IN THE SUPREME COURT OF THE STATE OF OREGON

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

and

MATTHEW WHITMAN, Plaintiff

v.

POLYGON NORTHWEST COMPANY, a foreign corporation,
Respondent on Review.

Clackamas County Circuit Court
No. CV 08020124
Court of Appeals No. A150199

SC No. S062977

BRIEF OF *AMICUS CURIAE*

OREGON TRIAL LAWYERS ASSOCIATION

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

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

Listing of Counsel Next Page February 2015

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I INTRODUCTION

Amicus Curie, the Oregon Trial Lawyers Association, supports the plaintiff's Petition for Review and urges the court to grant the petition to consider important questions relating to worker safety mandated by the Oregon Employer Liability Law, ORS 654.305 *et seq*.

Specifically, your *Amicus* respectfully suggests that the analysis of the "indirect employer" status based on "retained right to control" and "actual control" adopted by the Court of Appeals are in error.[1] . *Yeatts v. Polygon Northwest Co.*, 268 Or App 256, --- P3d ---, 2014 WL 7447758 (2014).

With regard to "retained right to control" the decision, 268 Or App at 271-276, fails to recognize the contractual right to control retained by the general contractor and is thus in conflict with the holding of *Cortez v. Nacco Material Handling Group, Inc*., 356 Or 254, 337 P3d 111 (2014).

More importantly, the decision gives effect to select contractual provisions seeking to avoid the responsibility of a general contractor for the safety of workers at its work site. This is based on an erroneous continued reliance on *Wilson v. P.G.E. Company,* 252 Or 385, 391–92, 448 P2d 562

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

(1968) which was limited to its own "particular contractual relationship" in *Cortez*, 356 Or at 276, note 23.

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

II THE EMPLOYER LIABILITY LAW

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

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

The result of this initiative was a law which was recognized as "broader in scope than any other Employers' Liability Law that has been

called to our attention."[2] *Browning v. Smiley-Lampert Lumber Co.*, 68 Or 502, 512, 137 P 777 (1914). See also *Camenzind v. Freeland Furniture Co.*, 89 Or 158,180, 174 P 139 (1918).

As noted in *Camenzind*, at 180:

> "The outstanding purpose of the statute is to protect employés from injury, and the statute should be liberally construed to effect that purpose. * * *.
>
> The duty imposed upon the master by the Employers' Liability Act is a nondelegable duty. * * *. It is also a continuing duty. * * *. And therefore, when we once determine the duty imposed upon the master, we find a duty which is absolute, nondelegable and continuing; the employer cannot absolve himself from the performance of it, nor can he delegate it to the employé, but it adheres to him without the possibility of suspension or interruption. Moreover, a transgression of the statute is negligence per se and is actionable. * * *." [Citations omitted.]

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

> " ELL liability can be imposed on a person or entity who (1) is engaged with the plaintiff's direct

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

> employer in a 'common enterprise'; (2) retains the right to control the manner or method in which the risk-producing activity was performed; or (3) actually controls the manner or method in which the risk producing activity is performed." [Citation omitted.] [Footnote omitted.]

III THE RETAINED RIGHT TO CONTROL

A. Facts Related to Retained Right to Control.

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

- The contract required the subcontractor to comply with all OSHA regulations and "any safety measures requested by contractor." ER 43.
- The subcontractor was required to provide a comprehensive "site specific safety plan" to the general contractor and was not permitted to commence work until the safety plan was submitted. *Id.* A fair reading of this requirement would include the right of the general contractor to approve, disapprove or require changes.
- The general contractor had its own "Accident Prevention Plan." ER 45. Although the Court of Appeals opinion said that

"plaintiff has not adduced evidence that the safety manual was ever given to Wood Mechanix", 268 Or App at 279, the actual testimony of Wood Mechanix representative was that he couldn't tell if he had seen the document before but it didn't look familiar. ER 89.[3]

- The Accident Prevention Manual was specifically applicable to subcontractors. It required subcontractors to "obey all OSHA and Tanasbourne Place Townhomes LLC Safety Standards and failure to do so will result in termination of their contract." Memo in Opposition, Ex N at page 6.
- The Accident Prevention Manual specifically gave superintendents the power to inspect and to issue "Safety Hazard Observed" notices to subcontractors. ER 46.
- The Accident Prevention Manual specified guardrails as a means of fall protection. ER 48. Since Polygon had no framers working on the job that requirement would apply to "whoever is doing the framing work." Motion to Supplement, Ex A (Deposition of Polygon Vice President Templeton at 96-97).

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

- The "Subcontractor Precon Safety Orientation," ER 44, specified termination of the contract and removal from the approved bidder list based on the occurrence of the same serious hazard on three occasions.
- The subcontractor's representative testified that, based on the Subcontractor Precon Safety Orientation, Polygon would be monitoring his safety operation. ER 38.

B. There Was Evidence of Retained Right to Control.

In *Cortez v. Nacco Material Handling Group, Inc.*, 356 Or 254, 274, 337 P3d 111 (2014) the court held that "retained right to control" could be shown by the governing statutes for LLCs. The retained right could also be based on legal authority, such as a contract, or by evidence of a retained right. *Boothby v. D.R. Johnson Lumber Co.*, 341 Or 35, 41, 137 P3d 699 (2006).

In the instant case the subcontractor was required by contract to comply with any safety measures specified by the general contractor. They were required to submit their safety plan for approval.[4] The general

[4] The Court of Appeals disposed of this fact by observing that this safety plan approval occurred before the subcontractor would be allowed to commence work. "After that Polygon's right to control Wood Mechanix's safety plan ceased* * *." 268 Or App at 276. That statement ignores the conclusion that this safety plan which the general contractor had the right to approve, reject or change governed safety measures while the project was in progress.

contractor adopted a safety plan which specifically governed subcontractors. That plan included the requirement of guardrails as the specified means of fall protection. Those requirements could only apply to framing subcontractors.

The Court of Appeals noted that there was no showing that the subcontractor actually received a copy of the safety plan. 268 Or at 279. Even if the evidence supported that finding the fact remains that the general contractor had reserved for itself the right to control subcontractors through its safety plan. And the contract required the subcontractor to follow any safety measures requested by the contractor.

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

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

447.[5] The Supreme Court reversed noting that *Wilson* dealt with the relationship of an owner and an independent contractor. The court went further, limiting *Wilson* to its particular contractual setting:

> "Whatever the merits of that decision, FN23 this case arises in a different context.
>
> > FN23. Plaintiff does not argue that Wilson was wrongly decided, and we assume that the court's decision was correct in light of the particular contractual relationship in that case." 256 Or at 376.

More importantly, the court stated:

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

C. Conclusion.

The duty imposed by the Employer Liability Law is nondelegable and absolute. *Camenzind v. Freeland Furniture Co.*, 89 Or 158,180, 174 P 139 (1918). If a general contractor could simply declare his or her lack of responsibility for worker safety through a contractual provision, such

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

clauses would become ubiquitous. The nondelegable duty to workers would be a legal fiction.

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

III ACTUAL CONTROL

A. Facts Related to Actual Control.

There was evidence that the general contractor specified guardrails as the means of fall protection. The trial judge so found. ER 11. The Accident Prevention Plan specified guardrails, ER 48, and the Polygon Vice President acknowledged that the guardrail requirement would apply to "whoever is doing the framing work." Motion to Supplement, Ex A, Templeton Dep 96-97. Wood Mechanix was "doing the framing work". ER 42. Wood Mechanix's representative testified that, based on the "Subcontractor Precon Safety Orientation," ER 44, he assumed that Polygon would be monitoring his safety program. ER 38.

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

However, after acknowledging that that work was the "risk producing activity" the court states that the action of the Polygon employee in directing plaintiff to work at height was insufficient "because it did not create the risk of danger that contributed to plaintiff's injury." 268 Or App at 271.[6]

B. There Was Evidence of Actual Control.

In *Woodbury v. CH2M Hill, Inc.*, 335 Or 154, 61 P3d 918 (2003) defendant hired the plaintiff's employer to install a water pipe, part of which would be elevated. They jointly decided to construct a wooden platform for work on the elevated part. The details of how to construct the platform were left to plaintiff's direct employer and defendant had no role in the actual construction. The platform was constructed without fall protection. When the project was completed plaintiff was required to disassemble the platform. None of defendant's employees were involved. Plaintiff fell.

The court, at 162, held that there was actual control:

> "In light of those facts, there was evidence from which the jury reasonably could conclude that defendant exercised actual control both over the decision to use a wooden platform and over the choice of how that platform was constructed. *We conclude that there is evidence in the record to support a jury finding that defendant exercised*

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

> *actual control over the manner or method in which the risk-producing activity (working at height) was performed * * *."* [Emphasis added.]

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

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

IV CONCLUSION

Your *Amicus* respectfully suggests that the court allow the Petition for Review. The petition raises serious questions relating to the nondelegable duty to protect workers form injury or death and whether that duty can be avoided by contractual clauses of non-responsibility.

RESPECTFULLY SUBMITTED this 12th day of February, 2015.

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

Brief Length

I certify that (1) this brief complies with the word-count limitations in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 3249 words.

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s/ W. Eugene Hallman
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Certificate of Filing and Service

I certify that on the 12th day of February, 2015, I filed the original **Brief of *Amicus Curiae* Oregon Trial Lawyers Association** with the State Court Administrator by Electronic Filing.

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

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