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Court of Appeals
Division III
State of Washington

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

DEAN WILCOX,

Appellant,

vs.

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

Respondents.

**RESPONDENT ELR CONSULTING'S RESPONSE TO WILCOX'S
OPENING BRIEF**

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I. INTRODUCTION

This is a straightforward personal injury case wherein Appellant Dean Wilcox was working on a demolition project at Washington Closure Hanford (“WCH”), when he fell through an open hatch on a catwalk. He survived the fall, and filed suit against Steve Basehore, a work planner, as well as Mr. Basehore’s employer, Bartlett Services, and the staff augmentation contractor through whom Mr. Basehore was hired, ELR Consulting. At the time, Mr. Wilcox was employed by WCH, and Mr. Basehore was working under the direction, control, and day-to-day supervision of WCH.

Mr. Wilcox alleged that Mr. Basehore was negligent for creating unsafe working conditions, and that since he was “employed by and/or acting as an agent of Bartlett Services and/or ELR Consulting,” Bartlett and ELR were vicariously liable under the doctrine of respondeat superior.

Throughout the case and at trial, ELR denied that it employed Mr. Basehore or that he was its agent. ELR consistently maintained that it did not—and could not—supervise, direct, or control the technical aspects of Mr. Basehore’s technical work. Accordingly, ELR was not vicariously liable for Mr. Basehore’s alleged negligence. After Mr. Wilcox rested his case-in-chief, the Honorable Bruce Spanner granted ELR’s motion for a directed

verdict, finding that there was insufficient evidence to establish a principal-agency relationship between Mr. Basehore and ELR.

The next day, Judge Spanner, exercising his discretion, gave a “borrowed servant” instruction to the jury. The jury entered a verdict in favor of Bartlett Services, after answering “Yes” to the first question on the verdict form—“Do you find that Steve Basehore was a borrowed servant of Washington Closure Hanford?” This affirmative defense ended the query and the case.

The Benton County Superior Court’s decisions should be affirmed on appeal because: (1) ELR’s directed verdict was warranted when Mr. Wilcox failed to present any evidence to meet his burden of establishing that a principal-agency relationship existed between Mr. Basehore and ELR.; and (2) the borrowed servant jury instruction was supported by substantial evidence, allowed each party to argue its theories of the case, and when read as a whole, properly informed the jury of the applicable law.

In sum, Judge Spanner’s rulings were correct, well-grounded in fact and law, and should be affirmed on appeal.

II. NO ASSIGNMENTS OF ERROR

Based on well-grounded law and facts, the Benton County Superior

Court correctly (1) granted ELR's Motion for a Directed Verdict; and (2) exercised sound discretion in giving the jury a "borrowed servant" instruction.

III. RESTATEMENT OF ISSUES

ELR submits the following restatement of issues for the Court's consideration:

1. Did the trial court correctly grant ELR's motion for a directed verdict after determining that Mr. Wilcox produced insufficient facts establishing that Mr. Basehore was ELR's agent, and therefore vicariously liable for Mr. Basehore's alleged negligence?
2. Did the trial court exercise sound discretion in giving the jury the "borrowed servant" instruction because the defense was adequately supported by substantial evidence, allowed each party to argue its theories of the case, and, when read as a whole, properly informed the jury of the applicable law?

IV. RESTATEMENT OF THE CASE

A. ELR Provided Mr. Basehore's Services to WCH.

ELR Consulting, Inc. ("ELR") is a corporation formed by Emmett Richards in 2005 "to provide staffing support and other contract support to a

variety of clients.” (RP at 887:23-25) Mr. Richards has a military disability resulting from a gunshot wound in Vietnam. (RP at 889:25 to 890:2-5) Accordingly, ELR is a service-disabled veteran-owned small business. (RP at 889:19-24)

Mr. Richards has worked for and with Washington Closure Hanford (“WCH”) for 24 years—beginning as a laboratory technician in 1968, followed by forming his own business and providing staff augmentation services to Hanford contractors and others in 2007. (RP at 888:3; 891:9-11; 893:2-9) WCH is one of the prime contractors to the Department of Energy at the Hanford site. (RP at 560:13-14)

ELR specializes in providing temporary staffing to its clients, such as WCH, the City of Richland, and Washington River Protection for positions such as engineers, scientists, designers, drafters, Quality Assurance, and safety professionals. (RP at 892:21-25; 894:20-25)

In 2008, WCH needed a “Work Control Planner,” and was specifically interested in hiring Mr. Basehore. To staff this position, WCH contacted ELR to double-check if Mr. Basehore was available and to get a rate. (RP at 867:11-15; CP 260) ELR was one of the staff augmentation firms that WCH used to get temporary staff. (RP at 861:17-19)

Mr. Basehore, who was directly employed by co-respondent Bartlett Services, Inc. (“Bartlett”), was already working at Hanford in a different position. After reviewing Mr. Basehore’s resume, WCH confirmed with ELR that it wanted to staff its open Work Control Planner position with Mr. Basehore.

ELR and WCH entered into a Technical Services Subcontract wherein WCH would pay ELR to supply Mr. Basehore’s work planning services to WCH. (RP at 900:9-12; 901:10-12) Likewise, ELR entered into a subcontract with Bartlett (Mr. Basehore’s direct employer) wherein ELR paid Bartlett for Mr. Basehore’s services. (RP at 903:2-6; *see also* Ex. 222)

Under these two contractual arrangements, WCH paid ELR \$89.00 per hour for Mr. Basehore’s professional services, and ELR paid Bartlett \$85.58 per hour for Mr. Basehore’s professional services. (RP at 904:3-16) ELR earned the difference—\$3.42 per hour—by providing Mr. Basehore’s services to WCH. (RP at 904:15-18) In exchange, ELR processed Mr. Basehore’s invoices and timesheets, ensured that WCH was satisfied with Mr. Basehore’s services, tracked the percentage and completion of WCH’s “not to exceed” contract, and performed other administrative activities related to Mr. Basehore’s work. (RP at 904:21-25; 905:1-9) ELR had no involvement

whatsoever in Mr. Basehore's day-to-day work.

B. Appellant Dean Wilcox Was Injured on the Job.

Plaintiff/Appellant Dean Wilcox worked for WCH as a millwright. With more than twenty-five years of experience at Hanford, Mr. Wilcox was highly skilled and highly trained. However, on July 1, 2009, Mr. Wilcox ignored his supervisor's "all up, all down" safety directive, failed to close an open hatch on an elevated catwalk after his co-worker descended, and failed to stop work when it became clear that "scope creep" had resulted in numerous unplanned and unsafe tasks. These factors all contributed to this very serious and unfortunate accident when Mr. Wilcox fell through the open hatch on the catwalk to the concrete floor below. (RP at 147:9-15; CP 22:5-6)

He survived the fall, but sustained serious injuries.

C. Mr. Wilcox Filed a Lawsuit Against ELR and Bartlett for Personal Injury.

Mr. Wilcox's Second Amended Complaint for Damages alleges that "Steve Mr. Basehore was *employed by and/or acting as an agent* of Bartlett Services, Inc. and/or ELR Consulting, Inc." while working at Hanford. (CP 22:8-9) (emphasis added) Mr. Wilcox averred that Bartlett and ELR breached their duty to train or supervise "their employees and/or agents," and that they were both liable "under the principle of respondeat superior for Mr.

Basehore's negligence." (CP 23:8; CP 23:13-14)

In sum, Mr. Wilcox claimed that Mr. Basehore failed to prepare an adequate work plan that would have prevented Mr. Wilcox from falling through the open hatch on the catwalk, and that ELR and Bartlett were liable under the doctrine of *respondeat superior*.

ELR denied that Mr. Basehore "its employee" and asserted, as an affirmative defense, that ELR was not liable for Mr. Wilcox's injuries because Mr. Basehore was not "employed by, or acting as an agent or borrowed servant of, ELR." (CP 27:8-7; CP 27:19-20)

D. ELR's First Motion for Summary Judgment.

Initially, ELR moved for summary judgment dismissal, arguing that Mr. Wilcox's negligence claim should be dismissed because: (1) Mr. Basehore was not ELR's employee; and (2) Mr. Basehore was not ELR's "borrowed servant." (CP 30-36) In response, Mr. Wilcox agreed that Mr. Basehore was not an ELR employee and that the borrowed servant doctrine did not apply here. Instead, Mr. Wilcox argued that Mr. Basehore was acting as ELR's agent while he was performing his work planning services. (CP 248:9-14)

Mr. Wilcox relied on the General Condition 2 (“GC-2”) of ELR’s subcontract with WCH, claiming that this provision gave ELR “complete control” over Mr. Basehore’s services, thereby creating an “agency relationship between ELR and Mr. Basehore.” (CP 248:15-17) In its reply, ELR argued that GC-2 was contradicted by extrinsic evidence, such as the circumstances of the agreement’s formation and indicia of its purpose. (CP 248:20-22) In other words, ELR argued that, despite the “complete control” provision in the subcontract, there was no evidence of actual control sufficient to find ELR vicariously liable for Mr. Basehore’s alleged negligence. The trial court rejected this contention and denied ELR’s motion. (CP 242)

E. ELR’s Second Motion for Summary Judgment.

On March 22, 2013, ELR again moved for summary judgment dismissal of Mr. Wilcox’s personal injury claim. ELR argued that the ELR-WCH subcontract contained an “Order of Precedence,” wherein the *Special* Conditions took precedence and applied over the *General* Conditions. (CP 250-51)

Special Condition 13 (“SC-13”) explicitly stated that WCH was “responsible” for and retained “ultimate authority” over “all technical

aspects” of Mr. Basehore’s services. (CP 244:18-21) Additionally, Mr. Wilcox failed to produce evidence that ELR controlled Mr. Basehore’s services. (CP 245:1-2) Accordingly, ELR argued that Mr. Basehore was not ELR’s “agent” and ELR was not vicariously liable for Mr. Basehore’s negligent acts or omissions. (CP 251:10-12) In other words, ELR argued that pursuant to SC-13, ELR had no right to control the technical aspects of Mr. Basehore’s work, and thus could not be vicariously liable for Mr. Basehore’s alleged negligence arising out of the performance of those technical aspects of his work.

On April 19, 2013—with trial set for May 6—the trial court heard ELR’s second motion for summary judgment. The Court identified only one issue of fact for the jury’s consideration and ruled as follows:

How I view this is it really gets down to an issue of **what services did ELR provide to WCH and/or which party had the right to control the technical aspects of the work that is the subject of this litigation.** So that's really how I'm viewing the issues, the substantive issues raised by ELR and joined in by Bartlett.

From the Court's perspective, while the contract and its language may not be disputed and it can be argued how it reads, from my perspective, despite or in spite of -- or **despite the contract,** really, it gets down to **what did these parties in their capacity do or not do.** And **from my perspective, that's really an issue of fact for a**

jury to consider regarding what was ELR's right to control Mr. Basehore. That's really how I see this, because **I'm finding that there are issues of fact regarding what ELR did or did not do.**

(RP (04/19/13) at 4:22-5:12) (emphasis added).

Based on Judge Carrie L. Runge's ruling, it was Mr. Wilcox's burden at trial to establish that: (1) Mr. Basehore was acting as ELR's agent while working for WCH when the alleged negligence occurred; and therefore (2) ELR was vicariously liable for his alleged negligence.

Mr. Wilcox submitted the Trial Management Report, wherein he expressly injected another issue: "Whether Mr. Basehore was a borrowed servant." (CP 48:8) At trial, however, Mr. Wilcox failed to present sufficient evidence to establish that Mr. Basehore was ELR's agent, and therefore ELR was vicariously liable. Mr. Wilcox also failed to sufficiently rebut Bartlett's and ELR's affirmative defense that Bartlett lent Mr. Basehore to WCH as its "borrowed servant."

F. The Trial Testimony Supported a Directed Verdict for ELR.

At trial, Mr. Richards, president and owner of ELR, testified that ELR:

- never employed Mr. Basehore (RP at 900:3-4);
- was not responsible for ensuring that he completed site-

specific training at WCH (RP at 907:13-20);

- did not pay for Mr. Basehore's specific training at WCH (RP at 908:6-7);
- did not handle Mr. Basehore's orientation at WCH (RP at 908:11-14);
- did not supervise Mr. Basehore (RP at 908:15-16);
- did not direct any of his work at WCH (RP at 908:17-19);
- did not control Mr. Basehore's work at WCH (RP at 908:20-22); and
- did not know which projects Mr. Basehore worked on for WCH (RP at 908:23-25).

In contrast, Mr. Richards testified that WCH: (1) supervised; (2) directed; and (3) controlled Mr. Basehore's work. (RP at 909:25 to 910:1-8).

G. WCH's Contract's "Order of Precedence" Clause Applies "Special" Conditions Before it Applies "General" Conditions.

The WCH/ELR Subcontract contains *General* and *Special* Conditions. The WCH/ELR Subcontract first describes an "Order of Precedence" governing contract interpretation. Bonnie Cole, the former Subcontract Administrator at WCH, testified as follows:

Q: Is there actually a provision in the contract that covers the order of precedence?

A: There is.

(RP at 875:24 to 876:1)

The Order of Precedence states:

The Subcontract Agreement Form, all documents listed therein, and subsequently issued Change Notices and amendments are essential parts of this Subcontract and a requirement occurring in one is binding as though occurring in all. In resolving conflicts, discrepancies, errors or omissions pursuant to the General Condition titled "CONTRACT INTERPRETATION" the following order of precedence shall be used:

1. Subcontract Change Notices and Amendments, if any
2. Subcontract Agreement Form
3. Exhibit "C" – Quantities, Prices and Data
4. Exhibit "E" – Representations and Certifications
5. Exhibit "B" – **Special Conditions**
6. Exhibit "A" – **General Conditions**
7. Exhibit "D" – Scope of Work

See Ex.34 and Exhibit A (page 5 of 11).

If the WCH subcontract contained "conflicts, discrepancies, errors, or omissions," then the parties agreed that, under the "Ordinance of Precedence," the *Special Conditions* Exhibit B (No. 5) took precedence over the *General Conditions* Exhibit A (No. 6). (RP 875:21 to 876:5)

H. Former WCH Employee Bonnie Cole Testified that Condition 13 Required WCH to Retain Ultimate Authority and control over Mr. Basehore's Technical Work.

Pursuant to SC-13, WCH retained ultimate authority over all technical aspects of Mr. Basehore's work. Ms. Cole who handled Mr. Basehore's contract, testified as follows:

Q: Under the contract do special conditions take priority over general conditions?

A: They do.

(RP at 875:21-23) SC-13 states as follows:

The CONTRACTOR [Hanford] has designated as Subcontract Technical Representative (STR), **Kim Koegler**, who **will be responsible for the technical aspects of the performance of the Subcontract**. The STR may designate other personnel to oversee the performance of the Work, sign field tickets, etc. However, **the designated STR retains ultimate authority over the technical aspects of the Work**. Should the SUBCONTRACTOR [ELR] and STR disagree over the technical requirements of the Subcontract, such matters will be immediately referred to the CONTRACTOR's Subcontract Administrator for resolution. The STR does not possess authority, express or implied, to direct the SUBCONTRACTOR to deviate from the terms and conditions of the Subcontract.

Pursuant to the "Order of Precedence," in the contract, WCH and ELR agreed that the above-referenced *Special Condition* trumped GC-2, which states:

SUBCONTRACTOR [ELR] shall act as an independent contractor and not as the agent of CONTRACTOR or OWNER [WCH] in performing this Subcontract, maintaining complete control over its employees and all of its lower-tier suppliers and subcontractors.

At trial, ELR presented evidence that WCH not only possessed “ultimate authority” pursuant to SC-13 to direct and control the technical aspects of Mr. Basehore’s services—but, WCH in fact—exercised such control. On that issue, Ms. Cole testified as follows:

Q: Okay, and in Paragraph B it talks about the Subcontract Technical Representative being responsible for the technical aspects of the performance of the subcontract.

A: Okay.

Q: What does this mean?

A: The technical aspects would be the work product. It would be the acceptability of the work produced by the subcontractor [Mr. Basehore]. Is his process correct? Is he working correctly? All the technical aspects of that particular person’s work are overseen by the technical representative. The Washington Closure Hanford Representative.

(RP at 879:22 to 880:10)

* * * *

Q: And it says here Mr. Koegler retains ultimate authority over the technical aspects of the work?

A: Yes.

Q: What does that mean, ultimate authority?

A: That means any questions about the quality of the work or the end product of the work or how he [Mr. Basehore] does it, when he does, it in accordance with what rules he does it. That would be the technical person’s responsibility.

Q: Does ELR Consulting, under the subcontract, have the right to control any of the technical aspects of Mr. Basehore's work?

A: No. It has to be a Washington Closure person.

Q: So, does Washington Closure then have complete control over the preparation of the work package?

A: Yes.

(RP at 880:16 to 881:6)

Ms. Cole testified that WCH had *exclusive* control over Mr. Basehore's preparation of the work package. (RP at 881:20-23) WCH provided its subcontracted employees (like Mr. Basehore) with an office, computer, phone, and other equipment. (RP at 881:24 to 882:3)

Ms. Cole testified that ELR was not permitted to direct or supervise Mr. Basehore while he was working for WCH. (RP at 882:8-15)

Q: Why not?

A: Because the ultimate authority for the project was with Washington Closure. DOE expects the product that Washington Closure produces. Somebody has to be responsible for that, and it has to be a Washington Closure employee.

(RP at 882:16-21)

I. WCH Employee Kim Koegler Testified that He, in Fact, Exercised Supervisory Authority Over Mr. Basehore.

Kim Koegler, who was WCH's Senior Project Engineer at the time of Mr. Wilcox's accident, testified that he was responsible "for the overall technical approach for the project activities." (RP at 548:23-24) Mr. Koegler was directly involved in hiring Mr. Basehore. (RP at 549:12-13) Mr. Koegler explained that "staff augmentation" means utilizing different organizations to provide subcontractors; a "staff aug" was a subcontract employee. (RP at 549:16-18)

Mr. Koegler confirmed that he was the "STR" or Subcontract Technical Representative who handled staffing for the project, and "was responsible to ensure that the technical requirements of the subcontract were ultimately accomplished by the subcontractor [Mr. Basehore]." (RP at 551:10-24) Mr. Koegler testified that it was ultimately "my responsibility to see that the subcontractor was performing in accordance with the subcontract." (RP at 552:8-11) The bottom line was that he and Tom Kisenwether (the Responsible Manager) were ultimately responsible for the work control program—not Mr. Basehore. (RP at 552:15-24)

Mr. Koegler confirmed that WCH provided Mr. Basehore with a camera—a typical tool that a Work Control Planner uses—as well as personal protective equipment, clothing, steel-toed boots, etc. (RP 560;18-22)

However, Mr. Basehore, as a Work Control Planner, was not responsible for drafting safety protocol. (RP at 560:23 to 561:1) Additionally, Mr. Basehore was not in a position to direct safety meetings, direct workers, or delegate his work. (RP at 563:3-13) In fact, Mr. *Koegler expected Mr. Basehore to rely on safety experts from within WCH* while Mr. Basehore performed his job as a Work Planner for WCH. (RP at 587:11-14)

While WCH employee Kim Koegler was responsible for the technical aspects of Mr. Basehore's performance of the subcontract, he delegated to Donna Yasek daily supervision of Mr. Basehore's work. (RP at 584:15-19)

J. WCH Employee Donna Yasek Testified that She Supervised Mr. Basehore Daily.

Donna Yasek, a WCH Project Engineer at the time of the accident, testified that she supervised Mr. Basehore on a daily basis. (RP at 606:19-21) She worked in the same building as Mr. Basehore, saw him daily, supervised him, and reviewed all of his work packages. (RP at 620:9-16)

Ms. Yasek testified that if the work plan needed to be changed while people were working in the field, then it was the Field Work Supervisor's responsibility—not the Work Planner—to stop all work while a change was considered. (RP at 636:11-18) "The Field Work Supervisor should be making that call." (RP at 636:18)

Ms. Yasek also confirmed that if a worker in the field (such as Mr. Wilcox) encounters: (1) an immediate danger; or (2) an unplanned condition, then the worker is required to stop work. (RP 639:13-21)

K. The Trial Court Granted ELR's Motion for a Directed Verdict

After Mr. Wilcox rested his case-in-chief, ELR moved for a directed verdict under CR 50. (RP at 924:6-7) ELR's motion was premised on two bases: (1) there was insufficient evidence to establish that ELR employed Mr. Basehore—which Mr. Wilcox admitted during the hearing for ELR's directed verdict (RP at 928:23-25); and (2) there was insufficient evidence to establish that Mr. Basehore was ELR's agent or borrowed servant. (RP at 927:16-18). Mr. Wilcox agreed that the borrowed servant doctrine did not apply to ELR because ELR was an independent contractor. (RP at 928:17-21)

In granting ELR's Motion for Directed Verdict, Judge Spanner reasoned as follows:

The rule of law is that a principal is not liable for the torts of the independent contractors. It's only liable for the torts of servants. That is those who are subject to the control of the principal. Both parties here agree that Mr. Basehore was not an employee and therefore not a servant of ELR.

Oh, I guess there is an exception to this rule regarding non liability of independent contractors, and that is in ultra-hazardous activities, and there may be a few others.

So, at this point, I do – I will grant ELR’s motion to dismiss because ELR cannot be vicariously liable for the negligence or the alleged negligence of Mr. Basehore.

(RP at 929:12-24) (emphasis added; typos corrected).

Mr. Wilcox then interjected that “agency” may arise from the “*right to control*, rather than the “exercise of control.” (RP at 930:2-3) (emphasis added) While entirely ignoring the Special Condition that granted WCH *ultimate authority* over Mr. Basehore, Mr. Wilcox nevertheless argued that General Conditions of the subcontract with WCH gave ELR the “right to control” Mr. Basehore. To that, Judge Spanner responded:

[M]ere right is not enough without some exercise of it, and here, while this contract ... indicated a right of control[,] [t]here was just no control actually exercised whatsoever.

So, as a matter of law, Mr. Basehore was not a servant of ELR because – and then if you look at the contractual relationship between the party, [Bartlett] contracted with ELR to provide Mr. Basehore. ELR then contracted to provide the services of Mr. Basehore to [WCH].

So, it’s clearly, in my mind, an independent contractor relationship. In fact, I don’t even think that ELR had any relationship with Mr. Basehore. Its relationship was with [Bartlett] as two independent contractors.

(RP at 930:5-21) (emphasis added)

Judge Spanner clarified that, “[The contract] says you have to control him, but again, without the master/servant relationship, I don’t even believe

we get to control.” (RP at 931:4-6)

The trial court granted ELR’s motion for a directed verdict on December 12, 2013. (CP 165) The next day, the jury reached a defense verdict in favor of Bartlett, finding that Mr. Basehore was a borrowed servant of WCH. (CP 119)

On January 9, 2014, Mr. Wilcox filed a Notice of Appeal of the jury’s defense verdict in favor of Bartlett Services, and the trial court’s directed verdict in favor of ELR.

V. LEGAL ARGUMENT IN OPPOSITION TO MR. WILCOX’S OPENING BRIEF

A. The Standard of Review for a Directed Verdict Is “Sufficiency of the Evidence.”

It is well settled that “no discretion is involved in ruling on a motion for a directed verdict. Such motion may be granted only where there is, as a matter of law, no evidence or reasonable inference therefrom to support the view of the party against whom the motion is made[.]” *Bailey v. Carver*, 51 Wn.2d 416, 418, 319 P.2d 821 (1957).

The Supreme Court counsels that “the word ‘support’ in the above quotation refers to that evidence which would support a jury verdict. If there is not substantial evidence adduced at the trial which is legally sufficient to

support a jury verdict in favor of the party opposing a motion for directed verdict, the motion must be granted.” *Benton v. Farwest Cab. Co.*, 63 Wn.2d 859, 864, 389 P.2d 418 (1964) (affirming a directed verdict against the plaintiff because she failed to present substantial evidence which would support a jury verdict in her favor).

Here, the Honorable Bruce Spanner correctly determined that Mr. Wilcox failed to present substantial (or sufficient) evidence to establish that Mr. Basehore was ELR’s “agent.” Without a principal-agent relationship, ELR was not vicariously liable for Mr. Basehore’s alleged negligence.

While Mr. Wilcox strenuously argued that ELR had the contractual “right” to control Basehore’s work, Judge Spanner was not persuaded because (1) as a matter of law, the Special Condition in the subcontract expressly gave WCH *ultimate authority to control Mr. Basehore’s work*—since Special Condition No. 13 “trumped” the General Condition upon which Mr. Wilcox relied; and (2) Mr. Wilcox failed to present sufficient evidence from which the jury could conclude that Mr. Basehore was ELR’s “agent.” Instead, the evidence conclusively established that WCH retained control over the technical aspects of Mr. Basehore’s work, which were the subject of the underlying claim.

Accordingly, if Mr. Basehore was negligent, then WCH was responsible. However, Mr. Wilcox could not sue WCH because WCH was his employer, and Mr. Wilcox's exclusive remedy for his employer's negligence was through Workers' Compensation.

B. The Trial Court Correctly Dismissed ELR as a Matter of Law.

ELR Consulting was dismissed on a directed verdict at the close of evidence, but before the case went to the jury. The issue, on appeal, is whether ELR's contractual *right to control* Mr. Basehore was sufficient to impose vicarious liability. Not surprisingly, Mr. Wilcox focuses exclusively on a General Condition in the subcontract, which stated that ELR would maintain "complete control over its employees and all lower-tier subcontractors," while ignoring the Special Condition wherein WCH retained "ultimate authority over the technical aspects of the Work." (See Mr. Wilcox's Opening Brief at 38) This was his approach at trial too. It strains credulity that Mr. Wilcox would steadfastly ignore the subcontract's Order of Precedence, particularly in light of the uncontroverted testimony of several WCH employees that SC-13 meant what it said.

Applying the subcontract's "Order of Precedence" provision, SC-13 unequivocally confirms that ELR never had the right to control the technical aspects of Mr. Basehore's work. Mr. Wilcox's insistence on narrowly focusing on one provision of the contract, to the exclusion of other provisions is misguided. (See Mr. Wilcox's Opening Brief at 11, citing the General Condition and ignoring the Special Condition) The trial court correctly dismissed ELR as a matter of law.

WCH not only possessed contractual authority to exclusively control the technical aspects of Mr. Basehore's services; WCH, in fact, exercised such control. WCH did not expect or allow ELR, or any other contractor, to be involved in, much less control, the technical aspects of the work performed by subcontract employees at Hanford.

Judge Spanner, after hearing all the evidence, concluded that there was no evidence from which a reasonable jury could find that ELR exerted any control over the technical aspects of Mr. Basehore's work. In fact, ELR's exercise of control over the technical aspects of Mr. Basehore's work would have violated ELR's subcontract with WCH.

In sum, Mr. Wilcox failed to present evidence demonstrating that ELR exercised control of Mr. Basehore's work. Given the dearth of

evidence, the agency/vicarious liability issue was decided by the trial court in a directed verdict. Judge Spanner's ruling was correct, well-grounded in fact and law, and should affirmed on appeal.

C. The Trial Court Correctly Dismissed ELR Based on the Insufficiency of Mr. Wilcox's Evidence.

The burden of establishing the agency relationship rests upon the party asserting its existence—here, Mr. Wilcox. *Stansfield v. Douglas Cnty*, 107 Wn. App. 1, 17, 27 P.3d 205 (2001); *Hewson Constr., Inc. v. Reintree Corp.*, 101 Wn.2d 819, 823, 685 P.2d 1062 (1984). At trial, Mr. Wilcox attempted to prove that Mr. Basehore was acting as ELR's agent when the alleged negligence occurred.

However, WCH not only possessed contractual authority to exclusively control the technical aspects of Mr. Basehore's services, WCH, in fact, exercised such control. The evidence—through the testimony of Emmett Richards, Kim Koegler, Bonnie Cole, and Donna Yasek—established that WCH did not expect or allow ELR, or any other contractor, to be involved in, much less control, the technical aspects of the work performed by subcontract employees, such as Mr. Basehore, at WCH.

An agency relationship may exist, either expressly or by implication, when one party acts at the instance of and, in some material degree, under the

direction and control of another. *Matsumura v. Eilert*, 74 Wn.2d 362, 368, 444 P.2d 806 (1968). Both the principal and agent must consent to the relationship. *Moss v. Vadman*, 77 Wn.2d 396, 402-03, 463 P.2d 159 (1969). “Before the sins of an agent can be visited upon his principal, the agency must be first established.” *Matsumura*, 74 Wn.2d at 363. Under Washington law, an agency relationship is created, either expressly or by implication, “when one party acts at the instance of and, in some material degree, under the direction and control of another.” *Hewson*, 101 Wn.2d at 823. Consent and control are the essential elements of the relationship. *Moss*, 77 Wn.2d at 403.

As the Division III noted in *Stansfield v. Douglas County*, an “agency relationship does not depend on an express understanding, but may arise out of the conduct of the parties. It does not exist unless the facts, either expressly or by inference, establish that one person is acting at the instance of and in some material degree under the direction and control of the other.” *Stansfield*, 107 Wn. App. 17-18. According to the *Matsumura* Court, “It arises from manifestations that one party consents that another shall act on his behalf and subject to his control, and corresponding manifestations of consent by another party to act on behalf of and subject to the control of the other.”

Matsumura, 74 Wn.2d at 368 (citing Restatement (Second) of Agency § 1 (1958)).

Judge Spanner correctly concluded that the facts were insufficient to establish a principal-agent relationship between ELR and Mr. Basehore. ELR's owner testified that ELR did not supervise Mr. Basehore (RP at 908:15-16); did not direct any of his work at WCH (RP 908:17-19); and did not control Mr. Basehore's work at WCH. (RP 908:20-22) Mr. Basehore was not acting at the instance of, or in some material degree under the direction and control of, ELR. The trial court correctly granted ELR's directed verdict, and it should be affirmed on appeal.

D. The Standard of Review for Jury Instructions Is "Abuse of Discretion."

Jury instructions are adequate if they are supported by substantial evidence, allow each party to argue its theories of the case, and, when read as a whole, properly inform the jury of the applicable law. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). The Court of Appeals reviews for abuse of discretion the trial court's decision to give or withhold a particular instruction. *Thomas v. Wilfac, Inc.*, 65 Wn. App. 255, 264, 828 P.2d 597 (1992).

The Court reviews the adequacy of jury instructions *de novo* as a question of law. *Hall v. Sacred Heart Med. Ctr.*, 100 Wn. App. 53, 61, 995 P.2d 621 (2000). The precise wording of the instructions is within the broad discretion of the court. *State v. Alexander*, 7 Wn. App. 329, 336, 499 P.2d 263 (1972).

The general rule is that a party who objects to the wording of a proposed instruction must provide the court with an acceptable alternative. *Miller v. Peterson*, 42 Wn. App. 822, 830, 714 P.2d 695 (1986) (emphasis added); *Harris v. Groth*, 99 Wn.2d 438, 447, 663 P.2d 113 (1983).

Here, Mr. Wilcox did not object to the actual wording of the Borrowed Servant Instruction—*so it stands as a correct statement of law* under de novo review. Additionally, Mr. Wilcox did not provide the trial court with an acceptable alternative. Rather, Mr. Wilcox objected solely to giving the Borrowed Servant instruction to the jury. (RP 942:4-9) However, whether to give or withhold a particular instruction is soundly within the trial court's discretion. *Wilfac*, 65 Wn. App. at 264. Here, based on the testimony and evidence, Judge Spanner correctly exercised his discretion in giving the Borrowed Servant instruction to the jury.

E. The Trial Court Correctly Instructed the Jury on the Borrowed Servant Doctrine.

With regard to borrowed servant, the jury was instructed as follows:

Under the borrowed servant doctrine, a worker in the general employ and pay of one employer may be loaned to another. If an employer meets its burden of proving by a preponderance of the evidence that the worker is a “borrowing servant” that employer is not liable for the worker’s negligence.

In order for a person to be a “borrowed servant,” the general employer must surrender, and the borrowing employer must assume, exclusive supervision and control over the worker. Exclusive control for all purposes is not required. Rather, the question is whether the borrowing employer has exclusive control of the borrowed worker for the transaction causing injury.

Defendant has the burden of proving borrowed servant by a preponderance of the evidence.

(CP 107)

Further, if “defendant proves that Steve Mr. Basehore was a borrowed servant of Washington Closure Hanford, your verdict should be for the defendant.” (CP 106)

The trial court correctly determined that ELR was not a “master” and Mr. Basehore was not its “servant.” Accordingly, the borrowed servant doctrine did not apply to ELR. However, if Judge Spanner’s ruling is reversed and this case is remanded for a new trial, ELR will be directly affected. For this reason, ELR briefly addresses the borrowed servant doctrine

and the instruction submitted to the jury.

A borrowed servant is, “an employee whose services are, with the employee’s consent, lent to another employer who temporarily assumes control over the employee’s work. Under the doctrine of *respondeat superior*, the borrowing employer is vicariously liable for the employee’s acts.” Black’s Law Dictionary (8th ed. 2004).

If Mr. Basehore was the borrowed servant of WCH, then WCH was vicariously liable for his negligence. However, since Mr. Wilcox was employed by WCH, his exclusive remedy for WCH’s negligence, including the negligence of its employees, was through Workers’ Compensation.

Here, the evidence substantially established that Mr. Basehore was WCH’s borrowed servant—and the jury agreed. Bartlett lent Mr. Basehore to WCH, and WCH utilized his expertise on the demolition project. The jury heard many witnesses, including Emmett Richards, Kim Koegler, Donna Yakek, and Bonnie Cole. The 12-member jury entered a verdict in Bartlett’s favor—finding that, in fact, Mr. Basehore was WCH’s borrowed servant.

Division III in *Campbell v. State*, 129 Wn. App. 10, 20-21, 118 P.3d 888 (2005), stated that under the borrowed servant doctrine “a worker under the general employ and pay of one person may be loaned or hired to another.

When the worker undertakes the work of the other, the worker becomes the servant of the other for the particular transaction, and the general employer may escape liability for the worker's negligence" (quoting *Brown v. Labor Ready N.W., Inc.*, 113 Wn. App. 643, 647, 54 P.3d 166 (2002) review denied, 149 Wn.2d 1011 (2003)). ***Exclusive control for all purposes is not required.*** *Brown*, 113 Wn. App. at 651 (emphasis added). That is exactly what happened in the case at bar.

Moreover, "[i]f the worker was a borrowed servant ***at the time of the transaction at issue***, the servant's general employer can escape liability for damages." *Campbell*, 129 Wn. App. at 21 (citing *Brown*, 113 Wn. App. at 647). The *Campbell* Court noted that "[t]he key factor is that the servant be in the exclusive control of the special employer ***at the time of the transaction.***" *Id.* (emphasis added) (citing *Davis v. Early Constr. Co.*, 63 Wn.2d 252, 258, 386 P.2d 958 (1963)).

Whether an employee qualifies as a borrowed servant is generally a factual question. *Campbell*, 129 Wn. App. at 21 (citing *Nyman v. MacRae Bros. Constr. Co.*, 69 Wn.2d 285, 288, 418 P.2d 253 (1966)). However, Mr. Wilcox apparently contends that a party must state in writing that an employee is a borrowed servant. (See Mr. Wilcox's Opening Brief at 8:

Bartlett “admitted that no writing stated that Mr. Basehore was a ‘borrowed servant’ employed by WCH.”) However, Mr. Wilcox fails to support his contention with case law.

Instead, with or without a statement in writing, a jury applies the facts to determine whether an employee is under the direction and control of another entity. Here, the jury concluded, based on the factual evidence, that Mr. Basehore was under the direction and control of WCH, and consequently was WCH’s borrowed servant.

The inquiry for applying the borrowed servant doctrine is fairly focused. Here, as in *Brown v. Labor Ready*, the borrowed servant (Mr. Basehore) was performing his work at Hanford under the direction and control of WCH. The testimony established that WCH, and only WCH, controlled Mr. Basehore’s day-to-day activities at the jobsite.

Each week, Mr. Basehore reported to, and had his timecards signed by his supervisor, a WCH employee, who instructed him regarding his duties and monitored his work. WCH provided the equipment necessary to perform the job. Moreover, there was no Bartlett or ELR employee on site to supervise Mr. Basehore’s work.

As Judge Spanner recognized, borrowed servant was front and center

in this case from the outset. That's why the jury was specifically instructed on the borrowed servant doctrine, and why the borrowed servant question was first on the verdict form. If the jury concluded that Mr. Basehore was WCH's borrowed servant, then that ended the case. This is exactly what happened.

F. The Trial Court Correctly Allowed ELR to Assert the Affirmative Defense of the Borrowed Servant Doctrine, If Necessary.

Mr. Wilcox contends that ELR did not plead the borrowed servant doctrine as an affirmative defense, and therefore could not raise it at trial. (*See* Mr. Wilcox's Opening Brief at 21-22) ELR explained that the borrowed servant doctrine was "front and center" in this lawsuit, and that the case had been about the doctrine from the very beginning. (RP at 13:23-24; 14:5-6)

ELR's position was that it never employed Mr. Basehore—he was Bartlett's employee, who worked for WCH under a contract to perform work planning services for WCH. (RP at 14:1-4) However, throughout the litigation, Mr. Wilcox was trying to prove that an employment and/or agency relationship existed between ELR and Mr. Basehore. Likewise, throughout the litigation, both ELR and Bartlett relied on the borrowed servant defense. The trial court agreed. "I have to agree with the defense. If the plaintiff is successful in proving that he was an employee of ELR, then ELR gets to raise

the Borrowed Servant Doctrine because it's ceded or according to its position ceded exclusive control of Mr. Bashore to Washington Closure Hanford.” (RP at 14:18-23)

To the extent that Mr. Wilcox assigns error to the trial court's ruling that ELR could avail itself of the borrowed servant defense, if necessary, then ELR submits that Judge Spanner's ruling was correct as a matter of law and should be affirmed. In *Davis v. Early Const. Co.*, 60 Wn.2d 252, 259-60, 386 P.2d 958 (1963), the Supreme Court explained that “[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings” (citing 15B Karl B. Tegland, *Washington Practice* (2004)).

While “amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment” nevertheless, “failure so to amend does not affect the result of the trial of these issues.” *Id.*

If Mr. Wilcox found the affirmative defense objectionable, then his remedy was to obtain a trial continuance “to enable the objecting party to meet such evidence.” *Id.* Here, Mr. Wilcox did not request a continuance and did not establish that the admission of the borrowed servant defense

prejudiced him. Having failed to exercise his remedies, Mr. Wilcox has waived claiming error on appeal. The trial court's ruling should be affirmed.

G. Mr. Wilcox Waived Raising the Issue or Applicability of “Indemnity” on Appeal.

Inexplicably, Mr. Wilcox raises—for the first time to ELR—the issue or applicability of contractual indemnity to the facts of this case. (*See* Mr. Wilcox's Opening Brief at 12, 28-30) Mr. Wilcox appears to argue that the contractual indemnity provision in the contract between ELR and WCH belatedly supports his argument that Mr. Basehore was not employed by WCH. (*Id.*)

Significantly, Mr. Wilcox never raised the issue or application of indemnity in his complaint; nor during ELR's two motions for summary judgment, during discovery, in the Trial Management Report, in his trial brief, during any portion of the two-week trial, or in jury instructions. Having failed to raise it in the trial court, Mr. Wilcox has now waived raising its applicability in the appellate court pursuant to RAP 2.5(a).

RAP 2.5(a) explains the circumstances which may affect scope of review:

(a) *Errors raised for first time on review.* The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the

following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

Here, the factors in RAP 2.5(a)(1)-(3) do not apply. Mr. Wilcox does not claim errors with respect to jurisdiction, failure to establish facts upon which relief may be granted, or a manifest error affecting a constitutional right. Moreover, Mr. Wilcox does not seek to “present a ground for affirming a trial court decision,” as required by RAP 2.5(a). Instead, he seeks reversal. Finally, no party has raised a claim of error with respect to indemnity.

In sum, Mr. Wilcox has waived the right to raise the applicability of indemnity on appeal. Accordingly, the Court of Appeals’ scope of review is limited to the lower court’s record. *See State v. Nason*, 168 Wn.2d 936, 233 P.3d 848 (2010) (noting that because the petitioner failed to preserve an issue on appeal, it was not properly before the Supreme Court); *Sorenson v. Pyeatt*, 158 Wn.2d 523, 542-43, 146 P.3d 1172 (2006) (declining to address arguments raised for the first time in supplemental briefing); *State v. Scott*,

110 Wn.2d 682, 685, 757 P.2d 492 (1988) (“RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them.”); *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978) (“An issue, theory or argument not presented at trial will not be considered on appeal.”) RAP 1.2(b) instructs that “will” is a word of command: “The word ‘will’ or ‘may’ is used when referring to an act of the appellate court.”

The policy basis for the general rule is judicial economy. “The rule reflects a policy of encouraging the efficient use of judicial resources.” *Scott*, 110 Wn.2d at 685. The Supreme Court counseled that the “appellate courts will not sanction a party’s failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.” *Id.*

RAP 2.5(a) also applies as a matter of fairness. *See* 2A Karl B. Tegland, *Washington Practice: Rules Practice RAP 2.5* (6th ed. 2004) (“[T]he opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted error or new theories and issues for the first time on appeal.”)

Based on the foregoing, ELR respectfully submits that Mr. Wilcox waived raising the applicability of indemnity for the first time on appeal.

VI. CONCLUSION

The trial court's ruling granting ELR's motion for a directed verdict should be affirmed because the record clearly confirms that Mr. Wilcox failed to introduce any (much less "sufficient") evidence to establish a principal-agency relationship between ELR and Mr. Basehore. Additionally, given the facts and law in this case, the trial court properly exercised its discretion in giving the jury a Borrowed Servant instruction. Both decisions should be affirmed.

Dated this 2 day of October, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 2nd day of October, 2014, I caused to be served a true and correct copy of the foregoing via email and messenger, and addressed to the following:

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