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No. 96527-7

COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by  
and through WILLIAM DUSSAULT, his Litigation Guardian ad  
Litem; LUCINA FLORES, an individual; ROSARIO CRISOSTOMO  
FLORES, an individual; and PATRICIA CRISOSTOMO FLORES, a  
minor child by and through LUCINA FLORES, her natural mother  
and default guardian,

Appellants,

v.

INLAND WASHINGTON, LLC, a Washington limited liability  
company,

Respondent,

and

INLAND GROUP, P.S. LLC, a Washington limited liability company,  
RALPH'S CONCRETE PUMPING, INC., a Washington corporation,  
and MILES SAND & GRAVEL COMPANY d/b/a/ CONCRETE  
NOR'WEST, a Washington corporation,

Defendants.

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BRIEF OF RESPONDENT

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## INTRODUCTION

Respondent Inland Washington, LLC (Inland)<sup>1</sup> respectfully asks this court to dismiss this appeal. In 2017, the trial court declined to revisit a 2015 no-vicarious-liability ruling, so Appellant Gildardo Crisostomo Vargas's 2017 NDR did not (and could not) attach it, and it is not properly before this Court. Moreover, the Commissioner did not grant review as to the trial court's 2017 ruling dismissing Inland for lack of evidence that it violated WISHA regulations. Neither vicarious nor direct liability is properly before the Court.

Should this Court nonetheless find extraordinary circumstances and extend the 30 days for two years and amend the Commissioner's ruling, the trial court's rulings are legally correct. General contractors are not vicariously liable to subcontractors' employees unless they retained control, or the right to control, the non-common work area. It is undisputed that Inland exercised no actual control, and retained no right to control, Hilltop's concrete-pour operation when Vargas was injured. Nor did Hilltop hire or control Hilltops' subcontractors. Nor did it violate its nondelegable duties under WISHA. If the Court reaches the merits, it should affirm.

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<sup>1</sup> Not to be confused with dismissed defendant Inland Group LLC.

## **RESTATEMENT OF THE ISSUES**

1. Should this Court review the trial court's 2015 ruling that Inland is not vicariously liable, where that ruling was neither timely noted for discretionary review in 2015, nor reaffirmed or revisited by the trial court in 2017, nor accepted for discretionary review, and thus is not properly before this Court?
2. If the Court nonetheless reaches the vicarious liability issue, should it affirm the trial court's 2015 ruling that Inland is not vicariously liable, where no legal authority supports general-contractor vicarious liability for the purported fault of (a) immune subcontractors (Hilltop); (b) subcontractors and suppliers to the immune subcontractor not hired by the general contractor (Ralph's and Miles); or (c) defendants dismissed from the litigation on summary judgment (Inland Group)?
3. Should this Court affirm the trial court's order dismissing Vargas' claims against Inland, where the issue is not properly before this Court, and where Vargas failed to produce evidence demonstrating that Inland breached a duty it owed and proximately caused the alleged harm?

## STATEMENT OF THE CASE

### **A. Hilltop retained contractual control over the concrete pour at the Project.**

This appeal involves a construction accident on May 23, 2013, when a concrete pump hose allegedly struck Vargas, severely injuring him (the “Incident”). CP 1742, 1745. Inland was the general contractor for the two-building North City Apartment, in Shoreline, WA (the “Project”). CP 1669, 1699. Inland hired subcontractor Hilltop Concrete Construction (“Hilltop”) to pour concrete walls at the Project. CP 1669-93 (“Subcontract”). Hilltop employed Vargas. CP 32.

The Subcontract required Hilltop to safely perform work in its own work areas, to hold and attend safety meetings, and to comply with Washington Industrial Safety and Health Act (WISHA) safety rules and regulations. CP 1669-71, 1675, 1684, 1687-88, 1692-93. The Subcontract also required Hilltop’s agreement “with any written instructions given by” Inland, so Inland did not retain full control over – or even the right to control – Hilltop’s work. CP 1672.

Hilltop hired Miles Sand & Gravel dba Concrete Nor’west (“Miles”) to supply the ready-mix concrete for the Project. CP 36. Hilltop also hired Ralph’s Concrete Pumping (“Ralph’s”) to pump

concrete from Miles' supply truck into the wall forms Hilltop erected. CP 34-36. Ralph's routinely used a form daily-rental agreement to rent its concrete-pump truck to Hilltop, including a qualified pump-truck operator solely under Hilltop's control. CP 69, 71-72 ("All operators are loaned servants acting under the sole supervision and control of Lessee [Hilltop] who is solely responsible for their actions"); CP 197-98 (Hilltop rented equipment from Ralph's multiple times before the Incident using the same form daily-rental agreement).

**B. Hilltop retained actual control of the concrete pour on the day of the Incident.**

In addition to its contractual control over the concrete pours under the Subcontract, Hilltop supervised and controlled the concrete-pour site on the day of the Incident. CP 1705. Matt Skoog was Hilltop's supervisor in charge of maintaining overall control of concrete pour. CP 1710. Skoog controlled the start of the pour, signaling Ralph's pump-truck operator to start pumping. CP 1711.

Vargas was Hilltop's lead employee – second-in-command only to Skoog – at the pour. CP 1712. Vargas had worked for Hilltop for six years. CP 117. Over that time, Vargas attended many Hilltop safety-training classes (some taught by Skoog) on safe concrete-

pumping operations and pump-hose risks. CP 2001. Hilltop trained its workers about hose-whip “blow outs.” CP 1717.

On the morning of the Incident, Ralph’s sent a Putzmeister concrete-pump truck to the Project, equipped with an adjustable boom approximately 47 meters (154 feet) long. CP 71, 77. The boom pumps concrete from the supply truck to difficult-to-reach areas. CP 1770, 1798. On this day, the wall forms were distant from the street-side where Miles’ trucks delivered concrete at Hilltop’s request. CP 35. No one from Inland was involved with this pour. CP 35.

Rather, Miles’ trucks delivered the wet concrete directly into Ralph’s pump-truck hopper, while Miles’ truck driver monitored the concrete level in the hopper. CP 68. Monitoring ensures that concrete levels remain above the pump inlet, preventing air from entering the system; if air gets in, it can compress inside the supply line; if compressed air reaches the end of the delivery hose, it may “whip” around when the air is suddenly released. CP 67.

Ralph’s pump-truck operator controlled the pumping operation with a portable remote-control box. CP 66. The Hilltop employee overseeing the pour would typically instruct Ralph’s operator where to pour concrete, but would give no instructions on how to operate the pump truck. CP 2206.

**C. Only Hilltop employees were at the Incident site.**

It is undisputed that on May 23, 2013, only Hilltop employees were present in the Incident area. CP 34. No other trades were present so that Hilltop employees “could focus on doing our work properly and safely during the pour.” CP 1716.

Just prior to the Incident, Skoog and Ralph’s concrete-pump operator, Anthony Howell, were standing on the previously-poured concrete deck near the wall-pour site. CP 1711. Howell then moved away from Skoog, 50 feet closer to his pump so his remote control would work. CP 1708-09. Vargas and two other Hilltop employees “were positioned on the scaffolding next to the concrete forms.” CP 1716. Vargas was holding the end of the concrete pour hose, while the two other Hilltop employees stood by, ready to assist him with the pour. CP 1706-07. The Incident occurred when a portion of the concrete supply hose struck Vargas’ head. CP 1709.

**D. Inland did not violate any WISHA safety regulations.**

Following the Incident, the Washington Department of Labor and Industries (“L&I”) conducted inspections of three entities (Inland, Ralph’s, and Hilltop) to determine whether they violated applicable WISHA safety regulations. Kyle Grayson, an L&I Compliance Safety and Health Officer, inspected the Project with two other L&I safety

inspectors; they concluded Inland violated no WISHA safety regulations (CP 1722, emphasis added):

Q Did the results of your investigation result in a report that found citations for WISHA violation?

A Which inspection are you referring to, sir?

Q Inland Washington.

A Inland.

Q Yes.

**A There were no violations for Inland.**

See also CP 1724 (“This inspection resulted in no violations); CP 1725 (“No violations were cited. No penalties were assessed”).

Similarly, the L&I inspectors determined that Ralph’s violated no WISHA regulations. CP 75.

Moreover, in response to written discovery, Vargas produced no evidence of any specific WISHA violations. CP 121-25.

No admissible expert opinion alleges how or why the hose suddenly whipped. Although Vargas’ experts have speculated about causation, none of them proffers, on a more probable than not basis, an Inland act or omission proximately causing the Incident.

## PROCEDURAL HISTORY

**A. In 2015, the trial court ruled that Inland is not vicariously liable – and no one sought discretionary review.**

Plaintiffs brought a single claim of negligence against Inland. CP 139-141. On June 26, 2015, the trial court (the Honorable Carol Schapira) ruled that Inland “owes non-delegable duties under **Stute**,” but that Inland “is not vicariously liable.” CP 1667. No one sought interlocutory review of this June 2015 ruling.

**B. In 2017, the trial court declined to revisit the 2015 ruling, found no breach of Inland’s duties, and dismissed Inland from the suit.**

Following nearly two years of additional discovery, Inland again sought dismissal of the remaining claims against it in a second summary judgment motion. CP 1639-59. In his opposition, Vargas moved (via an “embedded” request) to vacate the 2015 no-vicarious-liability ruling. CP 1841, 1864. On March 31, 2017, the trial court (the Honorable Jeffrey Ramsdell) refused to revisit the 2015 ruling:

THE COURT: . . . **I'm disinclined to revisit Judge Shapira's ruling** [on vicarious liability], as I said before, because I don't see a major sea-change arising from **Afoa**.

RP 92 (emphasis added).

The trial court also found no evidence Inland breached a non-delegable duty under **Stute v. P.B.M.C., Inc.**, 114 Wn.2d 454, 788 P.2d 545 (1990), dismissing all claims against Inland:

As far as the **Stute** issue and the nondelegable duty that we've just been arguing about, I'm inclined to grant Inland's motion, and the reason for that is I'm really not seeing much in the way of substance from the plaintiff as to what the actual violation is of what nondelegable duty we're talking about.

It sounds like a generalized guarantor of safety across the board, which I don't think is what **Stute** contemplates. And so I'm going to grant Inland's motion and dismiss the claim against them.

RP 93. The trial court's Order grants Inland's second summary judgment motion, dismisses all claims against Inland with prejudice, and enters no findings or conclusions regarding the 2015 no-vicarious-liability ruling. CP 2508-11 ("2017 Order").<sup>2</sup>

On April 21, 2017, the court denied reconsideration, again without revisiting vicarious liability. CP 2515-20. On the same day, the court certified its 2017 Order for immediate review. CP 2578-80 ("Certification Order"). The Certification Order does not explicitly reference the 2015 no-vicarious-liability ruling, yet it implies that the 2017 court reaffirmed the 2015 ruling. CP 2579. On the contrary, oral ruling and the writing order contradict that implication: the 2017 Order says nothing about the 2015 no-vicarious-liability Order because the trial court refused to revisit it. RP 92; CP 2508-11.

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<sup>2</sup> Because the court dismissed all claims against Inland with prejudice, the "alternative" in the 2017 Order is moot. See CP 2509 ("*Or in the alternative: ORDERED that Plaintiffs shall not assert any vicarious liability or concert of action theories against Inland*" at trial).

**C. The Commissioner nonetheless granted review solely on vicarious liability.**

On April 21, 2017, Vargas filed a Notice for Discretionary Review (NDR) of the 2017 Order and the order denying reconsideration. CP 2576-77. Vargas' NDR did not seek review of the 2015 no-vicarious-liability ruling. *Id.*

On July 21, 2017, the Commissioner granted Vargas' Motion for Discretionary Review (MDR) solely on vicarious liability:

It appears that the trial court granted summary judgment for Inland on the ground that the plaintiffs failed to articulate "what the actual violation is of what non-delegable duty we're talking about." The court's decision involves a fact question as to whether the plaintiffs presented sufficient evidence of any WISHA violation. But the court also reaffirmed its prior ruling that Inland is not vicariously liable for the breaches of WISHA or common law duties by the other defendants. This conclusion appears to involve a question of law as to the scope of Inland's WISHA and common law duties and liability as the general contractor. The issue is dispositive of the plaintiffs' claims against Inland when the plaintiffs assert that Inland is primarily responsible for Vargas's injury. In light of the cases discussed above, there is a substantial ground for a difference of opinion on the issue, and immediate review may materially advance the ultimate termination of the litigation. Review is granted on this issue under RAP 2.3(b)(4).

*Ruling Granting Discretionary Review in Part* ("Commissioner's Ruling") at 9-10 (emphasis added; footnote citation omitted).<sup>3</sup> As discussed *supra*, however, nothing in the record supports the

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<sup>3</sup> Copy attached as Appendix A.

Commissioner's Ruling that the trial court "reaffirmed its prior ruling that Inland is not vicariously liable."

On August 21, 2017, Inland timely asked this Court to modify the Commissioner's Ruling, "so as to deny discretionary review of the Order dismissing the claims against" Inland. *Respondent Inland Washington, LLC's Reply Re: Motion to Modify Commissioner's Decision Granting Discretionary Review* at 6-7 (Sept. 11, 2017). This Court denied Inland's Motion to Modify. *Order Denying Motion to Modify* (Dec. 11, 2017).

## ARGUMENT

**A. The 2015 no-vicarious-liability ruling is not properly before this Court, where Vargas did not timely note it – or note it at all – and the trial court did not revisit it in 2017.**

The 2015 no-vicarious-liability ruling is not properly before this Court. Vargas did not timely seek review of the 2015 ruling. He instead sought review of the 2017 Order, which did not revisit or reaffirm the 2015 ruling. Since the only issue on which the Commissioner granted discretionary review is untimely, this Court should dismiss this appeal as improvidently granted.<sup>4</sup>

Discretionary review is rare and should be granted only in rare cases. *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591 (2010). It is disfavored because it permits piecemeal appeals. *Id.* Pretrial review of trial court rulings confuses the functions of trial and appellate courts. *Id.* Orderly review is best served when finality exists, conserving appellate effort, and eliminating interlocutory delay. *Wlasiuk v. Whirlpool Corp.*, 76 Wn. App. 250, 253-54, 884 P.2d 13 (1994). This rule recognizes the deference appellate courts owe trial courts. *Id.* (citing *Firestone Tire*

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<sup>4</sup> See generally Stephen J. Dwyer, et al., *The Confusing Standards for Discretionary Review in Washington and a Proposed Framework for Clarity*, 38 SEATTLE U. L. REV. 91.

**& Rubber Co. v. Risjord**, 449 U.S. 368, 374 (1981); 9 James W. Moore, et al., FED. PRAC. § 110.07 at 39 (2<sup>nd</sup> ed. 1990)).

On June 26, 2015, the trial court concluded that Inland “is not vicariously liable.” CP 1667. Vargas could have requested discretionary review of that 2015 ruling up to 30 days after it was entered. See RAP 5.2(b). He did not seek review.

During the March 2017 hearing on Inland’s second summary judgment motion, the trial court refused to revisit the 2015 no-vicarious-liability ruling. RP 92. The 2017 Order Vargas listed in his NDR says nothing about the 2015 ruling. CP 2508-11. Vargas filed his NDR nearly two years after the 2015 ruling. And the Commissioner found no other issue satisfying RAP 2.3(b)(4).

The time for filing an NDR may be extended only in extraordinary circumstances and to prevent a gross miscarriage of justice. RAP 18.8(b). This rule will not be waived. RAP 1.2(c). “Extraordinary circumstances” may exist when “the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party’s control.” **Reichelt v. Raymark Indus., Inc.**, 52 Wn. App. 763, 765, 764 P.2d 653 (1988); **Shumway v. Payne**, 136 Wn.2d 383, 395, 964 P.2d 349 (1998). But negligence and lack of diligence are not extraordinary circumstances.

**v. Dep't of Soc. & Health Servs.**, 102 Wn. App. 687, 695, 11 P.3d 313 (2000). The RAP 18.8(b) analysis does not require prejudice to the opposing party. **Reichelt**, 52 Wn. App. at 766. And even where an appeal raises important – if untimely – issues, it is improper to consider them absent extraordinary circumstances and a gross miscarriage of justice. **Schaefco, Inc. v. Columbia River Gorge Comm'n**, 121 Wn.2d 366, 368, 849 P.2d 1225 (1993). Vargas' 2017 NDR is grossly untimely. This appeal should be dismissed.

Vargas appears to rely on the Certification Order he submitted, but that order falsely implies that the 2017 trial court revisited the 2015 no-vicarious-liability ruling. CP 2578-80. As explained *supra*, the 2017 court refused to revisit the 2015 ruling, and the 2017 Order says nothing about it. RP 92; CP 2508-11. Nor did the Commissioner's Ruling say that the 2015 ruling was subject to discretionary review in 2017. Rather, that Ruling erroneously states that the trial court "reaffirmed" its 2015 no-vicarious-liability ruling in 2017, a statement unsupported in this record. App. A.

The appropriate time for Vargas to seek review of the 2015 ruling is following a verdict in the trial of this matter, or after all claims against the other defendants have been resolved. The 2015 ruling is not properly before this Court. The 2017 trial court did not revisit the

2015 no-vicarious-liability ruling when it dismissed Inland from this matter. This Court should dismiss this appeal.

**B. Inland is not vicariously liable as a matter of law because vicarious liability is irrelevant to nondelegable duties a general contractor owes directly.**

The trial court correctly decided in its 2015 ruling that Inland is not vicariously liable as a matter of law, a conclusion the 2017 trial court refused to revisit. If this Court nonetheless finds extraordinary circumstances justifying extending the time to file an NDR by two years, then the 2015 no-vicarious-liability ruling is correct as a matter of law because vicarious liability is irrelevant here.

**1. A general contractor is not vicariously liable to employees of its subcontractor, and vicarious liability is irrelevant to nondelegable duties.**

Vicarious liability is distinct from nondelegable duties. Liability itself may be direct or vicarious: direct liability occurs when a party breaches its own duty of care; “vicarious liability, sometimes called imputed negligence, is liability for breach of another’s duty of care.”

***Phillips v. Kaiser Aluminum & Chem. Corp.***, 74 Wn. App. 741, 749, 875 P.2d 1228 (1994).

Generally, a principal is not vicariously liable for the acts of an independent contractor, “even when a principal hires an independent contractor to perform inherently dangerous work, if the injured

plaintiff is an employee of the independent contractor”. *Id.* (citing ***Epperly v. City of Seattle***, 65 Wn.2d 777, 785, 399 P.2d 591 (1965) (quoting ***Tauscher v. Puget Sound Power and Light Co.***, 96 Wn.2d 274, 277, 635 P.2d 426 (1981))). As discussed *infra*, unless Inland retained control or the right to control Hilltop’s worksite – which it did not – Inland cannot be liable, directly or vicariously.

And a claim based on the general contractor’s nondelegable duties alleges only direct liability, not alleged vicarious liability for an independent subcontractor’s negligence:

[T]he establishment of liability under a nondelegable duty does not give rise to vicarious liability. Under vicarious liability, one person, although entirely innocent of any wrongdoing and *without regard to duty*, is nonetheless held responsible for harm caused by the wrongful act of another . . . We reject any coupling of the concept of vicarious liability and nondelegable duty.

***Saiz v. Belen Sch. Dist.***, 827 P.2d 102, 114-15 (N.M. 1992) (underlining added); see also ***Kirkland v. City of Gainesville***, 166 So. 460, 464 (Fla. 1936) (addressing direct liability for breach of nondelegable duties). Vicarious liability is irrelevant to the nondelegable duty analysis.

**2. *Afoa II* does not sanction vicarious liability arising from breach of the general contractor's nondelegable duty to provide a safe worksite.**

This Court's decision in *Afoa v. Port of Seattle*, 198 Wn. App. 206, 393 P.3d 802 (2017) ("*Afoa II*") does not mandate reversal of the 2015 ruling that Inland is not vicariously liable. After reviewing the *Afoa II* decision, the 2017 trial court declined to revisit Judge Schapira's 2015 ruling that Inland is not vicariously liable as a matter of law. RP 92. The 2017 court was correct.

*Afoa II* is easily distinguished. That decision holds the Port of Seattle – a premises owner – vicariously liable for its SeaTac Airport airline business invitees' safety violations that proximately caused Afoa's injuries. 198 Wn. App. at 212. The Port's liability thus arose from business invitees' violations of the Port's own pervasive and enforced work rules related to safe operations on the tarmac of its airport premises. *Id.* at 224-26. By contrast, Inland was not a premises owner enforcing work rules over business invitees, but rather a general contractor constructing apartments with its subcontractor's labor and equipment. Vargas cites no case extending premises-owner liability to a general contractor.

The leading case for the proposition that a general contractor owes a common law duty to provide a safe workplace – *Kelley v.*

**Howard S. Wright Const. Co.**, 90 Wn.2d 323, 582 P.2d 500 (1978)  
– never mentions vicarious liability. The only case the Commissioner  
cites in granting discretionary review on vicarious liability is **Afoa II**.  
But its premises-liability ruling does not apply here.

**Afoa II** begins its discussion of vicarious liability with this  
comment from the WASHINGTON PATTERN JURY INSTRUCTIONS:  
“[n]ondelegable duties involve a form of vicarious liability.” 198 Wn.  
App. at 231 (quoting 6 WASH. PRAC., WASH. PATTERN JURY  
INSTRUCTIONS: *Civil* § 12.09 (WPIC 12.09) cmt. at 161 (6<sup>th</sup> ed. 2012))  
(citing W. Page Keeton, et al., *Prosser and Keeton on the Law of  
Torts* § 71 at 511-12; and **Jackson v. Standard Oil Co. of  
California**, 8 Wn. App. 83, 95, 505 P.2d 139 (1972))). But “pattern  
[jury] instructions are not authoritative primary sources of the law”  
and are not binding on trial courts or on this Court. 6 WASH. PRAC.,  
WASH. PATTERN JURY INSTRUCTIONS: *Civil* § 0.10 at 3 (6<sup>th</sup> ed. 2012).

In any event, WPIC 12.09 itself does not apply here, where no  
evidence suggests that Inland delegated or sought to delegate its  
nondelegable duty to provide a safe workplace to its subcontractor  
Hilltop (WPIC 12.09, emphasis added):

(Fill in name of person or entity) is not relieved of its duty to  
(particular duty) by delegating or seeking to delegate that duty  
to another person or entity.

## NOTE ON USE

The committee recommends that this instruction be used only in cases involving subcontracted work or other circumstances that could mislead jurors into thinking that a nondelegable duty has been delegated. See the discussion in the Comment.

**Afoa II** used the WPIC 12.09 comment by general reference to 16 David K. DeWolf & Keller W. Allen, WASH. PRAC.: *Tort and Law Practice* § 4:15 (4<sup>th</sup> ed. 2013). But that reference contradicts the court's holding regarding vicarious liability, expressly stating general contractor liability is only direct, not vicarious (*id.* at 204-06 (emphasis added)):

General contractors may be held liable for the torts of either their independent contractors or the independent contractor's employees, if the general contractor either negligently supervised the work or violated a nondelegable duty. However, the liability in either case is direct rather than vicarious.

And the portion of *Prosser* referenced in the WPIC 12.09 comment mentions no "duty" to a subcontractor's employee (*Prosser* § 71 at 511-12; internal footnotes omitted):<sup>5</sup>

The catalogue is a long one: the duty off a carrier to transport its passengers in safety, of a railroad to fence its tracks

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<sup>5</sup> *Prosser's* footnote referencing a duty "to provide employees with a safe place to work" cites **Kelley**, 90 Wn.2d 323 (among other, non-Washington cases). *Prosser* at 512 n.34. *Prosser's* footnote referencing "no doubt others" cites a California "statutory duty to have automobile brakes in good operating condition." *Prosser* at 512 n.38 (citing **Malony v. Rath**, 69 Cal.2d 442, 71 Cal.Rptr. 897, 445 P.2d 513 (1968); **Dutcher v. Weber**, 275 Cal.App.2d 961, 80 Cal.Rptr. 378 (1969)).

properly or to maintain safe crossings, and of a municipality to keep its streets in repair; the duty to afford lateral support to adjoining land, to refrain from obstructing or endangering the public highway, to keep premises reasonably safe for business visitors, to provide employees with a safe place to work; the duty of a landlord to maintain common areas to make repairs according to covenant, or to use proper care in making them, and no doubt others. The owner of land or a building who entrusts repairs or other work on it to a contractor remains liable for any negligence injuring those on or outside the land, while he retains possession during the progress of the work, or resumes it after completion, but not while he has vacated the premises during the work.

Similarly, **Jackson** (also referenced in the WPIC 12.09 comment) does not relate to any duty owed by a general contractor to a subcontractor's injured employee, but rather is a products liability case in which a fuel products manufacturer was held vicariously liable for the actions of its distributor when a tank containing contaminated diesel fuel exploded, killing a welder. **Jackson**, 8 Wn. App. at 84-90. The **Jackson** court examined whether defendant Standard Oil could be found vicariously liable (8 Wn. App. at 95, emphasis added):

This theory is expressed (although not in terms of nondelegable duty) in section 416, RESTATEMENT (SECOND) OF TORTS (1965). See footnote 3. That section was expressly adopted in this state in **Blancher v. Bank of Calif.**, 47 Wn.2d 1, 286 P.2d 92 (1955). In **Blancher**, a business establishment was determined to have a nondelegable duty to exercise due care to its business invitee, where a portion of the premises in which the invitee was injured was under renovation by an independent contractor and subcontractor.

It is also clear that a similar theory was previously utilized in Washington to remove the insulation generally afforded one who employs an independent contractor to achieve a particular result. **State v. Williams**, 12 Wn.2d 1, 120 P.2d 496 (1941); **Myers v. Little Church by the Side of the Road**, 37 Wn.2d 897, 227 P.2d 165 (1951). The breadth and scope of the theory has not, however, been explored.

**Afoa II** relies on **Millican v. N.A. Degerstrom, Inc.**, 177 Wn. App. 881, 313 P.3d 1215 (2013), for the proposition that a general contractor is vicariously liable for the negligence of its subcontractors. **Afoa II**, 198 Wn. App. at 232 (citing **Millican**, 177 Wn. App. at 896) (quoting RESTATEMENT (THIRD) OF TORTS § 57, cmt. b (2012)) (“RESTATEMENT § 57”). But **Afoa II** and **Millican** both disregard the RESTATEMENT’s express exception to a general contractor’s vicarious liability for injuries to a subcontractor’s employee:

The hirer of an independent contractor is not subject to liability to an employee of the independent contractor under any of the vicarious-liability avenues in this Chapter.

RESTATEMENT § 57, cmt. d. Applying this exception here, Inland, which hired independent-contractor Hilltop, is not liable to Vargas, an employee of Hilltop, under any vicarious liability theory. **Afoa II** is inapposite and does not support vicarious liability.

**3. Inland cannot be vicariously liable for the acts or omissions of Ralph's or its employees.**

This Court has granted Ralph's MDR from the trial court's order denying summary judgment on the loaned-servant doctrine (linked appeal No. 76893-0-I). If this Court grants Ralph's linked appeal and decides that Ralph's pump-truck operator, Anthony Howell, was a loaned servant to the immune employer, Hilltop, then Ralph's and Howell are similarly immune. Inland cannot be vicariously liable their nonexistent fault.

Even if Ralph's appeal is unsuccessful, Inland still cannot be held vicariously liable for its purported negligence because Inland did not hire Ralph's. Rather, Ralph's owned and maintained the concrete-pump equipment Hilltop rented, and Ralph's supplied its pump-truck operator directly to Hilltop. *Supra*, Fact § A. Inland cannot be vicariously liable for entities or individuals it did not hire to perform work at the Project, and over which it exercised no control and had no right to control. *See infra*, Arg. § C. Further, there is no record evidence that Ralph's more probably than not violated any WISHA safety regulation, so Inland cannot be vicariously liable based on Ralph's non-violations.

**4. Inland cannot be vicariously liable for Miles' or its employees' acts or omissions.**

Inland cannot be vicariously liable for Miles' purported negligence because the trial court previously granted summary judgment regarding product liability for the concrete mix Miles supplied. CP 2531-33.<sup>6</sup> Also, as with Ralph's, Inland neither hired Miles nor controlled or retained the right to control Miles. With no evidence that Miles more probably than not violated a WISHA safety regulation, Inland cannot be vicariously liable for Miles' conduct.

**5. Inland cannot be vicariously liable for the acts or omissions of dismissed-entity Inland Group.**

Inland cannot be vicariously liable for Inland Group's alleged negligence, where the trial court dismissed Inland Group with prejudice. CP 2528-30, 2605-06.<sup>7</sup> Inland Group is a holding company that administers profit sharing for a variety of affiliated companies. CP 170. Inland also cannot be vicariously liable Inland Group's alleged behavior because it has no employees, performed no work at the project, and was not hired by Inland. *Id.*

In sum, no legal basis exists to impose vicarious liability on Inland. The ruling on that issue – if reviewed – should be affirmed.

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<sup>6</sup> Vargas did not file a NDR from the dismissal of these claims.

<sup>7</sup> Vargas filed no NDR from Inland Group's dismissal.

**C. Inland is not directly liable as a matter of law.**

**1. This issue is not properly before the Court.**

This Court cannot properly review the factual question whether Vargas presented sufficient evidence of a WISHA violation to overcome summary judgment dismissal of Inland. Vargas' NDR did not raise that fact question, and the Commissioner did not accept review of it. No disputed factual or legal issue regarding Inland's direct liability is properly before this Court on discretionary review. The Court should dismiss Vargas' appeal.

**2. Inland cannot be directly liable under the common law because Vargas was not working in a common area under Inland's control.**

Even if the Court is inclined to review the evidence regarding Inland's direct liability despite the trial court's unappealed finding of insufficient evidence to support the claim, undisputed evidence shows Inland did not control Hilltop's work, and thus did not owe a common-law duty to keep Hilltop's "non-common work area" safe for Hilltop's employees. Inland did not retain sufficient control over Hilltop's concrete pour to impose a duty to keep that non-common work area safe for Vargas.

At common law, a person hiring an independent contractor is not liable for injuries to a subcontractor's employee. *Kelley*, 90

Wn.2d at 330. An exception to this general rule may occur when the general contractor controls work performed in a common area of the site; *i.e.*, where multiple subcontractors of the general contractor are contemporaneously working near each other. *Id.* (area where the accident occurred “was one in which four different contractors had worked within a short period of time”); *see also Bozung v. Condo. Builders, Inc.*, 42 Wn. App. 442, 47, 711 P.2d 1090 (1985) (no “common work site because Tucci was the only contractor active on the site at the time of the accident. Thus, the policy justification for placing ultimate responsibility on the general contractor for job safety in common work areas is not present here”).

The critical element is that the general contractor must retain control or the right to control the work performed in the common area. “The principal/employer of an independent contractor owes a duty of care to an employee of the contractor if it retains a right to control the contractor’s work.” *Phillips*, 74 Wn. App. at 750 (citing *Kelley*, 90 Wn.2d at 330; *Kennedy v. Sea-Land Serv., Inc.*, 62 Wn. App. 839, 851, 816 P.2d 75 (1991); *Bozung*, 42 Wn. App. at 446-47 (“the right to order the work stopped or to control the order of the work or the right to inspect the progress of the work do not mean that the general contractor controls the method of the subcontractor’s work”));

RESTATEMENT (SECOND) OF TORTS § 414; *Prosser* § 71 at 510 (5<sup>th</sup> ed. 1984)).

Whether a right to control has been retained depends on the parties' contract, the parties' conduct, and other relevant factors. One such factor is a principal/employer's inference in the work of the independent contractor; however, a *right* to control can exist even in the absence of that factor.

***Phillips***, 74 Wn. App. at 750 (citing ***Kelley***, 90 Wn.2d at 330-31)

("The test of control is not the actual interference with the work of the subcontractor, but the right to exercise such control").

It is not enough that the principal/employer have reserved "a right to oversee compliance with contract provisions"; rather, the principal/employer must have reserved a right "to so involve oneself in the *performance* of the work as to undertake responsibility for the safety of the independent contractor's employees".

***Phillips***, 74 Wn. App. at 750 (citations omitted; italics original); see also *id.*, n.24 (quoting RESTATEMENT (SECOND) OF TORTS § 414, cmt. c) ("There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way").

Here, Inland presented undisputed evidence that the specific work area where the Incident occurred was not a common work area. *Supra* Fact § B. By its contract, Hilltop had full control over its own work. *Id.* No other trades worked on the site that day. *Id.* Neither Inland nor its other subcontractors (*i.e.*, framers, electricians, etc.) were involved with or working on or nearby the concrete pour during

the Incident. *Id.* The trial court correctly determined Inland owed Vargas no duty to provide a safe non-common work area.

And even if the relevant work area included the entire concrete-pouring operation – from Miles’ concrete-supply truck, to Ralph’s pump truck, to the scaffold on which Vargas and his co-workers were standing – the exception creating general contractor liability still does not apply. Miles and Ralph’s worked directly for Hilltop, not Inland. Only Hilltop retained both the right to control and actual control over the work of Miles and Ralph’s.

Consequently, the exception to the general rule of employer non-liability for injuries to subcontractor employees does not apply here. Rather, the rule of non-liability for injuries occurring during work in a non-common work area applies. Inland cannot be liable.

**3. Inland is not statutorily liable because no one violated any WISHA safety regulations and thus proximately caused the Incident.**

The trial court correctly determined Inland is not liable absent evidence of a WISHA violation proximately causing the Incident. Under ***Stute***, “the general contractor has a duty to comply with all pertinent safety regulations with respect to every employee on the job site.” ***Stute***, 114 Wn.2d at 456. No admissible evidence exists that Inland violated any WISHA safety regulation, let alone a

violation that proximately caused Vargas' alleged injury.

Under WISHA, the general contractor has a statutory duty to employees at a construction worksite, where each employer:

(1) Shall furnish to each of his or her employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his or her employees . . . and

(2) Shall comply with the rules, regulations, and orders promulgated under this chapter.

RCW 49.17.060. The Supreme Court held that a general contractor owes a general duty under RCW 49.17.060(1) only to its own employees, but owes a specific duty under RCW 49.17.060(2) to comply with WISHA regulations covering all employees at the work site. **Stute**, 114 Wn.2d at 460 (“Employers must comply with the WISHA regulations”).

But this “duty only extends to employees of independent contractors when a party asserts that the employer did not follow particular WISHA regulations.” **Weinert v. Bronco Nat'l Co.**, 58 Wn. App. 692, 695, 795 P.2d 1167 (1990) (quoting **Stute**, 114 Wn.2d at 457). Here, the trial court accurately found no evidence that anyone violated any WISHA regulations. RP 69-81.

Vargas failed to offer any competent or admissible evidence that Inland failed to comply with WISHA. The L&I inspector who

investigated the Incident found Inland did not violate any WISHA regulations. Vargas' conclusory and speculative lay-witness testimony as to purported WISHA violations is not even admissible (ER 702); nor does it create a genuine issue of material fact sufficient to avoid summary judgment. ***Young v. Key Pharm., Inc.***, 112 Wn.2d 216, 234, 770 P.2d 182 (1989) ("material fact" is a fact upon which the litigation depends, in whole or in part, and "[o]nce the moving party has made and supported his motion, the nonmoving party must come forward with specific facts showing that a genuine issue of fact exists for trial. CR 56(e)").

No WISHA regulation requires that concrete-pour employees stay out of the purported "danger zone" when the pour operation starts. The general safety rule to stay out of the "danger zone" around the end of a concrete hose when pumping starts was extensively covered in the Putzmeister safety manual. CP 3573, 3575-76. The undisputed evidence shows that Howell, Ralph's pump operator, knew of this potential hazard and had responsibility for keeping the pouring crew out of the "zone." CP 1812, 1814, 1927-28. His purported failure to do so cannot be imputed to Inland on the record before this Court: no expert stated on a more-probable-than-not basis that Inland's purported failure to prevent Vargas from standing

in the “danger zone” when the hose whipped violated any WISHA regulation or proximately caused the Incident.

Further, Vargas-expert Gleason admitted the only safety practice a crew can follow when faced with an imminent “hose whip” is to “duck and cover.” CP 3584-85. Whether Vargas ducked – as he was trained – was entirely within his own control.

Regarding the aggregate rock-size issue, Gleason conceded that the WISHA regulation regarding concrete hose diameter and aggregate size (WAC 296-155-682) is not mandatory, but is only a suggestion; any failure to follow that suggestion is not a WISHA violation. CP 3553-56. Regardless, Inland’s safety requirements (as set forth in the Subcontract and the various site-safety plans) explicitly required Hilltop, and its suppliers and subcontractors, to comply with all WISHA regulations. Inland met its nondelegable duty to provide oversight and enforcement of all WISHA site-safety rules. No WISHA violation occurred.

Indeed, the undisputed evidence is that Inland had written safety plans in place that incorporated Hilltop’s and Ralph’s safety plans, including the “duck and cover” rule and the specific hose-whip and other safety-related training. CP 3572-77, 3594. Ralph’s equipment safety manual (by Putzmeister) covers every other

alleged WISHA violation relating to concrete-pump work. CP 3503-04, 3523-25, 3573, 3575-76. Again, no WISHA violation occurred.

Inland's general supervision and control did not extend to obtaining the concrete itself or to renting the pouring equipment – rather, Inland properly hired specialty-subcontractor Hilltop to perform those tasks. CP 3559-61. Inland's Subcontract required that Hilltop coordinate the work of its own subcontractors and suppliers and that any failure to do so was the act of Hilltop, for which it is immune from liability. Gleason conceded that the issue of how Ralph's concrete pump was physically set up did not relate to causation of the Incident. CP 3532-33, 3540-43.

Regarding Inland supervising Miles, no evidence shows that Miles violated any WISHA regulation. The unrebutted evidence shows the concrete-pump hopper was always full. CP 2107, 3455, 3678. Vargas' expert Gleason concedes that the mix design specified for the concrete walls was not defective and that there is no evidence the size of the aggregate in the mix caused the Incident. CP 3468-69, 3512-13, 3604.

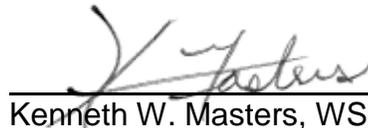
The trial court was unwilling to turn the law on its head to make the general contractor a guarantor of everyone's safety at the worksite. RP 84. This Court should affirm.

## CONCLUSION

The Court should dismiss this appeal. If not, it should affirm.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of January 2018.

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I certify that I caused to be sent, a copy of the foregoing  
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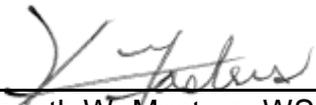
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# APPENDIX

Ruling Granting Discretionary Review in Part  
("Commissioner's Ruling")

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

GILDARDO CRISOSTOMO VARGAS, )  
an incapacitated person, by and through )  
WILLIAM DUSSAULT, his Litigation )  
Guardian ad Litem; LUCINA FLORES, )  
an individual; and LUCINA FLORES as )  
Guardian ad Litem for PATRICIA )  
CRISOSTOMO FLORES, and )  
ROSARIO CRISOSTOMO FLORES, )  
minor children, )

Plaintiffs/Petitioners, )

v. )

INLAND WASHINGTON, LLC, a )  
Washington limited liability company, )  
and RALPH'S CONCRETE PUMPING, )  
INC., a Washington corporation, )

Defendants/Respondents, )

INLAND GROUP P.S., LLC, a )  
Washington limited liability company, )  
and MILES SAND & GRAVEL )  
COMPANY d/b/a CONCRETE )  
NOR'WEST, a Washington corporation, )

Defendants. )

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GILDARDO CRISOSTOMO VARGAS, )  
an incapacitated person, by and through )  
WILLIAM DUSSAULT, his Litigation )  
Guardian ad Litem; LUCINA FLORES, )  
an individual; and LUCINA FLORES as )  
Guardian ad Litem for PATRICIA )  
CRISOSTOMO FLORES, and )  
ROSARIO CRISOSTOMO FLORES, )  
minor children, )

Plaintiffs/Respondents, )

v. )

No. 76717-8-I

RULING GRANTING  
DISCRETIONARY REVIEW IN PART

No. 76893-0-I

RULING GRANTING  
DISCRETIONARY REVIEW

RALPH'S CONCRETE PUMPING, )  
INC., a Washington corporation, )  
 )  
Defendant/Petitioner, )  
 )  
INLAND WASHINGTON, LLC, a )  
Washington limited liability company, )  
 )  
Defendant/Respondent, )  
 )  
INLAND GROUP P.S., LLC, a )  
Washington limited liability company, )  
and MILES SAND & GRAVEL )  
COMPANY d/b/a CONCRETE )  
NOR'WEST, a Washington corporation, )  
 )  
Defendants. )  
\_\_\_\_\_ )

This case involves a serious injury sustained in a construction worksite during a concrete pumping operation. Injured worker Gildardo Vargas (through his litigation guardian ad litem) and his wife and children seek interlocutory review of the summary judgment dismissal of their claims against Inland Washington, LLC, the general contractor. The plaintiffs also seek review of certain discovery rulings related to their immigration status. Defendant Ralph's Concrete Pumping (Ralph's) seeks review of the denial of its summary judgment motion in which Ralph's argued that its concrete pump operator was a borrowed servant of Vargas's employer and is thus immune from liability under Title 51 RCW. The trial court certified all of these rulings for immediate review.

I accept the trial court's certification on the summary judgment dismissal of Inland. The dismissal appears to involve a controlling question of law as to which there is a substantial ground for a difference of opinion on the scope of Inland's WISHA (Washington Industrial Safety and Health Act, chapter 49.17 RCW) and common law

duties and liability as a general contractor under the Stute line of cases.<sup>1</sup> The denial of Ralph's' summary judgment motion on the borrowed servant issue appears to involve largely a question of fact under established precedent as to whether Vargas's employer had exclusive control of Ralph's' operator for the transaction causing injury. The trial court concluded that there is an issue of fact on this issue. But the evidence relevant to the Stute issue overlaps with that relevant to the borrowed servant issue. To facilitate the resolution of this case, review is also granted on the borrowed servant issue. On the other hand, the discovery rulings appear largely moot, and immediate review may not materially advance the ultimate termination of the litigation. Review is granted in No. 76717-8 solely on the dismissal of Inland. Review is also granted in No. 76893-0.

#### FACTS

The injury at issue occurred on an apartment complex construction site in Shoreline, Washington. Below is a brief summary of the facts relevant to this ruling.

Inland was the general contractor of the construction project. To install concrete, it hired Hilltop Concrete Construction, Inc. (Hilltop), Vargas's employer. The trial court

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<sup>1</sup> See Stute v. P.B.M.C., Inc., 114 Wn.2d 454, 464, 788 P.2d 545 (1990) (WISHA imposes a specific statutory duty on a general contractor to comply with WISHA regulations for the benefit of employees of independent contractors because "the general contractor's innate supervisory authority constitutes sufficient control over the workplace"); Kelley v. Howard S. Wright Constr. Co., 90 Wn.2d 323, 330, 582 P.2d 500 (1978) (general contractor who retains control over the work of the employee of an independent contractor has a common law duty "within the scope of that control, to provide a safe place of work"); Afoa v. Port of Seattle, 176 Wn.2d 460, 472, 296 P.3d 800 (2013) (Afoa I) ("jobsite owners have a specific duty to comply with WISHA regulations if they retain control over the manner and instrumentalities of work being done on the jobsite," and "this duty extends to all workers on the jobsite that may be harmed by WISHA violations"); Kamla v. Space Needle Corp., 147 Wn.2d 114, 125-27, 52 P.3d 472 (2002) (jobsite owner, who does not retain control over the manner in which an independent contractor performs work, is not liable under common law or WISHA for the manner in which the contractor performed work); Afoa v. Port of Seattle, 198 Wn. App. 206, 217-34, 393 P.3d 802 (2017) (Afoa II) (Port of Seattle, which retained control over the manner of work done on a worksite, had a nondelegable duty to maintain a safe workplace, is vicariously liable for any breach of that duty, and is not entitled to allocate fault to four nonparty airlines to proportionately reduce its liability). In Afoa II, a petition for review is currently pending in the Supreme Court.

has previously ruled, and there is no dispute, that Hilltop, as Vargas's employer, is responsible for workers' compensation but is otherwise immune from liability for his injury under Title 51 RCW and that his co-workers at Hilltop are also immune.

Vargas's employer Hilltop hired Miles Sand and Gravel Co. (Miles) to supply the concrete mix for the project. Hilltop contracted with Ralph's to provide a concrete pump truck and a certified pump operator to pump the concrete into forms built by Hilltop carpenters. Ralph's asserts that Hilltop exercised control over the work of its pump operator Anthony Howell such that Howell was Hilltop's borrowed servant immune from liability for Vargas's injury under Title 51 RCW. The plaintiffs dispute this claim.

On the day of the injury, Hilltop supervisor Matt Skoog was at the worksite. He testified that he oversaw the concrete portion of the work. No Inland employee was in the vicinity. To build the concrete walls, Miles' truck operator would pour concrete mix into the hopper of Ralph's' pump truck, which would pump the concrete through a boom to a hose at the end, which Hilltop workers would use to pour the concrete into the forms. Ralph's' concrete pump operator Howell arrived at the site. Hilltop supervisor Skoog told him where to set up the pump and showed him the walls they were pumping that day. Howell set up the pump and hooked up the end hose. Vargas and several other Hilltop workers were on the scaffolding next to the concrete forms. Vargas held the end of the hose. Howell controlled the boom and the pump by a remote control. After Howell turned on the pump, it momentarily stopped due to a loss of the wireless signal. Howell reestablished the connection and re-started the pump. The hose whipped and hit Vargas in the head, causing him serious injuries.

Vargas and his wife and children filed a lawsuit in King County Superior Court

against Inland, Ralph's, and Miles. In June 2015, the trial court (Judge Carol Schapira) denied Inland's summary judgment motion. The summary judgment order stated that Inland owed "non-delegable duties under Stute" but was "not vicariously liable."<sup>2</sup> No party sought reconsideration or interlocutory review of this order.

In March 2017, Inland filed another summary judgment motion to dismiss the plaintiffs' claims against it. It argued that it was not liable for the acts or omissions of others, did not owe Vargas a duty to provide a safe *non-common* work area under the sole control of his employer Hilltop, and violated no applicable WISHA rules causing his injury. Inland pointed out Hilltop supervisor Skoog's testimony that Hilltop was in charge of pouring concrete, that he oversaw the concrete work, and that Vargas was the lead of the pouring team. Inland argued that a general contractor is not liable for injuries sustained by an employee of its subcontractor *outside common work areas* over which the general contractor lacks control. In response, the plaintiffs argued that Inland, as a general contractor, had per se control over the worksite as a matter of law under Stute. The plaintiffs asked the trial court to vacate its prior vicarious liability ruling as contrary to Division Three's 2013 opinion in Millican<sup>3</sup> and this Court's recent opinion in Afoa II.

Judge Jeffrey Ramsdell declined to "revisit Judge Schapira's earlier ruling" on vicarious liability, stating that Afoa II (decided after the prior ruling) did not present a major change in the law.<sup>4</sup> The court granted summary judgment for Inland because the plaintiffs failed to show any WISHA violation for which Inland had a non-delegable duty:

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<sup>2</sup> Appendix to Answer to Motion for Discretionary Review (Inland App. 76717-8) 9.

<sup>3</sup> Millican v. N.A. Degerstrom, Inc., 177 Wn. App. 881, 896, 313 P.3d 1215 (2013) ("The label 'nondelegable duty' does not mean that an actor is not permitted to delegate the activity to an independent contractor. Rather, the term signals that the actor will be vicariously liable for the contractor's tortious conduct in the course of carrying out the activity.").

<sup>4</sup> Inland App. (No. 76717-8) 1339; RP (Mar. 31, 2017) 76.

As far as the Stute issue and the non-delegable duty issue that we've just been arguing about, I'm inclined to grant Inland's motion. And the reason for that is, I'm really not seeing much in the way of substance from the Plaintiff as to what the actual violation is of what non-delegable duty we're talking about. It sounds like a generalized guarantor of safety across the board which I don't think is what *Stute* contemplates. And so I'm going to grant Inland's motion and dismiss the claim against them.<sup>[5]</sup>

On the plaintiffs' motion, the trial court certified for immediate review its summary judgment order, including its "affirmation" of its prior vicarious liability ruling.

Meanwhile, the plaintiffs filed a motion for a protective order to prevent discovery of their immigration status. Inland filed a motion to compel continued depositions of the plaintiffs in part to question them about their immigration status as relevant to their economic damages claim. The trial court granted a protective order as to non-party witnesses, but not as to the plaintiffs, and granted Inland's motion to compel. The court denied the plaintiffs' motion to depose Inland and Hilltop about their use of undocumented labor. Pursuant to the trial court's ruling, Inland deposed the plaintiffs. The court later denied reconsideration of the discovery rulings but, on the plaintiffs' motion, certified the rulings for immediate review.

Previously, in September 2015, Commissioner Mary Neel of this Court denied Ralph's motion for discretionary review of Judge Schapira's denial of its summary judgment motion.<sup>6</sup> In its prior summary judgment motion (as in its later motion at issue here), Ralph's argued that its concrete pump operator Howell was Hilltop's borrowed employee and is immune from liability under Title 51 RCW. In denying review, Commissioner Neel pointed out that whether a person is a borrowed servant is ordinarily a question of fact and that Ralph's failed to demonstrate an obvious error in

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<sup>5</sup> Inland App. (No. 76717-8) 1340 (emphasis added); RP 77.

<sup>6</sup> Ruling Denying Discretionary Review (No. 73503-9-I).

the trial court's denial of summary judgment:

Here, there is evidence that Hilltop told Howell where to set up and where the concrete was to be poured and that Hilltop employees handled the hose; there is also evidence that Howell moved the boom to the appropriate location, turned on the pump, and restarted it when it stopped shortly before it whipped and hit Vargas in the head. Although the language in the lease makes Howell the loaned servant of Hilltop, Ralph's acknowledges that the lease is not controlling. Ralph's has not shown that the trial court's decision denying summary judgment dismissal as a matter of law was obvious error.<sup>[7]</sup>

A three-judge panel of this Court denied Ralph's' motion to modify the ruling denying review. In March 2017, Ralph's again filed a summary judgment motion on the borrowed servant issue. The trial court again denied the motion. Judge Ramsdell explained that beyond Hilltop's instructions as to where to park the truck and where to pour the concrete, Howell apparently did the work "from the determination as to where to put the boom and how long it should be, et cetera et cetera."<sup>8</sup> The court stated:

I keep coming back to the fundamental question of, if this is all it takes, then virtually every subcontractor who comes on site that brings equipment with him is a borrowed servant. And I just can't - - I can't believe that that should be the state of the law.<sup>[9]</sup>

On Ralph's' motion, the trial court certified the issue for immediate review.

## DECISION

The plaintiffs seek review of the summary judgment dismissal of their claims against Inland as well as the discovery orders related to their immigration status. Ralph's seeks review of the denial of summary judgment on the borrowed servant issue.

"Interlocutory review is disfavored."<sup>10</sup> "It is not the function of an appellate court

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<sup>7</sup> Ruling Denying Discretionary Review at 7-8 (No. 73503-9-I).

<sup>8</sup> Inland App. (No. 76717-8) 1304-05; RP 41-42.

<sup>9</sup> Inland App. (No. 76717-8) 1305; RP 42.

<sup>10</sup> Minehart v. Morning Star Boys Ranch, Inc., 156 Wn. App. 457, 462, 232 P.3d 591 (2010) (citing Maybury v. City of Seattle, 53 Wn.2d 716, 721, 336 P.2d 878 (1959)).

to inject itself into the middle of a lawsuit and undertake to direct the trial judge in the conduct of the case.”<sup>11</sup> RAP 2.3(b) defines four situations in which this Court may grant pretrial review. The plaintiffs and Ralph’s primarily rely on RAP 2.3(b)(4). Under that rule, this Court may accept review when the trial court certifies that its decision “involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.” The trial court’s certification is not binding on this Court.

A. Summary Judgment Dismissal of Inland: *Stute* and Vicarious Liability

The plaintiffs argue that the trial court erred in applying a retained control analysis when Inland, the general contractor, had per se control over the workplace and is vicariously liable for breaches of WISHA and common law duties. Inland argues that a general contractor owes no duty to an injured employee of its subcontractor when the injury occurs *outside a common work area* over which the general did not retain control.

Under common law, a general contractor who engages an independent contractor is generally not liable for the injuries of the employees of the independent contractor resulting from their work.<sup>12</sup> An exception exists when the general contractor “retains control over some part of the work. The general then has a duty, within the scope of that control, to provide a safe place of work.”<sup>13</sup> In Kelley, our Supreme Court explained the policy reasons for requiring the general contractor to bear ultimate responsibility for job safety “in common work areas.”<sup>14</sup> In Stute, our Supreme Court followed the “policy reasons” articulated in Kelley and other cases as well as the

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<sup>11</sup> Maybury, 53 Wn.2d at 720.

<sup>12</sup> Kelley, 90 Wn.2d at 330.

<sup>13</sup> Id.

<sup>14</sup> Id.

language of WISHA to hold that a general contractor has a non-delegable statutory duty to comply with applicable WISHA regulations to protect the employees of independent contractors “because the general contractor’s innate supervisory authority constitutes sufficient control over the workplace.”<sup>15</sup> “A general contractor’s supervisory authority is per se control over the workplace, and the duty is placed upon the general contractor as a matter of law.”<sup>16</sup> In Afoa II, this Court discussed Kelley and Stute and noted that “[b]oth the common law theory of retained control based on the *Restatement* and the WISHA specific duty standard depend on control over the manner of work.”<sup>17</sup> This Court also held that nondelegable duties “involve a form of vicarious liability.”<sup>18</sup>

It appears that the trial court granted summary judgment for Inland on the ground that the plaintiffs failed to articulate “what the actual violation is of what non-delegable duty we’re talking about.”<sup>19</sup> The court’s decision involves a fact question as to whether the plaintiffs presented sufficient evidence of any WISHA violation. But the court also reaffirmed its prior ruling that Inland is not vicariously liable for the breaches of WISHA or common law duties by the other defendants. This conclusion appears to involve a question of law as to the scope of Inland’s WISHA and common law duties and liability as the general contractor. The issue is dispositive of the plaintiffs’ claims against Inland when the plaintiffs assert that Inland is primarily responsible for Vargas’s injury. In light of the cases discussed above, there is a substantial ground for a difference of opinion

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<sup>15</sup> Stute, 114 Wn.2d at 464.

<sup>16</sup> Id.

<sup>17</sup> Afoa II, 198 Wn. App. at 218. Afoa I and Afoa II involved a jobsite owner Port of Seattle, which was found to have retained the right to control the manner of the work performed by an injured employee of a contractor licensed by the Port to provide ground service work.

<sup>18</sup> Id. at 231 (quoting 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 12.09 cmt. At 161 (6th ed. 2012) and 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT AND LAW PRACTICE § 4:15, at 204-06 (4th ed. 2013)).

<sup>19</sup> Inland App. (No. 76717-8) 1340; RP 77.

on the issue, and immediate review may materially advance the ultimate termination of the litigation. Review is granted on this issue under RAP 2.3(b)(4).

**B. Discovery Rulings Related to the Plaintiffs' Immigration Status**

The plaintiffs argue that the trial court erred in allowing Inland to question them about their immigration status in discovery when they presented a declaration stating that no deportation proceedings were pending against them. But the issue appears largely moot when Inland has already conducted their depositions. The plaintiffs did not seek emergency relief before then. Further, they fail to demonstrate that the discovery rulings may materially advance the ultimate termination of the litigation. Nor do they demonstrate a probable error that would otherwise warrant review. Although they rely on Salas, that case turned on the balancing under ER 403 of the probative value and unfairly prejudicial effect of plaintiff's immigration status, not discoverability.<sup>20</sup> I respectfully decline to accept the trial court's certification on the discovery rulings.

**C. Denial of Summary Judgment on Ralph's' Borrowed Servant Defense**

Ralph's' motion for discretionary review appears to present a question of fact based on established precedent. "Normally the question of whether or not a particular individual was a 'loaned servant' is a factual one, to be determined by the jury."<sup>21</sup> "The borrowed servant defense is a legal fiction that expands the concept of respondeat superior."<sup>22</sup> An employer is vicariously liable to third parties for torts committed by its

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<sup>20</sup> See Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 670-72, 230 P.3d 583 (2010) (although plaintiff's immigration status was relevant to his lost future earnings, "the probative value of [his] undocumented status, by itself, is substantially outweighed by the danger of unfair prejudice"); see also Diaz v. Wash. State Migrant Council, 165 Wn. App. 59, 75, 265 P.3d 956 (2011) ("There is nothing in Salas that supports cutting off inquiry at the outset of discovery.").

<sup>21</sup> Nyman v. MacRae Bros. Constr. Co., 69 Wn.2d 285, 288, 418 P.2d 253 (1966).

<sup>22</sup> Wilcox v. Basehore, 187 Wn.2d 772, 783, 389 P.3d 531 (2017).

employee within the scope of employment.<sup>23</sup> An exception exists when the employee's "general employer loans the [employee] to another, or 'special,' employer."<sup>24</sup> "For those activities over which the special employer exercises *complete control*, the special employer also assumes vicarious liability under the 'borrowed servant' doctrine."<sup>25</sup> The borrowed servant doctrine "does not require complete and exclusive control over all aspects of the loaned worker's conduct. Liability arises out of *those particular transactions over which the special employer has exclusive control*."<sup>26</sup>

Ralph's argues that immediate review is appropriate based on the trial court's certification. It argues that the trial court was inconsistent in granting summary judgment for Inland (where Inland argued that Hilltop had exclusive control over the worksite) while finding an issue of fact preventing Ralph's' summary judgment motion on Hilltop's control over Howell's work. But a general contractor's duty based on its supervisory control over a worksite under Stute involves different considerations than those involved in the exclusive control analysis under the borrowed servant doctrine. Also, the operative facts presented in the prior motion for discretionary review denied by this Court in No. 73503-9-1 appear essentially the same as those presented here.

Ralph's argues that what constitutes the "transaction" over which the borrowing employer must have control and what facts are "material" in this case under the borrowed servant doctrine present questions of law. Ralph's argues that the resolution of these issues will facilitate the termination of this litigation. The evidence relevant to the Stute issue overlaps with that relevant to the borrowed servant issue. The plaintiffs

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<sup>23</sup> Wilcox, 187 Wn.2d at 783.

<sup>24</sup> Id.

<sup>25</sup> Id. (emphasis added).

<sup>26</sup> Id. (emphasis added).

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support review on the borrowed servant issue, although Inland opposes review. Because review is granted on the Stute issue, I grant review on the borrowed servant issue to facilitate the ultimate resolution of the litigation.

Therefore, it is

ORDERED that discretionary review is granted of the orders granting Inland's summary judgment motion and denying reconsideration in No. 76717-8-I. Review of the discovery rulings is denied. It is further

ORDERED that discretionary review is granted of the order denying summary judgment in No. 76893-0-I. It is further

ORDERED that these cases are linked.

Done this 21<sup>st</sup> day of July, 2017.

Marako Kangawa  
Court Commissioner

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**Appellate Court Case Title:** Gildardo Crisostomo Vargas, et al., Pets. v. Inland Washington, LLC, Res.  
**Superior Court Case Number:** 13-2-32219-6

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