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SUPREME COURT
OF THE STATE OF WASHINGTON

DEAN WILCOX,

Petitioner,

vs.

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

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENT ELR CONSULTING

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I. INTRODUCTION

In this personal injury case, Petitioner Dean Wilcox was employed by and working on a demolition project at Washington Closure Hanford (WCH), when he fell through an open hatch on a catwalk. He filed suit against Steve Basehore, a work planner, alleging that Mr. Basehore was negligent for creating unsafe working conditions. He also sued Mr. Basehore's general employer, Bartlett Services, and the staff augmentation contractor through whom Mr. Basehore was hired, ELR Consulting (ELR). He alleged that Mr. Basehore was "employed by and/or acting as an agent of Bartlett Services and/or ELR Consulting," therefore, Bartlett and ELR were vicariously liable under the doctrine of respondeat superior.

At trial, ELR presented substantial evidence that—in *actuality*—it never supervised, directed, or controlled the technical aspects of Mr. Basehore's work for WCH. Second, ELR presented undisputed evidence that it had *no contractual right* to control Mr. Basehore's technical work. Because ELR never controlled the technical aspects of Mr. Basehore's work, it was not vicariously liable for Mr. Basehore's alleged negligence at WCH.

After a two-week jury trial, ELR moved for a directed verdict that it was not vicariously liable, as a matter of law. In determining the legal relationship

between Mr. Basehore and ELR, if any, the trial court correctly focused on whether ELR exercised control over the technical aspects of Mr. Basehore's work, finding "[t]here was just no control actually exercised whatsoever." The trial court first considered whether Mr. Basehore was ELR's independent contractor, then concluded that "*I don't even think that ELR had any relationship with Mr. Basehore.*" The trial court dismissed ELR.

Based on the (1) uncontroverted trial testimony of WCH management personnel and ELR president, Emmet Richards, regarding WCH's control over Mr. Basehore's technical work; and (2) uncontroverted testimony that the Special Conditions in the contract between ELR and WCH gave WCH ultimate control over all of Mr. Basehore's technical work, the Court of Appeals, relying on Supreme Court precedent, affirmed the trial court's judgment in favor of ELR. *Wilcox v. Basehore*, 176 Wn. App. 63, 96, 356 P.3d 736 (2015).

With respect to ELR, the Court of Appeals focused on which entity—ELR or WCH—retained or exercised control over Mr. Basehore's allegedly negligent work. *Id.* at 95-96. The Court of Appeals correctly concluded that "ELR lacked any right to control Basehore's work as a work control planner, and did not, in fact, control that work." *Id.* at 95. Conversely, a WCH

manager, identified in ELR's contract with WCH, "administered the technical aspects of the use of Basehore's services." *Id.* at 96.

The trial court committed no error and the Court of Appeals' decision should be affirmed. "The common law rule is that one who engages an independent contractor is not liable for injuries to employees of the independent contractor resulting from the contractor's work." *Tauscher v. Puget Sound Power & Light Co.*, 96 Wn.2d 274, 277, 635 P.2d 426 (1981). Recently, the Supreme Court eschewed "formalistic" labels, holding that "the existence of a safe workplace duty depends on *retained control over the work*, not on labels or contractual designations such as "independent contractor" or "general contractor." *Afoa v. Port of Seattle*, 176 Wn.2d 460, 477, 296 P.3d 800 (2013). Here, substantial evidence clearly established that WCH retained *and exercised exclusive control* over Mr. Basehore's work. The Court of Appeals' decision with respect to ELR should be affirmed.¹

II. NO ASSIGNMENT OF ERROR

ELR submits that the evidence conclusively established that WCH retained and exercised control over all technical aspects of Mr. Basehore's

¹ ELR does not address the borrowed servant doctrine in this brief because ELR, Mr. Wilcox, and the trial court agreed that the doctrine did not apply to ELR since ELR never employed Mr. Basehore. Likewise, the Court of Appeals did not analyze its application to ELR. ELR's arguments concerning the borrowed servant doctrine in the trial court focused on the actual and exclusive control that WCH exercised over Mr. Basehore with regard to the acts and omissions giving rise to the underlying claim.

work. Accordingly, WCH was solely responsible for Mr. Basehore’s alleged negligence. The Court of Appeals’ decision—affirming the trial court’s dismissal of ELR—is factually and legally sound, and should be affirmed by the Supreme Court.

III. SUPPLEMENTAL RESTATEMENT OF THE CASE

A. ELR CONSULTING PROVIDES STAFF AUGMENTATION SERVICES TO WCH, AMONG OTHER ENTITIES.

ELR Consulting, Inc. (ELR), founded in 2005, is a service-disabled veteran-owned small business (SDVOSB). (6 Verbatim Report of Proceedings (VRP) at 889:19-24 (Dec. 12, 2013)). Its owner, Emmett Richards, suffered a gunshot wound in Vietnam. (6 VRP at 889:25 to 890:2-5 (Dec. 12, 2013). Operating a SDVOSB is an entrepreneurial federal benefit, allowing a veteran “to offer yet another contribution to the country they have long served.” Ramon Guillen Jr. and Tasha M. de Miguel, *Wounds of War: The Symposium Edition: Applauding the Entrepreneurial Spirit*, 37 NOVA L. REV. 579, 580 (2013). They are “[n]ow out of uniform, and in the role of entrepreneurs, veterans can become job creators and improve their circumstances, that of others, and their communities.” *Id.*

The federal benefit arose in 1999, when Congress first passed the Veterans Entrepreneurship and Small Business Development Act (15

U.S.C. §§ 631-657), followed by the Veterans Benefits Act of 2003 (15 U.S.C. § 657f) to support veterans in federal contracting. ELR, as an SDVOSB, specializes in providing temporary staffing to its clients, such as Washington Closure Hanford (WCH), the City of Richland, and Washington River Protection for positions such as engineers, scientists, designers, drafters, Quality Assurance, and safety professionals. (6 VRP at 892:21-25 (Dec. 12, 2013)); 6 VRP 894:20-25 (Dec. 12, 2013)). ELR provides temporary staffing solutions through either its own professional employees or through other service contractors, such as Co-Respondent Bartlett Services, Inc. (“Bartlett”).²

WCH is a prime contractor to the United States Department of Energy (DOE) at the Hanford site. (5 VRP at 560:13-14 (Dec. 11, 2013)). Under its federal contract with the DOE, “WCH received a fee incentive for subcontracting with small businesses and penalties if it did not.” *Wilcox*, 189 Wn. App. at 70. WCH regularly subcontracted with ELR to staff temporary

² Staff augmentation services are routinely provided to and utilized by companies. For example, Robert Half®, the highest-ranked staffing firm according to the March 1, 2016 issue of *Fortune*®, provides highly skilled legal professionals, including attorneys, paralegals, contract administrators, and office managers throughout Washington. <https://www.roberthalf.com/legal/client-services/why-work-with-us/client-faqs> Conversely, Microsoft utilizes hundreds of staff augmentation services for both temporary and contractor-based positions. <https://www.oncontracting.com/client/company/microsoft-contract-jobs-staffing-agencies-reviews>

positions. In 2008, WCH needed the expertise of a temporary demolition and decommissioning “Work Control Planner,” and specifically wanted to hire Stephen Basehore. An employee of Bartlett, Mr. Basehore was already working at Hanford for another prime contractor and was available for the Work Control Planner position.

ELR and WCH entered into a Technical Services Subcontract wherein WCH would pay ELR to supply Mr. Basehore’s work planning services to WCH. (6 VRP at 900:9-12; 901:10-12 (Dec. 12, 2013)). Likewise, ELR entered into a subcontract with Bartlett (Mr. Basehore’s direct employer) wherein ELR paid Bartlett for Mr. Basehore’s services. (6 VRP at 903:2-6 (Dec. 12, 2013; *see also* Ex. 222).

Under these two contracts, 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. (6 VRP at 904:3-16 (Dec. 12, 2013)) ELR earned the difference—\$3.42 per hour—for procuring Mr. Basehore’s services from Bartlett and furnishing him to WCH, as well as for performing *administrative* functions related to Mr. Basehore’s work. (6 VRP at 904:15-18, 21-25; 905:1-9 (Dec. 12, 2013)) ELR had no involvement, whatsoever, in

Mr. Basehore's day-to-day work for WCH, and in fact WCH prohibited ELR's involvement.

B. SPECIAL CONTRACT CONDITION 13 REQUIRED WCH TO RETAIN AND EXERCISE CONTROL OVER MR. BASEHORE.

The WCH/ELR subcontract contains *General* and *Special* Conditions. If the subcontract contained "conflicts, discrepancies, errors, or omissions," then the parties agreed that, under the "Order of Precedence," the *Special* Conditions Exhibit B (No. 5) took precedence over the *General* Conditions Exhibit A (No. 6). (6 VRP 875:21 to 876:5 (Dec. 12, 2013)).

General Condition 2 described ELR as an independent contractor and directed it to control its employees. It states as follows:

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.

Ex. 34 at ELR 000466. In contrast, Special Condition 13, which the parties agreed took precedence over General Condition 2 of the subcontract, assigned responsibilities to WCH senior project engineer Kim Koegler for the technical aspects of Mr. Basehore's work. Special Condition 13 states:

The CONTRACTOR [WCH] 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.

Ex. 34 at ELR 000486 (emphasis added). Numerous WCH employees testified at trial that this contract term was not just a formality, but a specific term grounded in the reality of WCH's practical role. At trial, former WCH Contract Administrator Bonnie Cole testified as follows:

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.

(6 VRP at 880:16 to 881:6 (Dec. 12, 2013)). Ms. Cole testified that WCH had *exclusive* control over Mr. Basehore's preparation of the work package. (6 VRP at 881:20-23 (Dec. 12, 2013)).

C. MR. WILCOX WAS INJURED AND FILED SUIT AGAINST MR. BASEHORE, ELR, AND BARTLETT.

In his personal injury suit, Mr. Wilcox alleged that "Steve Basehore was *employed by and/or acting as an agent* of Bartlett Services, Inc. and/or ELR

Consulting, Inc. when he was preparing the work plan and/or work package[.]” (CP at 22:8-9) (Emphasis added.) Specifically, Mr. Wilcox averred that: (1) 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 (2) 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 at 23:8; CP at 23:13-14).

ELR denied that Mr. Basehore was its employee or agent and asserted the 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 at 27:8-7; CP at 27:19-20).

D. THE TRIAL TESTIMONY ESTABLISHED THAT ELR DID NOT SUPERVISE, DIRECT, OR CONTROL MR. BASEHORE’S WORK.

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

- ELR never employed Mr. Basehore (6 VRP at 900:3-4 (Dec. 12, 2013));
- ELR was not responsible for ensuring that he completed site-specific training at WCH (6 VRP at 907:13-20 (Dec. 12, 2013));
- ELR did not pay for Mr. Basehore’s specific training at WCH (6 VRP at 908:6-7 (Dec. 12, 2013));

- ELR did not handle Mr. Basehore's orientation at WCH (6 VRP at 908:11-14 (Dec. 12, 2013));
- ELR did not supervise Mr. Basehore (6 VRP at 908:15-16 (Dec. 12, 2013));
- ELR did not direct any of his work at WCH (6 VRP at 908:17-19 (Dec. 12, 2013));
- ELR did not control Mr. Basehore's work at WCH (6 VRP at 908:20-22 (Dec. 12, 2013)); and
- ELR did not know which specific projects Mr. Basehore worked on for WCH. (6 VRP at 908:23-25 (Dec. 12, 2013)).

Conversely, Mr. Richards testified that *WCH supervised, directed, and controlled Mr. Basehore's work.* (6 VRP at 909:25 to 910:1-8 (Dec. 12, 2013)). Both WCH and Mr. Basehore agreed. WCH not only possessed "ultimate authority" to direct and control the technical aspects of Mr. Basehore's services, but—WCH, in fact—exercised such control.

E. THE TRIAL TESTIMONY ESTABLISHED THAT WCH SUPERVISED, DIRECTED, AND CONTROLLED MR. BASEHORE'S TECHNICAL WORK.

1. WCH SUBCONTRACT ADMINISTRATOR TESTIFIED THAT WCH OVERSAW ALL OF MR. BASEHORE'S WORK.

Bonnie Cole, the WCH Subcontract Administrator, testified as follows:

Q: [I]n Paragraph B it talks about the Subcontract Technical Representative being responsible for the technical aspects of the performance of the subcontract.

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.

(6 VRP at 879:22 to 880:10 (Dec. 12, 2013)). With respect to WCH's ultimate authority over Mr. Basehore's work, Ms. Cole testified as follows:

Q: And it says here [WCH employee] 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.

Ms. Cole testified that ELR was not permitted to direct or supervise Mr. Basehore while he was working for WCH. (6 VRP at 882:8-15 (Dec. 12, 2013)).

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.*

(6 VRP at 882:16-21 (Dec. 12, 2013)) (Emphasis added.)

2. WCH EMPLOYEE KIM KOEGLER TESTIFIED THAT HE, IN FACT, EXERCISED SUPERVISORY AUTHORITY AND CONTROL OVER MR. BASEHORE'S WORK.

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." (5 VRP at 548:23-24 (Dec. 11, 2013)). Mr. Koegler was directly involved in hiring Mr. Basehore. (5 VRP at 549:12-13 (Dec. 11, 2013)). Mr. Koegler explained that "staff augmentation" means utilizing different organizations to provide subcontractors; a "staff aug" was a subcontract employee. (5 VRP at 549:16-18 (Dec. 11, 2013)).

Mr. Koegler confirmed that he was the Subcontract Technical Representative or "STR" 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]." (5 VRP at 551:10-24 (Dec. 11, 2013)). *Mr. Koegler testified that it was ultimately "my responsibility to see that the subcontractor was performing in accordance with the subcontract."* (5 VRP at 552:8-11 (Dec. 11, 2013)). Both he and Tom Kisenwether (WCH Responsible Manager) were ultimately responsible for the work control program. (5 VRP at 552:15-24 (Dec. 11, 2013)) Mr.

Kisenwether had approved the work package before the work began. (2 VRP at 165 (Dec. 4, 2013)).

Mr. Koegler confirmed that WCH provided Mr. Basehore with personal protective equipment, clothing, steel-toed boots, etc. (5 VRP at 560:18-22 (Dec. 11, 2013)). Mr. Basehore, as a Work Control Planner, was not responsible for drafting safety protocol. (5 VRP at 560:23 to 561:1 (Dec. 11, 2013)). Additionally, Mr. Basehore was not in a position to direct safety meetings, direct workers, or delegate his work. (5 VRP at 563:3-13 (Dec. 11, 2013)). In fact, *Mr. Koegler expected Mr. Basehore to rely on WCH's safety experts* while performing his job as a Work Planner for WCH. (5 VRP at 587:11-14 (Dec. 11, 2013)).

In his Court of Appeals briefing, Mr. Wilcox represented that Mr. Koegler's duties concerned "merely administrative aspects of the subcontract, such as ensuring that invoices were correct." App. Reply Br. at 21. He also argued that Mr. Koegler *never* reviewed Mr. Basehore's work package. The Court of Appeals corrected these misstatements, noting that "Koegler declared that he did not review the work package '*on a regular basis*'" and that "he administered the technical aspects of the use of Basehore's services."

Wilcox, 189 Wn. App. at 96 (quoting 5 VRP at 565 (Dec. 11, 2013))
(Emphasis added.)³

3. 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*. (5 VRP at 606:19-21 (Dec. 11, 2013)). She worked in the same building as Mr. Basehore, saw him daily, supervised him, and reviewed all of his work packages. (5 VRP at 620:9-16 (Dec. 11, 2013)).

Ms. Yasek testified that if the work plan needed to be changed while people were working in the field, then it was the WCH Field Work Supervisor's responsibility—not the Work Planner—to stop all work while a change was considered. (5 VRP at 636:11-18 (Dec. 11, 2013)). “The Field Work Supervisor should be making that call.” (5 VRP at 636:18 (Dec. 11, 2013)). Contrary to a selective reading of the VRP, WCH did, in fact,

³ Mr. Wilcox's Reply to Answers to Petition for Review again blatantly misrepresents Mr. Koegler's testimony, misstating that Mr. Koegler's duties were “merely administrative” and that Mr. Koegler “did not supervise Mr. Basehore's work.” Pet. Reply Br. at 11-12. A cursory review of the VRP upon which he relies (5 VRP 565-66; 5 VRP 576 (Dec. 11, 2013)) reveals that Mr. Koegler testified that he did, in fact, review the work packages—just not on a “regular basis.” (5 VRP 565:18-20 (Dec. 11, 2013)). He also testified that he administered the technical aspects of the contract—not the administrative aspects. (5 VRP 576:13-15 (Dec. 11, 2013)).

exercise control over all technical aspects of Mr. Basehore's work, which technical aspects were the very bases for Mr. Wilcox's negligence claim.

F. THE TRIAL COURT GRANTED ELR'S MOTION FOR A DIRECTED VERDICT.

After two weeks of testimony, Mr. Wilcox rested his case-in-chief. ELR moved for a directed verdict under CR 50, explaining that Mr. Wilcox failed to prove that "ELR had any control over Basehore's work in preparing the work package." (6 VRP 927:24-928:1 (Dec. 12, 2013)). Also, because ELR did not employ Mr. Basehore, and WCH had exclusive control over the technical aspects of the work, the borrowed servant doctrine did not apply to ELR. (6 VRP at 924:6-7 (Dec. 12, 2013)). In response, Mr. Wilcox explained that "there's two kinds of relationships in play here. One is an employment relationship and the other is the independent contract[or] relationship." (6 VRP at 928:15-17 (Dec. 12, 2013)).

Mr. Wilcox agreed that Mr. Basehore was not ELR's employee and that the borrowed servant doctrine did not apply to ELR. Instead, he argued that Mr. Basehore was ELR's independent contractor. (6 VRP at 928:23-25; 930:1-3 (Dec. 12, 2013)). The trial court noted that a principal is not liable for the torts of independent contractors. (6 VRP 929:12-13 (Dec. 12, 2013)). Mr. Wilcox then interjected that "agency" may arise from the "*right to control*,"

rather than the “exercise of control.” (6 VRP at 930:2-3 (Dec. 12, 2013))
(Emphasis added.)

Judge Spanner—who had listened to all the testimony of ELR and WCH over the course of two weeks—responded “mere 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. (6 VRP at 930:5-10 (Dec. 12, 2013)). The trial court rejected any “agency” theory, ruling: “So, it’s clearly, in my mind, an independent contractor relationship.” The trial court then concluded that “[i]n fact, *I don’t even think that ELR had any relationship with Mr. Basehore.*” (6 VRP 930:17-19 (Dec. 12, 2013)). The trial court dismissed ELR. The jury rendered a defense verdict in favor of Bartlett the next day, finding that Mr. Basehore was a borrowed servant of WCH. (CP at 119). Focusing on the terms in the contract and the practical issue of which entity was controlling Mr. Basehore’s work, the Court of Appeals affirmed the trial court’s dismissal of ELR, and the trial court’s submission of the borrowed servant jury instruction to the jury. *Wilcox v. Basehore*, 189 Wn. App. 63, 356 P.3d 736 (2015).

IV. SUPPLEMENTAL LEGAL ARGUMENT

A. ELR IS NOT VICARIOUSLY LIABLE UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR BECAUSE IT DID NOT EMPLOY MR. BASEHORE.

The doctrine of respondeat superior—literally, “let the master answer”—holds that an employer is liable for the negligent acts of its employees that are “within the scope or course of . . . employment.” *Dickinson v. Edwards*, 105 Wn.2d 457, 466, 716 P.2d 814 (1986) (quoting *Nelson v. Broderick & Bascom Rope Co.*, 53 Wn.2d 239, 241, 332 P.2d 460 (1958)). Here, Mr. Wilcox agreed that ELR did not employ Mr. Basehore. Accordingly, the trial court correctly determined that any wrongdoing by Mr. Basehore could not be imputed to ELR, as a matter of law.

B. ELR IS NOT VICARIOUSLY LIABLE BECAUSE IT HAD NO PRINCIPAL/AGENT RELATIONSHIP WITH PURPORTED INDEPENDENT CONTRACTOR, MR. BASEHORE.

The burden of establishing an agency relationship rests with the party asserting it—Mr. Wilcox. *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. 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 v. Vadman*, 77 Wn.2d 396, 402-03, 463 P.2d 159 (1969).

Here, WCH not only possessed contractual authority to exclusively control the technical aspects of Mr. Basehore’s services, WCH, in fact, exercised such control. The undisputed evidence—through the testimony of Emmett Richards, Kim Koegler, Bonnie Cole, and Donna Yasek—factually 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, including Mr. Basehore.

Even if Mr. Basehore is characterized as an independent contractor, substantial evidence established that ELR retained no right of control and no right to inspect the actual work performance. Accordingly, as a matter of law, ELR was not vicariously liable for allegedly negligent acts of Mr. Basehore. The Court in *Afoa v. Port of Seattle* observed that “[a]t common law, a principal who hires an independent contractor is not liable for harm resulting from the contractor’s work.” 176 Wn.2d 460, 476, 296 P.3d 800

(2013) (citing *Tauscher v. Puget Sound Power & Light Co.*, 96 Wn.2d 274, 277, 635 P.2d 426 (1981)).

Here, the trial court—without weighing the credibility of the witnesses—correctly found that ELR had no agency relationship with Mr. Basehore, even if he was its purported independent contractor. Nevertheless, the trial court correctly concluded that “[i]n fact, *I don’t even think that ELR had any relationship with Mr. Basehore.*”

C. ELR WAS NOT VICARIOUSLY LIABLE BECAUSE IT HAD NO CONTRACTUAL RIGHT TO CONTROL MR. BASEHORE’S TECHNICAL WORK.

Throughout this entire case, Mr. Wilcox has heavily relied on the General Conditions in WCH’s subcontract with ELR for the proposition that ELR maintained “complete control over its employees and all of its lower tier suppliers and subcontractors.” But he consistently ignored the Special Conditions, which take precedence and expressly give WCH ultimate authority over the technical aspects of Mr. Basehore’s work. *Afoa* makes it abundantly clear that “the safety of workers does not depend on the formalities of contract language. Instead our doctrine seeks to place the safety burden on the entity in the best position to ensure a safe working

environment.” *Afoa*, 176 Wn.2d at 479 (citing *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 331, 582 P.2d 500 (1978)).

Here, substantial evidence established that WCH retained and exercised over-arching and pervasive managerial control over Mr. Basehore’s technical work at the job worksite. The trial court’s dismissal of ELR, when viewed in a light most favorable to Mr. Wilcox, was fair under the facts in this case. ELR was not vicariously liable for Mr. Basehore’s alleged negligence. The trial court committed no error and the Court of Appeals’ decision should be affirmed.

V. CONCLUSION

ELR respectfully requests that the Court affirm the Court of Appeals decision that ELR was not vicariously liable for Mr. Basehore’s alleged negligence at the WCH jobsite.

Dated this 29 day of April, 2016.

Respectfully submitted,

FLOYD, PFLUEGER & RINGER, P.S.



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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 29th day of April, 2016, 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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Case Name: DEAN WILCOX Petitioner, v. STEVE BASEHORE, BARTLETT SERVICES, INC., and ELR CONSULTING, INC., Respondents.	Cause No. 92362-1 Attorneys for: Respondent ELR Consulting, Inc.
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