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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SUPREME COURT NO.

COURT OF APPEALS NO. 32179-7

DEAN WILCOX,
Petitioner,

vs.

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

SUPPLEMENTAL BRIEF OF RESPONDENT BARTLETT
SERVICES INC.

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 ORIGINAL

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I. IDENTITY OF RESPONDENT

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

II. INTRODUCTION

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

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

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

benefits through BSI. However, WCH had sole control over Mr. Basehore's daily activities. They provided managerial oversight, controlled the hours that he worked, approved sick/vacation time, retained full control over the project and provided Mr. Basehore the necessary equipment to perform his job. Although Mr. Basehore was still an employee of BSI, he was under the control of WCH. The jury found in favor of BSI after a two week trial. The Court of Appeals affirmed this decision and found that Mr. Basehore was a borrowed servant of BSI at the time of Mr. Wilcox's injury. This Court accepted plaintiff's Petition for Review.

II. RESTATEMENT OF THE QUESTIONS FOR REVIEW

- a. Whether the borrowed servant doctrine is meant to protect an employer who does not control their employee while working for another, regardless of how the employee is ultimately retained.
- b. Whether the plaintiff can raise for the first time on appeal the wording of contractual agreements between the parties and where there is no contract applicable, whether precedent surrounding express contractual terms is applicable.

III. STATEMENT OF THE CASE

- a. **BSI supplies temporary specialized staff, such as Mr. Basehore.**

Bartlett Services, Inc. is a national corporation that supplies specialized personnel to nuclear, government and industrial facilities. Ex. 72, 76. Its employees include personnel from a broad range of specialties. Ex. 72. Mr. Basehore was a member of the nuclear group, which provides “staffing services, innovative solutions, and technology to... government facilities.” Ex. 143, RP 394. BSI provides specialized personnel to contracts such as WCH who are involved in the demotion and decommissioning of nuclear plants. RP 345. BSI provides temporary workers for these types of projects who are then assigned to complete a specific task on the project. RP 860; 394. These workers are on site temporarily to fill a need of the particular contractor. RP 860.

The structure utilized by BSI and contractors is beneficial for both parties: the contractors are not forced to hire permanent employees and BSI provides an efficient and effective way to find workers with a specialized skill set. RP. 860; 491. In this arrangement, BSI relinquished the majority of its control of Ms. Basehore to WCH. RP. 361. He was still a BSI employee but all of his duties, responsibilities and supervision were done at or by WCH. RP. 361. BSI still paid Mr. Basehore his salary and gave him benefits related to his employed. RP 361. However, the day to day activities, the oversight and the equipment needed for his job, etc. were provided by WCH. RP 361.

Mr. Basehore was sought after by WCH due to his experience and expertise as a work planner. RP 574-5. Kim Koegler requested that Mr.

Basehore come to WCH through ELR. RP 867-8. WCH must meet certain government regulations regarding contracts with small business or it could face a fine. ER 646. Although there is a monetary incentive to work with small business, there is also a penalty if WCH does not meet a certain amount. RP 646-7.

b. Mr. Basehore's daily activities were controlled by WCH.

While he worked at WCH, Mr. Basehore was supervised by Kim Keogler, an employee of WCH. RP 218. Mr. Basehore's job responsibilities at WCH included development of the Integrated Work Control Procedure (IWCP). RP 48. The work project requires a team effort. RP 36. Mr. Basehore's position required him to adhere to government regulations, WCH safety rules and input from his superiors in order to develop the IWCP. RP 48, 443.

As mentioned above, in order to complete the IWCP, a team must be created. RP 173. The procedures for creating IWCP are set out in PAS-2-1. Ex. 1. The Project Director, among other things, appoints a Responsible Manager and ensures that they are properly trained. RP 173. The Responsible Manager is then responsible for selecting the Planning Team members and appointing the Project Engineer. RP 175. This team includes the Subject Matter Experts (SME). RP 175. With the exception of two Work Control Planners, Mr. Basehore and Mr. Bateman, all of the individuals assigned to Building 336 were permanent employees of WCH. RP 178, 440, 491-2, 605, 684.

The IWCP is created in WCH offices, using WCH computers and materials. RP 230. Mr. Basehore had to answer to WCH personnel while creating the IWCP. RP 170, 174, 183. WCH had authority to override Mr. Basehore's changes to the IWCP. RP 562. Similarly, Mr. Basehore could not put anything in the IWCP without WCH approval. RP 553.

While creating the IWCP Mr. Basehore's day-to-day activities were directed by WCH. RP 561. The hours that he worked, the actual work he was doing and the approval of vacation/sick time was done by WCH employees. RP 559, 606, 611. Mr. Basehore was expected to follow WCH procedures as well as the WCH safety plan. RP 611.

WCH gave Mr. Basehore a promotion while he was working at the Hanford site. RP 671. In addition, Mr. Basehore adhered to WCH's holiday schedule rather than BSI's. RP 658. Mr. Basehore was provided the necessary tools from WCH in order to perform his job, he was also trained just like one of their employees. RP 505. His work activities were directed by a WCH employee and likewise, WCH did not expect anyone from BSI to direct him. RP 505.

c. The parties have valid and lawful reasons for their contractual positions.

Plaintiff argues that BSI, ELR and WCH had questionable motives when they engaged in these contractual relationships. However, as stated above, WCH must meet certain government regulations regarding small business or it could face fines. RP 646. The use of

ELR in the employment of Mr. Basehore was an attempt to avoid penalties by the government for failure to utilize these types of business. RP 646.

In addition to the monetary penalties, it makes more sense for WCH to hire specialized employees through companies like BSI and ELR. This prevents WCH from hiring a full-time employee when it knows that a position is only available on a temporary basis. RP 646. If WCH hired directly, it would not be fair to the worker who moves to the job site and then is laid off a year later. *Id.* Staff augmentation allows WCH the flexibility to obtain highly skilled workers in a way that is fair to the employee. It also allows contractors like WCH to obtain workers from other areas, rather than relying solely on those available in their community. RP 645.

Plaintiff argues that these contracts are set up to provide “access to federal money.” To the contrary, the contracts present in this appeal were drafted and used in order to provide an efficient way for contractors to obtain the workers they desperately need. Although they could do as the plaintiff suggests, and directly hire employees, they would be limited by applicants as contractors have ordinarily already employed as much of the local community as reasonably possible. RP 645.

In addition, the plaintiff argues that the existence of contracts between BSI and ELR Consulting as well as those between ELR

Consulting and WCH preclude the application of the borrowed servant defense. The plaintiff relies on *Stocker v. Shell Oil* in support of his contention that *any* contractual agreements preclude the borrowed servant defense. Petition at 10. However, the holding in *Stocker* is limited and applies only to indemnity contracts. *See Stocker v. Shell Oil*, 105 Wn.2d 546, 549, 716 P.2d 306, 307 (1968). Further, the contracts involved here were not between BSI and WCH, there were no express contractual terms between the relevant parties on which to base the holding of *Stocker*.

IV. STANDARD OF REVIEW

In his appeal to the Court of Appeals the plaintiff raised two issues: the directed verdict granted in favor of ELR and secondly, the instruction given to the jury regarding the borrowed servant defense. Opening Brief of Appellant at 6; Opinion at 18. Specifically, in his opening brief to the Court of Appeals, Division III, the plaintiff raises four separate issues in regards to the jury instruction on the borrowed servant defense. Opening Brief of Appellant at 6. Further, in his petition for review to the Supreme Court, the plaintiff requests that the court review the Court of Appeals decision in this matter while also raising additional issues. Petition at 1.

This defendant is not concerned with the standard of review regarding ELR's Motion for a directed verdict. Regarding the borrowed servant instruction, a trial court's decision to give a jury instruction is reviewed *de novo* if it deals with a matter of law and an abuse of discretion if dealing

with a matter of fact. *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286287 (2009). Here, the issue is one of fact as plaintiff alleges in his opening brief to the Court of Appeals that the trial court erred in giving the borrowed servant instruction when: 1) parties entered into contracts which stated that the loaned employee was not an employee of the “special employer; 2) the general employer did not loan its employee to the purported “special” employer; 3); trial court instructed jury it could apply the borrowed servant to an independent contractor’s sale of professional services; and 4) the general employer admitted that it did not give up exclusive control over the loaned employee. Appellant’s Opening Brief 6. The applicable standard of review for contesting a trial court’s giving of a jury instruction is abuse of discretion. *Herring v. Dept. of Social and Health Services*, 81 Wn. App. 1, 22, 914 P.2d 67, 80 (1996) (citing *Safeway v. Martin*, 76 Wn.App. 329, 332, 885 P.2d 842 (1994)).

V. ARGUMENT

- a. **The application borrowed servant defense rests upon who had control of an employee.**
 - i. **The origin of the borrowed servant defense rests upon respondeat superior.**

The borrowed servant defense rests upon the well-established doctrine of respondeat superior, that an employer is only liable for the acts of its employees when acting within the course and scope of employment. *See e.g. Nelson v. Broderick & Bascom Rope Co.*, 53 Wn.2d 239, 241, 332 P.2d 460, 462 (1958); *Elder v. Cisco Const. Co.*, 52 Wn.2d 241, 243, 324

P.2d 1082, 1084 (1958) (“the doctrine that holds a master responsible for the acts of his servant when the servant is in the course and scope of his employment”). *Westerland v. Argonaut Grill*, 185 Wash. 411, 414, 55 P.2d 819, 820 (1936) (“We there recognized the rule that the employer is held responsible under the doctrine of respondeat superior if the acts of the servant were in furtherance of his master’s business and within the scope of the servant’s employment.”)

This court has held that the borrowed servant defense expands the concept of respondeat superior. *Stocker v. Shell Oil*, 105 Wn.2d 546, 548, 716 P.2d 306, 308 (1986). Holding that under respondeat superior an employer is liable to a third party for the negligence of its employees done within the course of employment. *Id.* However, an employer may loan his employee to another at which time the employee becomes the “borrowed servant” of another. *Id.* As long as it can be established that the employee had borrowed servant status at the time of the injury, the general employer can escape liability. *Id.*

The plaintiff argues in his Petition that the borrowed servant defense does not apply in this case because there was a “double borrowing” situation. Petition at 9. However, there is no difference between a “double borrowing” as its alleged here or a single loan transaction. The relevant issue is who had control of Mr. Basehore when Mr. Wilcox sustained his on the job injury. *See Brown v. Labor Ready*, 113 Wn.App. 643, 651, 54 P.3d 166, 171 (2002). As stated in the facts, it

is clear that WCH had primary control of Mr. Basehore while he performed his duties at the Hanford site. Plaintiff attempts to throw a red herring in this case by arguing that the presence of ELR Consulting places the defendant's position outside the parameters of the borrowed servant defense. Conversely, the dispositive question here is who had control of Mr. Basehore, the answer is clearly WCH. *See id.*

ii. The Court of Appeals Decision affirms the well-established principles of both these doctrines.

Plaintiff argues that the decision of the Court of Appeals conflicts with the precedent of this Court because it expands the borrowed servant doctrine. Petition at 8. Further, plaintiff states that no Washington case describes a "double borrowing" and thus it is in conflict. *Id.* at 9. Similarly, there is no Washington case which says that expansion of this well-established doctrine equals conflict.

It is difficult to imagine the evolving state of the law if every doctrine was incapable of being updated, expanded or limited. In addition, the alternative to plaintiff's argument would make BSI liable for Mr. Basehore's actions while he was under the control of another employer. This would be in direct conflict with precedent establishing that a master is only liable for the acts performed while his employee is in furtherance of the master's business. *See e.g. Kuehn v. White*, 24 Wn.App. 274, 277, 600 P.2d 679, 681 (Div. 1, 1979) ("A master is responsible for the servant's acts... in furtherance of the master's business"); *McQueen v.*

People's Store Co., 97 Wash. 387,388, 166P. 626, 627 (1917) (“the act complained of must have been done while the servant was engaged in doing some act under authority from his master...”); *Footte v. Grant*, 55 Wn.2d 797, 801, 350 P.2d 870, 872 (1960) (“The true test of liability is whether the servant was engaged in his master’s business...”). The Court of Appeals Opinion protects this well-established doctrine. Court of Appeals 19-20.

The last opportunity this Court had to review the borrowed servant defense was in *Stocker v. Shell Oil Co.* There, the issue was whether the borrowed servant status of a negligent worker defeated an express indemnity agreement between the contracting parties. 105 Wn.2d 546, 546, 716 P.2d 306, 307 (1986). This Court has had numerous other opportunities to review the state of the borrowed servant defense. All confirm what was held in *Stocker* that an employer may borrow an employee from another and become liable for that employee’s specific actions in furtherance of its business. *See e.g. Davis v. Early Const. Co.*, 63 Wn.2d 252, 257, 386 P.2d 958, 961-2 (1963). (“It is of course well settled law that one who is in the general employ and pay of one person may be loaned or hired, by his employer to another and when he undertakes to do the work of the other he becomes the servant of such other, to perform the particular transaction.”); *B & B Building Material Co. v. Winston Bros. Co.*, 158 Wash. 130, 134, 290 P. 839, 841 (1930). (“It is well settled that one who is the general servant of another may be lent or hired by his

master to another for some special service, so as to become as to that service the servant of the hirer.”) *McHugh v. King County*, 14 Wn.2d 441, 445, 128 P.2d 504, 506 (1942). (“He who controls the actions and directs the work or action of another is responsible for the acts of the one to whom the instruction is given.”)

The Court of Appeal’s decision in this case encompasses the precedent surrounding the borrowed servant defense. *See Opinion*. The Court of Appeals discounted plaintiff’s argument by stating that “case law does not dictate how a general employer lends its employees or whether the general employer may employ an intermediary lender.” *Opinion* at 33. Analysis and application of the borrowed servant rule invariably focuses on who exerted control over the servant for the transaction causing an injury. *Opinion* at 33. (citing *Brown v. Labor Ready*, 113 Wn. App. 643, 651, 54 P.3d 166 (2002)).

One of the more recent cases covering the borrowed servant defense was decided in 2002 by Division I of the Court of Appeals is *Brown v. Labor Ready Northwest, Inc.* In *Brown*, the plaintiff was an employee of CMI Northwest, a lumbar distribution center. 113 Wn.App. 643, 645, 54 P.3d 166, 168 (2002). Mr. Henson was an employee of Labor Ready Northwest, Inc. which is a national provider of temporary manual labor employees. *Id.* While he was hired to provide manual labor, Henson was also determined to be qualified to operate a fork lift while at CMI Northwest. *Id.* The plaintiff, Ms. Brown was injured while Mr. Henson

was operating the forklift. *Id.* at 168, 54 P.3d at 646. She subsequently sued Labor Ready Northwest, Inc. arguing that it was vicariously liable for Mr. Henson, it was negligent in hiring and retaining him and failing to properly train him. *Id.* The trial court granted defendant's motion for summary judgment based on the borrowed servant defense and the Court of Appeals affirmed. *Id.* at 645, 54 P.3d at 168.

The facts and circumstances in *Brown* are exceedingly similar to the case at hand. See *Brown v. Labor Ready* 113 Wn.App. 643, 645-6, 54 P.3d 166, 168 (2002). Mr. Henson was hired through an agency that specializes in supplying temporary workers. *Id.* Mr. Henson was still an employee of Labor Ready Northwest, Inc. at the time of plaintiff's injury, but was also an employee of CMI Northwest. See *id.* at 651, 54 P.3d at 170. This is evidenced through the control that CMI Northwest had on Mr. Henson. See *id.* This includes the fact that the machinery that caused the injury was owned by CMI, CMI directed Henson to use the forklift and generally CMI directed the aspects of Henson's work. See *id.* He was not sent for a specific, limited task. See *id.*

The issue in *Brown* was whether the trial court was correct in granting summary judgment on behalf of Labor Ready Northwest, Inc. *Brown*, 113 Wn.App at 645, 54 P.3d at 167. There, the Court of Appeals affirmed based off of the authority that CMI Northwest had to control Mr. Henson's work. See *id.* 113 Wn.App. at 654, 54 P.3d at 173.

The decision of the Court of Appeals in this case affirms this Court's previous holdings regarding the borrowed servant defense. Further, the Opinion reflects what other divisions of the Court of Appeals have held since this Court's last review of the doctrine. The more recent decision in *Brown* is directly on point. *Brown*, 113 Wn.App. at 645, 64 P.3d at 167. The precedent of the borrowed servant defense has never been concerned with the number of parties involved in a certain transaction. Rather, the focus is on the control of the employee.

B. The plaintiff failed to raise the issue of express contractual terms at the trial court, thus he has waived his right to raise the issue.

i. The plaintiff waived his argument under RAP 2.5.

Plaintiff argues that the borrowed servant defense is secondary to express contractual terms between parties. Petition at 10. This argument was not raised at the trial court level and is improper in this appeal. RAP 2.5. An appellate court may refuse to review claims which were not raised for the first time at trial. RAP 2.5. A party may raise issues dealing with trial court jurisdiction, failure to establish facts upon which relief can be granted and manifest error regarding a constitutional right for the first time at the appellate court level. RAP 2.5. The plaintiff has not raised any of these issues.

The Court of Appeals in this matter applied the holding of *Lunsford v. Saberhagen Holdings, Inc.* in its decision to review the contractual issues. Opinion at 30. The Court of Appeals reasoned that

because plaintiff was making other arguments related to contractual arrangement that this issue should be allowed as well. However, those other contractual issues only involved the status of Mr. Basehore, they were not concerned with indemnity clauses. Further, the holding in *Lunsford* was applied to a strict liability action where a change in the law had been retroactively applied to previous cases. *See Lunsford*, 139 Wn.App. 334, 336, 160 P.3d 1089, 1090 (2007). There, the court reasoned that the law was applied to previous litigants; therefore it should be applied to all subsequent litigants. *Id.* Here, no similar issue exists. As such, the plaintiff should be barred from presenting this argument on appeal.

ii. Regardless of whether the plaintiff waived his argument, there are no express terms upon which to rest his argument.

The plaintiff argues that the Court of Appeals decision in this matter conflicts with the holding in *Stocker* that express contractual terms outweigh the application of the borrowed servant defense. Petition at 10. However, here no contract existed between BSI and WCH. The only contracts that existed were between BSI and ELR Consulting and ELR Consulting and WCH. BSI and ELR Consulting formed a contract on May 23, 2008 for the services of Steven Basehore. Ex. 100. This contract stated that the subcontractor, BSI was furnishing the services of Mr. Basehore to the contractor, ELR Consulting. Ex. 100. In addition, ELR Consulting had a contract with WCH for the services of Steven Basehore. Ex. 34. Within

this contract, it states that the contractor, Washington Closure Hanford has authority over the personnel, Mr. Basehore. RP 398; Ex. 34.

The plaintiff relies on *Stocker* for his argument that any express contractual terms offset the presence of the borrowed servant defense. Petition at 10. However, the circumstances in *Stocker* are drastically different than those present in the subject case. *See Stocker v. Shell Oil*. In *Stocker*, P.M. Northwest, a Washington Corporation, provided temporary workers to oil refineries including Shell. 105 Wn.2d 546, 547, 716 P.2d 306, 307 (1986). Four P.M. workers were sent to the Shell refinery; while one of them was working an explosion occurred. *Id.* This resulted in two of the four workers being killed. *Id.* at 547, 716 P.2d at 308. The personal representatives sued Shell, Shell in return sued P.M. for indemnification. *Id.* The indemnification was based in part on the negligence of one of P.M.'s workers and the fact that the contract between the parties stated that P.M. would be liable for any injuries arising from the contract *Id.* at 548, 716 P.2d at 308.

The largest disparity between *Stocker* and the subject case is that in *Stocker*, the borrowed servant is the one who was injured. *See Stocker*, at 546, 716 P.2d at 307 Conversely, in the subject case the plaintiff was employed by the borrowing employer, WCH. The effect of this difference limits Mr. Wilcox's compensation to those provided by the state.

In addition, the express contract provision in *Stocker* was an indemnity clause that placed liability on P.M. for injuries arising out of the

contract. *See Stocker*, 105 Wn.2d at 549, 716 P.2d at 308. There is no similar contract term present here. Rather, as mentioned above the contract terms present in this case described exactly what the borrowed servant defense would cover: the services of Steven Basehore. The terms did not cover indemnity nor did they cover anything beyond the services to be provided from subcontractor to contractor. *See Ex. 34; 100.*

In support of his argument plaintiff points to *Tidewater Oil Co. v. Travelers Ins. Co.*. However, there the Fifth Circuit held that parties could allocate the risk of labor through indemnity contracts. *See Tidewater*, 468 F.2d 985, 988 (1972). There is no mention of terminating the application of the borrowed servant when the parties have not specially allocated risk through indemnity agreements. The holdings in *Tidewater* and *Stocker* are not applicable here as to express contractual terms. BSI, ELR and WCH did not allocate risk or bargain about indemnity provisions.

VI. CONCLUSION

The overall issue in this case was who had control over Mr. Basehore's daily activities while he worked at WCH. The trial court and the Court of Appeals correctly found that WCH had this responsibility at the time of the accident. The Opinion of the Court of Appeals does not conflict with this Court's holdings but rather affirms its precedent regarding the borrowed servant defense.

Respectfully submitted this 20th day of April, 2016.


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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 28, 2016, I caused to be served upon the following parties, a copy of the document entitled SUPPLEMENTAL BRIEF;

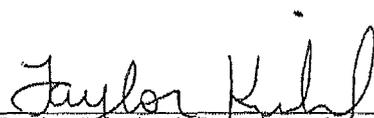
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I certify under penalty of perjury under the Laws of the State of Washington that the foregoing is true and correct.

Dated at Tacoma, Washington, this 28th day of October 2015.

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