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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

ARTHUR YEATTS; and NANCY DOTY, INC.,
Special Fiduciary for Arthur Yeatts,
Plaintiffs-Appellants,
Petitioners on Review,

and

MATTHEW WHITMAN,
Plaintiff,

v.

POLYGON NORTHWEST COMPANY, a foreign corporation,
Defendant-Respondent,
Respondent on Review

Court of Appeals
A 150199

S062977

BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION

Petition for Review of the Decision of Court of Appeals
from a Judgment of the Circuit Court of Clackamas County,
Honorable Jeffrey S. Jones, Circuit Judge of Clackamas County.

Decision Filed: December 31, 2014
Judges: Armstrong, PJ, Nakamoto, J, Egan, J.
Opinion by: Nakamoto, J

Listing of Counsel Next Page June 2015

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I INTRODUCTION

Amicus Curiae, the Oregon Trial Lawyers Association, urges the court to reverse the decision of the Court of Appeals particularly with regard to delegation of the responsibility for worker safety mandated by the Oregon Employers' Liability Law ("ELL"), ORS 654.305 *et seq., Yeatts v. Polygon Northwest Co.*, 268 Or App 256, 341 P3d 864 (2014).

For the convenience of the court, this brief repeats the arguments submitted by your *Amicus* in support of the granting of the Petition for Review and provides further discussion of the retained right to control and, in particular, of the continued inappropriate reliance on *Wilson v. P.G.E. Company,* 252 Or 385, 391–92, 448 P2d 562 (1968) in cases beyond the factual circumstances of that case.

Specifically, your *Amicus* respectfully suggests that the analyses of the "indirect employer" status based on "retained right to control" and "actual control" adopted by the Court of Appeals are in error.[1]

With regard to "retained right to control" the decision, 268 Or App at 271-276, fails to recognize the contractual and actual right to control retained by the general contractor and is thus in conflict with the holding of

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[1] Your *Amicus* does not address the issue of "common enterprise." That test requires "control over the activity or instrumentality that causes the injury," *Sacher v Bohemia, Inc*., 302 Or 477, 486, 731 P2d 434 (1987) and generally implicates the same "control" or "right to control" analysis.

Cortez v. Nacco Material Handling Group, Inc., 356 Or 254, 337 P3d 111 (2014).

More importantly, the decision gives effect to select contractual provisions in which the general contractor seeks to avoid responsibility for the safety of workers at its work site. This is based on an erroneous continued reliance on *Wilson v. P.G.E. Company,* 252 Or 385, 391–92, 448 P2d 562 (1968) despite this court's limitation of *Wilson* to its own "particular contractual relationship." *Cortez*, 356 Or at 276, note 23.

OTLA also urges the court to overrule or disavow that part of the *Wilson* decision that requires plaintiff to show that an ELL defendant's retention of a right to control "created" risk to plaintiff.

With regard to "actual control" the decision, 268 Or App at 276-279, reprises a narrow definition of the work to be analyzed and is in conflict with *Woodbury v. CH2M Hill, Inc*., 335 Or 154, 61 P3d 918 (2003).

II THE EMPLOYER LIABILITY LAW

The Employer Liability Law was passed by a vote of the people in 1910. 1911 Or Laws Ch 3. In *Saylor v. Enterprise Elec. Co.*,106 Or 421, 426-427, 212 P 477 (1923) the court quoted the argument in favor of the measure submitted to the voters:

> "This is the call of the plain people to the plain people for relief. Oregon is making a name for itself as the best home for the immigrant because

> of its political reforms and the powers which the people have taken into their own hands, and yet Oregon stands backward and almost alone in her failure to recognize that the injury or death of a workman is as much a part of the conduct of the business as the bursting of a boiler or breakage of the machinery and to prevent the death or injury of the workman should be as much a part of the cost of the business as the protection of machinery or replacing old with new. The iron machinery is insured and guarded from injury in every way, but the human machinery is, in fact, too cheap to be worth protecting. * * *."

The result of this initiative was a law which was recognized as "broader in scope than any other Employers' Liability Law that has been called to our attention."[2] *Browning v. Smiley-Lampert Lumber Co.*, 68 Or 502, 512, 137 P 777 (1914). See also *Camenzind v. Freeland Furniture Co.*, 89 Or 158,180, 174 P 139 (1918).

As noted in *Camenzind*, at 180:

> "The outstanding purpose of the statute is to protect employés from injury, and the statute should be liberally construed to effect that purpose. * * *.
>
> The duty imposed upon the master by the Employers' Liability Act is a nondelegable duty. * * *. It is also a continuing duty. * * *. And therefore, when we once determine the duty imposed upon

[2] The circumstances giving rise to the passage of the Employer Liability Law are discussed in Pozzi, *In Defense of the Employers' Liability Law - A Necessary Antidote to the Oppression of the Common Law*, 1 Willamette L J 48 (1959).

> the master, we find a duty which is absolute, nondelegable and continuing; the employer cannot absolve himself from the performance of it, nor can he delegate it to the employé, but it adheres to him without the possibility of suspension or interruption. Moreover, a transgression of the statute is negligence *per se* and is actionable. * * *." [Citations omitted.]

In *Woodbury v. CH2M Hill, Inc.*, 335 Or 154, 160, 61 P3d 918 (2003) the court noted that the ELL imposes a heightened statutory standard of care on a person or entity who either is in charge of, or responsible for, any work involving risk or danger. The court stated:

> " ELL liability can be imposed on a person or entity who (1) is engaged with the plaintiff's direct employer in a 'common enterprise'; (2) retains the right to control the manner or method in which the risk-producing activity was performed; or (3) actually controls the manner or method in which the risk producing activity is performed." [Citation omitted.] [Footnote omitted.]

III THE RETAINED RIGHT TO CONTROL

A. Facts Related to Retained Right to Control.

The subcontractor, Wood Mechanix, was hired by the general contractor, Polygon, to do framing. The general contractor included the usual "boiler plate" disavowal of responsibility for safety of workers at the work site. However, the general contractor also included a number of contractual obligations showing retained control:

- The contract required the subcontractor to comply with all

OSHA regulations and "any safety measures requested by contractor." ER 43.

- The subcontractor was required to provide a comprehensive "site specific safety plan" to the general contractor and was not permitted to commence work until the safety plan was submitted. *Id.* A fair reading of this requirement would include the right of the general contractor to approve, disapprove or require changes.
- The general contractor had its own "Accident Prevention Plan." ER 45. Although the Court of Appeals opinion said that "plaintiff has not adduced evidence that the safety manual was ever given to Wood Mechanix", 268 Or App at 279, the actual testimony of Wood Mechanix representative was that he couldn't tell if he had seen the document before but it didn't look familiar. ER 89.[3]
- The Accident Prevention Plan was specifically applicable to subcontractors. It required subcontractors to "obey all OSHA and Tanasbourne Place Townhomes LLC Safety Standards and failure to do so will result in termination of their contract."

[3] It would be ironic if a general contractor could avoid responsibility by simply failing to distribute its safety manual to affected subcontractors.

Memo in Opposition, Ex N at page 6.

- The Accident Prevention Plan specifically gave the general contractor's superintendents the power to inspect and to issue "Safety Hazard Observed" notices to subcontractors. ER 46.
- The Accident Prevention Plan specified guardrails as a means of fall protection. ER 48. Since Polygon had no framers working on the job, that requirement would apply to "whoever is doing the framing work." Motion to Supplement, Ex A (Deposition of Polygon Vice President Templeton at 96-97).
- The "Subcontractor Precon Safety Orientation", ER 44, specified termination of the contract and removal from the approved bidder list based on the occurrence of the same serious hazard on three occasions.
- The subcontractor's representative testified that, based on the Subcontractor Precon Safety Orientation, he understood that Polygon would be monitoring his safety operation. ER 38.

B. There Was Evidence of Retained Right to Control.

In *Cortez v. Nacco Material Handling Group, Inc.*, 356 Or 254, 274, 337 P3d 111 (2014), the court held that "retained right to control" could be shown by the governing statutes for LLCs. The retained right could also be based on legal authority, such as a contract, or by evidence of a

retained right. *Boothby v. D.R. Johnson Lumber Co.*, 341 Or 35, 41, 137 P3d 699 (2006).

In the instant case the subcontractor was required by contract to comply with any safety measures specified by the general contractor. They were required to submit their safety plan for approval. The general contractor adopted a safety plan which specifically governed subcontractors. That plan included the requirement of guardrails as the specified means of fall protection. Those requirements could only apply to framing subcontractors.

1. Retained Right to Control Depends on Rights Retained by the Defendant, Not Agreement of the Direct Employer.

The Court of Appeals opinion notes that the defendant did adopt a safety manual, including provisions for fall protection. And, as noted above, the safety manual clearly applied to sub-contractors. However, the court dismissed this fact because "plaintiff has not adduced evidence that the safety manual was ever given to Wood Mechanix." 268 Or at 279. Even if the evidence supported that finding, the fact remains that the general contractor had reserved for itself the right to control subcontractors through its safety plan. And the contract required the subcontractor to follow any safety measures requested by the contractor.

In *Cortez*, 356 Or at 274, the court noted that, under the statutes

governing LLCs, the member manager retained the right to manage all aspects of the LLCs business, including forklift operation or safety conditions. If the reasoning of the Court of Appeals in this case were correct, that finding would have been insufficient. The court in *Cortez* would also have had to find that the operators of the mill in question were familiar with the statutes governing LLCs and knew of the management prerogatives of the member manager . That has never been a requirement for finding retained right to control.[4]

2. Retained Right to Control Includes the Right to Dictate the Contents of Safety Plans.

The Court of Appeals also placed a temporal requirement on the retained right to control. The court acknowledged that defendant had the right to approve or reject any safety plans submitted by Wood Mechanix. However, "any right that Polygon had to approve or reject Wood Mechanix safety plan existed prior to the work commencing. After that Polygon's right to control Wood Mechanix's safety plan ceased* * *." 268 Or App at 276. That statement is contradicted by the evidence, noted above, that Polygon continued to monitor safety of its subcontractors as the project progressed.

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[4] This holding is also an invitation for general contractors to adopt or purchase "off the shelf" safety manuals to comply with OSHA or contractual requirements and leave them undistributed in the job shack.

More importantly, it ignores the conclusion that this safety plan which the general contractor had the right to approve, reject or change governed safety measures while the project was in progress. The right to control includes the right to specify, prior to the commencement of the work, how the work is to be conducted.

3. The Exculpatory Clause is Invalid - *Wilson v. P.G.E. Company* Should be Expressly Limited (Again) or Overruled.

The Court of Appeals gave weight to several exculpatory contract provisions seeking to disavow responsibilities for worker safety on the job site and to delegate those to the subcontractors. 268 Or App at 274-275. For support the court relied on *Wilson v. P.G.E. Company,* 252 Or 385, 391–92, 448 P2d 562 (1968). In so doing it relied on the analysis rejected by the Supreme Court in *Cortez v. Nacco Material Handling Group, Inc.*, 356 Or 254, 274, 337 P3d 111 (2014).

In *Cortez v. Nacco Materials Handling Group, Inc*., 248 Or App 435, 274 P3d 202 (2012) the Court of Appeals rejected a claim of retained right to control by relying exclusively on the reasoning of *Wilson.* 248 Or App at 447.[5]

The Supreme Court reversed, noting that *Wilson* dealt with the

[5] *Wilson* also had a contract which placed primary responsibility for worker safety on the contractor. 252 Or at 396.

relationship of an owner and an independent contractor rather than a general contractor and a sub-contractor. The owner was not involved in the manner or method in which the risk producing activity was performed.[6] 356 Or at 276. The court limited *Wilson* to its particular contractual setting:

> "Whatever the merits of that decision, FN23 this case arises in a different context.
>
> > FN23. Plaintiff does not argue that Wilson was wrongly decided, and we assume that the court's decision was correct in light of the particular contractual relationship in that case." 356 Or at 276.

More importantly, the court stated:

> "Put differently, a jury reasonably could find from the evidence on summary judgment that Swanson 'retain[ed] the right to control the manner or method in which the risk-producing activity was performed.' See *Woodbury*, 335 Or at 160, 61 P3d 918. *Were we to hold otherwise, we would effectively eviscerate a category of responsibility under the ELL that we have long recognized.* [Emphasis added.]

The true problem is the application of *Wilson* to contracts for the provision of labor which use exculpatory clauses whereby the general contractor disavows any responsibility for worker safety.

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[6] The court went to great lengths to limit *Wilson* to cases where an owner employs an independent contractor, pointing out eight times that the defendant was an owner and not a contractor. 356 Or at 275-276.

In *Woodbury v. CH2M Hill, Inc.*, 173 Or App 171, 181-82, 21 P3d 153, (2001) *rev'd*, 335 Or 154 (2003), the Court of Appeals found no right to control where a contractual provision placed responsibility for compliance with safety regulations on the subcontractor. The Supreme Court reversed finding there was actual control. 335 Or at 162. It did not specifically address the exculpatory language. Likewise, in the instant case the Court of Appeals gave effect to the contract which "placed the primary responsibility for safety on Wood Mechanix." 268 Or App at 275.

Your *Amicus* respectfully suggests that both Court of Appeals decisions are wrong in giving effect to exculpatory clauses regarding worker safety. To the extent that *Wilson* approves such clauses it should be overruled.

The reasoning of *Wilson* should be disavowed in any event. The additional requirement it imposes on ELL plaintiffs - to show not only that defendant retained the right to control the risk-producing activity but also that defendant's retention of that control *created additional risk* - has no basis in the statute or in this court's jurisprudence before or since. 252 Or at 396 (retention of right "created no risk of danger [to] plaintiff.") The *Wilson* court reasoned not from the language of the ELL but from its own public policy view that imposing liability might lead to less workplace safety by inducing complacency in plaintiff's employer:

> "The retention of the right by owners to direct the manner in which the work is done, if necessary to secure greater safety, tends to promote the same policy as that of the ELA. An owner who reserves the right to impose or require safety precautions for the benefit of his contractor's workmen derives no possible pecuniary benefit from the reservation because he has contracted for a finished product. Therefore, if duties not otherwise required of owners are imposed because of the reservation of a right to require safety precautions, it is obvious that owners will not actively concern themselves with the workmen's safety. As a result, the imposition of liability under the Act, because of a reservation of the right to impose safety measures, would defeat the very purpose the Act was designed to accomplish. Such an imposition of liability is contrary to the policy of the Act where no risk is created that the contractor will fail in his duties to his employees." *Id.*

Wilson was decided in 1968, two decades before this court's statutory construction jurisprudence narrowed its primary focus to the text and context of legislative language. This court's modern statutory construction methodology relies on the words the Legislature enacted, not on the court's view of what makes good policy. The ELL applies to "persons having charge of, or responsibility for, any work involving a risk or danger to the employees…". ORS 654.305. It does not require that the mere having of that charge - the mere right to control - *create* by itself a risk to workers. *Wilson* incorrectly added such a requirement based on what the court

thought was "obvious" about employer incentives. [7] 252 Or at 396.

Further, the *Wilson* decision conflates the question of who is subject to the ELL with the question of liability on the merits. The retained right to control subjects a general contractor to the statute. To add, as *Wilson* does, the requirement that the retention of control "created [a] risk of danger" is to require that the plaintiff also show the general contractor to have *violated* the statute. The ELL liability standard asks whether the defendant has "used[d] every device, care and precaution" for worker safety. To "create [a] risk of danger" is to violate that substantive standard. *Wilson* should be overruled to the extent that it requires plaintiff to show a violation of the liability standard in order to subject an owner or general contractor to the ELL's provisions.

With regard to exculpatory clauses, the duty imposed by the Employer Liability Law is non-delegable and absolute. *Camenzind v.*

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[7] *Stare decisis* teaches the importance of stability in legal rules and decisions. *e.g. Farmers Ins. Co. v. Mowry*, 350 Or 686, 693, 261 P3d 1 (2011). However, this Court recognizes the need to correct a decision that was "inadequately considered or wrong when it was decided." *Id,* quoting *G.L. v. Kaiser Foundation Hospitals, Inc.,* 306 Or 54, 59, 757 P2d 1347 (1988). *Wilson* was wrong when it was decided because it inserted a requirement in the ELL that the statute does not contain - a requirement that plaintiff show the defendant's control over risky work to have "created" risk. ORS 174.010 (court not to "insert what has been omitted".) *Wilson* should be overruled to the extent that it requires plaintiff to show that defendant's right to control a risk-producing activity created additional risk to plaintiff.

Freeland Furniture Co., 89 Or 158,180, 174 P 139 (1918). If a general contractor could simply declare his or her lack of responsibility for worker safety through a contractual provision, such clauses would become ubiquitous. The non-delegable duty to workers would be a legal fiction.

The disregard of contractual disclaimers has been acknowledges in Washington. In *Afoa v. Port of Seattle*, 176 Wash 2d 460, 479, 296 P3d 800, 810-11 (2013) the court rejected the argument that the contractual relationship was that of licensee, thus negating a duty of safety. The court stated:

> " Indeed, as *Kelley* makes abundantly clear, the safety of workers does not depend on the formalities of contract language. *Instead, our doctrine seeks to place the safety burden on the entity in the best position to ensure a safe working environment*. *Kelley [v. Howard S. Wright Const. Co.*, 90 Wash2d 323, 331, 582 P2d 500 1978]. Where there are multiple employers performing a variety of tasks in a complex working environment, it is essential that a safe workplace duty be placed on a landlord who retains the right to control the movements of all workers on the site to ensure safety. *Id*. The policy of encouraging a safe workplace is even more urgent in a complex, modern, multiemployer work site like Sea-Tac Airport than in a simpler, more traditional master-servant arrangement." [Emphasis added.]

See also *Millican v. N.A. Degerstrom, Inc.*, 177 Wash App 881, 890-91, 313 P3d 1215 (2013), *rev den*, 179 Wash2d 1026, 320 P3d 718 (2014) (non-delegable duty).

Likewise, in federally funded or federally assisted construction projects there is a prohibition on delegation of legal responsibility to sub-contractors for any part of the project including compliance with safety regulations. 29 CFR §1926.16. See *George v. Myers*, 169 Or App 472, 481, 10 P3d 265 (2000).

Oregon has long recognized the continuing, non-delegable duty of worker safety. *Camenzind*, 89 Or at 180. That duty cannot be avoided by exculpatory contractual provisions.

4. Conclusion.

In this case, through contract and practice, the general contractor retained the right to control the manner or method in which the risk producing activity was performed.

III ACTUAL CONTROL

A. Facts Related to Actual Control.

There was evidence that the general contractor specified guardrails as the means of fall protection. The trial judge so found. ER 11. The Accident Prevention Plan specified guardrails, ER 48, and the Polygon Vice President acknowledged that the guardrail requirement would apply to "whoever is doing the framing work." Motion to Supplement, Ex A, Templeton Deposition 96-97. Wood Mechanix was "doing the framing work". ER 42. Wood Mechanix's representative testified that, based on

the "Subcontractor Precon Safety Orientation," ER 44, he assumed that Polygon would be monitoring his safety program. ER 38.

On the day of the accident a Polygon employee directed plaintiff to a different building and to "go up there and finish something". ER 40-41. The Court of Appeals acknowledged that this put plaintiff at a dangerous height above a concrete surface. The court further acknowledged that this was "the dangerous work or 'risk producing activity'". 268 Or App at 265.

However, after acknowledging that that work was the "risk producing activity" the court states that the action of the Polygon employee in directing plaintiff to work at height was insufficient "because it did not create the risk of danger that contributed to plaintiff's injury." 268 Or App at 271.[8]

B. There Was Evidence of Actual Control.

In *Woodbury v. CH2M Hill, Inc.*, 335 Or 154, 61 P3d 918 (2003) defendant hired the plaintiff's employer to install a water pipe, part of which would be elevated. They jointly decided to construct a wooden platform for work on the elevated part. The details of how to construct the platform were left to plaintiff's direct employer and defendant had no role in the

[8] This was actually discussed in the court's treatment of "common enterprise." However, as noted above, the issues of control are common to both common enterprise and actual control.

actual construction. The platform was constructed without fall protection. When the project was completed plaintiff was required to disassemble the platform. None of defendant's employees were involved. Plaintiff fell.

The court held that there was actual control:

> "In light of those facts, there was evidence from which the jury reasonably could conclude that defendant exercised actual control both over the decision to use a wooden platform and over the choice of how that platform was constructed. *We conclude that there is evidence in the record to support a jury finding that defendant exercised actual control over the manner or method in which the risk-producing activity (working at height) was performed * * *." 335 Or at 162.* [Emphasis added.]

In *Woodbury* the Court of Appeals had narrowly construed "work" to involve "the moving of boards to facilitate the disassembly of the platform." *Id*. The Supreme Court noted it involved more, including "requiring plaintiff to work at height during the assembly, use and disassembly of the platform." *Id*. In the instant case the Court of Appeals, 268 Or App at 279, applied the same narrow test:

> "We also reject plaintiff's argument that the fact that Polygon employees would verify that guardrails were in place and bring observed hazards to the attention of the subcontractors is evidence of Polygon's actual control. That is because there is no evidence that Polygon employees instructed Wood Mechanix on *how* to construct, maintain, or fix the guardrails." [Emphasis in original.]

As in *Woodbury* the "work" here involved more than driving nails and moving boards. It involved working at heights with guardrails for fall protection: guardrails even the court acknowledges the defendant was to verify were in place and free of hazards.

The Court of Appeals approach conflates defendant's status as an indirect employer with the question of ELL liability. 268 Or App 278. Indirect employer status makes a defendant subject to the ELL. It does not establish liability. It is difficult to see how the defendant's direction to plaintiff to work at height and with a certain type of fall protection is not actual control. It may have been negligence-free. It may not have caused plaintiff's injury. That is a separate question.

A factual question was presented as to whether defendant exercised actual control.

IV CONCLUSION

Your *Amicus* respectfully suggests that the decision of the Court of Appeals be reversed and the case remanded for trial.

The Court of Appeals' narrow interpretation of retained right to control is contrary to this court's holding in *Cortez*. As in *Cortez,* 356 Or at 276, that narrow interpretation "would effectively eviscerate a category of responsibility under the ELL that we have long recognized." Equally important, the opinion raises serious questions relating to the non-

delegable duty to protect workers form injury or death and whether that duty can be avoided by contractual clauses of non-responsibility.

The Court of Appeals' equally narrow interpretation of actual control, as limiting "work" to *how* the guardrails are constructed, maintained or fixed is contrary to this court's holding in *Woodbury*, 335 Or at 162.

These restrictive interpretations of the Employers' Liability Law fail to give precedence to the purpose of the law - the safety of the worker.

RESPECTFULLY SUBMITTED this 3rd day of June, 2015.

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CERTIFICATE OF COMPLIANCE
WITH ORAP 5.05(2)(d)

Brief Length

I certify that (1) this brief complies with the word-count limitations in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 5,234 words.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

s/ W. Eugene Hallman
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Certificate of Filing and Service

I certify that on the 3rd day of June, 2015, I filed the original **Brief on the Merits of *Amicus Curiae* Oregon Trial Lawyers Association** with the State Court Administrator by Electronic Filing.

I further certify that on the same date I served a true and correct copy of this document upon the following by Electronic Filing (for registered Efilers) and by US Mail (for those not registered as Efilers):

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