Landstar’s load sustained damage. CP 151; CP 185; CP 188. When Mr. Samrow signed the Agreement and the Addendum on behalf of Oasis, he indicated that his title was “partner,” not knowing the difference between “partner” and “member.” CP 184.

On about October 13, 2009, Landstar's truck driver Gerald Frederick called Oasis and asked for a "pole car" to lead a truck from the Canadian border through the State of Washington. CP 186. A pole car is a particular type of lead escort car with a pole attached to the front bumper which would presumably give a warning if the pole were to encounter an overhead obstruction, such as an overpass, that was too low for the pole to pass under safely. CP 47; 5/25/12 RP 4, lines 17-25; 5/25/12 RP 5, lines 1-4.

When Mr. Frederick called Oasis, Mr. Samrow happened to take the call, advised Mr. Frederick that Oasis “couldn’t handle the job,” and declined to take it. CP 186. Mr. Frederick then asked Mr. Samrow if he “knew somebody who could, and [Mr. Samrow] gave him Mr. Phil Kent’s number.” *Id.*

Phil Kent, of CJ Car Pilot, Inc., operating his own pole car, met Mr. Frederick at the Canadian border on October 14, 2009. CP 196. When they met at the border, Mr. Kent put up pole on the front of his vehicle, and the Landstar truck driver (Gerald Frederick) verified that the top of the pole was at least 6 inches higher than the top of his load. CP 195-196.

Mr. Kent proceeded to lead plaintiff's truck through Pierce County. CP 3. When he passed under the specific overpass, he reported back to plaintiff's driver that he had successfully cleared the overpass. CP 197. When plaintiff's truck went under the overpass, the load on plaintiff's truck struck the overpass, damaging both the load being transported on the truck and the overpass. CP 4. According to plaintiff's counsel, the collision was by the sole negligence of Phil Kent, driver of the pole car (CP 73) when he deviated from the assigned route. CP 75.

According to the sworn testimony of both Mr. Kent (CP 126, page 46, lines 23-24) and Mr. Frederick, the pole on Kent's vehicle was set at 6 inches higher than the top of the load on plaintiff struck. CP 195-196. According to Kent's sworn testimony, his vehicle with the pole passed under the overpass without coming into contact with it. CP 127, page 49, lines 1-8.

Unless there was a sudden shift in the earth, the cause of this collision is truly a mystery.

***Procedural Facts***

Landstar sued Mr. Samrow and his marital community, along with Oasis and CJ Car Pilot, Inc. CP 1-9. The complaint against Oasis was based on the indemnity provision of the Master Independent Contractor Agreement.

The claims against Mr. Samrow personally were based on the fact that when he signed the contract on behalf of Oasis, he identified his title at Oasis as "Partner," which Landstar claimed made him personally liable as a "partner" of a partnership between Oasis Pilot Car Services, LLC, as one partner, and Samrow as the other partner. CP 92 ("By signing the Agreement as a partner of Oasis, he held himself out as personally liable for the actions of Oasis. Partners are individually liable for the liabilities of a common law partnership.").

Mr. Samrow and his spouse, personally, answered the complaint, denying any personal liability to plaintiff, specifically denying that he had signed the Agreement as a "partner" of Oasis (CP 40), and cross-claimed against co-defendant CJ Car Pilot, Inc. for indemnification. CP 39-45. Defendant CJ Car Pilot, Inc. also answered the complaint (CP 23 – 30), but Oasis Pilot Car Service, LLC did not appear or answer.

The Samrows filed a motion for summary judgment (CP 46-56) dismissing them from the case because "there [wa]s no genuine issue of

any material fact regarding plaintiff's contractual claim of indemnity against Samrow and his marital community." CP 47. The court granted that motion on May 25, 2012. CP 227-229.

Plaintiff Landstar then filed a motion for reconsideration (CP 230-237) and a motion for leave of court to file an amended complaint against Samrow. CP 201 – 208.

The court denied both the motion for leave to amend and the motion for reconsideration by an order entered on June 22, 2012. CP 318-319.

Landstar originally filed a notice for discretionary review of both the summary judgment dismissing Samrow and the order denying the motions for reconsideration and for leave to amend complaint, on July 20, 2012. There were still matters pending against the other defendants.

On July 25, 2012, Landstar took a default judgment against Oasis Pilot Car Service, LLC, (CP 320-322) and on that same date entered a stipulated order dismissing its complaint against CJ Car Pilot, Inc. CP 323-325.

Landstar timely filed a notice of appeal on August 23, 2012, seeking review of the trial court's grant of the Samrows' Motion for Summary Judgment and the trial court's denial of Landstar's Motion for Leave to Amend and Denying Motion for Reconsideration. CP 326-333.

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## II. ARGUMENT

### A. Standards of Review

This Court reviews a trial court's decision to grant or deny a motion for reconsideration and a motion to amend for abuse of discretion. *Drake v. Smersh*, 122 Wn. App. 147, 151, 89 P.3d 726 (2004); *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). A trial court abuses its discretion if its decision is manifestly unreasonable or rests on untenable grounds or reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

*Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 99, 38 P.3d 1040 (2002) (citing *Littlefield*, 133 Wn.2d at 46-47, 940 P.2d 1362).

This Court reviews a summary judgment de novo, conducting the same inquiry as did the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The facts, and all reasonable inferences to be drawn from them, are viewed in the light most favorable to the nonmoving party. *Id.* If there is no genuine issue of material fact, summary judgment will be granted if the moving party is entitled to judgment as a matter of

law. *Id.*; *Trimble v. Wn. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000). A “material fact” is one upon which the outcome of the case depends. *Atherton Condo. Apartment-Owners Ass’n Bd. Of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

On the issue of corporate disregard, summary decisions in favor of a corporation are appropriate if the injured plaintiff fails to present substantial evidence to support the elements. *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 398, 47 P.3d 556 (2002) (summary judgment); *Rogerson v. Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 924, 982 P.2d 131 (1999) (facts underlying corporate disregard are reviewed for substantial evidence).

**B. The trial court correctly found that Mr. Samrow’s signature did not make him a “partner” with Oasis, rendering him personally liable for Landstar’s damages.**

Landstar attempted to convince the trial court that Frank Samrow’s descriptive word “partner” following his signature on the Agreement and the Addendum created a third contracting “partnership” entity and rendered him personally liable for Landstar’s damages as a “partner of Oasis.” “By signing the Agreement as a partner of Oasis, he held himself out as personally liable for the actions of Oasis.” CP 92. Landstar repeats this argument on appeal. *See* Brief of Appellant, page 13 (“Frank Samrow

entered into the . . . Agreement ... with Landstar as a partner of Oasis. This indicated that he would be personally liable for any damages independently as a partner.”)

1. As a matter of law, indicating his title in Oasis was “Partner” did not render Mr. Samrow personally liable for Landstar’s damages.

In this case, the Agreement and the Addendum clearly contemplate only two contracting entities: the “Companies,” i.e., Landstar, and the “Contractor,” i.e., Oasis. Oasis -- not Mr. Samrow -- is identified as “the ‘Contractor’” in both the Agreement and the Addendum. CP 60-64. A signature block on both documents is provided for the “Contractor,” to be signed “by” an individual, indicating that the individual was signing on behalf of the Contractor, followed by the identification of that individual’s “title” or “office” within the Contractor entity and other information related to the Contractor (Federal identification number and contact information).

Mr. Samrow signed the documents on behalf of Oasis, as a “Partner” in that limited liability company, not as a distinct entity which was neither mentioned nor identified on the face of either the Agreement or Addendum, in a partnership with Oasis. Mr. Samrow testified that he did not know the difference between a “partner” and a “member.” CP 184.

The language of both documents places duties upon Oasis, but none upon Mr. Samrow personally, and certainly none upon an unidentified third partnership entity. **“Where the agreement contains language binding the individual signer,** additional descriptive language added to the signature does not alter the signer's personal obligation.” *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 700, 952 P.2d 590 (1998) (emphasis added). Here, there is no language whatsoever in the Agreement or the Addendum that binds Mr. Samrow personally.

It is true that “where the face of the document **does not otherwise indicate the signer's capacity,** a signature with additional descriptive language may create an ambiguity requiring judicial construction of the agreement to determine who is bound by its terms.” *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 700, 952 P.2d 590 (1998) (emphasis added).

However, in this case, the faces of both documents do “indicate the signer's capacity.” Mr. Samrow's capacity is clearly indicated as a “partner” **in -- not “of”** -- Oasis, identified as the “Contractor,” the contracting party. Landstar itself acknowledges that “Frank Samrow is a member of Oasis.” Brief of Appellant, page 12.

Even if an ambiguity had been created in the documents by Mr.

Samrow's use of the descriptive term "partner," the trial court properly construed the Agreement and the Addendum. There is nothing in the documents that identifies a "partnership" between Mr. Samrow and Oasis and no reference to such an entity. The alleged "partnership" between Mr. Samrow and Oasis is nonexistent, a fiction without factual or legal basis. Mr. Samrow's inartful descriptive language following his signature did not ipso facto create a new business entity in "partnership" with Oasis.

2. Landstar provided no evidence to support a finding that a partnership existed between Mr. Samrow and Oasis.

The burden of proving the existence of a partnership rests on the party alleging its existence. *Curley Elec., Inc. v. Bills*, 130 Wn.App. 114, 120-21, 121 P.3d 106 (2005), *review denied* 158 Wash.2d 1007, 143 P.3d 829 (2006) (citing *Eder v. Reddick*, 46 Wn.2d 41, 49, 278 P.2d 361 (1955)), *review denied*, 158 Wn.2d 1007 (2006). Although Landstar asserted that Mr. Samrow "held himself out as personally liable for the actions of Oasis" by signing the Agreement "as a 'partner' of Oasis," it provided no evidence whatsoever to show that such a partnership existed.

Whether a partnership exists depends on the parties' intentions, which are facts based on the parties' actions and conduct and the surrounding circumstances. *Malnar v. Carlson*, 128 Wn.2d 521, 535, 910 P.2d 455 (1996). Like other contracts, a partnership cannot be created

without the voluntary consent of all alleged partners. *Ferguson v. Jeanes*, 27 Wn.App. 558, 564, 619 P.2d 369 (1980) (citing *Beebe v. Allison*, 112 Wn. 145, 192 P. 17 (1920)). Mr. Samrow denied “that he was a partner of or with Oasis Pilot Car Service, LLC.” CP 40. Aside from Mr. Samrow’s use of the descriptive term “partner,” Landstar presented no evidence whatsoever to show the existence of a partnership between Mr. Samrow and Oasis.

There trial court’s implied findings that there was no “partnership” between Mr. Samrow and Oasis and that Mr. Samrow therefore was not personally liable for any breach of the Agreement or the Addendum were correct.

**C. The trial court correctly found that Mr. Samrow personally owed no contractual duty to Landstar under the Agreement and the Addendum.**

One of the theories used to pierce the corporate veil is that the corporation has been intentionally used to violate or evade a duty owed to another. *Morgan v. Burks*, 93 Wn.2d 580, 585, 611 P.2d 751 (1980). This requires a showing that disregard of the corporate entity is necessary to prevent an unjustified loss to the injured party. *Meisel v. M & N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 410, 645 P.2d 689 (1982).

Landstar asserted that Mr. Samrow “personally” owed Landstar “the duty of reasonable care equal to that of a reasonably prudent pilot car

operator in Washington state acting in the same or similar circumstances” (CP 91), citing WAC 468-38-100 as the source of this duty. *Id.*

Landstar argued that Mr. Samrow “hid[ ] behind the corporate form of Oasis to intentionally violate and evade the duty he owed to Landstar.” *Id.* “[T]he duty he owed to Landstar” was identified as “perform[ing] the pilot car services himself (as he was obligated to do under the contract) or “ensur[ing] that the pilot car driver he hired would exercise reasonable care.” CP 91-92.

1. Mr. Samrow had no personal duty to Landstar under the Agreement to perform the pilot car services himself.

The Agreement states that, for a period of six months beginning on July 20, 2009, Landstar “desires to retain the services of” Oasis “to perform escort services upon the terms and conditions” set out in the Agreement. CP 60. Paragraph 3 of the Agreement specifically provides that Oasis was not obliged “to accept for escort, every load or trip offered” by Landstar, and states that Oasis agrees to notify Landstar “at least” twenty-four hours in advance of “any unavailability of service.” CP 60. The Agreement specifically gave Oasis “complete control over the means and method of providing services required to be performed[.]” CP 60, ¶1.

On October 13, 2009, a Landstar truck driver called Oasis and asked for a “pole car” to lead a truck from the Canadian border through

the State of Washington. CP 47. “A pole car is a particular type of lead escort car with a pole attached to the front bumper which would presumably give a warning if the pole were to encounter an overhead obstruction, such as an overpass, that was too low for the pole to pass under safely.” *Id.* Mr. Samrow, who happened to answer the phone call, advised the Landstar truck driver “that he did not have a pole car available, but would locate one for him.” *Id.*

Mr. Samrow, acting on behalf of Oasis, contacted Phil Kent of CJH Car Pilot, Inc., and put Mr. Kent in contact with the Landstar truck driver. *Id.* See also CP 130, page 37, lines 15-25; page 38, lines 1-20. Mr. Kent, operating his own pole car, met Landstar’s truck at the Canadian border on October 14, and was leading Landstar’s truck when the subject accident occurred. CP 47.

Paragraph 1 of the Agreement giving Oasis “complete control over the means and method of providing services required to be performed” authorized Oasis to hire Mr. Kent<sup>1</sup>, who had the requisite equipment -- a “pole car” -- to perform the required service for Landstar.

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<sup>1</sup> See also CP 61, Paragraph B(1), requiring Oasis to maintain insurance on “all vehicles . . . hired or assigned by Contractor to escort shipments on behalf of” Landstar; CP 62, ¶ C(5) and 5, discussing the “employees or agents” of Oasis who may provide escort services to Landstar.

There is neither a specific provision nor any language permitting an inference that the members or employees of Oasis were required to provide the required services, and no provision in the Agreement or the Addendum requiring Mr. Samrow personally to provide the required services. Contrary to Landstar's argument, Mr. Samrow was not "obligated by the contract" to personally perform the services required by Landstar on October 13-14 of 2009. Oasis was authorized to hire or assign non-employee drivers to perform the required services.

2. Mr. Kent, not Mr. Samrow, owed Landstar a duty of care as a "reasonably prudent pilot car operator."

Landstar argued that Mr. Samrow personally owed a duty of care of a "reasonably prudent pilot car operator in Washington state acting in the same or similar circumstances," citing *Affiliated FM Insurance Co. v. LTK Consulting Services, Inc.*, 170 Wn.2d 442, 453, 243 P.3d 521 (2010) and WAC 468-38-100. CP 91-92.

- (a) *The tort duty imposed by the Supreme Court in Affiliated does not apply to Mr. Samrow.*

At the page of the *Affiliated* case cited by Landstar, the Supreme Court held that "engineers who undertake engineering services in this state are under a duty of reasonable care." *Id.* This was the Court's answer on the issue of whether "engineers who provide services" should be "required

by law to use reasonable care.” *Affiliated*, 170 Wn.2d at 451, 243 P.3d 521.

The *Affiliated* case applies only to “engineers who provide services” -- not to escort car operators. Even if the *Affiliated* case did apply to escort car operators, the duty to use reasonable care would apply only to those who “provide services” to an aggrieved party. It would not mean that every certified escort car operator in the State of Washington owed a duty of reasonable care to Landstar on October 14, 2009, including Mr. Samrow. In this case, Mr. Samrow did not “provide services” to Landstar on October 14, 2009, so he owed Landstar no duty of reasonable care on that date.

(b) *Any duty of care owed to Landstar under WAC 468-38-100 ran from Mr. Kent, not Mr. Samrow.*

WAC 468-38-100, is titled “Pilot/escort vehicle and **operator** requirements,” which sets out “pretrip procedures,” responsibilities of an **operator** when assigned to the front of an over-size vehicle, responsibilities when an **operator** is assigned to the rear of an over-size vehicle, and sets out other miscellaneous rules for **operators** of a pilot/escort vehicle.

Mr. Samrow was not the operator of the pole car that provided Landstar’s required service on October 14, 2009. As Landstar

acknowledged in the summary judgment proceedings, “[t]he pilot car involved in this case was operated by Phil Kent.” CP 68. Mr. Kent was a certified pilot car operator who had formed his own corporate business entity, C.J. Pilot Car, Inc. CP 48. As Landstar’s attorneys asserted in their letter of December 29, 2009 to Mr. Kent’s corporation, the subject incident was “caused by the sole negligence of C.J. Pilot Car and its pilot car operator.” On October 14, 2009, any duty owed to Landstar under WAC 468-38-100 ran from Mr. Kent, not from Mr. Samrow.

3. Oasis, not Mr. Samrow, agreed to maintain insurance on “all vehicles owned, leased, hired or assigned” by Oasis to escort Landstar shipments.

Paragraph 4 of the Agreement provides, in pertinent part:

At all times during the term of this Agreement, **Contractor** shall maintain the following insurance of the types and in the amount described below:

(1) Liability Insurance. Commercial Automobile Liability insurance with a combined single limit for bodily injury and property damage of not less than ONE MILLION DOLLARS (1,000,000) for each occurrence with respect to all vehicles owned, leased, hired or assigned by **Contractor** to escort shipments on behalf of the Companies. . . .

(3) Proof of Insurance. **Contractor** shall furnish to Companies written certificates obtained from its insurance carrier showing that all of the insurance coverages required above have been procured. . . .

(4) Failure to Maintain Coverage. In the event that **Contractor** fails to provide satisfactory proof of the

liability insurance required in subparagraph (1) herein on or before the date of first service performed by **Contractor**, Companies shall have the right, but not the obligation, to purchase such insurance at **Contractor's** expense, in which case **Contractor** authorizes Companies to deduct the amount of Twenty Five Dollars (\$25.00) per trip from **Contractor's** compensation under this Agreement. The liability insurance obtained by Companies pursuant to this provision shall be exclusively for the benefit of Companies and shall list Companies only as the named insured.

Emphasis added.

The "Contractor" referred to in the Agreement is identified as Oasis Pilot Car Service LLC, located at 558 Canterbury Lane, Moses Lake, Washington. CP 60. Mr. Samrow is not named as a contractor or as a party in the Agreement. Mr. Samrow's address was 2107 West Spruce Street, Moses Lake, Washington. CP 1451, page 96, lines 15-23.

The duty to maintain insurance under the Agreement belonged solely to Oasis. Mr. Samrow personally owed no contractual duty to maintain insurance to Landstar under the Agreement.

The trial court did not err in impliedly finding that Mr. Samrow personally owed no contractual duty to Landstar.

**D. The trial court correctly found that Mr. Samrow did not owe any duties to Landstar under the independent duty doctrine.**

Landstar asserts that Mr. Samrow -- "as a partner of Oasis" -- "is independently liable to Landstar in tort under the independent duty

doctrine.” Brief of Appellant, page 16. However, Mr. Samrow was never “a partner of Oasis,” as discussed above. Mr. Samrow was a member of Oasis. Landstar’s entire discussion of Mr. Samrow’s “extra-contractual duties under the independent duty doctrine” is based upon the existence of a fictional entity in a nonexistent “partnership” with Oasis.

Landstar cites *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 163 Wn. App. 436, 261 P.3d 664 (2011) to support the proposition that Mr. Samrow’s “duty to operate the pilot car (or to ensure that the driver of the pilot car hired by Samrow operated the pilot car) with reasonable skill and judgment.” Brief of Appellant, page 17.

The *Donatelli* Court concluded that “a majority of the supreme court in *Affiliated* held that **professional engineers** owe a tort duty of reasonable care to their clients. . . . Moreover, this duty arises despite the existence of a contract between such engineers and their clients.” *Donatelli*, 163 Wn. App. at 443, 261 P.3d 664 (emphasis added). *Donatelli* is not applicable in this case. As discussed above, the *Affiliated* decision that professional engineers owe a duty of reasonable care to their clients is simply not applicable to escort car operators.

The argument that Mr. Samrow owed a duty independent of the Agreement to Landstar under WAC 468-38-100 might be true if Mr. Samrow had operated his own escort car to provide the October 14, 2009

escort services to Landstar as a Blacksand employee. As discussed above, WAC 468-38-100 applies to **operators** of escort cars. But Mr. Samrow did not operate an escort car for Landstar on October 14: Phil Kent was the operator of the escort car providing service to Landstar on that date. Landstar's assertion at page 17 of its Brief that WAC 468-38-100 imposes a duty upon one escort car operator (Mr. Samrow) to "ensure" that another escort car operator (Phil Kent) performs "with reasonable skill and judgment" is legally baseless. There is no such duty set out under WAC 468-38-100.

Landstar also cites RCW 46.44.090 as a source of a statutory duty imposed on "professional pilot car operators." Brief of Appellant, page 17. RCW 46.44.090 authorizes the Department of Transportation to "issue a special permit in writing, or electronically, authorizing the applicant to operate or move a vehicle or combination of vehicles of a size, weight of vehicle, or load exceeding the maximum set forth in RCW 46.44.010, 46.44.020, 46.44.030, 46.44.034, and 46.44.041 upon any public highway under the jurisdiction of the authority granting such permit and for the maintenance of which such authority is responsible."

The "applicant" for such a permit is the entity seeking to move an over-size vehicle over public highways in Washington. In this case, that "applicant" was Landstar's truck driver, Gerald Frederick, on behalf of

Landstar. CP 117, page 10, lines 2-21; page 11, lines 13-17; page 12, lines 19-25; page 13, lines 1-25. CP 118, page 14, lines 1-19. Mr. Samrow had no duty under RCW 46.44.090 to obtain a permit for moving Landstar's over-size vehicle over Washington's public highways.

Finally, as an afterthought, Landstar asserts, “[a]t the very minimum, it cannot be argued that the fraud and misrepresentations of Frank Samrow do not warrant piercing the corporate veil as a matter of law.” Brief of Appellant, page 19.

Under CR 9, “circumstances constituting fraud . . . shall be stated with particularity. Landstar did not comply with CR 9. See CP 1-9. Landstar pled negligence, breach of contract, and indemnity and implied indemnity.

Further, “[e]ach element of fraud must be established by ‘clear, cogent and convincing evidence.’” *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996) (quoting *Sigman v. Stevens-Norton, Inc.*, 70 Wn.2d 915, 920, 425 P.2d 891 (1967)). To avoid summary dismissal of a claim of fraud, “a non-moving party in a civil case in which the proof must be clear, cogent, and convincing meets its burden of production by introducing evidence from which a rational trier of fact could find by clear, cogent and convincing evidence the facts required by the substantive law defining its claim or defense.” *In re Dependency of C.B.*, 61 Wn. App.

280, 285, 810 P.2d 518 (1991). Landstar did not even attempt to introduce such evidence.

The trial court correctly found that Mr. Samrow did not “personally” owe any tort duties independent of the Agreement and Addendum to Landstar.

**E. Mr. Samrow made no “misrepresentations that resulted in Landstar’s harm.”**

Landstar asserts that Mr. Samrow should not have been dismissed as a defendant “because he personally made the misrepresentations that resulted in harm to Landstar.” Brief of Appellant, page 19. The “misrepresentation” that Landstar identifies is Mr. Samrow’s submission of “his certificate of insurance to Landstar as proof that Oasis had insurance in place to cover potential escort services.” This statement misrepresents the facts.

Mr. Samrow testified during his deposition that he and Mr. Walker formed Oasis Pilot Car Service, LLC “as a dispatch service, and I kept my own private business for my own work,” which was a “safety and pilot car service called Blacksand Safety and Pilot Car.” CP 135, page 37, lines 9-10; CP 302, page 99, lines 11-16. Mr. Samrow and Mr. Walker “got a call or a lot of jobs for us personally and wanting more cars than just Mr.

Walker and I. And so we decided that if we dispatched some, we might as well get paid for it, too.” CP 138, lines 1-16.

When Landstar’s counsel suggested that he and Mr. Walker had “decided to start a business that would do dispatching as well as pilot car services,” Mr. Samrow corrected him: “It was just strictly dispatching.” CP 138, page 78, lines 17-21. Oasis was set up as a limited liability company, “a dispatching business,” in 2007. CP 78, lines 22-25.

Before forming Oasis, Mr. Samrow had insurance on his own vehicle, which he personally used in his own separate pilot car business, a sole proprietorship known as Blacksand Safety and Pilot Car (later changed to Blacksands Group (CP 142, page 99, lines 15-16), through which Mr. Samrow himself provided pilot car driver services. CP 138, page 81, lines 19-25; CP 139, page 82, lines 1-25; page 83, lines 1-25; page 84, lines 1-15. Mr. Samrow continued to personally provide pilot car services through Blacksands during the existence of Oasis. CP 145, page 120, lines 6-10.

The Certificate of Insurance that Mr. Samrow provided to Landstar in July of 2009 was “strictly for the vehicle [Mr. Samrow] was using” as a pilot car. CP 140, page 92, lines 17-19. Mr. Samrow testified that Landstar had asked for his personal insurance information when Landstar sent him the Agreement and Addendum to be filled out, and so he had

provided that information to Landstar. CP 142, page 101, lines 18-20; CP 143, page 103, lines 1-2.

Mr. Samrow agreed that if **he** was going to “do the job,” he would assume that Landstar would believe that the insurance information he provided was “for the vehicle he was actually going to use doing the pilot car services.” CP 143, page 103, lines 19-25.

During the hearing on the summary judgment motion, Landstar’s counsel identified Mr. Samrow’s submission of insurance information “on his personal vehicle that he used as a pilot car vehicle that Landstar believed would be used in this case” as a “misrepresentation on behalf of Mr. Samrow.” 5/25/12 RP 10. That “misrepresentation” was specifically identified as “Mr. Samrow representing to Oasis that he would personally be providing the pilot car services through Oasis.” 5/25 RP 11.

This argument ignores the unrebutted testimony that Oasis itself did not “provide pilot car services,” but provided “strictly dispatching” services. This argument ignores the fact that there is no specific or implied requirement in the Agreement that Oasis employees or Mr. Samrow himself were to provide the escort car services requested by Landstar. This argument also ignores the fact that the Agreement between Oasis and Landstar gives Oasis “complete control over the means and method of providing services required to be performed” (CP 60, ¶ 1),

including hiring or assigning vehicles to escort Landstar's shipments (CP 61, ¶ B(1)) and utilizing either its own employees or agents to physically provide the escort services. CP 62, ¶ C (5).

Landstar, as author of the Agreement and the Addendum, knew or should have known that individuals other than Mr. Samrow would be operating their own pilot cars to escort its over-size vehicles, as the Agreement clearly contemplated. The Agreement includes no term or suggestion that Mr. Samrow would personally provide escort services. There is no basis in fact for Landstar's alleged belief that Mr. Samrow would use his personal vehicle to provide escort services on October 14, 2009 or at any other time. As Mr. Samrow's counsel argued:

[T]he evidence that's been submitted to you is that when the Landstar truck driver called and said I need a pole car, he says, can't do it but I'll get somebody who can do it for you. And the driver's testimony which we incorporated said that he's familiar with the fact that most of these escort service companies farm their stuff out to independent people. But it doesn't change the fact that there is a contract that has an indemnity provision, but there is nothing in that contract that creates a duty on the part of Mr. Samrow, nor is there any kind of a duty on Mr. Samrow to be responsible for what may be other people's individual negligence.

5/25/12 RP 15.

Finally, the Agreement contemplates the situation in which Oasis failed to provide proof of liability insurance as described therein:

Failure to Maintain Coverage. In the event that Contractor fails to provide satisfactory proof of the liability insurance required in subparagraph (1) herein on or before the date of first service performed by Contractor, Companies shall have the right, but not the obligation, to purchase such insurance at Contractor's expense, in which case Contractor authorizes Companies to deduct the amount of Twenty Five Dollars (\$25.00) per trip from Contractor's compensation under this Agreement. The liability insurance obtained by Companies pursuant to this provision shall be exclusively for the benefit of Companies and shall list Companies only as the named insured. Companies' possession of insurance under this provision in no way restricts Companies' right of indemnification from Contractor under Paragraph 5 and other provisions of this Agreement.

CP 61, ¶ 4.B(4).

The Agreement and the Addendum were authored by Landstar or its agents. Landstar thus knew that Oasis might utilize someone other than an Oasis employee to drive an escort car, or might "hire" a vehicle not owned by Oasis. Through Mr. Fredrick, Landstar had actual prior knowledge that Mr. Samrow would not be the driver of the pole car on October 14, 2009. Through an employee or agent, Landstar had actual knowledge that only Mr. Samrow's insurance information on his personal vehicle had been requested and received. Landstar had actual knowledge that it could purchase insurance for the October 14, 2009 trip for its own benefit, at Oasis' expense. It failed to do so.

Contrary to Landstar's assertion at page 19 of its Brief, no act or omission of Mr. Samrow caused any harm to Landstar. First, Mr. Samrow

personally owed no duty to Landstar to provide insurance for Landstar, either under the Agreement or otherwise. Any duty to provide the insurance described in the Agreement was placed on the “Contractor,” identified as Oasis.

Second, Landstar had actual knowledge that Mr. Samrow would not be driving the pole car on October 14, 2009, and knew that it had Mr. Samrow’s insurance information on his own vehicle only.

Third, Landstar knew that, under the Agreement, it had the option to purchase insurance for its own benefit at Oasis’ cost. Contrary to Landstar’s assertion at page 21 of its Brief, Mr. Samrow’s “misrepresentations” did not “prevent[] Landstar from taking measures to obtain its own insurance.” Landstar had knowledge of good reasons to purchase its own insurance, and to do so at the expense of Oasis, but simply failed to exercise that option.

Fourth, contrary to Landstar’s repeated assertions, Mr. Samrow was not “a partner of Oasis.” Brief of Appellant, page 21. Landstar’s assertions that Mr. Samrow “should be held personally liable for the intentional misrepresentations he made as a partner of Oasis” are factually and legally baseless. The trial court committed no error by dismissing the claims against the Samrows.

**F. A trial court has authority to determine summarily whether the corporate veil should be pierced.**

Citing *Truckweld Equip. Co. v. Olson*, 26 Wn. App. 638, 642, 618 P.2d 1017 (1980), Landstar asserts that “[t]he very question of whether the corporate form should be disregarded is a question of fact that precludes summary judgment.” Brief of Appellant, page 22. Landstar is wrong, as the trial court pointed out during oral argument on the motion for summary judgment:

MS. HALL . . . [W]hether or not there is sufficient evidence for the corporate veil to be pierced is, in and of itself, a question of fact that I believe precludes summary judgment.

THE COURT: Only if a factual issue is raised, you know, on some kind of alter ego or fraud or something, misrepresentation, but I didn’t see that in here.

5/25/12 RP 10.

The plaintiff raised the same argument in *Minton*, 146 Wn.2d 385, 47 P.3d 556. The Supreme Court wrote:

Relying on *Deno v. Standard Furniture Co.*, 190 Wn. 1, 66 P.2d 1158 (1937), *Minton* argues that whether the corporate entity should be disregarded is a question of fact for the jury. However, the holding in *Deno* was more limited, finding only that the facts of that case were such as to make it a proper question for the jury. *Id.* at 9, 66 P.2d 1158. Contrary to *Minton*'s assertion, therefore, summary judgment in favor of the corporation may be appropriate if the plaintiff fails to show evidence of “either the requisite manipulation, or the perpetration of a fraud on plaintiffs.”

*Minton*, 146 Wn.2d at 398, 47 P.3d 556 (quoting *Peterick v. State*, 22 Wn.App. 163, 185, 589 P.2d 250 (1977)).

In *Truckweld*, the Court wrote, “[t]he question whether the corporate form should be disregarded is a question of fact.” *Truckweld*, 26 Wn. App. at 643, 618 P.2d 1017. However, it is well-established Washington law that “when reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law.” *Ruff v. County of King*, 125 Wn.2d 697, 704, 887 P.2d 886 (1995) (quoting *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985)). The trial court correctly found no genuine issues of material fact regarding whether the corporate form of Oasis should be disregarded.

## **VI. CONCLUSION**

Landstar’s arguments that Mr. Samrow should be held personally liable for the damages sustained by Landstar are based upon his use of the descriptive term “partner” following his signature on the Agreement and Addendum authored by Landstar. The fiction that Mr. Samrow’s use of that descriptive term created a third contracting partnership entity consisting of himself as one “partner” and Oasis as another “partner” is factually and legally baseless, rendering meritless all of Landstar’s arguments that Mr. Samrow should be held personally liable for Landstar’s damages. Mr. Samrow was nothing more than a member of the

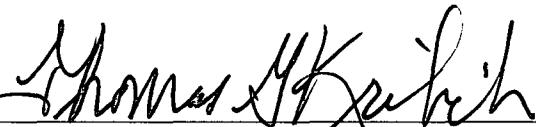
limited liability company known as Oasis. Mr. Samrow “personally” owed neither contractual nor tort duties to Landstar.

As the trial court correctly noted, “[t]he whole purpose of setting up corporations is to limit liability.” 6/22/12 RP 17. Limited liability companies are also set up for the purpose of limiting the personal liability of its members, a proper purpose. RCW 25.15.125(1) protects a member or manager of a limited liability company from personal liability “solely by reason of being a member or manager of the limited liability company.” There was no question below whether Mr. Samrow was a member of Oasis, and he was thus entitled to summary dismissal of the claims against himself and his marital community.

The trial court properly found that the facts in this case did not support a finding of personal liability on Mr. Samrow’s part and that there was not sufficient evidence presented to justify piercing the corporate veil of Oasis. This Court should affirm the trial court’s grant of summary judgment and denial of reconsideration of that ruling.

Respectfully submitted this <sup>25<sup>th</sup></sup> day of February , 2013.

KRILICH, LA PORTE, WEST & LOCKNER, P.S.

By   
Thomas G. Krilich, WSBA No. 2973  
Attorney for Respondents Samrow

**CERTIFICATE OF SERVICE**

The undersigned declares under penalty of perjury under the laws of the State of Washington that:

I am over the age of 18 years, not a party to this action, and competent to be a witness herein.

On the 25 day of February, 2013, I caused to be delivered a true and correct copy of:

**BRIEF OF RESPONDENT and CERTIFICATE OF SERVICE**

to David B. Jensen  
Sylvia J. Hall  
Merrick Hofstedt & Lindsey, P.S.  
3101 Western Ave., Ste. 200  
Seattle, WA 98121

by depositing said documents in the U.S. Mail, postage prepaid, addressed to the party/counsel listed above, and by E-mail.

DATED this 25 day of February, 2013.

By: Sally J Favors  
Print Name: Sally J. Favors

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