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No. 66403-4

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

GARY MERLINO CONSTRUCTION COMPANY, INC., *Appellant*,

v.

CITY OF SEATTLE, *Respondent*.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
HONORABLE SUSAN BARNETT

REPLY BRIEF OF APPELLANT

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I. SUPPLEMENTAL STATEMENT OF THE CASE

Merlino hereby strives to clarify the sequence of Officer Allen's activities in controlling traffic near the Merlino worksite.

Task One: Soon after Officer Allen arrived at the worksite, he began controlling traffic on [W] Armory [Way]. [RP—Allen 9/6-16; 11/3-14]. He did that for several hours. [RP—Allen 10/21-24; 12/7-19].

Task Two: Then, Officer Allen began controlling traffic in the signalized intersection of 15th [Avenue W] and Gaylor [W. Galer] Street. [RP—Wiley 109/13-26; 110/1-19]. At some point, he was told to take a break. [RP—Wiley 109/13-26; 110/1-19; 111/1-11; 116/8-26; 117/1-3; 123/7-13].

Task Three: Then, says Officer Allen, Mr. Trudeau requested that he control traffic in the intersection of 15th Avenue W and W. Galer Street. [RP—Allen 12/22-25]. At that time, as Officer Allen acknowledged, equipment was “in the lanes going north and south on 15th on both sides and on Gaylor [W. Galer].” [RP--Allen 14/15-17]. While there, he began directing traffic from W. Galer Street onto northbound 15th Avenue W. [RP—Allen 12/22-25]. Officer Allen testified that when he was directing traffic in that intersection, he was:

Trying to coordinate the construction workers work area so that they can perform the duties they are, they have to do. Pedestrians, to try and keep them out of the work area so

they don't get injured. Trying to keep them away from cars so they don't get run over, which is a problem. And trying to help facilitate the pedestrians to get to where they want to if I can. And then trying and keep the traffic flowing at a reasonable rate so it doesn't jam up causing too much of an inconvenience. [RP—Allen 29/6-26; 30/1-2].

While there, he was struck by a vehicle. [RP—Allen 12/22-26, 13/1-7].

II. REPLY ARGUMENT

A. Employer-Employee Relationship

This addresses Part C of the City's Response. The parties agree on the *broad* two-pronged legal criteria for an employment relationship. They agree that both criteria must exist. The City stumbles both in its understanding of the more *specific* legal nature of those criteria and in how to apply those criteria to the facts here. Merlino asserts that an off-duty police officer in uniform with a sidearm directing traffic in a signalized intersection within the City is, as a matter of law, a City employee. Merlino also asserts that no evidence supports the trial court's finding that Merlino had a right to control or did control the method or details of Officer Allen's work in directing traffic in a signalized intersection.

(1) **Right to Control.** The criterion of the right to control derives from the criterion for identifying a master-servant relationship. *Hubbard v. Dep't of Labor & Indus.*, 198 Wn. 354, 357-359, 88 P.2d 423 (1939).

The first major weakness in the City's argument is that it elides the true nature of this right to control test. The proper criterion is "whether or not the employer retained the right or had the right to control the manner of doing the work and the means by which the result was to be accomplished." *Hubbard*, 198 Wn. at 358-359. "There must be control, not only as to the method but as to the detail" of the work. *Burchett v. Dep't of Labor & Indus.*, 146 Wn. 85, 88-89, 261 P. 802 (1927), affirmed *en banc*, 263 P. 746 (1928); *Machenheimer v. Dep't of Labor & Indus.*, 124 Wn. 259, 263-264, 214 P. 17 (1923). In *Machenheimer*, the worker had his time kept by the alleged secondary employer; he worked the same hours as the employees of the alleged secondary employer; and he was subject to the orders of the superintendent of the alleged secondary employer as to when and where he would work. But only the worker controlled the manner of repairing the boilers, with the alleged secondary employer's superintendent only designating which boiler was to be repaired first, and which next and how many flues in each boiler were affected and needed repairing, with no control over the method or details of the work. The court held that because the worker controlled the manner of repairing the boilers, the worker was not the alleged secondary employer's employee.

The second major weakness in the City's argument is this: No evidence exists that Merlino controlled how Officer Allen physically performed his duties while controlling traffic in the signalized intersection, whether he was countermanding a signal or directing traffic in some other circumstance. Instead, the City controlled Officer Allen through its policies, its inculcated police training, its monitoring, and its threat of discipline. That is, Officer Allen performed his work in the context of a matrix of SPD rules, regulations and customs. The SPD and Officer Allen had a shared understanding about this network of SPD rules, regulations and customs. Based on these factors, Officer Allen, as an SPD employee, considered that the SPD, not Merlino, controlled him in how he performed his duties when directing traffic. As a result, Officer Allen cannot be Merlino's employee.

The City lists factors it believes establish that Merlino controlled Officer Allen. In considering what the City has identified, the Court should ask two intertwined questions: (1) in what way does the listed item reflect the right to control "the manner of doing the work and the means by which the result was to be accomplished" and (2) is the listed item characteristic of an independent contractor?

1. *Officer Allen was not on duty.* This item is unimportant. The SPD certainly employed him as a police officer. "Police officers are

considered to be under a duty to respond as police officers 24 hours a day.” *State v. Graham*, 130 Wn.2d 711, 718, 927 P.2d 227 (1996); *Anderson v. The Baseball Club of Seattle dba The Seattle Mariners*, 2010 U.S. Dist. LEXIS 138544 at 9 (2010) (“the Seattle Police Department authorizes its officers to take law enforcement action ‘whether on-duty or off-duty’”).

2. *Officer Allen violated SPD policy in failing to obtain a secondary work permit.* This item is unimportant. That the SPD required Officer Allen to obtain such a permit signifies its control over him. Officer Reed found a number of specific secondary work permits in Officer Allen’s name, though not one with Merlino. [RP—Reed 80/8-9]. If an officer fails to file secondary work permit, the SPD may investigate and discipline him/her. That Officer Allen might not have obtained such permission—that is, that he violated a workplace rule--does not place his conduct outside the scope of his SPD employment. *Rahman v. State*, 170 Wn.2d 810, 818, 246 P.3d 182 (2011).

3. *Merlino paid Officer Allen.* This item is unimportant. As the Washington Supreme Court has held, “neither is the method of payment or [*sic*] the right to discharge the decisive test.” *Leech v. Sultan R. & Timber Co.*, 161 Wn. 426, 297 P. 203 (1931). Professor Larson notes that who

pays is intrinsically one of the least significant in determining the real employment relationship. Larson §67.04 at 67-8.

4. *Merlino assigned him tasks.* This item is unimportant. Merlino merely informed Officer Allen at what signalized intersection he should ply his trade or special skills, directing or controlling traffic in the presence of a traffic signal, and on one occasion the result it wanted accomplished. These directions would be as well characteristic of an independent contractor relationship.

5. *Merlino supervised his activities.* This statement is vague and overly broad. The City does not identify in what way Merlino supervised Officer Allen's activities—*viz.*, his acts of directing or controlling traffic. The evidence is uncontroverted that Merlino did not supervise how he controlled traffic. At most, it told him what result it wanted—keep traffic moving; keep it from bunching up; keep people on the street from being hurt. As the Washington Supreme Court has held:

“If under the contract the party for whom the work is being done may prescribe not only what the result shall be, but also may direct the means and method by which the other shall do the work, the former is an employer, and the latter an employee. But if the former may specify the result only, and the latter may adopt such means and methods as he chooses to accomplish that result, then the latter is not an employee, but an independent contractor.”

Leech, 161 Wn. at 428.

Officer Allen had the ultimate authority as to how to perform his traffic duty as a peace officer. [RP--Allen 26-27].

Additional indicia indicate that the SPD, not Merlino, supervised Officer Allen. The SPD prohibited certain types of off-duty work. [RP—Reed 75/18-21]. The SPD required that the officer report specific dates, times and locations and nature of work and name of the contractor. [RP--Reed 76-78]. The SPD often monitored off-duty work. [RP—Reed 81; 94-95]. The SPD had authority to intervene if its off-duty officers were improperly directing traffic. [RP--Reed 81/15-18; 95/3-10; Allen 28/11-21]. The SPD authorizes a police officer to wear his/her uniform when performing such off-duty work. [RP—Reed 87; 89/17-21].

6. *Merlino dictated when he could leave.* This item is unimportant. Merlino *informed* him when the workday began and ended. That is not indicia that Merlino controlled the direct the means and method by which Officer Allen shall do his work.

7. *Merlino filled out his time cards.* This item is unimportant. The City obligated Merlino to submit Officer Allen's time cards to the City. [RP—Vancil 141/4-9]. Mr. Wiley testified that the off-duty officer usually fills out the time card. [RP—Wiley 108/3-23]. *See also Machenheimer*, 124 Wn. at 263-264 (the alleged secondary employer kept the worker's time cards).

8. *Officer Allen obtained the job through Ms. Boone-Jakobsen.*

This item is unimportant. Ms. Boone-Jakobsen, not as Merlino's employee, brokered off-duty police officers to contractors which the City required to hire such off-duty police officers. This is no different from how an independent contractor may be assigned to a workplace.

9. *Ms. Boone-Jakobsen set his wage.* This item is unimportant.

Ms. Boone-Jakobsen, not as Merlino's employee, set the wage based on the collective bargaining agreement between the police officers and the City. [RP—Reed 82-83; 93/26; 94/1-14].

10. *The SPD was unaware Ms. Boone-Jakobsen coordinating work with its off-duty police officers.* This item is unimportant. Officer Reed said he was unaware. [RP—Reed 80/13-18]. That he was unaware is not the same as the SPD being unaware. The SPD knew off-duty officers were being hired to contractors to perform traffic control. [RP—Reed 91/12-14]. The City knew that contractors such as Merlino had to hire uniformed police officers to control traffic at signalized intersections. It is immaterial whether a particular supervisor at the SPD knew the name of the person brokering such off-duty police officers. Given the frequency with which she brokered off-duty officers to contractors under City contracts, no doubt should exist that the City and SPD were aware of this process.

In sum, Merlino did not supervise Officer Allen's activities in any sense that could be considered to reflect or to establish that Merlino had the right to control how he should direct traffic while in the signalized intersection. As a result, Merlino is not his employer as a matter of law and of fact.

(2) **Mutual Agreement to Employment.** A worker must clearly consent to be the employee of the alleged employer. *Rideau v. Cort Furniture Rental*, 110 Wn. App. 301, 307-308, 39 P.3d 1006 (2002) (Division I). Although a worker's subjective belief is relevant, "a worker's bare assertion of belief that he or she worked for this or that employer does not establish an employment relationship." *Jackson v. Harvey*, 72 Wn. App. 507, 520, 864 P.2d 975, *rev. den.* 124 Wn.2d 1003 (1994); *Rideau*, 110 Wn. App. at 307-308. The worker's choice of employer must be informed. That is, a worker cannot provide informed consent if he/she fails to understand the key consequences of agreeing to be employed by this employer rather than that employer. Moreover, whether the worker's consent is informed is assessed objectively: Would a *reasonable* person as employee have consented to work for this employer?

The City lists those factors that it believes establishes that Merlino, not the SPD, and Officer Allen had a mutual agreement.

1. *The City was unaware Officer Allen directed traffic near the Merlino worksite.* This objection is weak. The City cannot deny that it required Merlino to engage a uniformed police officer to control traffic in signalized intersections. The City cannot deny that 99% of the uniformed police officers Merlino engages are from the SPD. [RP--Wiley 104/5-6]. Presumably, the City realizes it is unpersuasive to argue that because it is 1% possible that the uniformed police officer it required Merlino to engage would not be a SPD employee, it did not know that Merlino would be using a SPD employee to direct traffic in a signalized intersection within the City limits. Instead, it appears to argue that although it was 99% sure that Merlino would engage a SPD officer to direct traffic in a signalized intersection within the City limits, it did not know with such certainty that that SPD officer was Officer Allen because Officer Allen, not Merlino, failed to notify the City through a secondary work permit. It is certain that Officer Allen and the SPD had an employer-employee relationship and that Officer Allen, when in the intersection directing traffic, considered himself an SPD employee.

2. *Officer Allen considered Merlino his employer.* True, Officer Allen said he considered himself Merlino's employee. But "a worker's bare assertion of belief that he or she worked for this or that employer does not establish an employment relationship." *Jackson*, 72 Wn. App. at

520. Objectively, despite his aforementioned belief, Officer Allen continued to consider himself first and foremost a SPD police officer, not merely a flagger. [RP--Allen 21/13-19; 26-27]. First, he considered himself a police officer with police power at the intersection. [RP--Allen 19-21]. At that time, Merlino, he said, had no right to control how he directed traffic. [RP—Allen 27/1-12]. Second, he did not consent with knowledge of the consequences of losing his SPD status because he did not explicitly appreciate that losing his SPD status might mean losing his qualified immunity.

3. *When injured, Officer Allen was in the intersection at Merlino's specific request.* This is unimportant. The fact is, when Officer Allen was countermanding traffic signals, he was in the intersection at the specific request of either Dan Trudeau or James Wiley. This would as well be the case of an independent contractor.

Next, the City argues that off-duty police officers are not acting as police officers unless acting as police officers. This is a tautology, but the City's point is apparently that a uniformed police officer with a sidearm directing traffic in a signalized intersection has two hats—one hat is that of a uniformed police officer and the other hat is that of a private citizen. If the uniformed officer is countermanding a traffic signal or directing traffic with a dark signal or performing any of the other duties *only* a

police officer may perform, then he is the City's employee. He would be wearing his police officer hat. But if the uniformed officer is merely doing what a private citizen could do as a "flagger," then the uniformed police officer, despite outward appearances, is not the City's employee. He would be wearing his mere flagger hat.

The City then argues that, as a matter of fact, when Officer Allen was injured, he was a mere flagger. This argument is the City's basic theme throughout its brief. For ease of reference, this argument will be called the City's "two-hat argument." This "two hat argument" forms the underlying basis for the next four items.

4. *Merlino's work was complete and there was no reason for a police officer qua police officer to be directing traffic.* This assertion is factually untrue. What was complete was the work that the laborers were performing earlier in the day; Officer Allen's work was not complete, and that is why he was directing traffic in a signalized intersection hemmed in on both sides of the lanes by Merlino's equipment. [RP—Allen 12/10-25; 14/5-8].

5. *Officer Allen was not countermanding the signal and signal was functioning properly.* This item is unimportant. A police officer countermands a signal when the signal is functioning, either properly or improperly; that is what "countermanding" means. [RP—Allen 31/5-19;

Vancil 145/1-10]. Officer Allen was in the signalized intersection directing traffic because the road there was narrowed on both sides with Merlino's equipment, a fact that potentiated that traffic would bunch up or clog the roadway even though the signal was working properly. Given that, Officer Allen may have needed to countermand the signal to keep the traffic flowing. Merely because he in fact did not countermand the signal at the instant he was injured does not obviate the public need to have him there should the immediate need arise to countermand a signal or to enforce his traffic commands. Police officers, on and off duty, who walk dangerous streets are still police officers even though they might not, on a particular day, collar a malefactor.

6. *When injured, Officer Allen was a mere flagger.* But Merlino could not hire a mere flagger to do what Officer Allen was capable of doing.¹ The City required that Merlino hire a uniformed police officer. [RP—Vancil 131-132; SMC 11.12.100 & .120²; Reed 99-100; Wiley

¹ The City misstates Mr. Wiley's testimony as stating that *even if it is not required*, Merlino often uses off-duty police officers to direct traffic because it provides a benefit to them. [City Brief 4, citing RP--Wiley 113-114]. Wiley never made such a statement.

² The City claims the Department improperly cited without evidentiary authentication the *City of Seattle Traffic Control Manual for In-Street Work*. [City Brief 14-15]. However, the City's own traffic code expressly adopts the manual by reference. The City's traffic manual is a part of the City code, a legislative not an adjudicative fact. *See Wyman v. Wallace*, 94 Wn.2d 99, 102, 615 P.2d 452 (1980).

107/8-11 & 20-21; 113-114]. The reason for that hire was to insure public safety. [RP—Reed 96-97; Vancil 145-147].

Moreover, on-duty uniformed police officers perform mere flagging functions. Merely because, in performing that function, they are not countermanding a traffic signal does not mean they are not acting as police officers. At the time, Officer Allen considered himself a peace officer, not merely a flagger. [RP—Allen 21/13-19]. He had the authority of a peace officer. [RP— Allen 24/15-20; 25/3-9; 26/11-17; 27/1-12; Reed 95/18-26; 97/17-22]. He could legally write tickets. [RP—Allen 19/4-16; 20/3-5; 30/21-25; 31/3-4]. He could legally countermand traffic lights. [RP—Allen 19/4-16, 20/6-16; 22/2-20]. Importantly, he said he had ultimate say about how he controlled traffic. [RP—Allen 24/15-20; 25/3-9; 26/11-17; 27/1-12]. Merlino, beyond directing Officer Allen to a particular location, had no say about how he controlled traffic. [RP-- Wiley 115/22-26; 118/4-11]. This would not be true if Officer Allen were merely Merlino's flagger.

7. *That Officer Allen wore his SPD uniform is irrelevant.* If it is irrelevant, why did the City require that Merlino hire a uniformed police officer? It is relevant. That recognizable uniform clearly signals to motorists and pedestrians that the police officer directing traffic in that

intersection, whether or not countermanding a signal, to ensure public safety, must be obeyed. [RP—Allen 19/8-11].

The City then argues that the uniform does not *per se* dictate that the SPD is directing Officer Allen's activities. That may be true; he could be in uniform acting *ultra vires*. But that is a somewhat academic concern here because here Officer Allen was acting *intra vires*; he was performing a function that SPD police officers perform regularly—directing traffic at a signalized intersection.

Nor does the uniform, the City continues to argue in the same vein, confer police officer authority.³ The City notes that some people, like Ms. Boone-Jakobsen, not police officers, wear uniforms. Merlino agrees to the extent that some uniforms are not those of a police officer. For example, a member of the military may wear a uniform. Such a uniform would not confer police officer authority. A public transit driver may wear a uniform. Such a uniform would not confer police officer authority. But this again is a somewhat academic concern here because when the uniform *is* that of a SPD police officer and it is worn *by a SPD police officer*, such as Officer Allen, particularly when he/she is wearing an official badge with an official identification number and carrying a sidearm, it does confer police

³ The City's claim that Officer Allen, when injured, was not acting as a police officer but was acting as a private person essentially means that the officer was impersonating a police officer, a gross misdemeanor. RCW 9A.60.045.

officer authority—it consistently notifies the public that he is a police officer. [RP—Allen 19/4-7].

Q. And with that uniform that you wear carries the significance of your office, is that correct, or your authority?

A. Yes. [RP—Allen 19/4-7].

“Police officers are considered to be under a duty to respond as police officers 24 hours a day.” *Graham*, 130 Wn.2d at 718; *Anderson*, 2010 U.S. Dist. LEXIS 138544 at 9 (“the Seattle Police Department authorizes its officers to take law enforcement action ‘whether on-duty or off-duty’”). [RP—Vancil 144/12-15]. Directing traffic through an intersection is law enforcement action. [RP—Reed 80].

B. Merlino’s Employee

This addresses Part D of the City’s Response. Part D reiterates the City’s argument in Part C of its Response. First, the City argues that Officer Allen was Merlino’s employee because, when injured, he was not countermanding a signal. This is again the City’s “two-hat argument.” This is the focal inquiry in Part C, which Merlino has addressed above. Second, the City argues that if Officer Allen was Merlino’s employee, when he was injured, he was within the scope of that employment with Merlino. If Officer Allen is not Merlino’s employee, then the second part

of the argument becomes moot because Officer Allen would be acting within the scope of his employment with the City.

C. Law Enforcement Capacity

This addresses Part E of the City's Response. The City again asserts its "two-hat argument." It argues, in essence, that an off-duty police officer is not acting as a police officer unless at the instant of injury he/she is doing *only* what a police officer might do. That is, the City would have the Court consider Officer Allen as having an ever shifting role—at one instant, a police officer exercising only tasks only performed by police officers, such as countermanding a signal in the intersection; at the next instant, a police officer exercising tasks performed by both police officers and mere private citizens, such as flagging; and at the next instant, a police officer again exercising tasks performed only by police officers. He would be a legal chameleon, metaphorically changing his work clothes and hat with every shift in function to reflect his changing legal roles. This argument is unsound.

Police officers, on and off duty, are empowered to do a range of activities, from the seriously dangerous to the ponderously mundane. Some of these activities are those a private citizen might do, such acting as a flagger outside a signalized intersection. But when a police officer does activities which a private citizen might equally do, the police officer is not

thereby, at the moment he/she does such an activity, stripped of his/her authority as a police officer. He/she constantly has that authority. *Graham*, 130 Wn.2d at 718; *Anderson*, 2010 U.S. Dist. LEXIS 138544 at 9 (“the Seattle Police Department authorizes its officers to take law enforcement action ‘whether on-duty or off-duty’”). [RP—Vancil 144/12-15].

When injured, Officer Allen was controlling traffic in a signalized intersection. That is a function performed by on-duty as well as off-duty police officers. The City errs in resting its argument on the distinction between what a police officer can *only* do and what a private citizen can do. What is relevant is what a uniformed police officer is *permitted* to do. A uniformed police officer is permitted to countermand signals in an intersection. He is also permitted to direct traffic without having to countermand a signal. In both circumstances, he is acting as a police officer *qua* police officer.

By analogy, a licensed physician may perform a range of professional activities, from the medically complicated task of transplanting a heart to the uncomplicated task of applying a band aid to a scratch. But when applying the band aid, the physician does not thereby become an unlicensed non-physician merely because an unlicensed non-physician could equally well apply the band aid.

Moreover, Officer Allen is not overqualified for the job of directing traffic in the dual roles of directing traffic through countermanding signals and of directing traffic without countermanding signals. As a uniformed police officer, he can do both kinds of tasks. But a mere flagger would be under-qualified for the job. He/she could not direct traffic in a signalized intersection that might right require countermanding a signal or commanding obedience to his/her traffic commands.

D. Qualified Immunity

This addresses Part F of the City's Response. First, the City argues that Merlino waived this issue in failing to raise it explicitly before the Board and the Superior Court. The fact is, this issue is entwined with or entailed by with the "mutual agreement" issue discussed above, an issue raised before the Board and the Superior Court. It is what a reasonable person in Officer Allen's circumstance should consider to have properly consented to employment with Merlino. It is a reason supporting an argument on an assigned error, not a separate assignment of error.

Second, the City argues that Officer Allen did not testify about what he knew or did not know about a potential loss of his qualified immunity. But the test for evaluating informed consent to employment is objective, not subjective. *Jackson*, 72 Wn. App. at 518-519. So what

Officer Allen believed is somewhat beside the point. From an objective standpoint, would a *reasonable* person likely have waived his/her right to a qualified immunity by agreeing to employment with a private contractor?

Third, the City argues that if Officer Allen were merely Merlino's flagger, he would retain his qualified immunity as to actions under 42 USC §1983. The City's argument is unsound. *Cummings v. Guardianship Servs. of Seattle*, 128 Wn. App. 742, 758, 110 P.3d 796 (2005) ("Merely private conduct, no matter how wrongful, is excluded from the reach of section 1983"). The City's first premise is that 42 USC §1983 creates civil cause of action for violation of constitutional rights effected under color of state law. Although this is true, the City appears to attempt to limit the universe of potential liability to actions brought under this federal statute. That limitation is legally unwarranted. The police officer may also have common tort liability for such acts as, for example, false arrest or false imprisonment or assault or battery.

The City's second premise is that because no rigid formula determines whether a person is acting under color of state law, an uniformed officer may not be acting under color of state law. *Van Ort v. Estate of Michael Stanewich*, 92 F.3d 831, 838 (9th Cir 1996). In *Van Ort*, Stanewich was an non-uniformed off-duty police officer who when off

duty robbed someone. He was found *not* to be acting under color of state law. This case is factually distinguishable from the situation here.

The City's third premise concerns in what circumstances a police officer has a qualified immunity under 42 USC §1983. *Dang v Ehredt*, 95 Wn. App. 670, 977 P.2d 29 (1999) (on duty police officers erroneously arrested a suspected law breaker). *Dang* does not involve a private citizen (which is what the City is contending Officer Allen was when injured), mistakenly thinking he was wearing his police officer hat, erroneously detaining a suspected law breaker. Moreover, this third premise is question begging because the issue here extends beyond liability under 42 USC §1983; it extends as well to the issue of a qualified immunity for common law torts. *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed. 2d 589 (1991); *Staats v. Brown*, 139 Wn.2d 757, 778, 991 P.2d 651 (2000).

If Officer Allen, as a SPD police officer, detained a motorist or pedestrian for a traffic violation, he probably would have the qualified immunity if he was carrying out a statutory duty according to procedures dictated to him by statute and by superiors and, in the process, acting reasonably. But if he were a merely Merlino's flagger, wrongly directing a motorist or pedestrian, he would probably not have the qualified

immunity. Objectively, as a rational person, he would not want to be in that latter situation.

E. Loaned Employee

This addresses Part G of the City's Response. First, the City argues that Officer Allen cannot be a loaned employee because the City was unaware *he was the* uniformed officer appointed to direct traffic for Merlino. As argued earlier, the City cannot deny that it required Merlino to engage a uniformed police officer to control traffic in signalized intersections. The City cannot deny that 99% of the uniformed police officers Merlino engages are from the SPD. [RP--Wiley 104/5-6]. The City appears to argue that although it was 99% sure that Merlino would engage a SPD officer to direct traffic in a signalized intersection within the City limits, it did not know with such certainty that the SPD officer was Officer Allen because Officer Allen, not Merlino, failed to notify the City by obtaining a secondary work permit as he was required to do. Officer Allen's failure to follow the City's workplace rules should not benefit the City in its dispute with Merlino.

Second, the City erroneously argues that Officer Allen satisfies the following two key criteria of the loaned employee test (in italics).

The work being done is essentially that of the second employer?

The City asserts "there was no reason for an off-duty police officer to be

directing traffic in the intersection,” work there was done for the day, and that he was in the intersection because Merlino’s superintendent directed him there. So “Allen’s task,” argues the City, “was primarily for the benefit of Merlino.” But this reason is insufficient and essentially an evasion. He was there because the City required Merlino to hire a uniformed police officer to direct traffic in a signalized intersection to ensure public safety and to enforce traffic laws. These are public functions. [RP--Reed 80, 83, 94, 96-99; Vancil 145-146]. As a *practical matter*, a uniformed police officer had to direct traffic at any signalized intersection because the officer had to decide *at any given instant*, perhaps in a split second, whether to countermand the signal. [RP--Vancil 132, 145; Reed 99-100]. Moreover, just before Officer Allen was injured, Mr. Trudeau perceived that a functioning signal was less than what might be needed to keep traffic moving properly through the intersection. If the City had not required that a uniformed officer be used, because that is what the City had determined was needed to insure public safety, Officer Allen would not have been in that intersection. [RP—Reed 97; Vancil 145-147].

An off-duty police officer is employed by the special employer [Merlino] *only* if he is performing a job which of interest *only* to the “special employer.” Larson §67.05 at 67-8. The line into the area of non-

liability of the “special employer” [Merlino] is crossed when the police officer continues to perform his/her public function while serving the individual employer. Larson §67.05 at 67-10. An “off duty police officer is a public servant, with the authority to respond to emergencies and to react to criminal conduct.” *Graham*, 130 Wn.2d at 719. “Off duty police officers are under a duty to respond as police officers 24 hours a day.” *Id.* at 718; *Anderson*, 2010 U.S. Dist. LEXIS 138544 at 9 (“the Seattle Police Department authorizes its officers to take law enforcement action ‘whether on-duty or off-duty’”).

When Officer Allen was directing traffic in the signalized intersection, he was *not* performing duties which were *essentially* Merlino’s, but rather duties which were in the City’s interest—keeping pedestrians and motorists safe, and keeping the vehicular traffic on City streets moving effectively. Those are the public functions of a peace officer.

The second employer has the right to control the details of the work? The City’s only apparent argument that Merlino had a right to control the details of Officer Allen’s work is the City’s vague assertion that “Merlino ... supervised his activities, dictated his tasks and location, ... and determined when he could leave the job site.” But what the City asserts Merlino had the right to do is not supported by the evidence.

Merlino did not supervise Officer Allen as to how to control traffic while in the signalized intersection. In fact, all the evidence is that Merlino did not have that right.

III. CONCLUSION

For the preceding reasons, this Court should reverse the ruling of the trial court, vacate the judgment entered in favor of the City of Seattle and enter judgment in favor of Gary Merlino Construction Company, Inc.

Respectfully submitted this 14th day of June 2011.

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

GARY MERLINO CONSTRUCTION CO.,
INC.,

Appellant,

v.

CITY OF SEATTLE,

Respondent.

COURT OF APPEALS No. 66403-4

**DECLARATION OF SERVICE OF
APPELLANT'S REPLY BRIEF**

I hereby certify under penalty of perjury under the laws of the State of Washington that I caused the BRIEF OF APPELLANT to be served on the following:

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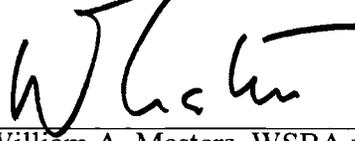
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