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COA No. 49819-7-II

**THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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JERRY PORTER and KAREN ZIMMER

Appellants,

v.

PEPPER E. KIRKENDOLL and CLARICE N. KIRKENDOLL

Respondents

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**SUPPLEMENTAL BRIEF OF PEPPER E. KIRKENDOLL IN  
SUPPORT OF MOTION FOR DISCRETIONARY REVIEW**

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## TABLE OF CONTENTS

<b>I.</b>	<b>INTRODUCTION.</b> . . . . .	1
<b>II.</b>	<b>QUESTION PRESENTED.</b> . . . . .	1
<b>III.</b>	<b>STATEMENT OF FACTS</b> . . . . .	1
<b>IV.</b>	<b>ANALYSIS</b>	
	A.    The common law rules of vicarious liability apply to the instant case, notwithstanding the inapplicability of RCW 4.22. . . .	8
	B.    The Loggers were not independent contractors with regard to the specific harm in this case. . . . .	6
<b>V.</b>	<b>CONCLUSION.</b> . . . . .	11
<b>Cases</b>		
	<i>Anderson v. Marathon Petroleum Co.</i> , 801 F.2d 936, (7th Cir. 1986) . . . . .	8
	<i>Bair v. Peck</i> , 811 P.2d 1176 (Kan. 1991) . . . . .	7
	<i>Bloedel Timberlands Dev., Inc. v. Timber Indus., Inc.</i> , 28 Wn. App. 669, 626 P.2d 30 (1981) . . . . .	2, 8-10, 11
	<i>Crown Controls, Inc. v. Smiley</i> , 110 Wn.2d 695, 756 P.2d 717 (1988) . . . . .	2
	<i>Glover for Cobb v. Tacoma Gen. Hosp.</i> , 98 Wn.2d 708, 658 P.2d 1230 (1983) . . . . .	2, 3
	<i>Holst v. Fireside Realty, Inc.</i> , 89 Wn. App. 245, 948 P.2d 858 (2013) . . . . .	5
	<i>Jackson v. AEG Live, LLC</i> , 233 Cal.App.4th 1156, 183 Cal. Rptr. 3d 394 (2015). . . . .	5
	<i>Jacobson v. Parrill</i> , 351 P.2d 194, (Kan. 1960) . . . . .	5
	<i>Kight v. Sheppard Bldg. Supply, Inc.</i> , 537 So.2d 1355 (Miss. 1989) . . . . .	5
	<i>O'Brien v. Hafer</i> , 122 Wn. App. 279, 93 P.3d 930 (2004). . . . .	1, 6
	<i>Simpson v. Townsley</i> , 283 F.2d 743 (1960). . . . .	5

*Toyota Motor Sales U.S.A. v. Superior Court*,  
220 Cal. App.3d 864, 269 Cal. Rptr. 647 (1990). . . . .5-6  
*Vanderpool v. Grange Ins. Ass'n*,  
110 Wn.2d 483, 756 P.2d 111 (1998) . . . . .1  
*Ventoza v. Anderson*,  
14 Wn. App. 882, 545 P.2d 1219 (1976) . . . . . 10-11

**Statutes/ Rules**

RCW 4.22.040. . . . . 3  
RCW 62.12.030. . . . . 3

**Other Authorities**

Restatement (Second) of Judgments § 51 (1982). . . . . 3  
Prosser and Keaton on Torts § 69, pp. 500-01 (5th ed. 1984). . . . .7

## I. INTRODUCTION

Pepper E. Kirkendoll (hereinafter “Kirkendoll”), submits this supplemental brief pursuant to RAP 13.7(d).

## II. QUESTION PRESENTED

Whether this Court should clarify the rules of agency applicable to timber trespass cases by holding that where one hires an independent contractor and directs them to commit a trespass, then the person directing the trespass is vicariously liable to the aggrieved third part on the basis of agency?

## III. STATEMENT OF FACTS

See Statement of Facts contained in Petition for Review.

## IV. ANALYSIS

**A. The common law rules of vicarious liability apply to the instant case, notwithstanding the inapplicability of RCW 4.22.**

Citing *Vanderpool v. Grange Ins. Ass’n*, 110 Wn.2d 483, 487, 756 P.2d 111 (1988) the Court of Appeals in its decision below began from the correct premise that if an agency relationship exists, then the common law rule applies whereby a principal is released by operation of law as a result of a release of the agent if that agent is solvent. Slip op. at 11. The Court went on to cite *O’Brien v. Hafer*, 122 Wn. App. 279, 283, 93 P.3d 930 (2004), *rev. den.*, 153 Wn.2d 1022 (2005) for the rule that for

a finding of agency, the principal must have the right to control the manner of performance by the agent. Slip op. at 11. The Court cited *Bloedel Timberlands Dev., Inc. v. Timber Indus., Inc.*, 28 Wn. App. 394, 404, 41 P.3d 30 (1981), *rev. den.*, 95 Wn.2d 1027 (1981) for the proposition that in a timber trespass case, “the manner of performance refers to the actual cutting.” Slip op. at 11. Based on this analysis, the Court concluded that while Kirkendoll directed which trees to cut, there was no agency relation because Kirkendoll did not control the means and methods by which the Loggers cut the trees. For the reasons stated below, Kirkendoll asserts that the Court of Appeals decision conflicts with *Bloedel* and *Ventoza*, which are factually inapposite to the instant case. Kirkendoll requests that this Court clarify the law of agency as it relates to the facts herein.

Vicarious liability exists to provide a source of recovery for the innocent victim of another's negligence when the actual tortfeasor may be unable to respond financially for the damage caused. See, *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 658 P.2d 1230 (1983).<sup>1</sup> The fact that the plaintiff could have the basis of a separate lawsuit against one of the parties is immaterial where a single trespass is committed by only one of the parties, causing a single loss, giving rise to a single recovery of

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<sup>1</sup> Superseded on other grounds by *Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988).

damages. There is no functional difference between Porter's settlement with the Loggers in the instant case and a situation where judgment has been taken against only one tortfeasor in a joint and several liability case, involving multiple tortfeasors and a single indivisible harm. In discussing what would be the preclusive effect of such judgment, this Court observed in *Glover*,

In an important sense, however, there is only a single claim. The same loss is involved, usually the same measure of damages, and the same or nearly identical issues of fact and law. The substantive legal basis for vicarious responsibility rests largely on the notion that the injured person should have the additional security for recovery of his loss that is represented in imposition of liability on a person other than the primary obligor. The optional additional security thus afforded by rules of vicarious responsibility should not, however, afford the injured person a further option to litigate successively the issues upon which his claim to redress is founded.

*Glover*, 98 Wn.2d at 720, citing comment b. to Restatement (Second) of Judgments § 51 (1982).

It is immaterial to the above analysis that a timber trespass in violation of RCW 62.12.030 is deemed to be an intentional tort and therefore not subject to RCW 4.22.040 and other parts of the Tort Reform Act the common law rules involving vicarious liability stem from a separate and distinct analysis. The system of contribution among joint tortfeasors, of which RCW 4.22's apportionment rules are a key component, has arisen completely apart from the common law system of

vicarious liability and indemnity and meets an entirely distinct problem: how to compensate an injury inflicted by the acts of more than one tortfeasor. Unlike the liability of a principal, the liability of a joint tortfeasor is direct (because the tortfeasor actually contributed to the plaintiff's injury) and divisible (since the conduct of at least one other also contributed to the injury). The one analysis does not depend on the other.

In summary, the instant case involves two tortfeasors (Kirkendoll and the Loggers) where the principal (Kirkendoll) controlled and directed the specific action of the agent (selection of which trees to cut) that caused the plaintiff's indivisible harm and damages. Porter sued Kirkendoll and the Loggers jointly and severally based on their alleged concert of action. Kirkendoll's liability in the present suit can only be vicarious since he is not the one who went onto Porter's property and cut the trees. Accordingly, termination of the claim against the agent (Loggers) by settlement and release extinguished the derivative claim against the principal (Kirkendoll).

**B. The Loggers were not independent contractors with regard to the specific harm in this case.**

While the issue of a principal's vicarious liability may arise in either commercial (master-servant) and non-commercial (principal-agent) contexts, there is no distinction to be drawn between the two types of

cases when it comes to basic principles. In both cases liability is grounded upon the doctrine of respondeat superior. *Simpson v. Townsley*, 283 F.2d 743, 746-747 (1960), citing *Jacobson v. Parrill*, 351 P.2d 194, 199 (Kan. 1960). There is no simplistic test for whether an agency relationship was formed or intended; the inquiry is highly fact-specific. “Agency and independent contractorship are not necessarily mutually exclusive legal categories as independent contractor and servant or employee are. In other words, an agent may also be an independent contractor.” *Jackson v. AEG Live, LLC*, 233 Cal.App.4th 1156, 1184, 183 Cal. Rptr. 3d 394 (2015).<sup>2</sup>

The crucial factor is the intent of the parties as to the right of control – specifically *what* the principal had the right to control. An agency relationship may arise by express agreement, or by implication from other conduct. Either way, the principal must manifest a willingness that the agent act on his or her behalf, and the agent must manifest a willingness to act subject to the principal's control. *Holst v. Fireside Realty, Inc.*, 89 Wn. App. 245, 255-256, 948 P.2d 858 (2013). “One of the means of ascertaining whether or not this right to control exists is the determination of whether or not, if instructions were given, they would have to be obeyed.” *Toyota Motor Sales U.S.A. v. Superior Court*, 220

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<sup>2</sup> As one court observed, “the line between an agent and an independent contractor is not really a line but a ‘twilight zone,’ with the answer inevitably revolving around the idea of control.” *Kight v. Sheppard Bldg. Supply, Inc.*, 537 So.2d 1355, 1359 (Miss. 1989).

Cal. App.3d 864, 875, 269 Cal. Rptr. 647 (1990). There can be no question in the present case that while Pepper Kirkendoll did not control the means and methods by which the Loggers conducted their operation, he did control the very factor that caused Porters loss: the selection of trees to cut. This renders all other aspects of the logging operation immaterial to the imposition of vicarious liability.

This question of the right to control was paramount in *O'Brien*, a non-commercial case. Car accident victims sued Miller, who had left her automobile at home while she was out with friends in downtown Seattle. She called her boyfriend, Hafer, told him where the keys to her car were, and requested that Hafer pick her up in Seattle and give her a ride home. *O'Brien*, 122 Wn. App. at 281. Hafer, driving with a suspended license, caused the accident on his way to pick up Miller. The injured party sued Hafer and Miller under the theory that Hafer was acting as Miller's agent at the time of the accident. *Id.*, at 932. The trial court dismissed the agency claim on summary judgment. The Court of Appeals reversed, holding that the questions of agency presented a genuine issue of material fact because a jury could find that Miller had a right to control Hafer's actions. *Id.*, 122 Wn. App. at 283-84.

Although *O'Brien* is instructive, it is of limited use to the master-servant analysis which involves broader public policy dynamics, which have been described as follows:

What has emerged as the modern justification for vicarious liability is a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise, which will on the basis of all past experience involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.

*Bair v. Peck*, 811 P.2d 1176 (Kan. 1991), citing Prosser and Keaton on Torts § 69, pp. 500-01 (5th ed. 1984). The policy reasons for distinguishing between employees and independent contractors are well-established:

The reason for distinguishing the independent contractor from the employee is that, by definition of the relationship between a principal and an independent contractor, the principal does not supervise the details of the independent contractor's work and therefore is not in a good position to prevent negligent performance, whereas . . . the employee surrenders to the employer the right to direct the details of his work, in exchange for receiving a wage. The independent contractor commits himself to providing a specified output, and the principal monitors the contractor's performance not by monitoring inputs -- i.e., supervising the contractor -- but by inspecting the contractually specified output to make sure it conforms to the specifications.

. . .

Since an essential element of the employment relationship is thus the employer's monitoring of the employee's work, a principal who is not knowledgeable about the details of some task is likely to delegate it to an independent contractor. Hence in general, . . . the principal who uses an independent contractor will not be as well placed as an employer would be to monitor the work and make sure it is done safely. This is the reason as we have said for not making the principal vicariously liable for the torts of his independent contractors.

*Anderson v. Marathon Petroleum Co.*, 801 F.2d 936, 938-939 (7th Cir. 1986) (Internal citations omitted.)

*Bloedel* is consistent with these principles, and supports Kirkendoll's, not Porter's position as to agency. In the case at bar, Kirkendoll specifically told the Loggers which trees to cut. In *Bloedel*, there was no such specific evidence. Plaintiff (Bloedel) sued a timber buyer (Timber Industries), its president (Ortolf) and a buyer of logs (Mitsui) for timber trespass, conversion and damages. Bloedel hired Timber Industries to cut some standing timber on its property. Representatives of Bloedel and Timber Industries inspected the property and observed and discussed the assumed boundary lines. The trial testimony was in conflict as to the location of the actual property lines that had been represented to Timber Industries by Bloedel's forest manager. *Bloedel*, 28 Wn. App. at 671. Timber Industries contracted with three different logging operators in succession to conduct the logging

operations, with the last one being M & M Logging (M & M). *Id.*, at 672. Ortolf did not return to the site after the initial inspection, and a different employee of Timber Industries was assigned to supervise the last of the cutting, yarding and delivery operations. However, this supervisor's knowledge was gained by maps, and not by the original discussions, and the logging operations ended up trespassing on to 9.3 acres of Bloedel's other property. *Id.*, at 673. At trial, the Court dismissed the claims against Ortolf and Mitsui, awarding judgment for damages against Timber Industries only. Timber Industries appealed, claiming that the trespass was committed by M & M, acting as an independent contractor. Division II of the Court of Appeals upheld the trial court determination that even though the contract between Timber Industries and M & M stated that M & M was independent contractor, employees of M & M were nevertheless agents of Timber Industries, because Timber Industries retained the right to control them by the presence of its field supervisor in the field. After examining the various factors that could evidence Timber Industries' control over the performance of the work (*i.e.*, testimony that Timber Industries' representative supervised the entire logging operation nearly every day), the Court concluded;

Since the question of agency is a factual one, and we are satisfied that there was sufficient evidence which, if believed, would support the trial court's finding that [the Loggers] were agents of

Timber Industries.

*Id.*, 28 Wn. App. at 675. In summary, *Bloedel* should be limited to its facts, and is consistent with the public policy that it is fair and appropriate to impose vicarious liability on a principal who directs the independent contractor's work. In *Bloedel*, such imposition of liability was appropriate, because there was substantial evidence from which the factfinder could determine that Timber Industries not only directed the work, but also specifically directed the trespass.

Porter argues that *Ventoza v. Anderson*, 14 Wn. App. 882, 545 P.2d 1219 (1976) negates vicarious liability because it held that one who engages an independent contractor to perform logging operations is not responsible for the trespass of the logger unless (1) the trespass is the result of the advice or direction of the principal, or (2) the principal has notice of the trespass and fails to interfere. *Ventoza*, 14 Wn. App. at 895. *Ventoza* is factually distinguishable than the instant case at bar, and is in fact authority for Kirkendoll's position. Defendant Anderson, a logger, trespassed onto Ventoza's property and logged 16 acres of Ventoza's trees. Anderson cut the trees, and subcontracted to defendant Clark the job of hauling away the logs. *Id.*, 14 Wn. App. at 886. At trial, the jury found in favor of the plaintiffs and against the defendant Anderson only, specifically finding that defendant Clark did not trespass on the plaintiffs

property or destroy or remove trees therefrom. *Id.* On appeal, the Court of Appeals found that there was no error in the giving of the following instruction:

One who engages an independent contractor to perform logging operations is not liable to landowners for the trespass of the independent contractor or those employed by the independent contractor, whether as agents or independent contractors themselves, unless the trespass is the result of the advice or direction of the principal, or unless the principal has notice of the trespass and fails to interfere.

The Court of Appeals in the instant case interpreted *Ventoza* to conclude that Porter preserved a separate timber trespass claim against Kirkendoll independent of any claim against Kirkendoll for timber trespass based on agency theory. However, *Ventoza* is not authority for this proposition; like *Bloedel*, *Ventoza* should be limited to its facts, in which the defendant was the logger, not the person hiring a logger. The Court merely concluded plaintiff Bloedel clearly had a direct claim against Anderson, who was precluded from shifting liability to his subcontractor (the yarder), whom the jury specifically concluded did not trespass or cut trees. In summary, *Ventoza* is inapposite to the present case should be limited to its facts.

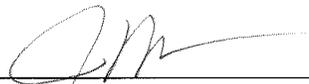
## V. CONCLUSION

In conclusion, Kirkendoll respectfully asserts that the Court of Appeals erred in its application of Washington agency cases to negate an

agency relationship based on a finding that the Loggers were independent contractors. A more precise analysis of the factual record in this case compels the conclusion that the only way to deny that the Loggers were Kirkendoll's agents would be to find that the timber trespass arose out of some independent exercise of professional judgment that Kirkendoll delegated to the Loggers, as opposed to specific direction from Pepper Kirkendoll. There is no evidence in this record to support such a finding. This Court should reverse the Court of Appeals decision and affirm the trial court's dismissal at the timber trespass claims.

DATED this 7 day of February, 2019.

**J. MICHAEL MORGAN, PLLC**

  
\_\_\_\_\_  
J. Michael Morgan, WSBA No. 18404  
Attorney for Pepper Kirkendoll

## CERTIFICATE OF SERVICE

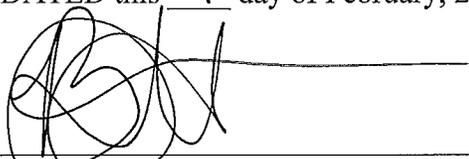
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DATED this 7 day of February, 2019.



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