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 No. CV 08020124

Court of Appeals No. A150199

Supreme Court No. S062977

DEFENDANT-RESPONDENT'S BRIEF ON THE MERITS

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)

RESPONDENT'S MERITS BRIEF FILED: July 31, 2015

J. Randolph Pickett, OSB #721974
R. Brendan Dummigan, OSB #932588
Kimberly O. Weingart, OSB #091407
PICKETT DUMMIGAN LLP
621 S.W. Morrison Street, Suite 900
Portland, OR 97205
(503) 226-3628
Email: randy@pickettdummigan.com
Email: brendan@pickettdummigan.com
Email: kim@pickettdummigan.com

Jeffrey A. Bowersox, OSB #814422
BOWERSOX LAW FIRM P.C.
6960 S.W. Varns Street
Portland, OR 97223
(503)452-5858
Email: jeffrey@bowersoxlaw.com

Scott M. Supperstein, OSB #840989
LAW OFFICE OF SCOTT SUPPERSTEIN, P.C.
6960 S.W. Varns Street
Portland, OR 97223
(503) 227-6464
Email: superlaw@earthlink.net

of Attorneys for Petitioners on Review

W. Eugene Hallman, OSB #741237
HALLMAN LAW OFFICE
PO Box 308
Pendleton, OR 97801
(541) 276-3857
Email: office@Hallman.pro

of Attorneys for Amicus Curiae

Bruce H. Cahn, OSB #935450
Amy Heverly, OSB #093817
BALL JANIK LLP
101 SW Main Street, Suite 1100
Portland, OR 97204
(503) 944-6115
Email: bcahn@balljanik.com
Email: aheverly@balljanik.com

of Attorneys for Respondents on Review

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OREGON STATUTES

FEDERAL STATUTES AND RULES

OTHER AUTHORITIES

I.
INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff-Appellant Nancy Doty, Inc., Special Fiduciary for Arthur Yeatts ("Plaintiff")[1] seeks to overturn the Court of Appeals' decision affirming the trial court's grant of summary judgment in Polygon Northwest Company's ("Polygon") favor. Plaintiff presents four questions for review, based on the three control measures under Oregon's Employer Liability Law[2] ("ELL") and the common-law negligence standard. Each question is premised upon specific factual assertions that are unsupported or contradicted by evidence in the record. Moreover, each question should be resolved in Polygon's favor by direct application of controlling authority, including *Woodbury v. CH2M Hill, Inc.*, 335 Or 154, 159, 61 P3d 918 (2003), *Boothby v. D.R. Johnson Lumber Co.*, 341 Or 35, 41, 137 P3d 699 (2006), and the Court's recent decision in *Cortez v. NACCO Material Handling Group, Inc.*, 356 Or 254, 337 P3d 111 (2014).[3]

---

[1] As the Court of Appeals did, Polygon uses "Plaintiff" to refer to Arthur Yeatts and Nancy Doty, Inc., Special Fiduciary for Arthur Yeatts.

[2] ORS 654.305, *et seq.*

[3] In *Cortez*, the Court was faced with similar claims regarding common-law negligence and the ELL. The Court ruled that the plaintiff failed to establish its negligence claim and that, concerning its ELL claim, plaintiff failed to establish either actual control or common enterprise as a basis for liability. The Court solely found, with regard to the underlying liability claims, that the defendant had retained control of plaintiff's employer, primarily by virtue of ORS 63.130, as the sole member-manager of plaintiff's employer.

Despite Plaintiff's efforts at crafting a fact question from the record below,[4] both the trial court and the Court of Appeals correctly found that there were no facts to establish that Polygon exercised actual control over the risky or dangerous work Plaintiff was performing at the time of his injury, retained control over that work, or was part of a common enterprise with Plaintiff's employer, Wood Mechanix, LLC ("Wood Mechanix"). Further, both the trial court and Court of Appeals found that the uncontroverted record established that "Polygon hired Wood Mechanix for its expertise in framing buildings," and that Polygon did not have "any special expertise or knowledge regarding how to design, construct, and maintain the guardrails." *Yeatts v. Polygon Northwest Company*, 268 Or App 256, 283, 341 P3d 864 (2014).

In sum, this case presents a slight variation on a fact pattern in a well-developed area of the law—Oregon's Employer Liability Law. The Court of Appeals published a thorough and well-reasoned unanimous opinion, taking into consideration this Court's most recent case law in the area. Plaintiff has failed to establish a factual basis for his claims, and instead relies on inferences that are directly contradicted by the record in an attempt to create a question of material fact. Accordingly, Polygon requests that this Court reject Plaintiff's claims and affirm the decisions of the trial court and the Court of Appeals.

---

[4] For example, in his introduction, Plaintiff asserts that "within minutes of being instructed by a Polygon superintendent to 'get back up there' and get to work, plaintiff fell through an insecure guardrail[.]" Plaintiff's-Petitioner's Brief on the Merits ("Opening Brief"), page 1. However, nowhere in the record or in Mr. Yeatts's deposition transcript does the exact quote from a Polygon representative to "get back up there" appear, nor is there any definitive time correlation between when Plaintiff claims that he was instructed to work on a specific building and when his injury occurred. While not material to this matter, the Opening Brief is rife with such overstatements and misstatements. Where such factual overstatements and misstatements are material to this matter, they will be addressed in detail below.

II.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

Polygon does not agree with Plaintiff's proposed rules of law. With respect to each proposed rule, there is significant controlling case law that resolves these questions against Plaintiff. In addition, each proposed rule is limited in its application to specific interactions between Polygon and the framing subcontractor for whom Plaintiff worked. Accordingly, the proposed rules do not accurately reflect existing case law or establish new rules of general application. Polygon proposes the following questions and rules of law.

First Question Presented

Did Plaintiff establish evidence showing that a common enterprise existed between Polygon and Wood Mechanix?

First Proposed Rule of Law

An owner, general contractor, or project manager is not part of a common enterprise with a subcontractor that is merely hired to perform construction services to be integrated into a larger project. That is, in the normal owner or general contractor/subcontractor relationship, the subcontractor's employees are not so integral to the enterprise or intermingled with the owner's or general contractor's operations to make the construction project a common enterprise.

Second Question Presented

Did Plaintiff establish evidence showing that Polygon actually controlled the manner and method in which Plaintiff performed his work, including the design and construction of guardrails?

Second Proposed Rule of Law

An owner, general contractor, or project manager does not actually control the work of a subcontractor where it generally oversees the work of a

subcontractor but does not participate in the decision of how the subcontractor's work is to be performed, does not direct the subcontractor's work, and does not participate in the design or application of the subcontractor's work.

Third Question Presented

Did Plaintiff establish evidence showing that Polygon retained control of the subcontractor's work when the subcontract specifically placed responsibility for safety on the subcontractor and Polygon merely maintained the ability to attain a greater degree of safety?

Third Proposed Rule of Law

An owner, general contractor, or project manager that contractually requires a subcontractor to provide a safe workplace for its employees and who can also provide greater safety measures on its own, does not retain control over the means and method of protecting workers from harm by the contractual provisions.

Fourth Question Presented

Did Plaintiff establish evidence showing that Polygon lacked reliance on the expertise or knowledge of the subcontractor in the design and construction of guardrails?

Fourth Proposed Rule of Law

An owner, general contractor, or project manager that contracts with a subcontractor that has specialized knowledge and expertise is entitled to rely on that subcontractor's specialized knowledge and expertise and does not owe a duty to the subcontractor's employees to discover or warn of dangerous conditions within the scope of work and expertise of the subcontractor.

III.

SUMMARY OF MATERIAL FACTS

Polygon adopts the Court of Appeals' statement of facts. Polygon supplements those facts with the following recital of facts from the record in response to Plaintiff's Statement of Historical Facts. Plaintiff acknowledges that "[t]he facts set forth in the Court of Appeals' opinion are correctly stated[.]" Opening Brief, page 4. Yet, immediately thereafter, Plaintiff asserts that the facts were incomplete and that the items omitted by the Court of Appeals and the reasonable inferences drawn from those omitted facts justify overturning the Court of Appeals' decision. However, the "facts" submitted by Plaintiff were previously presented to the trial court and the Court of Appeals, and which were rejected as insufficient, overstated, or unsupported. When scrutinized by this Court, the same result should occur.

A. Respondent's Statement of Material Facts

1. *Facts regarding the Project.*

Tanasbourne Place Townhomes, LLC ("Tanasbourne") was the developer of a townhome project in Portland (the "Project"). Polygon was the project manager for Tanasbourne. Polygon was generally responsible for managing the site, budgets, scheduling, coordination of work, and quality assurance. ER 27; Plaintiff's MSJ,[5] Ex. B, pages 40-41 (Landschulz Dep. 133: 17-134:15); Plaintiff's MSJ, Ex. G, page 2 (Taylor Dep. 22:19-20); Plaintiff's

[5] Exhibit references are to exhibits attached either to Polygon's Motion for Summary Judgment ("Polygon's MSJ") or Plaintiff's Opposition to Polygon's Motion for Summary Judgment ("Plaintiff's MSJ") that were filed with the trial court, but were not included in the Excerpt of Record provided to the Court of Appeals.

MSJ, Ex. H, page 25 (Marsh Dep. 74:9-16). Tanasbourne hired Wood Mechanix as the framing contractor for the Project. Plaintiff was an employee of Wood Mechanix.

As part of framing the buildings, Wood Mechanix was responsible for providing "temporary railings, braces and fall protection" for its employees. ER 51 (Subcontract, Scope of Work, ¶ 18). Polygon employees did not go into the Wood Mechanix work space generally and did not go onto the upper floors of any building being framed by Wood Mechanix until the floor was complete. ER 70-71; Plaintiff's MSJ, Ex. H, page 20 (Marsh Dep. 64:12-22).

Polygon conducted weekly meetings on site for representatives of all of the trades working on the Project. Plaintiff's MSJ, Ex. G, page 16-16a (Taylor Dep. 69:7-70:10). The purpose of these meetings was to review the upcoming schedule, coordinate the day-to-day activities of the various trades, and generally discuss whatever needed to be discussed regarding the jobsite and the Project. Plaintiff's MSJ, Ex. G, page 16-16a (Taylor Dep. 69:7-70:10). This included some general safety discussions, such as reminding the subcontractors that their employees needed to wear hardhats on site. Plaintiff's MSJ, Ex. G, page 16 (Taylor Dep. 69:16-22). Each subcontractor, including Wood Mechanix, was required to conduct separate weekly safety meetings with its employees. Plaintiff's MSJ, Ex. L (Subcontract, General Terms and Conditions, § 4.3(c)). Polygon itself held separate safety meetings just for its employees. Plaintiff's MSJ, Ex. G, pages 15-16 (Taylor Dep. 68:7-69:6).[6]

[6] Brennan Taylor, a Polygon superintendent on the Project, was specifically asked who attended the Polygon weekly safety meetings and he replied "On-site personnel, on – Polygon on-site personnel."

Employees of the subcontractors on the Project did not attend Polygon's internal safety meetings.

During construction, if Polygon representatives observed a general and obvious safety issue, such as workers on the premises without hardhats or shirts, workers riding on forklifts, or such similar unsafe behavior, the Polygon representatives would bring that to the attention of the subcontractor or the worker to cure that condition. ER 62; Plaintiff's MSJ, Ex. B, pages 29-30 (Landschulz Dep. 75:20-76:18); Plaintiff's MSJ, Ex. E, page 10a (Mallett Dep. 189:11-25); Plaintiff's MSJ, Ex. G, pages 2-4, 13 and 16 (Taylor Dep. 22:16-24:4, 64:17-25, 69:16-22). Although Polygon representatives were not experts in guardrails, they would advise the framer about an absence of guardrails, if they saw such a condition. ER 53-54, 59, 60, 61, 96 and 97.

2. *The Subcontract placed responsibility for Plaintiff's safety upon his employer, Wood Mechanix.*

The subcontract between Tanasbourne and Wood Mechanix (the "Subcontract") placed responsibility for the safety of Wood Mechanix's workers squarely upon Wood Mechanix—including fall protection. For example, the Subcontract provided that:

> "The *Subcontractor [Wood Mechanix] is required to* promptly and diligently *provide temporary railings, braces and fall protection* as may be required by the *ongoing* framing of the buildings [p]er OSHA requirements."

ER 51 (Subcontract, Scope of Work, ¶ 18) (emphasis added). It also provided, in pertinent part, that:

> "CONTRACTOR [Tanasbourne] is committed to maintaining a safe workplace. *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 property from damage arising out of the performance of the work.***
>
> *"SUBCONTRACTOR shall take all necessary safety precautions pertaining to its work and the conduct thereof*, including but not limited to, all applicable laws, ordinances, rules [sic] 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, and materials *within SUBCONTRACTOR'S care, custody or control*."

ER 43 (Subcontract, General Terms and Conditions, § 4.3) (emphasis added).

The Subcontract expressly made Wood Mechanix responsible for identifying potential hazards and for developing specific means for addressing those hazards:

> *"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*."

ER 43 (Subcontract, General Terms and Conditions, § 4.3(b)) (emphasis added).

Before commencing work on the Project, Polygon held a pre-construction meeting at which Wood Mechanix completed a "Subcontractor Precon Safety Orientation" checklist.[7] This checklist required Wood Mechanix to confirm

[7] The preconstruction meeting was contractual and required under Section 4.4 of the Subcontract ("A Pre-Construction Meeting shall be held to the SUBCONTRACTOR commencing work at the Project site. *** 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

that it would be taking responsibility for safety relating to its work. Through this checklist, Wood Mechanix confirmed that it had developed its own "Fall Protection Work Plan" that, among other requirements:

> "• Identif[ied] all fall hazards[.]
>
> "• Describe[d] the method of fall arrest or fall restraint to be used for these hazards[.]
>
> "• Describe[d] the correct procedures for assembly, maintenance, inspection and disassembly of the fall protection system[.]
>
> "* * * * *
>
> "• [Ensured that Wood Mechanix] employees [were] trained and instructed in all of the above items[.]
>
> "• [Ensured that] fall protection equipment [would be] inspected daily by a competent and qualified person[.]"

ER 44. As this document shows, Polygon left it to Wood Mechanix to determine how Wood Mechanix would provide fall protection to Wood Mechanix's workers.

3. *Polygon had no involvement with the design, construction, or maintenance of the guardrail that caused Plaintiff's injuries.*

Plaintiff alleges that a defective guardrail caused his injuries. ER 2. However, there is no evidence in the record that Polygon had any involvement with the design, construction, or maintenance of the guardrail that allegedly caused Plaintiff's injuries. Wood Mechanix's president, Stanley Trytko, testified that Wood Mechanix alone designed and installed the allegedly defective guardrails.

---

the Project before work commences."). Plaintiff's MSJ, Ex. L, page 11 (Subcontract, General Terms and Conditions, § 4.4).

> "Q. Okay. So in 2005-2006, when Wood Mechanix was working on the Tanasbourne project –
>
> "A. Yes.
>
> "Q. -- the guardrails that were constructed on that project were following what Wood Mechanix's had designed or -- or had created as the best design at the time?
>
> "A. That's correct.
>
> "Q. Okay. And that was -- those guardrails were installed by Wood Mechanix; is that correct?
>
> "A. They were."

ER 81. *See also* ER 76-77; 79-80; 81-82; 83-84; 85-88; and 89. This was confirmed by Kirk Downs, Wood Mechanix's job foreman on the project. ER 69-70 and 73-74 .

Christopher Mallett, who was a project manager for Polygon on the Project, confirmed that Wood Mechanix was solely responsible for the construction and inspection of the guardrails.

> "Generally the -- the -- the team [i.e., Polygon] would -- would require the subcontractor to fulfill the responsibilities for the guardrails and require them to -- to inspect them and make sure that they -- they built the rails.
>
> "* * * * *
>
> "[Polygon] wouldn't dictate how the construction of the guardrail was -- how -- how -- how the rail was constructed.
>
> "* * * * *
>
> "They would -- in the first place it's their subcontractor's responsibility to maintain -- to build, maintain, and -- and manage their -- their -- their safety protocol.
>
> "* * * * *

> "If that -- if that's handrails, it's their responsibility to keep that up."

ER 95 and 96.

Brennan Taylor, a Polygon superintendent on the project, also testified that Polygon relied upon Wood Mechanix to ensure that the guardrails were secure.

> "Q. And what were Polygon's requirements related to guardrails or harnesses or lanyards?
>
> "A. Our policy was to leave it up to the subcontractor to make sure that they were installed and that they -- that they installed them per the requirements."

ER 55.

> "A. Wood Mechanix ensured Polygon that those [guardrails] were secured.
>
> "Q. And what did you do to make sure that was true?
>
> "A. We take their word for it. That's -- that's their responsibility."

ER 56.

> "Q. Did the Wood Mechanix employees inspect the guardrails?
>
> "A. It would be their responsibility to respect the guard -- inspect the guardrails."

ER 57.

Moreover, it was Wood Mechanix general policy to regularly check the guardrails in its work space to make sure they were secure. Polygon MSJ, Ex. W, page 7 (Trytko Dep. 97:3-24). [8]

[8] Exhibits W and X were attached to the Second Supplemental Declaration of Bruce H. Cahn in Support of Polygon Northwest Company's Motion for Summary Judgment ("Second Supplemental Declaration"). The Second Supplemental Declaration was provided to the trial court and considered as part of the summary judgment proceedings, but was not included in the official trial

The record also shows that Polygon did not have control over the activity Plaintiff was performing at the time of his injury. Plaintiff was performing framing work in an area exclusively controlled by Wood Mechanix. ER 63; ER 70-71; and ER 41.

4. *Polygon relied on the expertise of Wood Mechanix with respect to the design, construction, and maintenance of the guardrail that caused Plaintiff's injuries.*

Polygon relied on the expertise of Wood Mechanix with respect to fall protection. Chris Walther, who was the first Polygon project manager for the Project,[9] testified that the guardrails were solely Wood Mechanix's responsibility.

> "Once again, it goes back to the -- to the site contractor to -- to -- for this case would be to install those railings. That's why we hired them, to put them up – or that's why we hired them, to frame the building. They're taking their own safety program and critiquing it to the building or a project specific. And that's why we hire them, for the experts."

ER 91-92.

James Tyler Marsh, another superintendent on the Project, reiterated that Polygon was relying upon Wood Mechanix to properly design, construct, and maintain the guardrails.

> "Q. You have no idea how a guardrail should be built?
>
> "A. It wasn't my job to know. I was relying on the expertise of someone who did know."

---

court record. Polygon moved to supplement the trial court record at the Court of Appeals. That motion was unopposed by Plaintiff, and the Court of Appeals granted the motion, supplementing the trial court record with the Second Supplemental Declaration and attached exhibits. *See* Order Supplementing the Record, signed by Commissioner Nass, dated November 19, 2012.

[9] Mr. Walther preceded Mr. Mallett on the Project.

ER 60. As Marsh further explained, "[w]e were instructed that the framing subcontractor would put all the safety measures in place." ER 61. *See also* ER 64-65.

5. *Facts regarding the accident.*

In February 2006, Plaintiff was working on the third floor of a building at the Project that was being framed by Wood Mechanix. Plaintiff was injured when he used a guardrail on the third floor to pull himself up from a kneeling position to a standing position, and the guardrail gave way, causing Plaintiff to fall nineteen feet to a concrete pad below. The guardrail that gave way was designed, constructed, and maintained by Wood Mechanix. ER 69-70, 73-74, 76-77, 81-82, 83-84, 89.

The night before Plaintiff's accident, Kirk Downs, Wood Mechanix's job foreman on the project, specifically walked the jobsite and inspected the guardrails. Polygon MSJ, Ex. X, pages 9-11 (Downs Dep. 138:6-140:22). This inspection included a physical check to confirm that the guardrails were secure, if they appeared loose or not secure. Polygon MSJ, Ex. X, pages 9-11 (Downs Dep. 138:6-140:22).[10]

[10] To the extent that Plaintiff asserts that the OSHA investigation report for his accident states that the "[s]ite superintendent stated that he had checked the guardrails the night before" (Opening Brief, page 28) that reference was to Mr. Downs, a Wood Mechanix employee, not to any Polygon representative. Polygon's MSJ, Ex. X, pages 7-8 (Downs Dep. 136:15-137:2); Plaintiff's MSJ, Ex. D, pages 15-16 (Contreras Dep. 30:6-31:2).

B. Plaintiff's Statement of Historical Facts Contains Inaccuracies and Unreasonable Inferences

Plaintiff's Statement of Historical Facts contains several inaccuracies and inferences that are not reasonably drawn from, or are contradicted by, the facts in the record. Polygon addresses those material inaccuracies below.

First, Plaintiff repeatedly asserts that Polygon was the general contractor on the project. This is incorrect. *See* ER 42 (Polygon signed the Subcontract as Tanasbourne's "Authorized Project Manager"). Although this is not a material distinction under the ELL, Polygon clarifies this point, to the extent it is relevant to the issue of its common-law duties.[11]

Second, Plaintiff reiterates that Polygon was contractually "committed to maintaining a safe work place" due to the preamble in Section 4.3 of the Subcontract. But as the Court of Appeals found, this did not create a separate contractual obligation on the part of Polygon, nor detract from the terms of the contract which identified the specific safety obligations of Wood Mechanix. *Yeatts*, 268 Or App at 275.[12] Plaintiff also highlights Section 1.2 of the

[11] To the extent that the ELL applies to "other persons having charge of, or responsibility for, any work involving a risk or danger" [ORS 654.305], Polygon has admitted that its status as Tanasbourne's project manager would make it subject to the ELL regardless of its title *if* it is found to control the risky or dangerous work performed by Plaintiff. The Court of Appeals, while overstating the scope of Polygon's admission, correctly noted that, for the purposes of its summary judgment motion and on appeal, Polygon assumed that it is subject to Tanasbourne's contractual obligations as its project manager. *See Yeatts*, 268 Or App at 259 n 2.

[12] The Court of Appeals properly noted that despite the preamble to Section 4.3, "the *terms* of the contract specified that it was Wood Mechanix that agreed 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 ***injury *** arising out of the performance of the work.' Moreover, the contract provided that Wood Mechanix would 'at all times, be responsible for providing a safe

Subcontract, which provides that "[t]o the extent that Contractor has other inspection or procedures in place, Subcontractor also agrees to comply with those," as further support that Polygon directed Wood Mechanix safety operations. Plaintiff's MSJ, Ex. L, page 7 (Subcontract, General Terms and Conditions, ¶ 1.2). However, this language is taken out of context. Section 1.2 specifically addresses delays and quality control inspections. The reference to "other inspection or procedures in place" specifically and directly references quality of construction and not safety. Nothing from Section 1.2 can be read to infer control over safety procedures.

Plaintiff repeats his argument that the internal "Tanasbourne Townhomes LLC Accident Prevention Plans" which contained a Fall Protection Plan within it is evidence that Polygon required Wood Mechanix to use guardrails on above-ground decks, or that he is at least entitled to an inference that Polygon required guardrails as fall protection in light of that internal plan. Opening Brief, pages 6-9. However, the Court of Appeals properly rejected this argument because there was no actual evidence that the internal plan was provided to Wood Mechanix. In fact, the evidence is to the contrary. Wood Mechanix's president testified that he could not recall having ever seen the Polygon Accident Prevention Plan prior to his deposition and that the decision to use guardrails was Wood Mechanix's decision alone. ER 81-82; 83-84; 89; *see also* ER 76-77; 79-80; and 85-88. Moreover, Mr. Trytko testified that Wood Mechanix alone designed and constructed the guardrails using what

---

work site and be responsible for the safety' of its employees and equipment." *Yeatts*, 268 Or App at 275 (emphasis added).

Wood Mechanix determined to be its "best design" at the time. ER 81. This was confirmed by Mr. Downs, Wood Mechanix's job foreman on the Project. ER 69; 70; and 73-74.

Moreover, Wood Mechanix completed a "Subcontractor Precon Safety Orientation" checklist, which required *Wood Mechanix* (not Polygon) to "[i]dentify all fall hazards" and "[d]escribe the method of fall arrest or fall restraint to be used for these hazards." In other words, Polygon left it to Wood Mechanix to select the method of fall protection for Wood Mechanix's workers. Finally, Wood Mechanix was required to develop *its own* site-specific safety plan pursuant to the Subcontract, including fall protection for working at heights, which it did. ER 43 (Subcontract, General Terms and Conditions, §4.3(b)); ER 85-88. Despite this, Plaintiff asserts that it is reasonable to infer Polygon required the use of guardrails.

In order to confirm the inference requested by Plaintiff, this Court must dismiss the direct and specific testimony of Mr. Trytko and Mr. Downs, and instead rely on Plaintiff's strained reading of the contract terms.[13] However, to infer that Polygon required the use of guardrails, the jury would be required to believe that Mr. Trytko and Mr. Downs—disinterested witnesses—were lying when they stated that Wood Mechanix alone decided to use guardrails. An objectively reasonable jury would not be allowed to make such an inference

[13] In fact, that is what Plaintiff directs the Court to do. Opening Brief, pages 8-9 ("Mr. Trytko's memory may be that it was 'Wood Mechanix, and Wood Mechanix alone, that decided to us guardrails,' but the contract between the parties and Polygon's written direction to its employees tell a different story.").

where there is no evidence that is contrary to that testimony. *See Tolbert v. First National Bank,* 312 Or 485, 495, 823 P2d 965 (1991).

Furthermore, Plaintiff argues that he is entitled to an inference that because the internal plan requires Polygon's site superintendents to implement the internal plan, Polygon required Wood Mechanix to use guardrails as the means and method of fall protection. Opening Brief, page 9. Implicit in this argument is that the internal plan creates an affirmative obligation on the part of Polygon to enforce Tanasbourne's fall protection plan and to inspect the site daily for safety hazards and OSHA violations for the benefit of third-parties. Although not directly considered in Oregon, courts from around the country have held that a general contractor or owner safety manual cannot create a duty of care to the employee of a separate subcontractor.[14] This Court should adopt a similar rule and reject the inference requested by Plaintiff as improper as a matter of law.

---

[14] *See Thompson v. United States,* 592 F2d 1104, 1109-10 (9th Cir 1979) (defendant did not assume a duty to supervise safety on site, despite defendant's internal instruction memorandum requiring on-site inspections); *Graham v. Amoco Oil Company,* 21 F3d 643, 647-648 (5th Cir 1994) (only the contract between the owner and the contractor, and not the owner's safety manual, could create a duty by the owner to the contractor's employee); *Dupre v. Chevron U.S.A. Inc.*, 913 F Supp 473, 480-83 (E D La 1996) (Court rejected the plaintiff's claim that the defendant had a duty to inspect a drilling rig based upon the defendant's internal policy requiring such inspections); and *Archambault v. Soneco/Northeastern, Inc.*, 287 Conn 20, 55-56, 946 A2d 839 (2008) (Court rejected allegations that the defendant had exercised control over the work site by virtue of provisions in the general contractor's safety manual because the "safety manual was not the source of a contractual or legal duty to provide a safe work site" for purposes of negligence claim by subcontractor's employee).

Plaintiff next asserts that because the Subcontract required Wood Mechanix to submit its safety plan before it could begin work, that he is entitled to an inference "that Polygon had the right to approve, disapprove or require changes" to that plan. Opening Brief, page 9. Again, however, the evidence in the record is solely contrary to the inference sought. Brennan Taylor, the Polygon project manager that conducted the pre-construction meeting with Wood Mechanix, testified that he did not review the Wood Mechanix safety plan for content. Rather Mr. Taylor's concern was that Wood Mechanix had a plan in place before it began work. Plaintiff's MSJ, Exhibit G, page 23 (Taylor Dep. 80:9-24). This makes sense, because Polygon personnel did not have expertise in guardrail construction or fall protection and relied on Wood Mechanix—an experienced framing subcontractor—to supply that expertise. *See* Section III. A(4), above.[15]

Furthermore, Plaintiff appears to assert that he is entitled to an inference that Wood Mechanix did not take safety as seriously as it should, because it knew that Polygon would be monitoring its safety practices. Not only is there no evidence from which this inference can be reasonably drawn, but Wood Mechanix's self-interest militates against this inference. While Plaintiff believes that Polygon's ability to terminate Wood Mechanix from the job if Polygon representatives observed three occurrences of the same serious safety hazard shows control over jobsite safety, it also provides incentive for Wood Mechanix to monitor its own worksite and employees to make sure that there

[15] *See also* Plaintiff's MSJ, Exhibit G, pages 22 and 28 (Taylor Dep. 79:2-16 and 93:6-13).

are no observed safety violations. Likewise, it is Wood Mechanix that was cited for OSHA violations,[16] which could have a negative monetary impact on Wood Mechanix in the form of higher insurance premiums and lost work opportunities. Setting aside the obvious human reasons for wanting to maintain a safe work place for its employees, Wood Mechanix had all the economic reasons to maintain a safe work place, and there is no basis in the record to infer that it did not take safety as seriously as it could because of any provision of the Subcontract.[17]

IV.
ARGUMENT

When reviewing a grant of summary judgment, the court is to view the evidence in the light most favorable to the non-moving party. *Jones v. General Motors Corp.*, 325 Or 404, 420, 939 P2d 608 (1997). When considering the factual record, the court is to make all *reasonable* inferences that may be derived from the facts in favor of the non-moving party. *Id.* at 408. Inferences are reasonable if they flow logically from the proven facts, are not so attenuated to be pure speculation, and are not contradicted by evidence in the record. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 US 133, 151, 120 S Ct 2097, 147 L Ed 2d 105 (2000); *Tose v. First Pennsylvania Bank, N.A.*, 648 F2d 879, 895 (3d Cir.), *cert den*, 454 US 898 (1981); *Tolbert*, Or 485 at 495; *see also Garrison v. Cook*, 280 Or 205, 209, 570 P2d 646 (1977) (looking to

[16] Opening Brief, page 10.

[17] In fact, when asked about Polygon's oversight of Wood Mechanix and Polygon's ability to remove Wood Mechanix from the jobsite, Mr. Trytko replied, "I'm not sure I gave it a second thought." Plaintiff's MSJ, Ex. I, Pages 21-22 (Trytko Dep. 77:24-78:8).

interpretation of federal rules of civil procedure for guidance where standard is the same under Oregon and Federal law).

Here, the Court of Appeals appropriately viewed the facts in the best light possible to Plaintiff and made reasonable inferences in Plaintiff's favor, yet still found that Plaintiff "failed to present evidence from which a jury could reasonably conclude that Polygon was subject to the ELL or that Polygon owed [P]laintiff a duty[.]" *Yeatts*, 268 Or App at 283.

A. Establishing Liability for Indirect Employers under the ELL Requires a Multi-Faceted Analysis

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." *Cortez*, 356 Or at 272 (*citing Woodbury v. CH2M Hill, Inc.*, 335 Or 154, 159, 61 P3d 918 (2003). Although the ELL was originally designed to compensate employees for injuries from all responsible parties, including their employers, because of Oregon's mandatory workers compensation system,[18] ELL liability currently applies to "indirect employers" as opposed to direct employers.[19]

---

[18] Although Workers' Compensation existed in an optional form starting in 1913, ORS 656 was overhauled in 1965 and again in 1967, which made the workers' compensation insurance system mandatory for employers. *See* 2014 Report on the Oregon Workers' Compensation System, page 3 (available at http://www.cbs.state.or.us/external/imd/rasums/2362/14web/14_2362.pdf). This had a profound impact on worker safety and compensation for workplace injuries, which significantly adjusted the basis for the ELL.

[19] That is the current case. Because Plaintiff has received workers' compensation benefits for his injuries, Wood Mechanix is shielded from claims in this matter. Rather, Plaintiff is seeking to recover additional damages from Polygon in excess of his workers' compensation benefits.

1. *The ELL is Not a Strict Liability Statute*

Although the ELL places a higher burden on "owners, contractors or subcontractors and other persons having charge of, or responsibility for, any work involving a risk or danger," it is not a strict liability statute.[20] ORS 654.305. Rather, in order for an entity to be subject to the ELL, it must first have had control over the instrumentality of the injury before the court can determine if the entity used "every device, care and precaution that is practicable to use" to prevent a jobsite injury. *Id.* As this Court has long held, general control of a worksite is insufficient. Rather, a plaintiff must prove that the defendant exercised or retained control over the specific instrumentality that caused the plaintiff's injury—which, in this case, plaintiff alleges was a defective third-floor guardrail. ER 2 (Complaint, ¶ 5).

> "'Control', in the sense that a third party is to be subjected to liability under the Employers' Liability Law as we conceive the meaning of 'control' and contrary to the conception of the 'remote' or nebulous 'control' as defined by plaintiffs, *means a primary control of the physical instrumentalities immediately in use and which are the media of the injuries or death giving rise to a claim of damage under that law*."

---

[20] In other words, Polygon is not liable under the ELL merely because it generally managed the Project and Plaintiff was injured on the job, even though the Project included working at height. If that were the case then the owner or developer of every construction project would be liable under the ELL for injuries sustained by workers on the job. Rather, the owner or developer must take some action that makes the workplace less safe, before it can be responsible to use every device at its disposal to make the workplace safer. *Wilson,* 252 Or at 391, 395, 398; *Boothby,* 341 Or at 45.

Myers v. Staub, 201 Or 663, 676, 272 P2d 203 (1954) (emphasis added). Thus, in order to be liable for Plaintiff's injuries in this matter, Polygon must have controlled the instrumentality of the harm—here, the guardrails.

2. *Liability Under the ELL Does Not Extend to Polygon Under Existing Authorities and the Underlying Facts*

Liability under the ELL extends to persons or entities who "(1) is engaged with the plaintiff's direct employer in a 'common enterprise'; (2) retain 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." *Woodbury*, 335 Or at 160. In order to determine whether the defendant had a sufficient degree of control over the dangerous work to subject it to the heightened standard of care under the ELL, it is first necessary to determine the risky or dangerous work in question. *Id.* at 161. Here the Court of Appeals found that Plaintiff's "framing work at a dangerous height above a concrete surface" was the "risk producing activity" in question. *Yeatts*, 268 Or App at 265. Plaintiff agrees. Opening Brief, page 11 ("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.'"). The Court of Appeals then determined that under the facts of this case, Polygon did not exercise the requisite control over the framing work at higher elevations necessary to trigger ELL liability.

a. **Polygon was not engaged in a common enterprise with Wood Mechanix**

The common enterprise test requires a showing that the plaintiff's direct employer and the defendant participated together in a project wherein

defendant's operations were an integral part of the enterprise, the work involved risk or danger, plaintiff was an adopted or intermingled employee of defendant, and defendant had responsibility for the activity or instrumentality that caused the injury. *Cortez v. Nacco Materials Handling Group*, 248 Or App 435, 446, 274 P3d 202 (2012), *rev'd on other grounds*, 356 Or 254, 337 P3d 111 (2014). Specifically, to be liable under the "common enterprise" test, "the defendant employer must do more than have its own employees working with plaintiff toward the furtherance of a common enterprise." *Sacher v. Bohemia*, 302 Or 477, 485, 731 P2d 434 (1987) (citing *Wilson v. P.G.E. Company*, 252 Or 385, 488 P2d 562 (1968)). Instead, the defendant must have "control or charge over the activity or instrumentality that causes the injury[.]" *Sacher*, 302 Or at 486. Thus, "there must be a causal link between the defendant's involvement in the joint work and the plaintiff's injury." *Brown v. Boise-Cascade Corp*., 150 Or App 391, 397, 946 P2d 324 (1997), *rev den*, 327 Or 317, 946 P2d 324 (1998) (summarizing the Court's ruling in *Sacher*).

The Court of Appeals specifically found that the facts in this case do not support the basic foundation of the common enterprise test for ELL liability. *Yeatts*, 268 Or App at 268-71. That is consistent with this Court's decision in *Cortez*, 356 Or at 273 (relying in the decision in *Sacher* to conclude that defendant was not in a common enterprise with its wholly owned subsidiary, of which defendant was the managing member).

Courts have properly limited common enterprise liability to circumstances where the two entities were working jointly for a common result. That is not the case here. Rather, Wood Mechanix merely provided framing

services that were part of a larger construction project. That, by itself, is not enough to create a common enterprise. Polygon relies on its briefing before the Court of Appeals on the common enterprise test, and directs the Court to those arguments.

b. <u>Polygon did not actually control the manner or method of the risky or dangerous work.</u>

A defendant is subject to the ELL under the "actual control" test if it actually controlled the manner or method in which the specific risk-producing activity that caused plaintiff's harm was performed (here, framing at a dangerous height above a concrete surface). *Woodbury*, 335 Or at 160.

In *Woodbury*, the leading case on the actual control test, the plaintiff was injured as he dismantled a platform that he used to install piping above a stairwell and underground corridor. The Court held the defendant responsible under the ELL because the Court found that the defendant exercised actual control over not only the method of the work to be done,[21] but also the manner in which the plaintiff's employer would perform the dangerous work.[22] *Woodbury*, 335 Or at 162 ("In light of those facts [defendant's participation in the decision to use the platform and design of the platform], there was evidence

[21] "Flaherty [plaintiff's employer] and Griffin [defendant's representative] discussed the options [for installing the pipe over the stairwell and corridor]. They considered the use of ladders or a fixed platform. Because ladders would not be stable on the kind of ground that was present on either side of the corridor, Flaherty and Griffin *jointly decided* to use a fixed wooden platform consisting of boards and plywood sheets." *Woodbury*, 335 Or at 162 (emphasis added).

[22] "Griffin advised Flaherty 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.'" *Woodbury*, 335 Or at 162.

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 could be constructed*.") (emphasis added).

The mere fact that the project in *Woodbury* included a risk of harm generally (working at height) together with the defendant's general control over the project was not what established the defendant's liability. Rather, it was defendant's direct involvement in the decision and design of the platform that created liability. *Id.* at 162-63. In contrast, here it was *Wood Mechanix* alone that designed, constructed and maintained the guardrails at the Project. *See* above, pages 9-11.

Despite this, Plaintiff maintains that the facts here are similar to *Woodbury*. In support of this proposition, Plaintiff asserts that: Polygon representatives generally monitored the Project for general safety violations (such as workers without shirts and hardhats, workers riding on the forks of a forklift, workers running through the worksite, and other similar obvious safety violations); Wood Mechanix was aware that Polygon was monitoring the Project for general safety infractions; Polygon mandated that Wood Mechanix "use OSHA-standard guardrails"; Polygon and Wood Mechanix jointly agreed on safety measures because Polygon required Wood Mechanix to submit a safety plan before it could commence work on the Project; and that Polygon "required Wood Mechanix's employees to attend weekly safety meetings taught by Polygon superintendents." Opening Brief, pages 14-16. However, these "facts" are not supported by evidence in the record and, regardless, do not amount to actual control.

First, while Polygon representatives did keep an eye out for general safety issues, each testified that they could not tell if a guardrail was designed and constructed correctly. Rather, they each testified that, if they had observed a lack of guardrails, they would bring that condition to Wood Mechanix's attention (this was hypothetically stated; no Polygon representative ever testified that they, in fact, ever saw elevated openings without guardrails). ER 53, 59, 61, 96, and 97.[23] Moreover, generally monitoring for safety does not establish actual control over the decision of Wood Mechanix to use guardrails or the design of the guardrails (particularly in light of the testimony of Wood Mechanix representatives that the guardrail selection, design, and construction were solely their decision).[24] Likewise, the evidence shows that Polygon did

[23] Plaintiff now asserts, for the first time, that Polygon was negligent in placing representatives on the Project that were responsible for monitoring guardrails but who lacked the training or expertise to adequately monitor such guardrails. Opening Brief, page 15, note 10. However, as discussed in Section IV.B. below, Polygon was entitled to rely on the expertise of Wood Mechanix in the design, construction, and maintenance of the guardrails. Accordingly, Polygon did not owe a duty to Plaintiff, who himself was an experienced framer, because of this reliance.

[24] Plaintiff asserts that Polygon mandated the use of "OSHA-standard guardrails" (Opening Brief, page 15) despite contradictory evidence that Wood Mechanix itself chose to use guardrails and used its best practices in the design and construction of the guardrails. Plaintiff also does not explain what the OSHA-minimum standards for guardrails are. Instead he directs the Court to 29 CFR 1926.502. However, this provision provides generalized guidelines for guardrail construction and does not include detailed plans or drawings for how guardrails should be constructed. Thus, OSHA leaves the specific guardrail design to the framer, as long as it meets the general OSHA provisions. Moreover, Plaintiff does not explain how asking Wood Mechanix to follow OSHA guidelines, which are arguably crafted to increase guardrail effectiveness, made the jobsite less safe. Plaintiff does not point to a higher standard for guardrail design and specification that would have made the guardrails more effective and safer. Finally, Wood Mechanix was required to

not jointly agree on safety measures—Polygon merely required Wood Mechanix to have a separate safety plan in place before it commenced work. Because Polygon was relying on Wood Mechanix to provide safety for its workers, Polygon confirmed that Wood Mechanix had a plan in place. *See* above, page 15.[25]

When considered directly, the "facts" that Plaintiff relies on to support actual control over the means and methods of the instrumentality of the harm—i.e., the guardrails—shows the opposite: that Polygon did not have any part of the decision to use guardrails, the design of the guardrails, and the construction of the guardrails.

This Court's recent decision in *Cortez* is instructive in determining whether Polygon actually controlled the method or manner in which the risk-producing activity was performed. In *Cortez,* Swanson, the owner and managing member of Sun Studs, which employed the plaintiff, provided Sun Studs with a safety manual template to customize for its day-to-day operations. While Swanson delegated day-to-day responsibility for safety at Sun Studs to Sun Studs personnel, Swanson representatives met regularly with their Sun Studs counterparts and gave advice on safety issues and protocols. Swanson

---

comply with OSHA standards regardless of the contractual requirement to do so. 29 USC § 654. Wood Mechanix was independently aware of this requirement and incorporated the OSHA guidelines into its guardrail design. *See* ER 80-81.

[25] Plaintiff also conflates weekly safety meetings that Polygon conducted for its own employees (Plaintiff's MSJ, Ex. G, pages 15-16 (Taylor Dep. 68:7-69:6)) with the general weekly subcontractor meeting wherein the construction schedule was reviewed, building plan issues were addressed, and other day-to-day activities were discussed (Ex. G, page 16, (Taylor Dep. 69:7-22)).

representatives attended at least one Sun Studs safety committee meeting "to ensure that Sun Studs' supervisors did not need any help or further assistance." *Cortez*, 356 Or at 259. If Swanson representatives saw a safety violation on Sun Studs' worksite, they could have directed Sun Studs to correct the safety violation. *Id*. Despite this, the Court specifically found that such activities did not give rise to actual control for ELL purposes. *Cortez*, 356 Or at 273-74. These facts mirror closely what Plaintiff alleges were Polygon's incidents of actual control—providing an internal safety manual, giving advice on safety matters, and having the ability to call out and correct safety violations.

Despite Plaintiff's efforts to craft a factual scenario under which Polygon actually controlled the method and manner of work, the evidence contradicts Plaintiff's arguments and the facts that Plaintiff relies on are insufficient, as a matter of law, to establish actual control. Accordingly, the trial court and Court of Appeals properly concluded, as a matter of law, that Polygon did not actually control the risk-producing work that caused Plaintiff's injuries.

c. <u>Polygon did not retain control of Wood Mechanix's work in the Subcontract or by its actions.</u>

To establish that Polygon retained the right to control the risk-producing activity (performing framing work at a dangerous height above a concrete surface), Plaintiff "must either 'identify some source of legal authority for that perceived right' or evidence from which a retained right could be inferred." *Cortez*, 356 Or at 274 (citing *Boothby*, 341 Or at 41). Both Plaintiff and amicus assert that the Subcontract and Polygon's internal safety plan constitute the legal authority by which Polygon retained control. Specifically, Plaintiff argues

that the Subcontract established retained control because it: allowed Polygon to require Wood Mechanix to follow any additional safety measures Polygon requested, prohibited Wood Mechanix from commencing work until it submitted a safety plan to Polygon, required Wood Mechanix to conduct and document Wood Mechanix own safety meetings, and allowed Polygon to terminate the contract if it observed the same substantial safety hazard on three occasions. Amicus goes further, requesting that this Court overturn the leading case on contractually assigned safety responsibility, *Wilson v. P.G.E. Company*, 252 Or 385, 488 P2d 562 (1968). However, neither argument is persuasive nor does amicus present a compelling reason to depart from long-standing precedent. Accordingly, the Court should not disturb the determination of the Court of Appeals with respect to retained control, and the Court should affirm the ongoing applicability of *Wilson* to independent contractors.

The Supreme Court has addressed the retained control test in three significant decisions—*Wilson*, *Boothby*, and *Cortez*.

In *Wilson*, the plaintiff sued for injuries he suffered when he fell during the construction of a transmission line tower. 252 Or at 389. The tower was constructed with an arm to hold the transmission lines and the plaintiff was injured when the arm gave way as he walked out onto it. *Id.* The plaintiff in *Wilson* alleged that the defendant had exercised "actual physical control over the work" and gave three specific instances of such control. *Id.* at 397. The Court, nonetheless, held that these specific instances were insufficient because they did not demonstrate control over the particular activity or instrumentality that caused plaintiff's injuries, but rather related to control over the project as a whole. *Id.* ("These instances failed to demonstrate such control as would bring

defendant within the purview of the Act because they related to the securing of the ultimate result agreed to be furnished.") *Id.*[26]

Furthermore, the plaintiff in *Wilson* argued that the defendant had retained control over the work being done. In rejecting that claim, the Court looked at the contractual language at issue. That contract, which was between the defendant (referred to as the "Engineer") and plaintiff's employer (referred to as the "Contractor"), reserved far more control for the defendant than the contract in the present case reserved for Polygon. Specifically, the contract provided, in pertinent part:

> "'The Engineer shall have the right to direct the manner in which all work under this Contract shall be conducted in so far as may be necessary to secure the safe and proper Progress and the specified quality of the work[.]
>
> "'* * * * *
>
> "'If at any time the Contractor's methods, materials or equipment appear to the Engineer to be unsafe, inefficient, or inadequate for securing the safety of the workmen or the public, the quality of work or the rate of progress required, he may order the Contractor to increase their safety, efficiency, and adequacy; and the Contractor shall comply with such order.'"

Id. at 393-94. (emphasis deleted) The Court, nonetheless, held that the defendant could not be liable under the ELL. *Id.* at 396 (remanding case with directions to grant defendant's motion for judgment notwithstanding the verdict).

---

[26] In *Wilson*, the defendant exercised far more control over the plaintiff and his employer's work than Polygon did here, but the Court nonetheless refused to hold the defendant liable. 252 Or at 393-96. As the Court explained, even specific acts of control that are not directly related to the particular activity or particular instrumentality of the plaintiff's harm are insufficient to establish liability under the ELL. *Id.*

In supporting its decision in *Wilson*, the Court found that a general contractor cannot be held liable merely because it reserves the right to exercise greater safety precautions if the subcontractor is not taking adequate safety measures:

> "By the provisions of the contract, the [sub]contractor was primarily responsible for the safety of the work. Defendant had the right to step in and exercise greater safety precautions, or to require the [sub]contractor to do so, if the defendant thought the [sub]contractor's methods were inadequate for that purpose. *The right of defendant to take over control to attain a greater degree of safety created no risk of danger to plaintiff*."

Wilson, 252 Or at 396 (emphasis added). As this Court recognized, to impose liability simply because the defendant reserved the right to step in if the subcontractor failed to provide adequate safety measures would encourage contractors to intentionally turn a blind eye to safety in order to avoid ELL liability. Conversely, 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 [ELL]." *Id.* at 396. Neither Plaintiff nor amicus present any evidence that contradicts the determination of this Court in *Wilson*. Rather, as discussed below, the findings of the Court are confirmed by an assessment of current materials regarding construction-site safety.

Plaintiff attempts to distinguish *Wilson* by arguing that the defendant in that case was the owner of the property as opposed to the general contractor. Opening Brief, pages 19-20. However, the ELL explicitly treats owners and general contractors identically. ORS 654.305 (applying to "all owners, contractors or subcontractors and other persons having charge of, or responsibility for, any work"). Thus, there is no difference in the application of the ELL based on the classification of defendant's position on the Project.

Boothby followed *Wilson*.[27] In *Boothby*, this Court further addressed the retained control test under the ELL. There, the plaintiff's decedent worked for Intermountain Forest Management. Intermountain logged property owned by defendant under a contract which provided that "the conduct and control of the [logging] work will lie solely with [Intermountain]." *Boothby*, 341 Or at 38. After an accident involving a log loader killed plaintiff's decedent, plaintiff brought an action against defendant under the ELL and for common-law negligence. The ELL claim turned solely on whether defendant "was responsible for the method and manner in which Intermountain operated the log loader." *Id*. at 40. In analyzing the contract, the Court found that defendant only reserved for itself "the right to control times of operation and log flow if conditions so warrant" and that Intermountain agreed to conduct its operations safely. *Id.* at 41-42. Despite the unambiguous language in the contract, plaintiff sought to establish ELL liability through other evidence, including provisions of the land purchase agreement with Washington State and standard practices in the timber industry. The Court rejected these claims because the evidence proffered did not modify or address the plain language of the contract. *Id*. at 43-44.

Finally, in *Cortez*, this Court addressed the corporate governance structure of single-member-managed LLCs under ORS Chapter 63. In *Cortez*, there was no written agreement between the entities regarding safety at the work site. Rather, Swanson was the sole member-manager of Sun Studs. Under ORS 63.130, Swanson had the right to manage and conduct Sun Studs' business. This Court found that although Swanson chose to delegate responsibility to Sun Studs' mill manager and human resources director, "Swanson retained the right, under ORS 63.130, to manage all aspects of Sun Studs' operations, including the way that forklifts operated in the mill and the

[27] *Boothby* was also decided after *Woodbury*.

safety conditions in their area of operation." *Cortez*, 356 Or at 274. Thus, ORS 63.130 provided the legal authority for retained control.[28]

This Court separately addressed Swanson's argument that *Wilson* dictated a different result regarding retained control. This Court described *Wilson* as follows:

> "In *Wilson*, an owner contracted with an independent contractor to build an electric transmission line. 252 Or at 389, 448 P2d 562. Under the contract, the independent contractor was responsible for the method or manner in which the risk-producing activity was performed. *Id*. at 393. The owner, however, retained the contractual right to " 'increase th[e] safety, efficiency, and adequacy' " of the independent contractor's methods ' "[i]f at any time the Contractor's methods * * * appear to the [owner] to be unsafe.' " *Id*. at 394 (quoting the contract) (emphasis deleted).
>
> "The contractual right that the owner retained in *Wilson*, as the court characterized it, was limited to requiring greater safety procedures than those that the contractor had put in place, and the question in *Wilson* was whether the owner's retention of that right was sufficient to make it liable under the ELL. The court held that it was not, for three related reasons. First, the court explained that, in order for an owner's retained right to give rise to liability under the ELL, the right had to "bear some relation to the *creation* of a risk of danger to work[ers] resulting from dangerous working conditions." *Id*. at 396 (emphasis added). Under the terms of the parties' contract, however, the independent contractor was responsible for the manner or methods in which the risk-producing activity was performed. *Id*. at 396. Second, although the owner retained the right to require greater safety procedures, the court explained that the retention of that right "created no risk of danger to [the] plaintiff." *Id*. The court reasoned that the retention of that right would create a risk of danger to the plaintiff only if it caused the independent contractor to be less diligent regarding safety, a possibility that the court discounted because "the duty to maintain safety remained the primary duty of the contractor." *Id*. Finally,

[28] The Court found further support for retained control from witness admissions that Swanson could have made safety improvements at Sun Studs before plaintiff's accident had it chosen to do so. *Id*. at 274-75.

> the court reasoned that imposing liability on owners for retaining a contractual right to require greater safety measures would serve as a disincentive to including such clauses in future contracts and thus would be contrary to the purposes underlying the ELL. *Id*. at 396-97."

Cortez, at 275-76. This Court further noted that *Wilson* arose in the context of a "claim against an owner by an employee of an independent contractor[,]" which is decidedly different than the wholly owned and managed subsidiary relationship in *Cortez*.[29] Although this Court used language that amicus sees as an invitation to revisit *Wilson*, the fact remains that the Court did not disturb the holding of *Wilson* in the context of contracts between independent parties, such as Polygon and Wood Mechanix, and the reasoning of *Wilson* and *Boothby* remain sound. *See* Section IV.A.3, below.

With regard to Plaintiff's direct arguments, Plaintiff asserts that because Wood Mechanix understood that Polygon would be overseeing Wood Mechanix's safety practices, it was entitled to the inference that Wood Mechanix was less diligent about workplace safety. However, there is no evidence that Wood Mechanix was less diligent, despite Plaintiff's taking the deposition of Mr. Trytko, Mr. Downs, and Mr. Deos, all of whom were responsible for Wood Mechanix's safety practices on the Project. None of them said that they were less diligent about safety.[30] Rather, each testified that they

---

[29] As the Court noted, "this case arises in a different context [than *Wilson*]. Sun Studs was not an independent contractor over which Swanson retained only a limited right of control. Rather, Swanson was the sole member-manager of Sun Studs, and the jury reasonably could find that, as such, Swanson retained the right to control all aspects of Sun Studs operation." *Id*. at 276.

[30] Plaintiff never asked directly if the Wood Mechanix representatives were less diligent about safety because of Polygon's alleged "oversight," despite ample opportunity to do so.

took jobsite safety seriously and that the decision to use guardrails was theirs and theirs alone, as was the guardrail design.[31]

Plaintiff also argues that while the Subcontract made Wood Mechanix responsible for providing a safe work environment, Polygon also had responsibility because it was to provide oversight.[32] However, the Subcontract does not support this proposition. Specifically, the key provisions specifically provide as follows:

- Subcontract (Scope of Work), ¶ 18: "The Subcontractor is required to promptly and diligently provide temporary railings, braces and fall protection as may be required by the ongoing framing of the buildings [p]er OSHA requirements."

- Subcontract (General Terms and Conditions), Section 4.3: "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 property from damage arising out of the performance of the work."

- Subcontract (General Terms and Conditions),Section 4.3: "SUBCONTRACTOR shall, [*sic*] take all necessary safety precautions pertaining to its work and the conduct thereof."

---

[31] In fact, Mr. Trytko testified that he did not give Polygon's safety oversight a "second thought." Plaintiff's MSJ, Ex. I, pages 21-22 (Trytko Dep. 77:24-78:8).

[32] Amicus further argues that contractual provisions assigning responsibility for safety are invalid because the "the duty imposed by the [ELL] is non-delegable and absolute." Amicus Brief, page 13 (citing *Camenzind v. Freeland Furniture Co.*, 89 Or 158, 180, 174 P 139 (1918)). However, amicus ignores this Court's ruling in *Boothby*, which unequivocally states that merely engaging "an independent contractor to perform work involving a risk or danger does not, in and of itself, impose a duty under the ELL on the owner." *Boothby*, 341 Or at 45. Thus, if the defendant has no independent duty under the ELL (either through actual control, retained control or common enterprise), then it can contractually require that the independent contractor be responsible for safety at the worksite. *Id*. at 44-45.

- Subcontract (General Terms and Conditions), Section 4.3: "SUBCONTRACTOR shall at all times, be responsible for providing a safe work site and be responsible for the safety of all personnel, equipment, and materials within SUBCONTRACTOR'S care, custody or control."

- Subcontract (General Terms and Conditions), Section 4.3(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.

ER 43.

In addition, the "Subcontractor Precon Safety Orientation" checklist required Wood Mechanix to identify all fall hazards; describe the method Wood Mechanix intended to use for fall restraint; describe the procedures for assembly, maintenance, inspection and disassembly of the fall restraint; ensure that Wood Mechanix employees were trained on the Wood Mechanix fall restraint plan, and confirm that a competent and qualified Wood Mechanix representative would inspect the fall protection equipment daily.

Thus, Polygon merely had the ability under the Subcontract to correct safety deficiencies on the job and require that Wood Mechanix perform its work in compliance with applicable safety standards. Under Oregon law, this is not enough to establish ELL liability. *Wilson*, 252 Or at 396-97. As this Court has explained, the right to step in and correct a subcontractor's safety deficiencies is insufficient to establish liability under the ELL. *Wilson*, 252 Or at 396. The right to "exercise greater safety precautions" does not create a risk of danger to the plaintiff and cannot be a basis for liability under the ELL. *Id. Cf. Cortez*, 356 Or at 274-75 (concluding that the LLC statute gave Swanson the right to

control day-to-day operations, which included making safety-related changes in Sun Studs' equipment and practices).[33]

Plaintiff does not point to a single act where Polygon somehow made the Project more dangerous for Plaintiff—much less any act that made the Project more dangerous in a way that actually caused Plaintiff's injuries. Rather, Polygon reserved the right to step in and make the project *safer* if it noticed any unsafe conditions. As this Court explained in *Wilson*, holding a defendant liable for keeping an eye out for unsafe conditions, or for reserving the right to correct unsafe conditions, "would defeat the very purpose the Act was designed to accomplish." *Id*. at 396. This remains true today. Accordingly, as a matter of law, Plaintiff did not adduce evidence that Polygon retained control over the work being performed by Plaintiff at the time of his accident or the means and method of protecting Plaintiff from harm—i.e., the guardrails designed and installed by Wood Mechanix.

3. *Polygon's position supports the policy behind the ELL*

The policy behind the ELL is to protect workers and to encourage employers to make workplaces safer.[34] As the voter's pamphlet stated, "'[T]o

[33] Also, that Polygon could terminate Wood Mechanix for repeated safety violations is insufficient to establish retained control. *Boothby*, 341 Or at 42-43.

[34] As noted above, the workers' compensation system in Oregon was dramatically changed in the mid-1960s, making compliance by employers mandatory. See footnote 17, above. Accordingly, the historic justifications submitted by amicus counsel and included in the appendix to the Opening Brief are now largely being addressed by the modified Workers' Compensation system and no longer reflect the need or current application of the ELL. Both Plaintiff and amicus cite cases from the early 20th Century and the 1911 Voter's Pamphlet, ignoring how the current Workers' Compensation system addressed the concerns described in those materials. When considered with the Workers'

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.'" *Saylor v. Enterprise Elec. Co.*, 106 Or 421, 426-427, 242 P 477 (1923) (quoting 1911 Voter's Pamphlet). The rule of law proposed by Plaintiff and amicus however, which would expose Polygon to ELL liability in this case, would not serve the purposes of the ELL or workers generally. Rather, attaching ELL liability to indirect employers who show a general regard for and communication about safety will only serve to discourage such actions, leaving safety concerns entirely up to subcontractors and direct employers. As discussed below, open communication between levels of employers is an important piece of workplace safety.

Each of the actions that Plaintiff and amicus point to as evidence of actual control is an action that would increase safety or is safety-neutral. For example, the evidence shows that Polygon employees generally monitored safety, required Wood Mechanix to submit a safety plan, had a pre-construction safety meeting, and required Wood Mechanix to conduct weekly safety meetings. Opening Brief, pages 14-16. Additionally, as evidence of retained control, Plaintiff and amicus point to contractual provisions that required OSHA compliance, Polygon's ability to fire Wood Mechanix for repeated safety

---

Compensation system in mind, it is clear that the ELL now functions as a remedy for workers that are injured on the jobsite as a result of a third-party that is controlling the risk-producing activity, despite not being the worker's actual employer. Thus, the ELL now opens the putative employer to liability that it would not have for its own direct employees.

violations, and Polygon's *internal* safety manual. Opening Brief, pages 19-24; Amicus Brief, pages 4-6.

Industry publications and text books illustrate the actions taken by Polygon are measures that generally increase worker safety and are consistent with industry standards. That is, they are not extraordinary examples showing control of risk-producing activity that should expose Polygon to extraordinary liability.

As described by the Associated General Contractors and Northwest Utility Contractors Association, best practices for workplace safety between general contractors and subcontractors include "site specific safety plans," communication between subcontractors and general contractors, contracts that include safety expectations, and "follow up team work in the field." AGC/NWUCA Safety Forum—*Best Practices, Subcontractor Management*, 4 (February 27, 2015).[35]

A Safety Consultant for the American Contractors Insurance Group created a list of ten best practices for improving safety performance on construction sites. These best practices include: "executive level support," "management visibility," supervision involvement and accountability," "pre-project planning," and "subcontractor safety management." Center for Construction Research and Training, *Safety Culture and Climate in*

[35] Available at http://www.agc-oregon.org/wp-content/uploads/2011/11/SHC-Best-Practices-2015.pdf

Construction: Bridging the Gap Between Research and Practice, Workshop Report, 17 (June 11-12, 2013).[36]

Moreover, subcontractors have fewer injuries where job-site managers, like Polygon: "emphasize safety as their highest priority," "integrate safety into the preplanning and continued planning," "show concern for workers," and "have good housekeeping, ensure the use of safety equipment, and the maintenance of rails and barricades." J.W. Hinze, *Construction Safety*, 117 (2d Ed. 2006) (excerpt attached as Appendix) (internal citations omitted).

If the Court determines that the actions taken by Polygon—including having a pre-construction safety meeting, requiring subcontractors to submit a safety plan and having consequences for not following it, and having Polygon employees generally look for safety hazards on site—create ELL liability, then general contractors concerned about such liability will instruct their employees not to undertake those actions.[37] Given the huge potential liability for workplace accidents on construction sites and the inability to use workers' compensation insurance to plan for that liability, owners and general contractors will likely respond to increased exposure to ELL liability by washing their hands of subcontractor safety completely, so that there is no question of

---

[36] Available at http://www.cpwr.com/sites/default/files/publications/CPWR_Safety_Culture_Final_Report.pdf

[37] *See* McGraw Hill Construction, *Report: Safety Management in the Construction Industry: Identifying Risks and Reducing Accidents to Improve Site Productivity and Project ROI*, page 25 (available at http://www.cpwr.com/sites/default/files/publications/SafetyManagementinConstructionSMR-2013.pdf) (77 percent of respondents cited liability concerns as influencing their safety management practices).

whether they retained control of jobsite safety. That result is not in the interest of workers or construction-site safety, because it will lead to a less-safe workplace.

B. Plaintiff Failed to Present Separate Evidence to Support his Negligence Claim

In addition to his ELL claim, Plaintiff asserts that the Court of Appeals erred when it found that Polygon did not owe a duty to Plaintiff because it relied on the expertise of Wood Mechanix in performing framing on the Project, including the use of guardrails as fall restraint. Plaintiff's argument in favor of its negligence claim focuses on his disagreement with the Court of Appeals' recitation of the facts—he asserts that Polygon required the use of guardrails and that Polygon did not rely on Wood Mechanix's expertise with respect to construction of guardrails.[38] As discussed above, the record does not support either factual assertion made by Plaintiff. Moreover, Oregon law is clear that owners and general contractors do not owe a duty to employees of independent contractors hired for their expertise in a dangerous field.

A touchstone case in this area of the law is *Yowell v. General Tire & Rubber Co.*, 260 Or 319, 490 P2d 145 (1971). In *Yowell*, the plaintiff, an

---

[38] Plaintiff contends that other forms of fall protection that could have been employed on the site are safer than guardrails, without providing any basis for this assertion. However, there is nothing to indicate that harnesses and lanyards (which can cause harm if they are not sized right, the rope length is too long, or the anchor is not securely fastened), netting (which can tear or not be securely fastened), scaffolding (which is not fall-proof; *see George v. Myers*, 169 Or App 472, 10 P3d 265 (2000) (ELL claim based on fall from scaffolding)) or man lifts (which itself has inherent dangers; *see Moe v. Eugene Zurbrugg Const. Co.*, 202 Or App 577, 123 P3d 338 (2005) (ELL claim based on a fall from a man lift)) are safer than guardrails.

electrician who worked for a company that repaired signs, was injured while performing work for the defendant, a tire business. 260 Or at 320-21. In the course of repairing a sign that was installed on a pole, the plaintiff leaned his ladder against a second sign that was on the same pole. The second sign, which had been installed two years earlier by another sign company, had been installed improperly, and it rotated around the pole, causing the ladder to fall and injure the plaintiff. *Id.* at 321. The Court held that the occupier of land *could* owe a duty to the employee of an independent contractor *if* it actually knows of the defect that caused the harm or had an expertise concerning the cause of the harm. However, the Court clarified that:

> "[A] person who orders repairs or work to be done by a third-party owes no duty to such third-party or his workman to discover and warn of any unknown dangerous conditions surrounding the work which fall within a special expertise or knowledge, not shown to have been had to the person ordering the work, and which the third-party impliedly represents to the public that he possesses."

Yowell, 260 Or at 325.

This court followed the *Yowell* holding in *Boothby*. 341 Or at 47; s*ee also Boothby v. D.R. Johnson Lumber Co.* , 184 Or App 138, 159, 55 P3d 113 (2002), *aff'd* 341 Or 35 (2006) ("Johnson Lumber had bargained for, and was entitled to rely on, Intermountain's exercise of its own specialized knowledge and expertise * * * including the implementation of appropriate safety measures[.]").[39]

[39] This is particularly true where, as here, the company with the expertise, Wood Mechanix, created the conditions that caused Plaintiff's harm.

Plaintiff also argues that the Subcontract included specific language regarding framing to be performed by Wood Mechanix, and that this specific language exposed Polygon's expertise with respect to framing. Opening Brief, pages 30-31. However, a plain reading of this language shows that these were merely general guidelines for certain framing situations that had nothing to do with safety. Paragraph 22 of the Scope of Work section of the Subcontract addresses, generally, the framing of overhanging roof structures and prophylactic measures to prevent water intrusion. Paragraph 23 concerns sequencing of work. Paragraph 25 specifically relates to preventing floor squeaks. Subcontract, Scope of Work (Plaintiff's MSJ, Ex. L, page 2). Nothing in the Subcontract, including the portions highlighted by Plaintiff, suggests control by Polygon of the design, construction, or maintenance of fall protection, including guardrails.

In sum, as shown by the subcontract and other documents executed by Polygon and Wood Mechanix, Polygon bargained for, and was entitled to rely on Wood Mechanix's exercise of its own specialized knowledge and expertise in the performance of the framing work. As did the defendant in *Yowell*, Polygon hired a subcontractor with expertise in a dangerous field to do this work. Polygon was entitled to assume that Wood Mechanix and its employees were competent and trained to do that work safely. In fact, each of the Polygon employees who testified in this matter stated that they relied on the expertise of Wood Mechanix with respect to the design, installation, and maintenance of the guardrails. Moreover, the subcontract specifically required that Wood Mechanix prepare a safety plan for its work which specifically included a fall

protection for Wood Mechanix workers. There is no evidence that Polygon either knew or should have known about any problems with Wood Mechanix's guardrails, and the undisputed evidence shows that Polygon bargained for and relied upon Wood Mechanix's specialized knowledge and expertise in the performance of Wood Mechanix's framing work. Because Plaintiff can present no evidence to the contrary, the Court of Appeals' conclusion that Plaintiff did not present a genuine issue of fact as to Polygon's duty to Plaintiff should be undisturbed and affirmed.

V.
CONCLUSION

Even after viewing the evidence in the light most favorable to Plaintiff, and drawing reasonable inferences from that evidence, no questions of fact remain with respect to Polygon's liability under either the ELL or common-law negligence. Polygon did not actually control Wood Mechanix's work, generally, with respect to framing, or specifically, with respect to the fall protection used to protect Wood Mechanix's employees. Accordingly, under *Woodbury*, Plaintiff has not established actual control under the ELL. Likewise, Polygon did not retain control over the means and methods of the work performed by Wood Mechanix, and merely had the opportunity to make the workplace safer, if it recognized an unsafe condition. Under *Wilson*, *Boothby* and *Cortez*, this is insufficient to establish retained control over Wood Mechanix's work. To the extent that Plaintiff and amicus invite this court to overturn *Wilson*, there is no legitimate basis supported by evidence to do so. In fact, studies suggests that overturning *Wilson* will create a less safe workplace

rather than a safer work place. Finally, because Polygon relied on the expertise of Wood Mechanix, it did not owe a duty to Plaintiff under *Boothby* and *Yowell*. Accordingly, Polygon respectfully requests that this Court affirm the Court of Appeals decision and reject Plaintiff's claims.

DATED: July 31, 2015

Respectfully Submitted

/s/ Bruce H. Cahn
Bruce H. Cahn, OSB 935450
Amy Heverly, OSB 093817
Ball Janik LLP

Of Attorneys for Respondent on Review
Polygon Northwest Company

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 12,494 words.

I also 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: July 31, 2015

Respectfully Submitted

/s/ Bruce H. Cahn

Bruce H. Cahn, OSB 935450
Amy Heverly, OSB 093817
Ball Janik LLP

Of Attorneys for Respondent on Review
Polygon Northwest Company

CERTIFICATE OF FILING AND PROOF OF SERVICE

I certify that on July 31, 2015, I filed the foregoing **DEFENDANT-RESPONDENT'S 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.

J. Randolph Pickett, OSB #721974
R. Brendan Dummigan, OSB #932588
Kimberly O. Weingart, OSB #091407
PICKETT DUMMIGAN LLP
621 S.W. Morrison Street, Suite 900
Portland, OR 97205
(503) 226-3628
Email: randy@pickettdummigan.com
Email: brendan@pickettdummigan.com
Email: kim@pickettdummigan.com

Jeffrey A. Bowersox, OSB #814422
BOWERSOX LAW FIRM P.C.
6960 S.W. Varns Street
Portland, OR 97223
(503)452-5858
Email: jeffrey@bowersoxlaw.com

Of Attorneys for Petitioners on Review

Scott M. Supperstein, OSB #840989
Law Office of Scott Supperstein, P.C.
6960 SW Varns Street
Portland, OR 97223
(503) 227-6464
Email: superlaw@earthlink.net

Of Attorneys for Petitioners on Review

W. Eugene Hallman, OSB #741237
HALLMAN LAW OFFICE
PO Box 308
Pendleton, OR 97801
(541) 276-3857
Email: office@Hallman.pro

of Attorneys for Amicus Curiae

DATED: July 31, 2015

Respectfully Submitted

/s/ Bruce H. Cahn
Bruce H. Cahn, OSB 935450
Amy Heverly, OSB 093817
Ball Janik LLP

Of Attorneys for Respondent on Review
Polygon Northwest Company