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.

Clackamas County Circuit Court
CV 08020124
Court of Appeals
A150199
S062977

PLAINTIFFS-PETITIONERS' BRIEF ON THE MERITS

Petition for Review of the Decision of the 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, P.J.,
Nakamoto, P.J., Egan, J.,
Opinion by: Nakamoto, P.J.

(Counsel listed on inside cover)

PETITIONERS' MERITS BRIEF FILED: June 12, 2015

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INTRODUCTION

Nearly 10 years ago during the real estate construction boom, Arthur Yeatts suffered catastrophic injuries after he fell from the third floor of a multi-unit townhome construction project operated and supervised by general contractor Polygon. Plaintiff's direct employer was framing subcontractor Wood Mechanix. Polygon instructed Wood Mechanix to use guardrails as fall protection on the framing job. Within minutes of being instructed by a Polygon superintendent to "get back up there" and get to work, plaintiff fell through an insecure guardrail causing him to fall approximately 19 feet to the concrete below. Plaintiff sustained brain injuries that have ended his ability to work and affect all aspects of his daily living.

Plaintiff brought claims against Polygon based upon Oregon's Employers' Liability Law ("ELL")[1] and common-law negligence. Polygon filed a motion for summary judgment asserting that no facts had been presented by plaintiff upon which a reasonable juror could find Polygon liable under the ELL or common-law negligence principles. The Court of Appeals affirmed by written opinion issued December 31, 2014, *Yeatts v. Polygon Northwest Co.*, 268 Or App 256, 341 P3d 864, (2014). Plaintiff urges this court to reverse the courts below, hold

[1] *See* ORS 654.305 *et seq.*

that fact questions exist and to remand this case for a jury trial on plaintiff's ELL and common law negligence claims.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question: Did the Court of Appeals correctly decide that plaintiff did not submit evidence below sufficient to create a factual dispute as to whether Polygon was engaged in a "common enterprise" with Wood Mechanix, thereby exposing Polygon to potential liability under the ELL?

Proposed Rule: A general contractor is potentially liable under the ELL when it engages in a "common enterprise" with plaintiff's employer by "working together on a project" and overseeing the use of fall protection, an act that lead directly to plaintiff's injury.

Second Question: Did the Court of Appeals correctly decide that plaintiff did not submit evidence below sufficient to create a factual dispute as to whether Polygon exercised actual control over the manner or method in which the risk-producing activity (working at a dangerous height without adequate fall protection) was performed, thereby exposing Polygon to potential liability under the ELL?

Proposed Rule: A general contractor is potentially liable under the ELL when it exercises actual control over the manner or method in which the risk-producing activity is performed by requiring plaintiff's employer to use guardrails as the designated means or method of fall protection, as opposed to

another, safer method of fall protection as opposed to another ,safer method, *e.g.*, lanyards, netting, scaffolding, man lifts, or harnesses.

Third Question: Did the Court of Appeals correctly decide that plaintiff did not submit evidence below sufficient to create a factual dispute as to whether Polygon retained the right to control the manner or method in which the risk-producing activity was performed, thereby exposing Polygon to potential liability under the ELL?

Proposed Rule: A general contractor is potentially liable under the ELL when it contractually retains control over the manner or method in which the risk-producing activity is performed by requiring, through its subcontract with plaintiff's employer, compliance with the general contractor's "own procedures in place" including its "Fall Protection Plan" and "all OR-OSHA requirements."

Fourth Question: Did the Court of Appeals correctly decide that plaintiff did not submit evidence below sufficient to create a factual dispute as to whether Polygon was negligent in the performance of its duties as the general contractor on the construction project?

Proposed Rule: A general contractor is potentially liable under common-law negligence principles when it fails to adequately inspect fall protection measures taken by a subcontractor and fails to enforce "all OR-OSHA

requirements," and an employee of a subcontractor is injured as a direct result of an OSHA violation.

STATEMENT OF HISTORICAL FACTS

The facts set forth in the Court of Appeals' opinion are correctly stated, but are incomplete. Moreover, after limiting its statement of facts, the Court of Appeals incorrectly viewed those facts and reasonable inferences in favor of Polygon. [2] The opinion omits many important facts that create genuine issues of material fact on each of plaintiff's claims. Those additional facts from the record below would enable a reasonable juror to determine that Polygon had "charge of, or responsibility for, any work involving a risk or danger to employees." *Woodbury v. CH2M Hill, Inc*., 335 Or 154, 159, 61 P3d 918 (2003).

Polygon[3] was the general contractor of the multi-unit housing development where plaintiff was injured. Polygon's construction contract represented to Wood Mechanix that Polygon was "committed to maintaining a safe work place." Polygon's Vice President in charge of construction, Brad Templeton, testified about that contractual representation when asked whether Polygon's commitment

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[2] *See Robinson v. Lamb's Wilsonville Thriftway*, 332 Or 453, 455, 31 P3d 421 (2001) (Court of Appeals improperly construed evidence and drew inferences in favor of defendant, the moving party).

[3] As correctly explained by the Court of Appeals in its opinion in *Yeatts*, *supra*, as footnote 2, 268 Or App at 259, Polygon makes no attempt to refute plaintiff's assertion that Polygon and Tanasborne Place Townhomes, L.L.C. "functioned as the same entity in connection with the project."

to maintain a safe work site referred "to everybody on the site or just Polygon's employees." Templeton testified,

A. "What I'm saying is we are – the company, Polygon, was committed to a safe work site."

Q. "Okay. And so –"

A. "So I guess – I guess anything and everything that was there."

Plaintiff's Motion to Supplement, Ex. A, Templeton Depo, 78:1-10

Wood Mechanix owner Stan Tryko testified that as a result of the contract with Polygon, Wood Mechanix understood that Polygon was monitoring the safety of Wood Mechanix's framing process. Ex. I, p. 21, Trytko depo, 77: 1-22.

One of the provisions of the Agreement of Subcontract (Contract) entered into between Polygon/Tanasbourne Place Townhomes LLC[4] and Wood Mechanix, indicated: "To the extent that contractor has other inspection or procedures in place, Subcontractor also agrees to comply with those" (Ex. L, Agreement of Subcontract, p. 7 of 12, §1.2).[5] The written contract also noted

[4] As correctly explained by the Court of Appeals in its opinion in *Yeatts*, *supra*, at footnote 2, 268 Or App at 259, Polygon makes no attempt to refute plaintiff's assertion that Polygon and Tanasbourne "functioned as the same entity in connection with the project."

[5] All references to Exhibits with specific letters (*e.g.*, Ex. __), unless otherwise indicated, refer to exhibits attached to Plaintiff's Memorandum in Opposition to Defendant Polygon Northwest Company's Motion for Summary Judgment, as submitted in the trial court below.

that "Contractor is committed to a safe work place," and required Wood Mechanix to comply with OSHA regulations, as well as "any safety measures requested by Contractor" (ER 43, Ex. L, Agreement of Subcontract, p. 10 of 12, §4.3, Safety Requirements).

Polygon/Tanasbourne prepared a site specific "Accident Prevention Plan" that required its own construction superintendents on the work site to: (1) "know and enforce Tanasbourne Place Townhomes L.L.C.'s [Polygon's] safety standards for construction"; (2) "meet * * * any visiting OR-OSHA inspectors"; (3) be familiar with and enforce all OR-OSHA requirements"; (4) "know and enforce Tanasbourne Place Townhomes L.L.C.'s [Polygon's] Accident Prevention Plan, Fall Protection Plan, and Hazard Communication Program"; * * * (9) "inspect their construction sites daily for safety hazards, issue 'Safety Hazard Observed' notices to any subcontractor in violation" (ER 45-48, Ex. N, Accident Prevention Plan, pp. 1, 4, 13, and 15 of 45).

Contained within the Accident Prevention Plan was a document entitled "Fall Protection Plan" that provided, in part:

> * * * 3. Second floor decks.
> *Restraint: guardrails* (emphasis in original)

(ER 48, Ex. N, Accident Prevention Plan, p. 15)

Paul Templeton, Polygon's Vice President for Construction testified that Polygon's requirement in the Accident Prevention Plan that guardrails be used as

fall protection was applicable to "whoever is doing the framing work."

16 Q. Okay. Please turn to PNW 0092 in that
17 same exhibit. It's page 16 of the exhibit. Do you
18 see under sub 3, "Second floor decks"?
19 A. Yes.
20 Q. What is the restraint required by this
21 Fall Protection Plan?
22 A. It's stated as "guardrails."
23 Q. Now, Polygon was not itself undertaking
24 any construction or framing work on the Tanasbourne
25 site, was it?
1 A. It was not.
2 Q. So you would agree, would you not, that
3 this instruction number 3 for the Fall Protection
4 Plan relates to whoever is doing the framing work?
5 A. Yes.

(Plaintiff's Motion to Supplement Response to Defendant Polygon Northwest Company's Motion for Summary Judgment, Ex. A, Templeton Depo, 96:16 to 97:5)

Julie Miller, Polygon's Scheduling Manager, was generally in charge of using its generic Accident Prevention Plan form to create a site-specific Accident Prevention Plan[6], testified about the Accident Prevention Plan as follows:

11 Q. To your understanding, who was responsible
12 to implement the requirements of the accident
13 prevention plan, for example, Exhibit 8?
14 A. The site superintendents.

(Ex. C, Miller Depo, 51:11-14)

Ms. Miller further explained:

13 Q. What is your understanding of the purpose
14 of the accident prevention plan such as contained

[6] Miller could not remember if she had drafted the specific Accident Prevention Plan used on this site, but she testified that she had created essentially identical plans by inserting the work site name in the Polygon's generic form Accident Prevention Plan.

15 there in Exhibit 8?
16 A. Basically, to -- to communicate company
17 policy and OROSHA policy, and to make sure that
18 people are aware of the standards.
(Ex.C, Miller Depo, 55:13-18)

The Court of Appeals focused on Polygon's Accident Prevention Plan and concluded there was no evidence in the record to establish that Wood Mechanix actually received the Accident Prevention Plan. Although plaintiff believes there is a fact question about that, the Court of Appeals' conclusion misses the mark.

> Although plaintiff relies on the fall-protection plan contained in Polygon's internal safety manual and asserts that it is given to subcontractors and requires that guardrails be used, as noted earlier, plaintiff has not adduced evidence that the safety manual was ever given to Wood Mechanix. Nor is there any evidence that Polygon ever told Wood Mechanix that it had to use guardrails as opposed to any other form of fall protection. To the contrary, Trytko, Wood Mechanix's owner, testified that Wood Mechanix, and Wood Mechanix alone, decided to use guardrails and that Polygon did not instruct them on how to build them. Even when viewed in a light most favorable to plaintiff, the facts do not support plaintiff's assertion that Polygon required Wood Mechanix to use guardrails.

Yeatts, at 268 Or App 279

Polygon required its site superintendents to implement its Accident Prevention Plan (Ex. C, Miller Depo. 21:11-14); to know and enforce the Polygon Accident Prevention Plan and Fall Protection Plan; and to inspect their construction site daily for safety hazards. Polygon's Vice President in charge of construction testified the Polygon's Accident Prevention Plan required the framers to use guardrails. Mr. Trytko's memory may be that it was "Wood

Mechanix, and Wood Mechanix alone, that decided to use guardrails," but the contract between the parties and Polygon's written direction to its employees tell a different story.

The testimony and the documents create a genuine issue of material fact about Polygon's potential liability. Polygon's site superintendents were responsible to implement the Accident Prevention Plan. Polygon required the framers (Wood Mechanix) to use guardrails as the means and method of fall protection on the site.

The contract also required Wood Mechanix to prepare and submit to Polygon a separate site specific Safety Plan that "identifies all anticipated hazards" before Wood Mechanix could begin work on the site.[7] A fair inference to be drawn from this requirement and the other provisions of the parties' contract is that Polygon had the right to approve, disapprove or require changes in Wood Mechanix's separate safety plan. Especially given the declared importance of safety on its work site, it is difficult to reconcile the Court of Appeals conclusion that the pre-construction meeting was the end point in time for Polygon's "right to control" issues related to safety on its job site.

[7] Wood Mechanix's site specific Safety Plan is not part of the record below. Neither Polygon nor Wood Mechanix were able to locate and provide the document as part of the discovery process in this case. As explained in the body of this brief, that fact does not control the outcome of this case.

Until Polygon approved the means and methods of Wood Mechanix's safety plan in the Pre-Con meeting, Wood Mechanix was not authorized to begin work on the site (ER 43, Ex. L, Agreement of Subcontract, p. 10 of 12). Polygon also notified subcontractors, via this process, that if Polygon observed more than three occurrences of the same serious hazard, it would terminate the contract with that contractor (*Id*.). Even Wood Mechanix's owner and president, Stan Trytko, understood that according to this provision, Polygon would be monitoring Wood Mechanix's safety practices (*Id.;* Ex. I, p. 21 Trytko Depo, 77:1-22).

After the incident, Oregon OSHA investigated and cited plaintiff's employer, Wood Mechanix, for the following OSHA violation:

> Citation 1 Item 1 Type of Violation: Serious
>
> 29 CPR 1926.502(b)(3): Guardrail systems were not capable of withstanding, without failure, a force of at least 200 pounds (890 N) applied within 2 inches (5.1 cm) of the top edge, in any outward or downward direction, at any point along the top edge:
>
> a) The guardrail system for a section of the third floor residential dwelling under construction failed when a 170- pound employee leaned on the midrail for support. The guardrail system failure allowed the employee to fall 19 feet to the concrete floor below. (Ex. O, OSHA Report, p. 5 of 144)[8]

[8] An example of the type of conduct resulting from a contractor thinking and acting as though safety is not his responsibility is epitomized by the testimony of Polygon site man Brennan Taylor. Ex. G, pages 26-31, Taylor Depo, 91:17-107:13.

ARGUMENT

Plaintiff's arguments rest on the basic rule of law that when deciding a Motion for Summary Judgment the court must view all evidence and inferences that can be drawn in favor of the non-moving party. *Jones v. General Motors Corp.*, 325 Or 404, 420, 939 P2d 608 (1997). The courts below incorrectly viewed evidence in favor of Polygon and also overlooked evidence cited by plaintiff that create fact questions.

For ease of discussion of overlapping facts, plaintiff will begin argument with actual control (Question 2), the retained right of control (Question 3) and common enterprise (Question 1). Plaintiff will then address his common law negligence claim (Question 4).

A. Plaintiff presented sufficient evidence from which a reasonable juror could find Polygon potentially liable under each of the three prongs of the ELL as described by this Court.

As is typical in an ELL claim, defendant Polygon is not the direct employer of plaintiff, but remains subject to potential liability under the statute as the project's general contractor or "any other person" having charge of work involving "risk or danger." ORS 654.305. According to this Court, as used in ORS 654.305, "risk" or "danger" refers to conditions of the work that create the possibility that a worker will suffer harm. *Woodbury*, 335 Or at 161. The Court of Appeals in this case correctly identified the risk-producing activity as

"plaintiff's framing work at a dangerous height above a concrete surface." *Yeatts*, 268 Or App at 265.

A person or entity can be liable under the ELL as an "indirect employer" by acting in any one of the following three alternative ways: (1) engaging with the plaintiff's direct employer in a "common enterprise"; (2) retaining the right to control the manner or method in which the risk-producing activity was performed; or (3) actually controlling the manner or method in which the risk-producing activity is performed. *Woodbury*, 335 Or at 160. This brief will first address actual control, then retained control, and finally the common enterprise alternative.

1. Polygon's actual control of the risk-producing activity.

Woodbury, is the leading Oregon case regarding potential liability of a general contractor. In *Woodbury*, plaintiff was employed by a subcontractor and was injured while working at a construction site. The relevant evidence in the record included the following: defendant (general contractor) hired subcontractor (who hired the plaintiff); defendant contractor told subcontractor to install a water pipe; defendant contractor told subcontractor where to locate the pipe and what materials to use; installation of the water pipe was performed entirely by subcontractor's employees; subcontractor and contractor jointly agreed that the pipe should be suspended at a height over a stairway and corridor, and that a platform should be built; the details of how to construct the platform were left to

subcontractor; and when the work was complete, plaintiff was dismantling the platform with no assistance or oversight from defendant contractor when he fell and was seriously injured.

The plaintiff in *Woodbury* brought claims against the general contractor for violation of the ELL, and for negligence. The jury returned a verdict in favor of plaintiff on both claims, and defendant moved for directed verdict. The trial court denied defendant's motion for directed verdict, and defendant appealed.

The Oregon Court of Appeals in *Woodbury*,[9] agreed with defendant that the evidence was insufficient to support a claim against the general contractor. It reversed the trial court and remanded for entry in favor of defendant. This Court reversed the Court of Appeals and held that there was sufficient evidence to support the jury's finding that contractor was liable under the ELL and in negligence.

The Oregon Supreme Court in *Woodbury* found that the Court of Appeals had construed the risk-producing activity too narrowly as disassembly of the platform. This court determined that the "work involving a risk or danger" was the requirement that plaintiff work at height during assembly, use, and disassembly of the platform. Accordingly, this Court concluded that there was sufficient evidence in the record to support a jury finding that defendant actually

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[9] *Woodbury v. CH2M Hill, Inc.*, 173 Or App 171, 21 P3d 153 (2001).

exercised control over the manner or method in which the risk-producing activity was performed.

In the *Woodbury* opinion, the Court based its findings, in particular, on the following facts: the subcontractor relied on defendant-contractor's safety coordinator, who was at the job site every day, for guidance on hazards in that industrial setting; defendant-contractor instructed subcontractor to install the pipe and provided detailed instructions as to how the pipe should be installed; and subcontractor and defendant-contractor jointly decided to use a wooden platform to construct the pipe, even though the details of how to construct the platform were left to subcontractor and subcontractor built the platform without input or oversight from contractor.

The facts of the case at bar are similar to the facts at issue in *Woodbury* where defendant contractor was found to have actually controlled the risk-producing activity. Plaintiff in this case has provided evidence from which a reasonable juror could conclude that Polygon exercised actual control over the risk-producing activity.

For example, plaintiff provided evidence from Wood Mechanix stating that it knew defendant's site superintendents, who were present on the job site every day, were monitoring the safety of the site (Ex. I, p. 21, Trytko Depo, 77:1-22). Indeed, plaintiff also submitted evidence below showing that defendant's employees did in fact monitor the safety of the job site on a daily basis, and

specifically the use of guardrails[10] (Ex. E, pp. 7-10, Depo of Christopher Mallett, Polygon Project Manager, 184:9 to 186:3; 188:7-22; Ex. H, pp. 16-28, 36-37, Depo of James Tyler Marsh, Polygon On-Site Superintendent, pp. 50, 57, 62-64, 70-77, 103-104). In the contract between Polygon and Wood Mechanix, Polygon specified that the subcontractor must comply with all applicable laws and with OSHA. (ER 43 at ¶ 4.3) OSHA sets minimum standards for guardrail construction (29 CFR 1926.502). Polygon's choice that Wood Mechanix use OSHA-standard guardrails evidences detailed direction to the subcontractor regarding the building and use of guardrails. Defendant instructed the subcontractor to frame the walls and provided detailed instructions on how the framing should be constructed (ER 42-43, Ex. L, Agreement of Subcontract, pp. 2-5).

[10] The Court of Appeals cited to the testimony of a Polygon employee, in which he stated that he would "simply look up and see if it appeared something [a guardrail] was in place, and that was about where it stopped[,]" and that he would not know whether the guardrail was constructed properly. *Yeatts*, 268 Or App at 270-71. The Court of Appeals concluded that there was no evidence that a Polygon employee was responsible for checking that the guardrails were sufficiently secure. However, the evidence clearly indicates that Polygon tasked its employees with monitoring the guardrails. Whether the employees knew if a guardrail was properly constructed and secure, speaks not to whether Polygon tasked them with this responsibility (which Polygon clearly did), but to whether Polygon was negligent in directing its employees to monitor the guardrails when their employees did not know what they were looking for, or its employees otherwise negatively performed their required duties.

When viewed in a light most favorable to plaintiff, further evidence of Polygon's actual control can be found in Polygon and Wood Mechanix jointly agreed upon safety measures that would be used to address fall hazards (Ex. L, Agreement of Subcontract, pp. 10-11, §§ 4.3-4.4 (requiring subcontractor to submit a safety plan to contractor before work can begin, and providing that a pre-construction meeting shall be held prior to commencing work, during which the contractor's superintendent and subcontractor's employees will review, among other things, the safety plan); ER 44, Ex. M, Subcontractor Precon Safety Orientation, p. 1).

Defendant Polygon's own Fall Protection Plan identified the type of restraint to be used for working at height as "guardrails," demonstrating that Polygon required this form of restraint alone as a sufficient safety measure (ER 48, Ex. N, Accident Prevention Plan, p. 15). Polygon's Vice President in charge of construction testified that the Polygon Accident Prevention Plan specified the use of guardrails and that Polygon's requirement for use of guardrails applied to the framers. (Plaintiff's Motion to Supplement, Ex. A, Depo of Templeton, 96:16-97:5). Further, Polygon employees were to "know and enforce" Polygon's Accident Prevention Plan and OSHA regulations. ER 46. Polygon also required Wood Mechanix's employees to attend weekly safety meetings taught by Polygon superintendents (Ex. G, pp. 15-16, Depo of Brennan Taylor, Polygon On-Site Superintendent, 68:24 to 69:24).

The Court of Appeals incorrectly weighed the competing evidence on the issue of Polygon's selection of guardrails and requirement that the framing subcontractor use OSHA-complaint guardrails as fall protection. Despite Trytko's testimony cited by the Court of Appeals that "Wood Mechanix alone decided to use guardrails" there is other significant evidence that would allow a reasonable juror to conclude otherwise. In addition to the evidence already cited by plaintiff, Polygon site employee Brennan Taylor testified that if he saw that guardrails were not installed he would require "immediate" correction. (Ex. G, pp. 3-4, Taylor Depo. Pp 23-24). Moreover, Taylor testified that even a loose guardrail would require attention by him. (Ex. G, pp. 30-31, Taylor Depo pp. 106-107).

The trial Judge noted at p. 1 of 3 of his letter opinion (ER 11): "Polygon's apparent decision to select guardrails as a fall protection measure is not enough to trigger liability under the ELL." Plaintiff disagrees. The Court of Appeals viewed the record in a different manner than the trial judge in order to conclude plaintiff had not created a fact question of potential liability under the ELL related to Polygon's selection of guardrails as fall protection. Both courts below were wrong.

It was the use of guardrails rather than a safer method of fall protection that lead directly to plaintiff's injury. The issue is whether a question of fact was created in the record below on whether Polygon had "actual control" of that use.

Not only did the Court of Appeals in this case not address all of the pertinent evidence, but the court also made findings inconsistent with this Court's decision in *Woodbury*. As noted above, the Court of Appeals stated that plaintiff provided "no evidence that Polygon employees instructed Wood Mechanix on *how* to construct, maintain, or fix the guardrails." *Yeatts*, 268 Or App at 279. Under *Woodbury*, it is not required that Polygon have instructed Wood Mechanix *exactly* how to build the guardrails. *Woodbury*, 335 Or at 162. (Defendant's employee told plaintiff's direct employer that he should "build [the] platform sturdy enough" and "long enough to stay in the opening so it doesn't shift one way or the other.")

This Court, in *Woodbury*, found that the defendant exercised actual control over the risk-producing activity by jointly deciding with the subcontractor that a platform would be built. This actual control was found even though the details of *how* to construct the platform were left solely to the subcontractor and the contractor provided no input or oversight regarding the construction of the platform. Plaintiff presents a stronger fact pattern than in *Woodbury*. Defendant Polygon told Wood Mechanix to use guardrails and the contract required that Wood Mechanix comply with OSHA. As a result, a reasonable juror could infer or conclude that Polygon thereby exercised actual control by requiring Wood Mechanix *how* to construct the guardrails, *i.e.* construct the guardrails to be OSHA-complaint. The fact that the guardrail failed to meet the standard that

Polygon instructed be used and Polygon did not correct that failure is a basis for potential liability.

Based on the evidence plaintiff has provided, and guided by this Court's holding in *Woodbury*, plaintiff has provided evidence from which a reasonable juror could conclude that defendant Polygon had actual control over the risk-producing activity that caused plaintiff's injuries. Creating a "fact question" allows plaintiff to present his facts to the jury. The jury may agree or disagree that Polygon is liable under these facts.

2. Polygon retained the right to control the risk-producing activity

An indirect employer can be found liable under the ELL if the employer has retained the right to control the risk-producing activity. To establish that defendant retained the right to control, the plaintiff must "identify some source of legal authority for that perceived right or evidence from which a retained right could be inferred." *Cortez v. Nacco Material Handling Group*, 356 Or 254, 274, 337 P3d 111 (2014) (internal quotation marks omitted).

The Court of Appeals in this case relied primarily on *Wilson v. PGE Company*, 252 Or 385, 488 P2d 562 (1968), in its analysis of retained control. However, it is important to note that the facts in *Wilson* are distinguishable from the case at bar. In *Wilson*, a property owner hired a general contractor, who then in turn hired a subcontractor. *Wilson*, 252 Or at 389-90. Plaintiff was employed

by the subcontractor. *Id.* The plaintiff in *Wilson*, rather than bringing claims against the general contractor, brought claims against the owner of the property under the ELL and principles of common-law negligence. *Id.* The *Wilson* opinion did not address whether the general contractor was liable to plaintiff under the ELL or in negligence.

The Court of Appeals in this case cited to *Wilson*, noting that "[b]efore any such right to control would relate to the creation of a risk to plaintiff, the contract would have to create a situation where the [general] contractor would probably be less diligent concerning safety because of an expectancy that defendant [owner] would exercise necessary care." *Yeatts*, 268 Or App at 273. Even *Wilson* is not applicable to the facts of this case, Moreover, plaintiff has created a fact question about whether defendant Polygon did create an expectancy in Wood Mechanix that Polygon would exercise necessary care with regard to fall safety.

For example, Polygon provided management for the construction project and was "essentially running the show" (Ex. E, p. 4, Mallet Depo, 17:11-25; Ex. F, pp. 4-5, Depo of Chris Walther, Polygon Project Manager, 56:20 to 57:10). Stanley Trytko, who completed Pre-Construction Safety Orientation on behalf of Wood Mechanix, understood that Polygon would be overseeing Wood Mechanix's safety practices (Ex. I, p. 21, Trytko Depo, 77:1-22). Polygon superintendents walked around and inspected the job site daily for safety hazards and to make sure OSHA requirements were being met (Ex. H, pp. 18, 22-26, 29-

36-37, Marsh Depo, 62:8-14; 71:25 to 75:21; 103:4 to 104:20; 75:6-21; 80:11-23; Ex. E, Mallet Depo, 166:11-23; Ex. G, p. 5, Taylor Depo, 25:7-25).

The Court of Appeals in the instant case also cited to *Brown v. Boise-Cascade Corp.*, 150 Or App 391, 397, 946 P2d 324 (1997), *rev den*, 327 Or 317 (1998), noting that "[t]he contract between plaintiff's employer * * * and the defendant [in *Brown*] provided that [plaintiff's employer] was an independent contractor and *that the defendant had no power to determine or control the manner in which Partridge performed the work*." *Yeatts*, 268 Or App at 274 (emphasis added). The Court of Appeals in this case concluded that there was no evidence from which a reasonable juror could find that Polygon had retained control, noting that the subcontract agreement placed "primary responsibility for employee safety on Wood Mechanix * * * ." *Id.* at 275.

However, there is no language in the contract at issue in this case stating that Polygon has no power or authority to control the risk-producing activity. Nor is there any language stating that subcontractor is to have *sole* responsibility for safety measures. The relevant contract language (ER 43, Ex L, Agreement of Subcontract, §§ 4.3-4.4, p. 10 of 12) provides:

4.3 <u>Safety Requirements.</u>

> CONTRACTOR is committed to maintaining a safe work place. SUBCONTRACTOR agrees to take necessary safety and other precautions, at all times, to prepare for and perform the work in a safe manner and to protect persons from illness or injury and properly from damage arising out of the performance of the work.

SUBCONTRACTOR agrees and is responsible to ensure that all sub-tier subcontractors and suppliers adhere to the requirements of this.

SUBCONTRACTOR shall take all necessary safety precautions pertaining to its work and the conduct thereof, including but not limited to, compliance with all applicable laws, ordinances, rules, regulations and orders issued by a public authority, whether federal, state, local or other, the federal Occupational Safety and Health Act, the Oregon Safe Employment Act, and any safety measures requested by CONTRACTOR. SUBCONTRACTOR shall, at all times, be responsible for providing a safe work site and be responsible for the safety of all personnel, equipment, materials, and materials within SUBCONTRACTOR'S care, custody or control. SUBCONTRACTOR shall promptly provide CONTRACTOR with written notice of any safety hazard or violation found anywhere on or adjacent to the construction site.

a. SUBCONTRACTOR shall provide all safety equipment required to safely perform its work, including but not limited to a first aid kit and fire extinguisher. In addition, the SUBCONTRACTOR shall have an individual who is trained in CPR and First Aid for each crew on site.

b. SUBCONTRACTOR shall develop a site specific safety plan (hereinafter "Safety Plan") that identifies all anticipated hazards that will most likely be encountered in all phases of the project and which identifies the specific means that will be used to address those hazards. The Safety Plan shall be submitted to CONTRACTOR prior to SUBCONTRACTOR commencing work on the Project site or at any off-site location under the exclusive control of SUBCONTRACTOR. The Safety Plan shall comply in all respects with the Oregon Safe Employment Act, all regulations promulgated thereunder, and all other applicable federal, state, or local statutes, regulations, ordinances, or rules. SUBCONTRACTOR may not commence work on the Project site or at any off-site location subject to this paragraph until its Safety Plan has been submitted to CONTRACTOR.

> c. SUBCONTRACTOR shall submit to CONTRACTOR, on a monthly basis, copies of all documentation maintained by SUBCONTRACTOR pertaining to safety, weekly safety meeting minutes, implementation of its Safety Plan, as well as documentation relating to SUBCONTRACTOR'S compliance with any other job site safety plans applicable to its work.
>
> d. SUBCONTRACTOR acknowledges the importance of compliance with the safety-related programs and requirements of this Agreement and no action or inaction of CONTRACTOR shall be deemed to cause a waiver of the requirements of this paragraph 2.3(c).
>
> 4.4 Pre-Construction and Weekly Job Meetings:
> A Pre-Construction Meeting shall be held [prior] to the SUBCONTRACTOR commencing work at the Project site. This meeting shall be attended by the CONTRACTOR'S Superintendent, as well as the SUBCONTRACTOR'S Owner or Project Manager and its Project Foreman. The intent of the Pre-Construction Meeting is to review the Project's Scope of Work, schedule, crew size, quality control, safety, clean-up and other requirements of the Project before work commences. Weekly subcontractor meetings will be held at the on-site job trailer. The intent of these meetings is to discuss any on going changes, problems, safety issues, or concerns. (emphasis in original)

Wood Mechanix had a responsibility to provide a safe work environment, along with Polygon, who was to provide oversight. Wood Mechanix also had a statutory obligation to provide a safe work place for its direct employees. The Court of Appeals' interpretation of the ELL and the evidence eviscerates a long established basis of ELL liability. Nothing in the contract suggests that Polygon did not have the right to control the risk-producing activity. In fact, it seems to suggest otherwise—that Polygon was to provide direct oversight over safety

measures and the risk-producing activity. Polygon included the subcontractor Wood Mechanix in many of the decision-making related to safety. However, there is no evidence that dictates, as a matter of law, that Polygon did not retain the right to control. Plaintiff has even submitted evidence that Polygon determined the actual safety measures that would be put in place and determined that they were sufficient.

Moreover, contract language *explicitly* providing that the general contractor has no authority or obligation to control the risk-producing activity and that subcontractor is *solely* responsible for safety does not foreclose a finding of retained or actual control because retained or actual control can be evidenced by defendant's conduct. For example, in *Woodbury*, where this Court found that the contractor had exercised actual control over the risk-producing activity, the relevant contract language provided:

> **J. Safety**
> SUBCONTRACTOR will be solely and completely responsible for conditions of the jobsite, including safety of all persons (including employees) and property during performance of the Work.
> * * *
>
> **C. Duties and Responsibilities of CH2M Hill**
> CH2M HILL reserves the right, but not the obligation, to inspect or otherwise evaluate the Work during the various stages to observe the progress and quality of the Work and to determine, in general, if the Work is proceeding in accordance with the intent of this AGREEMENT. CH2M HILL will not be required to make comprehensive or continuous inspections to check quality or quantity of the Work. Visits and observations made by CH2M HILL will not relieve SUBCONTRACTOR of its obligation to conduct comprehensive inspections of the Work, to furnish materials, to perform acceptable Work,

> and to provide adequate safety precautions in conformance with this AGREEMENT.
>
> **D. Limitations of CH2M HILL'S Responsibilities**
> CH2M HILL will not be responsible for SUBCONTRACTOR's means, methods, techniques, sequences or procedures of the Work, or the safety precautions including compliance with the programs incident thereto.

This contractual language was set forth in the Court of Appeals opinion in *Woodbury, supra*, 173 Or App at 174.[11]

In the case at bar, based on the evidence plaintiff submitted below, and guided again by this Court's decisions in *Woodbury*, and *Cortez*, a reasonable juror could conclude that defendant Polygon had retained control over the risk-producing activity that caused plaintiff's injuries.

3. There is a question of fact as to whether Polygon and Wood Mechanix engaged in a common enterprise.

A "common enterprise," as described in *Sacher v. Bohemia, Inc.*, 302 Or 477, 486-87, 731 P2d 434 (1987), exists when:

> (1) the plaintiff's direct employer and the defendant participate in a project of which defendant's operations were integral or component parts;
> (2) the work involved a risk or danger to the employees or public;
> (3) the plaintiff was an adopted or intermingled employee of the defendant; and

---

[11] In reversing the Court of Appeals, this Court stated: "[W]e need not reexamine the Court of Appeals' conclusion that the contract did not support a finding of a right to control, because our analysis rests on different grounds." *Woodbury*, 335 Or at 160. This Court reversed and remanded for reinstatement of the jury verdict in favor of plaintiff.

> (4) the defendant had charge of, or responsibility for, the activity or instrumentality that caused the plaintiff's injury.

ELL liability is triggered only if, "as a result of the activities of defendant's employees or use of his equipment, a risk of danger is created which contributes to an injury to plaintiff." *Wilson*, 252 Or at 391. Evidence in the record satisfies elements one and two: defendant's participation in the construction project, as general contractor, was an "integral or component part" of the project; and the work involved risk and danger to the employees (that is, the danger of working at height above concrete).

In *German v. Murphy*, 146 Or App 349, 356, 932 P2d 580 (1997), cited and relied upon by the Court of Appeals in *Yeatts*, 268 Or App at 268-271, the lower court analyzed whether plaintiff had provided sufficient evidence to satisfy element three of the common enterprise test, stated:

> Regarding whether plaintiff was an adopted or intermingled employee of defendant, plaintiff testified that Perrine [defendant's superintendent] was 'the big boss' at the site. Plaintiff provided evidence that Perrine supervised Murphy employees [the employees of plaintiff's employer] and told them what to do and that Perrine held mandatory meetings that included Murphy employees. Plaintiff also provided evidence that Perrine supervised the entire project and did not distinguish among the various workers on site. That evidence satisfies the third element of the common enterprise test.

In the instant case, plaintiff has presented evidence sufficient to satisfy the third element of the common enterprise test: that plaintiff was an adopted or intermingled employee of defendant. Plaintiff presented evidence that Polygon

site superintendents supervised the entire job site, walking around and inspecting the site daily (Ex. H, pp. 19-22, Marsh Depo, 63:22 to 64:1, 70:19 to 71:6). The superintendents acknowledged that it was their job to monitor the site for safety (Ex. H, pp. 22-26, 36-37, Marsh Depo, 71:25 to 75:21; 103:4 to 104:20; Ex. G, p. 2-3, Taylor Depo, 22:16 to 23:1).

Plaintiff also provided evidence showing that Polygon's superintendents held weekly mandatory safety meetings with subcontractors on the work site. During the meetings, they would discuss observed safety violations, as well as day-to-day activities on the project (Ex. G, pp. 15-16, Taylor Depo, 68:24-69:24). Plaintiff provided testimony of the lead framer for Wood Mechanix, who stated that Polygon was the "first in charge of safety" (Ex. K, Declaration of Randy Deos, ¶3). Additionally, on the day of the incident, plaintiff recalls that a Polygon employee instructed him to wear his hardhat and to go "up there and finish something" (Ex. J, pp. 12-13, Depo of Plaintiff Arthur Yeatts, 107:21 to 108:7).

The Court of Appeals in *German*, addressing the fourth element, stated at 146 Or App 356:

> The fourth element of the test is satisfied by plaintiff's evidence that Perrine had instructed various workers, including Murphy employees, on how to make their work areas safe and how to cover holes properly; that defendant directed workers to cut openings in the roof three days before plaintiff was injured; and that defendant directed an employee to cover holes on the roof other than the one through which plaintiff fell. Perrine's accident report, in which he noted that 'the workmen failed to protect roof opening or notify [defendant's employee] to protect opening,' is additional evidence

> that defendant had charge of, or responsibility for, the instrumentality that caused plaintiff's injury.

Similarly, plaintiff in the instant case has provided sufficient evidence to satisfy the fourth element of the common enterprise test. The following evidence provided by plaintiff supports a finding that "defendant had charge of, or responsibility for, the instrumentality that caused plaintiff's injury": defendant Polygon instructed workers at the weekly safety meeting on how to make work areas safe (Ex. G, Taylor Depo, pp. 68:24 to 69:24); defendant Polygon met with Wood Mechanix employees to review and approve the safety plan that identified guardrails as the safety measure against fall risks (ER 43, Ex. L, Agreement of Subcontract, §§ 4.3-4.4; ER 44, Ex. M, Subcontractor Precon Safety Orientation, p. 1; ER 45-48, Ex. N, Accident Prevention Plan, pp. 14-15); a Polygon superintendent testified that guardrails are part of "general safety" for which he was responsible on the project site, and if he found a guardrail loose, he would require that it be fixed (Ex. G, p. 31, Taylor Depo, 107:9-13); and the OSHA Accident Report of the incident stated that "[s]ite superintendent stated that he had checked the guardrails the night before" (Ex. O, OSHA Report, p. 12 of 144). Plaintiff has provided sufficient evidence from which a reasonable juror could find that defendant Polygon and Wood Mechanix were engaged in a common enterprise.

B. Plaintiff presented sufficient evidence from which a reasonable juror could find Polygon potentially liable under principles of common-law negligence.

Plaintiff has also provided evidence from which a reasonable juror could find defendant Polygon liable under principles of common-law negligence. The Court of Appeals made the same error in analyzing the common-law negligence issue, *i.e.*, failing to view the evidence and all reasonable inferences to be drawn therefrom, in a light most favorable to plaintiff, when it noted at 268 Or App 283:

> However, as we explained above, there is no evidence from which a jury could find that Polygon required Wood Mechanix to use guardrails as opposed to any other method of fall protection or that Polygon gave its fall-protection plan to Wood Mechanix.

As discussed above in section IV A., this view of the evidence in a light favorable to Polygon was one that even the trial court did not adopt. Plaintiff incorporates herein the arguments in section IV A. of this brief.

Moreover, defendant Polygon did not rely on the expertise of Wood Mechanix, as the Court of Appeals stated in *Yeatts*, 256 Or App at 282-83; in fact, evidence from the record suggests otherwise—that Wood Mechanix actually relied on the expertise of Polygon with regard to safety. Polygon provided safety oversight on a daily basis by supervising the job site and all employees on the job site, regardless of whether they were Polygon employees or Wood Mechanix employees (Ex. H, pp. 19-25, 36-37, Marsh Depo, 63:22 to 64:1, 70:19 to 71:6; 71:25 to 75:21; 103:4 to 104:20; Ex. G, pp. 2-3, Taylor Depo, 22:16 to 23:1). Polygon also required Wood

Mechanix employees to attend a weekly safety meeting held by Polygon superintendents (ER 43, Ex. L, Agreement of Subcontract, § 4.4; Ex. G, pp. 15-16, Taylor Depo, 68:24 to 69:24).

Additionally, the specific language in the contract directing Wood Mechanix on how to construct the framing suggests that Polygon has expertise with regard to framing. For example, the agreement quite specifically required, in part, the following (Ex. L, Agreement of Subcontract, pp. 2-5):

> 22) The Subcontractor shall pay particular attention to the overhanging roof structures with their varying pitches and associated * * * framing. The assembly of all beams, posts, *** framing * * * shall be properly coordinated such that the * * * are level and there is consistent drip edge reveal after installation of vinyl siding and * * * materials. Sub-framing for the installation of decorative column trims shall be installed securely and * * * to compensate for bowed or twisted posts. This framing shall allow the natural free flow of air through the column from bottom to top.
>
> 23) Subcontractor shall install the 2’ x 2’ in the gable overhangs prior to sheeting the roof.
> * * *
> 25) For the purpose of eliminating floor squeaks, the Subcontractor shall:
>
> > a. Use ring-shank nails exclusively when nailing sub-floor (no screw shank nails)
> > b. Glue sub-floor and nail off each sheet completely as each sheet is laid. Maintain a minimum 1/8” gap at all edges or as required by the manufacturer.
> > c. Glue and nail wall plate to sub-floor at walls perpendicular to supports.
> >
> > d. Apply construction adhesive between overlapped and doubled joist.

> e. Use glue in joist hangers and all points of contact at i-joints.

Finally, in requiring that Wood Mechanix's Fall Protection Plan be approved by Polygon before work could begin, requiring the use of guardrails as fall protection and in requiring that Wood Mechanix employees attend safety meetings held by Polygon, Polygon clearly did not defer to Wood Mechanix's expertise in the use of fall protection.

There is sufficient evidence in the record created by plaintiff in the trial court from which a reasonable juror could find that Polygon did not rely on Wood Mechanix's "expertise in framing," thereby creating a duty Polygon owed to plaintiff and other workers on the construction project. There is also a question of fact as to whether that duty was breached when Polygon failed to properly supervise and inspect the work performed by Wood Mechanix and its employees, and ensure that sufficient fall protection safety measures were in place.

VI. CONCLUSION

Viewing the evidence from the factual record below in the light most favorable to plaintiff, and drawing reasonable inferences therefrom, creates questions of fact such that the trial court should have denied summary judgment,

and the Court of Appeals erred in affirming the trial court's ruling. Accordingly, this Court should remand the case to the trial court for further proceedings against defendant Polygon on both plaintiff's ELL and negligence claims.

Plaintiff attaches as Appendix A a modified version of a part of the Oregon Trial Lawyers Association Amicus brief submitted to this Court in *Woodbury*. This is done for the Court's convenience and the entire Appendix A is included in the word count of Plaintiff's Merits Brief.

Respectfully submitted this 12th day of June, 2015.

s/ Jeffrey A. Bowersox

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b)(1)(A) and the word-count of this brief (as described in ORAP 5.05(2)(a)) is 10,373, but this number specifically includes all of Appendix A in the word count.

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)(g).

DATED: June 12, 2015.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on June 12, 2015, I mailed two true copies of the foregoing PLAINTIFFS-PETITIONERS' BRIEF ON THE MERITS to:

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I further certify that on June 12, 2015, I filed the foregoing PLAINTIFFS-PETITIONERS' BRIEF ON THE MERITS, with the Oregon Supreme Court via the Court's eFiling system. Participants in this case who are registered eFilers will also be served via the electronic mail function of the eFiling system.

DATED this 12th day of June, 2015.

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