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COLORADO COURT OF APPEALS
Court Address: 2 East Fourteenth Ave.
Denver, CO 80202

District Court, Denver County, Colorado
Case No. 2014CV31144
Hon. Elizabeth A. Starrs, District Court Judge

Plaintiff/Appellant: RICHARD BLAKESLEY

v.

Defendants/Appellees: BT CONSTRUCTION, INC.; BNSF RAILWAY COMPANY; DENVER TRANSIT PARTNERS, LLC; DENVER TRANSIT CONSTRUCTORS, LLC; JOE BARGER; LOUIS SANGOINETTE; and ERNESTO IBARRA

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Case No.: 2016CA763

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OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirement of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in those rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

x It contains 9,362 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

x **For each issue raised by the appellant**, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

Date: September 9, 2016.

Respectfully submitted,

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ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in granting the partial summary judgment motion of BT Construction, Inc., Denver Transit Partners, LLC, Denver Transit Constructors, LLC, Joe Barger, Louis Sangoinette and Ernesto Ibarra.

2. Whether the trial court erred in granting the summary judgment motion of BNSF Railway Company.

STATEMENT OF THE CASE

A. Nature of the Case:

This is personal injury action. Richard Blakesley was severely injured on June 4, 2012 when a "track hoe," an excavator that moves on tracks like a tank, crushed his left foot. After twelve surgeries failed to save Mr. Blakesley's foot, doctors amputated his left leg below the knee.

Mr. Blakesley filed suit on February 5, 2014. The defendants included BT Construction, Inc. ("BTC"), Denver Transit Partners, LLC ("DTP") and Denver Transit Constructors, LLC ("DTC") and three BTC employees, Joe Barger, Louis Sangoinette and Ernesto Ibarra. These persons and entities are referenced collectively as the Construction Defendants. Plaintiff asserted negligence claims against the Construction Defendants. (R. CF pp. 9-11, ¶¶ 75-92.)

The final defendant was BNSF Railway Company ("BNSF"). Mr. Blakesley asserted a claim under C.R.S. § 13-21-115 (*id.* p. 141, ¶¶ 94-102) and an alternative common law negligence claim (*id.* p. 142, ¶¶ 104-110).

B. **Relevant Facts:**

Overview: Mr. Blakesley's injury occurred during construction of the Gold Line of the Regional Transportation District's ("RTD") FasTracks light rail system ("FasTracks") at the intersection of Olde Wadsworth Boulevard and Grandview Avenue in Arvada ("Wadsworth Project").

BTC was charged with relocating underground utilities beneath BNSF railroad tracks at the intersection. For this job, utilities had to be enclosed in 20-inch diameter steel casing. Construction standards required a level 6G certified welder to weld the casing. BTC's business is excavating; it does not have certified welders. Mr. Blakesley was a level 6G certified welder for Mountain Man Welding and Fabrication, Inc. ("MM Welding"). (R. CF p. 131, ¶ 2.) BTC orally asked that MM Welding send a certified welder to the Wadsworth Project on June 4, 2012.

A written contract was required for all subcontractors before they started work. BTC did not enter into a written contract with MM Welding for its services at the Wadsworth Project before Mr. Blakesley started work.

Mr. Blakesley drove his MM Welding truck to the Wadsworth Project on the morning of June 4, 2012. BTC's foreman directed Mr. Blakesley to cut casing above ground near the track hoe. The BNSF foreman, who was in charge of safety around the railroad tracks, authorized Mr. Blakesley to remove his high visibility vest. While Mr. Blakesley was rolling a 20-foot section of casing into position, BTC employees operating the track hoe ran over and crushed Mr. Blakesley's left foot. (R. CF p. 137, ¶¶ 62-69.) The track hoe and area are depicted at R. CF p. 400.

Construction Defendants' involvement: FasTracks involved construction of a light rail line from Wheat Ridge to Arvada. (R. CF p. 133, ¶ 24.) RTD entered into an agreement with DTP. (*Id.* p. 133, ¶ 25.) The agreement required DTP to design and build the line between Union Station and Arvada. (*Id.*)

DTP contracted its design and construction obligations to DTS. Utility relocation was included. (R. Supr. 375-376, Art. 2.1; *see also id.* p. 4, ¶ F.)

DTS contracted its design and construction obligations to DTC. (R. CF p. 134, ¶ 31.) DTC had to perform "all Work necessary to complete" FasTracks, including utilities relocation. (R. Supr. pp. 39-40, 216.)

DTC contracted the work of upgrading and relocating utilities to BTC. (R. CF p. 134, ¶ 35.)

BTC's relationship with MM Welding: The work BTC undertook involved welding. DTC mandated that welding be done by welders with a level 6G certification.[1] BTC had no certified welders. After Mr. Blakesley's injury, BTC employees repeatedly took and failed the certification test. (BTC depo. at 28:9 – 29:12, 31:12-15, 32:11 – 33:14, R. CF pp. 248-252.) BTC relied on MM Welding to provide certified welders. (*Id.* at 27:4-9, R. CF p. 247.)

BTC and MM Welding entered an agreement titled General Conditions in November 2010. The agreement stated:

- There must be a separate contract for each job. (R. CF p. 219, § 2.a.)
- Each separate subcontract must specifically describe MM Welding's work. (*Id.* § 2.d.)
- MM Welding could only perform the work described in the subcontracts. (*Id.* § 2.e.)

Jeffrey Scafe, welding superintendent for MM Welding, testified to the importance of specific job descriptions for each separate FasTracks project:

> [T]he scope of work for each job was unique and incredibly varied. Moreover, the job scope of a certified welder for each project differed vastly

[1] Jesse Grantham, a welding expert who oversees welder certification programs, testified by affidavit that becoming a certified welder requires showing great proficiency. (R. CF p. 244, ¶ 2.) The 6G certification Mr. Blakesley had is among the most difficult to obtain. (*Id.* ¶ 3.) Hundreds of hours of classes and hands-on training are required, and many who train for 6G certification fail the test. (*Id.* ¶ 4.)

> from job to job—especially on the RTD Projects. The differences ranged in size of pipe, thickness of pipe, nature of pipe, purpose of pipe, pit size, terrain surrounding the pits, exposure to pinch points, exposure to water hazards, exposure to heavy equipment, and size of work site foot print, to name just a few variables.

(R. CF p. 217, ¶ 4.)

On March 31, 2011, over a year before Mr. Blakesley's injury, BTC and MM Welding entered into a subcontract for the Milwaukee Street Project, an RTD job at 42nd Street and Milwaukee. MM Welding's work was "Welding." (R. CF p. 215.) The Milwaukee Street Project was BTC's first work for DTC on FasTracks. (BTC depo. at 39:12-16, R. CF p. 253.) MM Welding's work was limited to "certified welding services." (*Id.* at 41:7-10, R. CF p. 254.)

The Wadsworth Project, the site of the injury, was a subsequent and separate job. BTC violated the General Conditions and its contract with DTC by ordering work from MM Welding at the Wadsworth Project without a written contract.

After Mr. Blakesley's injury, BTC realized it had no complying contract with MM Welding for Mr. Blakesley's services on June 4, 2012. BTC tried to create a contract after the fact by sending MM Welding a letter on July 30, 2012, stating that the separate Milwaukee Street contract applied to "any work performed [by MM Welding] for other locations that have been added by DTC under contract

modifications to the original contract." (R. CF p. 214.) MM Welding did not sign the letter until September 12, 2012, long after the injury. (*Id.*)

DTC's relationship with BTC: The DTC-BTC contract required that:

- BTC must hold daily briefings covering safety topics and work tasks. (R. CF p. 237, Attachment F, § VIII ¶ 5.)
- BTC must protect persons from injury, and comply strictly with all safety laws. (*Id.* p.228, Part III—Article 6.1.)
- BTC could not subcontract work without notifying DTC and obtaining DTC's written acceptance. (*Id.* p.229, Part III—Article 7.1.)
- BTC had to conduct safety training, including regular safety meetings. (R. CF p. 232 Attachment D, ¶ 9.4.)
- BTC must ensure that subcontractors knew the site layout and specific operational zones. (*Id.* p. 233, Attachment E, ¶ 21.)
- BTC must conduct a daily job hazard analysis, the Safety Task Assignment ("STA") process, before each assignment. STA included reviewing each step of the job, identifying hazards, and eliminating or mitigating hazards. (*Id.* p. 242, § XII ¶ 1.)

The Wadsworth Project: BTC's work involved excavating and horizontal boring to install 72 feet of pipe casing beneath BNSF tracks. (R. Supr. p. 149, ¶ 3.)

The casing had a 20-inch diameter. 20-inch casing comes in 20-foot lengths. (BTC depo. at 85:7-10, R. CF p. 267.) Due to space constraints, BTC had to excavate a "short pit." (*Id.* at 93:4-13, R. CF p. 268.) That meant the casing had to be cut into 10-foot lengths. (*Id.* at 84:16 – 85:3, R. CF pp. 266-267.) In contrast, the Milwaukee Street project – the prior job for which BTC hired MM Welding – had a different scope of work. Moreover, Milwaukee Street did not involve a "short pit" and did not require cutting casing. (R. CF p. 217, ¶ 6.)

The Wadsworth Project work area: The area was small and congested, measuring about 35 feet square, with a fence to keep out pedestrians. (Barger depo. at 48:16-23, R. CF p. 471; BTC Incident Report, R. CF p. 551.) Within that confined space was the pit excavation, track hoe, pipe casing, dunnage for the casing, the BTC crew, and Mr. Blakesley. (See photos at R. CF pp. 272, 398-400.)

BNSF's involvement: RTD and BNSF entered into a Relocation and Construction Agreement ("Agreement") on March 31, 2010. RTD had purchased real property interests from BNSF for use in the light rail system. (R. CF p. 353.) The Agreement covered "relocation, modification and construction of improvements," including utility relocation. (*Id.*)

RTD had to have "all Non-BNSF Contractors" – including BTC and its subcontractors – comply with BNSF's safety rules and have contractors complete a

BNSF online safety orientation. (*Id.* p. 361.) Mr. Blakesley took the BNSF safety course. (Blakesley dep. at 148:4-14, R. CF p. 462.)

BNSF "has no duty or obligation to observe or inspect, or to halt work by any Non-BNSF contractor . . . ." (R. CF p. 362.) However, BNSF had full authority to stop work by contractors:

> BNSF will have the right to stop work if any of the following events take place: (i) If BNSF determines that proper supervision and inspection is not being performed by RTD at any time during construction of the RTD Initial Improvements, (ii) any Non-BNSF Contractor performs any work in a manner contrary to the applicable Approved Plans; (iii) any Non-BNSF Contractor, in BNSF's opinion, prosecutes its work in a manner which is hazardous to BNSF property, facilities, personnel, or the safe and expeditious movement of railroad traffic . . . .

(*Id.* p. 361.) Glenn Gallowicz, the BNSF foreman on duty at the time of injury, repeatedly stopped the work of outside contractors for safety reasons, including concerns that contractor employees would be injured by their own equipment. (Gallowicz depo. at 45:4-14, R. CF p. 436.)

Based on the BNSF safety orientation, Mr. Blakesley concluded the BNSF flagger had safety and supervisory control over jobs near BNSF's tracks. (Blakesley depo. at 147:8 – 148:14, R. CF p. 462.) BNSF's safety training stated that the BNSF representative must approve on-site storage locations. (BNSF Course 100, R. CF p. 501.) BNSF required contractors to wear flame resistant

orange reflective vests within the railroad right of way and within 50 feet of operating construction equipment. (R. CF pp. 500-501.)

The railroad right of way extends from 50 to 150 feet either side of BNSF's tracks. (Barger depo. at 49:14-17, R. CF p. 472.) The location of this work area vis-à-vis BNSF's track is shown at R. CF p. 398-400.

MM Welding's instructions to Mr. Blakesley: June 4, 2012 was the first time Mr. Blakesley worked at the Wadsworth Project. (Blakesley dep. at 80:6-8, R. CF p. 203.) On the preceding Friday, MM Welding's vice president told Mr. Blakesley to arrive on Monday June 4 at 8:00 a.m. (*Id.* at 80:14-22.)

The vice president said that BTC would be doing a bore pit, meaning they would run pipe casing beneath railroad tracks. (*Id.* at 81:2-9, R. CF p. 204.) The description led Mr. Blakesley to believe that he would only be welding, not cutting casing. (*Id.* at 81:17-23, R. CF p. 204.)

June 4, 2014 Safety Meeting: Each work day began with a 7:00 a.m. safety meeting. On June 4 the attendees were BNSF foreman/safety representative Gallowicz; BTC foreman Barger; BTC laborer Jaime Parra; BTC track hoe operator Sangoinette; and BTC spotter Ibarra. Gallowicz gave a BNSF safety briefing. (Gallowicz depo. at 30:5-10, R. CF p. 380.) Barger and the BTC

employees went over the STA form. Mr. Blakesley's involvement and his duties were not discussed. (Sangoinette depo. at 97:4-7, R. CF p. 453.)

In violation of safety procedures that require all workers to attend safety meetings before work begins, BTC foreman Barger excluded Mr. Blakesley from the June 4 meeting. On the night of June 3, Barger told Mr. Blakesley not to attend the safety meeting the next morning because BTC did not want to pay for his time. (Blakesley depo. at 149:16-150:5, 150:20-151:2, R. CF p. 463.)

It was important for all workers to attend on-site safety meetings. (Daniell depo. at 115:13-19, R. CF p. 269.) All workers must know what others are doing and the hazards involved. (*Id.* at 115:17-22.) On June 4, 2012 the meeting ended before Mr. Blakesley arrived. (*Id.* at 115:23 – 116:5, R. CF pp. 269-270.) BTC saved $100-$150 by excluding Mr. Blakesley. (*Id.* at 117:5-8, R. CF p. 117.)

Mr. Blakesley's arrival and meeting with Gallowicz: As instructed, Mr. Blakesley arrived shortly before 8:00 a.m. (Blakesley depo. at 82:8-11, R. CF p. 455.) BNSF required that everyone report to Gallowicz before starting work. (Gallowicz depo. at 20:25-21:1, 21:10-12, 21:23 – 22:6, R. CF pp. 432-433.) Mr. Blakesley reported to Gallowicz for a safety briefing and instructions on where to park MM Welding's truck. (*Id.* at 82:16-83:6, R. CF p. 455; Barger depo. at 37:11-

15, R. CF p. 469.) Barger directed Mr. Blakesley to cut casings into ten-foot lengths. (Blakesley depo. at 83:12-15, 86:14-22, R. CF pp. 455, 456.)

Mr. Blakesley wore the high visibility orange vest MM Welding issued him. The vest was flammable. (*Id.* at 145:21 – 146:5, R. CF p. 462.) Mr. Blakesley asked Gallowicz for permission to remove the vest while welding and cutting. (*Id.* at 146:6-9, R. CF p. 462; Gallowicz depo. at 28:9 – 29:11, R. CF pp 434-435.)

Despite the BNSF safety rule that contractors wear high-visibility vests within 50 feet of construction equipment, BNSF representative Gallowicz authorized Mr. Blakesley to remove the orange safety vest. (Blakesley depo. at 146:11-15, R. CF p. 462; Gallowicz depo. at 29:4-11, R. CF p. 435.)

The injury: Mr. Blakesley was instructed to cut the pipe casing into 10-foot sections that could be lowered into the short pit. He made the cuts using a torch. (Blakesley depo. at 100:13-17, R. CF p. 207.) Mr. Blakesley began cutting the first casing. To finish the bottom of the cut, he had to roll the casing off its dunnage westward, toward the track hoe. The casing rolled too far, coming to rest against the trench shield near the front right track of the track hoe. A photo of the casing, trench shield and track hoe appears at R. CF p. 525.

The portion of the casing that still needed cut was resting on the ground and inaccessible. Mr. Blakesley had to roll the casing eastward away from the track

hoe, which would require that he place part of his body in front of the vehicle's right track. (Blakesley depo. at 153:9 – 154:1, R. CF. p. 464.)

Following safety protocol Mr. Blakesley told track hoe operator Sangoinette and spotter Ibarra that he needed to step in front of the track hoe to do his work. (Blakesley depo. at 100:25 – 101:114, 115:7-17, R. CF pp. 457-458, 459.) As Mr. Blakesley understood it, Sangoinette and Ibarra agreed the track hoe would not move until Blakesley finished and was out of the danger zone. (Blakesley Depo. at 115:14-17, 153:2-15, 155:14-17, R. CF p. 459, 464.)

At least two people could see Mr. Blakesley trying to roll the casing. The first was Gallowicz, who was in a pickup truck to the front (north) and right (east) of the site, on the north side of the tracks. (Gallowicz depo. at 59:3-6, R. CF p. 438; Sangoinette depo. at 49:7-17, R. CF p. 448.) The second was spotter Ibarra, who had unobstructed view. (Ibarra depo. at 41:22-23, 42:11-15, 42:25-43:2, 44:21-23, R. CF p. 524; Blakesley depo. at 140:6-14, R. CF p. 461.)

As Mr. Blakesley pushed against the casing, his left foot was extended behind him. Barger, working inside the pit, signaled Ibarra for the track hoe to move forward. Ibarra relayed the signal to Sangoinette, who drove forward, crushing Plaintiff's left foot. (Ibarra depo. at 39:13 – 40:4, R. CF p. 523.)

Mr. Blakesley underwent twelve surgeries to save his left foot. His thirteenth surgery amputated his left leg below the knee. He has had multiple prosthetics and remains on intensive pain management. (*Id.* at 137:3 – 138:5, R. CF pp. 209-210.)

BTC's incident report lists as contributing factors "[l]imited space to complete the necessary work," noise and possible "lack of situational awareness" by BTC employees. (R. CF p. 551.)

C. **Procedural history:**

Mr. Blakesley filed suit on February 5, 2014. The Construction Defendants moved for partial summary judgment, contending they had workers' compensation immunity as "statutory employers." (R. Supr., pp. 1-11.) The trial court granted that motion on September 8, 2015. (R. CF pp. 343-348.)

BNSF moved for summary judgment, contending it was not a "landowner" and owed no common law duty. The trial court granted that motion on April 13, 2016. (*Id.* pp. 662-667.) On the same day the court vacated the trial and dismissed the case. (*Id.* p. 661.) Mr. Blakesley filed a timely Notice of Appeal. (*Id.* p. 685.)

D. **Orders Presented for Review:**

Mr. Blakesley appeals the orders granting the Construction Defendants' motion for partial summary judgment (R. CF p. 343), granting BNSF's motion for summary judgment (*id.* p. 662), and dismissing the case (*id.* p. 661).

SUMMARY OF ARGUMENT

1. The trial court erred in granting the Construction Defendants' motion because those entities were not statutory employers.

A. The trial court failed to apply the regular business test. A company is a statutory employer only if the work it contracted out was part of its regular business. The work BTC passed on MM Welding was not part of BTC's regular business because BTC was incapable of performing that work.

B. A statutory employer is a company that "contract[s] out" all or part of its work to the injured person's direct employer. C.R.S. § 8-41-401(1)(a)(I). Here, there was no complying contract because there was no writing between BTC and MM Welding for work on the Wadsworth Project. In addition, there was no meeting of the minds regarding exactly what MM Welding was to do.

2. The trial court erred in granting BNSF's summary judgment motion.

A. The trial court granted summary judgment on causation, an issue BNSF never argued.

B. BNSF was a "landowner" per C.R.S. § 13-21-115(1) because it had possession of the premises and was responsible for the dangerous condition.

C. Alternatively, BNSF owed a common law duty of reasonable care.

ARGUMENT

I. THE TRIAL COURT ERRED IN AWARDING THE CONSTRUCTION DEFENDANTS SUMMARY JUDGMENT.

Standard of Review and Preservation: Summary judgment rulings are reviewed *de novo*. *TABOR Found. v. Regional Transp. Dist.*, 2016 COA 102, ¶ 13. The trial court's ruling appears at R. CF p. 348.

"Summary judgment is a drastic remedy and is never warranted except on a clear showing that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1339-40 (Colo. 1988). The evidence and all reasonable inferences must be construed in the nonmoving party's favor. *Lombard v. Colorado Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 570 (Colo. 2008).

A. **Applicable law:**

For summary judgment purposes the Construction Defendants never disputed that they were egregiously negligent and that their negligence caused Mr. Blakesley's injuries. The sole basis of their motion was workers' compensation immunity per the statutory employer doctrine. (R. Supr. p. 2.)

Immunity is an affirmative defense. *Bain v. Town of Avon*, 820 P.2d 1133, 1136 (Colo. App. 1991); C.R.C.P. 8(c). A defendant claiming workers' compensation immunity must "establish the factual and legal predicates for the

defense." *Popovich v. Irlando*, 811 P.2d 379, 385 (Colo. 1991). Since the Construction Defendants raised the issue on summary judgment, they had to prove the defense beyond any genuine factual dispute. *See* C.R.C.P. 56(c).

Workers' compensation law designates as "employers" entities that would not qualify as such under the common law. *Krol v. CF&I Steel*, 2013 COA 32, ¶ 24, 307 P.3d 1116. "Statutory employer" status extends only to those entities designated statutory employers in the code. *Id.* (citing *Finley v. Storage Tech. Corp.*, 764 P.2d 62, 64 (Colo. 1976)). A company subcontracting its work must provide workers' compensation benefits to injured employees of subcontractors. C.R.S. § 8-41-401(1)(a)(I). But if the injured person's direct employer had worker compensation coverage, the hiring company and its "upstream" contractors are generally as immune from civil liability as the direct employer. *Id.* § 8-41-401(2); *Buzard v. Super Walls, Inc.*, 681 P.2d 520, 522 (Colo. 1984).

A statutory employer is a "person . . . operating or engaged in or conducting any business by . . . contracting out any part or all of the work thereof to any . . . contractor, or subcontractor . . . ." C.R.S. § 8-41-401(1)(a)(I) (emphasis added). Thus, immunity does not apply when there is no contract between the plaintiff's direct employer and the putative statutory employer. *See, e.g., Krueger v. Merriman Electric*, 488 P.2d 228 (Colo. App. 1971) (statutory employer doctrine

did not apply in action by injured employee of subcontractor against another subcontractor where there was no contractual relationship).

A contract alone does not make the hiring company a statutory employer of the subcontractor's employees. That status exists "only if the [contracted] work is part of an entity's regular business, as defined by its total business operation." *Krol*, 2013 COA 32, ¶ 25. The Colorado Supreme Court has held:

> [T]he "regular business" test is satisfied where the disputed services are such a **regular part of the statutory employer's business** that **absent the contractors services, they would of necessity be provided by the employer's own employees**.
>
> From these cases there emerges a broader standard that takes into account the constructive employer's **total business operation**, including the elements of **routineness, regularity, and the importance of the contracted service to the regular business** of the employer.

Finlay, 764 P.2d at 66 (emphasis added, citations omitted). Thus, "not every type of work contracted out will render an entity a statutory employer under section 8-41-401: the nature of the work is critical." *Krol*, 2013 COA 32, ¶ 25.

B. BTC was not Mr. Blakesley's statutory employer because the work BTC contracted out was not part of BTC's regular business.

1. The regular business test applies.

Mr. Blakesley discussed the regular business test at length in his response to the Construction Defendants' motion. (R. CF pp. 192-197.) The trial court did not mention the regular business test. (*See id.* pp. 343-348.) Presumably, the court

accepted the Construction Defendants' contention that the regular business test is superfluous in light of *Monell v. Cherokee River, Inc.*, 2015 COA 21, 347 P.3d 1179, decided after Mr. Blakesley filed suit.

The regular business test applies for two reasons. First, *Monell* held that the test applies where the scope of the contracted-out work was unclear. 2015 COA 21, ¶ 12. That is what happened here. Neither MM Welding nor Mr. Blakesley had any real idea what Mr. Blakesley would encounter on the morning of the injury. Mr. Blakesley did not know that he would be working in a small, enclosed area within the zone of danger of an operating track hoe. He did not know of the need for a non-flammable orange vest. The cutting work to which Mr. Blakeley was assigned appeared nowhere in the STA and was not discussed during the safety meeting, from which Mr. Blakesley was intentionally excluded in violation of the BTC-DTC contract. On those facts, it cannot be said as a matter of law that the scope of MM Welding's work for June 4, 2012 was "clear."

The circumstances of Mr. Blakesley's injury are in themselves proof of an unclear work scope. Experienced construction professionals like those at the Wadsworth Project on June 4, 2012 would not have injured Mr. Blakesley had everyone been on the same page regarding all the work that was occurring. The Milwaukee Street contract, which BTC tried to make applicable to the Wadsworth

Project after the fact, featured a different scope of work, no "short pit" and no cutting of pipe casing. (R. CF p. 217, ¶ 6.) At the very least, a jury should decide whether or not the scope of MM Welding's work on June 4 was clear.

Second, a decision of one Court of Appeals division is not binding on another division. *People v. Clark*, 2015 COA 44, ¶ 207, 370 P.3d 197; *Valentine v. Mountain States Mut. Cas. Co.*, 252 P.3d 1182, 1195 (Colo. App. 2011). This Court should not follow *Monell* because it was wrongly decided.

The *Monell* division held the regular business test "superfluous" where the scope of the work contracted out by the putative statutory employer to the direct employer was clear. 2015 COA 21, ¶ 13.

Monell cited no authority for its "clear scope of work" exception. The reason is simple: no such authority existed. *Monell* contravened Colorado Supreme Court precedent holding that "the test for whether statutory employer status exists under section 8-48-101 [prior version of § 8-41-401] [i]s whether the work contracted out is part of the 'regular business' of the alleged employer." *Finlay*, 764 P.2d at 65. The regular business test is <u>the</u> standard for determining statutory employer status, and the test applies in <u>all</u> cases where a company like BTC claims immunity. *See id.; see also San Isabel Elec. Ass'n. v. Bramer*, 510 P.2d 438, 440 (Colo. 1973); *Pioneer Constr. Co. v. Davis*, 381 P.2d 22, 24 (Colo. 1963). *Meyer v. Lakewood*

Country Club, 220 P.2d 371, 372 (Colo. 1950); *American Radiator Co. v. Franzen*, 254 P. 160 (Colo. 1927); *Krol v. CF&I Steel*, 2013 COA 32, ¶ 25; *Humphrey v. Whole Foods Rocky Mountain/ Southwest, L.P.*, 250 P.3d 706, 709-711 (Colo. App. 2010); *Blood v. Qwest Servs. Corp.*, 224 P.3d 301, 329 (Colo. App. 2009), *aff'd* 252 P.3d 1071 (Colo. 2010), *cert. dismissed*, 123 S. Ct. 1087 (2012); *Snook v. Joyce Homes, Inc.*, 215 P.3d 1210, 1218 (Colo. App. 2009); *Cowger v. Henderson Heavy Haul Trucking, Inc.*, 179 P.3d 116, 119-120 (Colo. App. 2007), *cert. dismissed*, Jan. 14, 2008; *Thornbury v. Allen*, 39 P.3d 1195, 1198 (Colo. App. 2001); *M&M Mgmt. Co. v. Industrial Claims Office*, 979 P.2d 574, 577 (Colo. App. 1998); *Virginians Heritage Square Co. v. Smith*, 808 P.2d 366, 368 (Colo. App. 1991); *Fraser v. Kysor Indus. Corp.*, 607 P.2d 1296, 1303 (Colo. App. 1979), *rev'd on other grounds*, 642 P.2d 908 (Colo. 1982); *Posey v. Intermountain Rural Elec. Ass'n*, 585 P.2d 303, 304 (Colo. App. 1978).

The foregoing cases also refute *Monell*'s notion that the regular business test is inapplicable if the scope of work was clear. Courts apply the test even if the job the plaintiff was doing fell clearly within the scope of work the hiring company contracted to the direct employer. *E.g.*, *Finlay*, 764 P.2d at 63 (employee of a janitorial company hired by the alleged statutory employer to provide cleaning services injured while cleaning a bathroom); *Humphrey*, 250 P.3d at 708-709

(employee of a food delivery company hired to make weekly food deliveries to the putative statutory employer's store, injured while making a delivery).

The *Monell* division did not acknowledge what it was doing, but it completely rewrote statutory employer law. The intent behind the statutory employer doctrine was "to prevent employers from evading compensation coverage by contracting-out work instead of directly hiring the workmen." *Bramer*, 510 P.2d at 440. But to keep the class of constructive employers within reasonable and intended limits, the legislature conditioned statutory employer status on the contracted-out work being "(1) a part of the normal business of the company contracting out such business and (2) business which the company would ordinarily accomplish with its own employees." *Campbell v. Black Mountain Spruce, Inc.*, 677 P.2d 379, 381 (Colo. App. 1983). Those limits appear in language limiting "employer" status to companies doing their "business" by contracting out "the work thereof." C.R.S. § 8-41-401(1)(a)(I). *Monell* upended that sensible balance by eliminating the limitations and foisting employer status on anyone who contracts out any work. *Monell* expands liability to non-employees for workers' compensation benefits, and expands immunity from civil liability, far beyond anything the legislature envisioned. The regular business test facilitates the

goal of preventing evasion of the workers' compensation code while limiting the class of statutory employers as the legislature intended.

Monell is an anomaly that contravenes decades of established, well-reasoned precedent holding that the regular business test determines statutory employer status. Mr. Blakesley respectfully submits that *Monell* was wrongly decided. This Court should decline to follow *Monell* and instead apply the regular business test.

2. The work Mr. Blakesley was doing at the time of injury was not part of BTC's regular business because BTC was incapable of performing that work.

Again, "the 'regular business' test is satisfied where the disputed services are such a regular part of the statutory employer's business that absent the contractor's services, they would of necessity be provided by the employer's own employees." *Finlay*, 764 P.2d at 66. BTC submitted an affidavit from its vice president pontificating that "BT Construction would have had to perform the work itself" had it not contracted with MM Welding. (R. Supr. p. 149, ¶ 4.) But the record conclusively proves that BTC could not have done the work itself.

BTC had to use level 6G certified welders. BTC had no such welders on its own payroll. BTC tried to have its own employees obtain the certification, but they repeatedly failed the test. BTC cannot claim that 6G welding is part of its regular

business when its own employees could not pass the tests. BTC itself has never provided 6G certified welding services as part of its routine business.

Instructive is *Frazier v. Kysor Industrial Corp., supra.* There, the employee of a company hired to deliver a four-ton machine tool was injured while unloading the device at its final destination. The distributor that hired the delivery company claimed it was the injured worker's statutory employer. This Court disagreed. Although the distributor had delivered smaller equipment to purchasers, it did not have the machinery or expertise to move heavy items such as machine tool at issue. 607 P.2d at 1303. Since the distributor could not make the delivery itself, and had no history of making such deliveries, the work plaintiff was doing at the time of injury was not within the distributor's regular business. That being true, the distributor was not the injured worker's statutory employer. *Id.*

In *Ledbetter v. Wal-Mart Stores, Inc.*, No. 06-cv-01958-WYD-MJW, 2008 U.S. Dist. LEXIS 38065 (D. Colo. May 9, 2008), Wal-Mart hired Eaton Electrical to perform thermographic imaging services at various Wal-Mart stores. Eaton hired RS Services to provide electricians. The plaintiffs were employees of RS Services. While working at a store in Aurora, the plaintiffs were injured in an electrical accident. *Id.* at *3, 7. The plaintiffs collected workers' compensation benefits

through RS, their employer, and filed suit against Eaton, which argued that it was immune from suit as a statutory employer.

The court denied the putative statutory employer's motion for summary judgment. The court, applying Colorado's regular business test, found an issue of fact "as to whether Eaton always uses subcontractors as part of its regular business operation for necessary and integral tasks or whether this type of work was ordinarily handled by Eaton employees," an issue that was "central to the analysis of whether Eaton was a statutory employer . . . ." *Id.* at *13-14.

Here, the nature of BTC's business, the terms of its original subcontract with MM Welding, and the fact that BTC has no history of providing certified welding services itself at the least established an issue of material fact.

BTC did not have any certified welders who could continue Plaintiff's work after he was injured. BTC farmed this work out precisely because it is not a routine or ordinary part of BTC's business and no BTC employee could have performed the work as they lacked the necessary skill.

In addition, the regular business test focuses not only on the job at issue but also the putative statutory employer's "**total business operation**, including the elements of routineness, regularity, and the importance of the contracted service to the regular business of the employer." *Finlay,* 764 P.2d 66 (emphasis added). BTC

presented no evidence of its "total business operation" or the "routineness, regularity, and the importance" of level 6G certified welding to its total business. BTC had the burden of proving immunity. *See Popovich*, 811 P.2d at 385. Since BTC failed to submit evidence regarding its total business operation – evidence essential to establishing statutory employer status under the regular business test – it failed to discharge its burden of proving the immunity defense.

On these facts, the work BTC contracted to MM Welding was not part of BTC's regular business. At the very least, a jury should decide the issue since, construing the evidence in the light most favorable to Mr. Blakesley, the work was not part of BTC's regular business. *See Cowger,* 179 P.3d at 120 (Court remanded for trial, finding genuine issue of material fact regarding statutory employer status under the regular business test). And if BTC is not a statutory employer, neither is any upstream contractor. *See Buzard,* 681 P.2d at 522-523. The trial court erred in granting the Construction Defendants' motion.

B. The absence of a complying contract between BTC and MM Welding, and the absence of a meeting of the minds, precludes any finding that BTC was Mr. Blakesley's statutory employer.

The statutory employer defense applies only to contracted-out work. C.R.S. § 8-41-401(1)(a)(I); *Krueger*, 488 P.2d at 232. There was no written contract governing MM Welding's work at the Wadsworth Project. The only "applicable"

document was signed three months after the injury. (R. CF p. 214.) Further, there was no complying contract between DTC and BTC governing BTC's work at the Wadsworth Project until two months after the injury. (R. Supr. pp. 150-151.)

The trial court wrote that it knew of no law requiring a written contract and found "there was at the very least an oral agreement" between BTC and MM Welding. (R. CF p. 347.) Mr. Blakesley agrees that no case law or statute requires written contracts for statutory employer status. However, the Construction Defendant themselves required written subcontracts for each jobsite. Hence, under the facts here, an oral agreement could not trigger § 8-41-401.

The contract between DTC and BTC provided that BTC could not subcontract work without notifying DTC and obtaining DTC's written acceptance. (R. CF p. 229, Article 7.1.) The contract between BTC and MM Welding mandated separate, written subcontracts for each jobsite describing with specificity the scope of MM Welding's work. (*Id.* p. 219, § 2.a, 2.d.)

The Construction Defendants required written contracts. They violated their own rule at two levels of the chain, DTC-BTC and BTC-MM Welding. The Construction Defendants chose to order their affairs that way. The trial court erred by creating an exception to the rule after Mr. Blakesley lost his leg.

Contracting parties may waive a provision requiring that modifications be in writing. *Arkansas Valley Bank v. Esser*, 224 P. 227, 230 (Colo. 1927); *Williams v. Colorado Springs College of Business, Inc.*, 736 P.2d 419, 420 (Colo. App. 1987). That did not occur here. There is nothing in the record indicating that MM Welding or BTC knowingly and voluntarily waived the requirement of a written subcontract. *See Cordillera Corp. v. Heard*, 612 P.2d 92, 93 (Colo. 1980) (elements of waiver). To the contrary, it appears that BTC violated two contracts to which it previously agreed, then sought to paper over its mistake by having MM Welding sign a document after the fact stating that all work MM Welding does for BTC would be subject to the Milwaukee Street contract. (R. CF p. 214.)

Moreover, BTC had no authority to unilaterally "waive" the provisions in its contract with DTC requiring DTC's prior written approval for BTC to hire subcontractors. The notion that BTC somehow waived DTC's rights fails.

The requirement for written scope-of-work documents makes sense. Each jobsite has its own unique conditions. A document setting forth in detail the work Mr. Blakesley was expected to do would better enable him to prepare for the conditions, particularly the cramped quarters and working in close proximity to a track hoe. By failing to follow its own requirements, BTC deprived Mr. Blakesley of valuable information and exposed him to danger.

Further, a meeting of the minds is essential to contract formation. *Jorgenson v. Colorado Rural Props., LLC,* 226 P.3d 1255, 1260 (Colo. App. 2010). Whether a meeting of the minds occurred is generally a question of fact. *E.g., Avemco Ins. Co. v. Northern Colo. Air Charter, Inc.,* 25 P.3d 1238, 1241 (Colo. App. 2000), *rev'd on other grounds,* 38 P.3d 555 (Colo. 2002). To prove their affirmative defense the Construction Defendants had to show that BTC "contract[ed]" with MM Welding, C.R.S. § 8-41-401(1)(a)(I), which required a meeting of the minds.

The Milwaukee Street contract, which the Construction Defendants claim applied to the Wadsworth Project, involved very different work. At Milwaukee Street there was no short pit and no cutting pipe casing. (R. CF p. 217, ¶ 6.) MM Welding's instructions to Mr. Blakesley for the Wadsworth Project referenced only a bore pit. BTC said nothing to MM Welding about a short pit, cutting 20-foot lengths of casing in half, or how closely Mr. Blakesley would be working to the track hoe. On these facts, a jury could conclude that there was no meeting of the minds regarding exactly what BTC wanted MM Welding to do on June 4, 2012 and therefore no "contract[ing] out." C.R.S. § 8-41-401(1)(a)(I).

In conclusion, the contract documents mandated that BTC's subcontracts be in writing and approved by DTC. BTC failed to comply. Further, a jury could reasonable find that there was no meeting of the minds. Therefore, it cannot be said

as a matter of law that the Construction Defendants were statutory employers and the trial court erred in granting summary judgment.

II. THE TRIAL COURT ERRED IN GRANTING BNSF'S MOTION FOR SUMMARY JUDGMENT.

Standard of Review and Preservation: The standard of review is set forth at the outset of Section I, *supra*. The trial court's ruling on BNSF's summary judgment motion appears at R. CF p. 667.

A. **The trial court erred in granting summary judgment based on causation, an issue that BNSF never argued.**

BNSF's motion was based on the contentions that: (1) it was not a "landowner" per § 13-21-115; and (2) it owed no common law duty. (R. CF pp. 422, 427.) The trial court *sua sponte* ruled that Mr. Blakesley failed "to prove causation" and granted the motion "[f]or this reason alone[.]" (*Id.* p. 665.)

Before granting summary judgment on a basis not advanced by the movant, a court must notify the parties and allow presentation of evidence. *Krol*, 2013 COA 32, ¶¶ 36-38 (citing *Kannady v. City of Kiowa*, 590 F.3d 1161, 1170 (10th Cir. 2010); *Imaging Bus. Machines, LLC* v. BancTec, Inc., 459 F.3d 1186, 1191 (11th Cir. 2006)). That rule is consistent with basic fairness and helps ensure that the court will have all the information needed to make a fully informed ruling. *Id.* ¶ 38.

The trial court granted summary judgment on causation without giving notice of its intent or a chance to present evidence and argument. The court thus deprived Mr. Blakesley of his due process rights of notice and an opportunity to be heard. *See People v. Nelson*, 2015 CO 68, ¶ 47, 362 P.3d 1070.

B. **The evidence supports a reasonable finding that BNSF was a "landowner" and therefore subject to C.R.S. § 13-21-115.**

1. <u>BNSF retained sufficient possession of and control over the worksite to qualify as a "landowner."</u>

The trial court, relying on the Agreement between RTD and BNSF, ruled that BNSF was not a landowner because it had "no obligation, and no intent" to control work within the fenced area. (R. CF p. 665.) The court erred.

"Landowner" includes "a person in possession of real property and a person legally responsible for the condition of real property or the activities conducted or circumstances existing on real property." C.R.S. § 13-21-115(1); *Wycoff v. Grace Community Church*, 251 P. 3d 1260, 1265-66 (Colo. App. 2010) Thus, a "person need not hold title to the property to be considered a 'landowner.'" *Burbach v. Canwest Investments, LLC,* 224 P.3d 437, 441 (Colo. App. 2009).

In its motion, BNSF did not dispute that the injury occurred within its right of way.[2] The evidence indicated that BNSF's right of way extends 50-150 feet of either side of the track. BTC's foreman testified that the excavation pit was within the right of way. (Barger Depo. at 49:22-24, R. CF p. 472.) Mr. Blakesley was working at the very southeast corner of the pit when he was injured. (Sangoinette depo. at 61:4-7, R. CF p. 450; *see also* R. CF p. 525.)

Thus, the record supports a finding that the injury happened on BNSF property. Where an owner, or right of way holder as in this case, tries to shift liability to an operator or lessee, complete control over the premises must be transferred such that the landowner is no longer "a person in possession." *Pierson v. Black Canyon Aggregates, Inc.*, 48 P.3d 1215, 1220 (Colo. 2002); *see also Perez v. Grovert*, 962 P.2d 996, 999 (Colo. App. 1998).

BNSF did not transfer complete control. The Agreement gave BNSF an absolute right to enter the worksite and stop the work of a non-BNSF contractor if the contractor was acting unsafely. (R. CF p. 361.) BNSF required RTD to pay for a BNSF flagman. (Gallowicz depo. at 93:20-23, R. CF p. 441.) BTC recognized BNSF's authority to stop its work. (Barger depo. at 40:12:17, R. CF p. 469;

[2] BNSF contested the right of way issue in its reply brief (R. CF pp. 650-652), but new summary judgment issues may not be raised in a reply brief. *E.g., Wallman v. Kelley*, 976 P.2d 330, 331-332 (Colo. App. 1998).

Sangoinette depo. at 82:22-25, R. CF p. 452.) Before starting work, BTC had to give BNSF a description of what BTC planned to do. (Barger depo. at 33:18 – 34:1, R. CF p. 468.) BNSF could stop work if certificates and permits were not completed and posted within the fenced-in work zone. (Barger Depo. at 31:9-15, R. CF p. 467.) BNSF not only required such permits, but actually issued a hot work permit and a confined space permit for the work on June 4, 2012. (R. CF p. 136, ¶ 55 [third amended complaint]; *id.* ¶ 42 [answer].)

Additionally, non-BNSF contractors were required to take a BNSF safety exam and display a certificate of completion or badge before entering the construction site. (Gallowicz Depo. at 53:23 – 54:16, R. CF p. 437.) BNSF safety rules provided that BNSF personnel can to stop contractor operations where there is imminent jeopardy to the safety/health of personnel. (R. CF p. 498.)

BNSF not only had authority to control the work at the Site but also exercised that authority. Mr. Blakesley requested BNSF's approval to remove his flammable orange safety vest while cutting the casing within the fenced-in work zone. Gallowicz granted that request. Without a high visibility garment, Mr. Blakesley was more easily overlooked.

BTC foreman Barger recalled BNSF flagmen giving other welders similar permission to remove their flammable vests. (Barger depo. at 41:13-42:1, R. CF p.

470.) And if BNSF's flagman told BTC personnel to obtain and wear a non-flammable vest, BTC would have to comply. (*Id.* at 42:9-14, R. CF p. 470.)

In the case the trial court cited, the Colorado Supreme Court held that a tenant in a commercial office building was not a "landowner" of the uneven sidewalk where the plaintiff tripped walking back to her car. *Jordan v. Panorama Orthopedics & Spine Ctr., PC*, 2015 CO 24, ¶ 30, 346 P.3d 1035. The lease in that case only gave the tenant a non-exclusive right of use, and did not require or even permit the tenant to repair damaged sidewalks. *Id.* ¶ 29. Thus, the tenant did not have sufficient "possession" of the sidewalk to qualify as a landowner.

Here, the injury happened on BNSF's right of way. BNSF surrendered some rights of possession to BTC, but not all rights. BNSF retained full authority to stop a contractor's work for safety reasons. Per the Agreement, BNSF safety rules applied to all non-BNSF contractors. BNSF's flagger gave specific directions to employees of other companies – Ms. Blakesley included – regarding protective equipment. BNSF itself issued the permits BTC needed to do its work that morning. Those facts, viewed in the light most favorable to Mr. Blakesley, establish an issue of fact regarding BNSF's continuing possession.

2. In addition, the evidence supports a reasonable finding that BNSF was a "landowner" by virtue of being legally responsible for the activity or circumstances at issue.

Separate and apart from possession, an entity is a landowner if it is "legally responsible for the condition of real property or for the activities conducted or circumstances existing on real property." C.R.S. § 13-21-115(1); *see also Pierson*, 48 P.3d at 1221. BNSF is a "landowner" if it was responsible for the condition of the property when and where the accident occurred. *Jordan*, 2015 CO 24, ¶ 33.

BNSF representative Gallowicz was responsible to approve material storage locations at the work site. The BNSF safety course, which all non-BNSF contractors must take, stated that "[p]roposed storage locations need to be approved by the BNSF project representative." (R. CF p. 501.) Based on that provision, a reasonable inference arises that Gallowicz approved the location of stored materials, particularly the pipe casing and dunnage in the confined fenced area, in dangerous proximity to heavy equipment. *See Lombard*, 187 P.3d at 570 (reasonable inferences must be construed in the nonmoving party's favor).

The record supports a finding that the congested condition of the work zone contributed to Mr. Blakesley's injury. BTC's investigation listed "[l]imited space to complete the necessary work" as the first contributing factor. (R. CF p. 551.)

For purposes of § 13-21-115, a person is legally responsible for a condition where that person "is legally entitled to be on the real property and . . . is responsible for creating a condition on real property or conducting an activity on real property that injures an entrant." *Pierson*, 48 P.3d at 1221. The trial court noted that BNSF was legally entitled to be on the property, but concluded BNSF was not legally responsible for its condition. (R. CF p. 666.) That was incorrect. BNSF's safety rules mandated that BNSF approve storage locations for contractors. That means BNSF approved the storage of pipe casing and dunnage in proximity to massive mobile construction equipment in a fenced area measuring only 35 feet square. That dangerous arrangement contributed to the injury per Defendants' investigation. Accordingly, a jury could reasonably find that BNSF was landowner as C.R.S. § 13-21-115 defines that term. Thus, the trial court erred in dismissing Mr. Blakesley's premises liability claim.

B. The trial court erred in dismissing Mr. Blakesley's negligence claim because BNSF owed a common law duty of care.

The elements of common law negligence are duty, breach, causation and injury. *Vigil v. Franklin*, 103 P.3d 322, 325 (Colo. 2004). The existence of a duty is a question of law. *Id.* Recognizing a common law duty involves a policy determination that the plaintiff's interests are entitled to legal protection. *Casebolt v. Cowan*, 829 P.2d 352, 356 (Colo. 1992).

The trial court dismissed Mr. Blakesley's alternative[3] common law negligence claim, ruling that BNSF owed no duty. (R. CF p. 666.) Mr. Blakesley respectfully submits that the court erred.

The lower court accused Mr. Blakesley of trying "to create an issue of fact to avoid summary judgment without evidence to support it . . . where . . . the Plaintiff himself said something diametrically opposed under oath at his deposition." (*Id.*) That was incorrect. Responding to BNSF's motion, Mr. Blakesley stated that BNSF placed him in danger "by instructing him to work in close proximity of a track hoe without the one piece of protective equipment which would have made him more visible," a high-visibility vest. (R. CF p. 581.) That is accurate. Though BTC told Mr. Blakesley to cut the casing, Gallowicz authorized Mr. Blakesley to do the job without a high-visibility vest, exactly as Messrs. Blakesley and Gallowicz testified. (Blakesley depo. at 146:11-15, R. CF p. 462; Gallowicz depo. at 29:4-11, R. CF p. 435.) By falsely accusing Mr. Blakesley of misrepresenting the record, the trial court missed the import of the high-visibility vest issue.

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[3] If BNSF was a statutory "landowner," then § 13-21-115 applies and is Mr. Blakesley's exclusive remedy. *Vigil*, 103 P.3d at 329. If BNSF was not a "landowner," then the Act does not apply and its liability is determined under common law negligence principles. *See Wycoff*, 251 P.3d at 1266 (noting that if defendant was not a statutory "landowner" it would have owed the plaintiff a common law duty of reasonable care).

The duty for which Mr. Blakesley advocates would apply where: (1) a defendant has actual authority to shut down work at a particular jobsite for safety reasons; (2) the defendant knew or had reason to know that another company was operating heavy equipment in a manner posed a foreseeable risk of injury to a particular worker; and (3) the defendant helped create the conditions giving rise to the risk. Imposing a duty of reasonable is warranted under those circumstances.

This case does not involve imposing a duty of care based on mere omission. This case involves allegations of affirmative negligent conduct by BNSF, which militate in favor of imposition of a duty. *University of Denver v. Whitlock,* 744 P.2d 54, 59-60 (Colo. 1987). Stated differently, this case involves misfeasance rather than just nonfeasance. *Id.* at 57 (noting that the presence of "negligent affirmative action is a critical factor" in deciding whether to impose a duty).

Two affirmative acts of BNSF contributed to this injury. First, Gallowicz placed Mr. Blakesley in danger by letting him enter a cramped workspace without the one piece of protective equipment which would have made him more visible to the crew operating the track hoe. Gallowicz's act violated BNSF's policy requiring all contractors to wear flame resistant orange high-visibility vests. Breach of one's own rules is relevant in assessing negligence. *E.g., Rupert v. Clayton Brokerage Co.,* 737 P.2d 1106, 1112 (Colo. 1987). Such action also violated OSHA rules and

regulations requiring a high-visibility garment when working in a public roadway. *See* 29 CFR 1926.651(d). Although OSHA regulations do not establish a private right of action, such regulations are proper evidence of the standard of care. *Scott v. Matlack, Inc.*, 39 P.3d 1160, 1167-69 (Colo. 2002).

Second, material storage had to be approved by BNSF's on-site representative. Per BNSF's own rules, BNSF alone controlled storage and handling of materials within the right of way. (R. CF p. 501.) Given the absoluteness of that requirement, an inference arises that Gallowicz actually approved storage of the casing in an enclosed 35-foot square area in dangerously close proximity to the track hoe. Again, lack of working space was a contributing factor. (*Id.* p. 551.)

By approving storage of pipe casing and dunnage in a dangerously cramped manner and allowing Mr. Blakesley to work without a high-visibility vest in contravention of its own rules, BNSF helped create a dangerous situation where Mr. Blakesley would be working in close proximity to a track hoe under circumstances that would make him less visible to the equipment operator. From his pickup truck Gallowicz had a clear line of sight to Mr. Blakesley. (*See* R. CF p. 396 [Gallowicz drawing depicting location of work area and his truck]; *id.* p. 400 [photo showing track hoe, the casing at issue, and BNSF truck].) Accordingly, this Court should hold that BNSF owed Mr. Blakesley a duty of reasonable care. *See*

Collard v. Vista Paving Corp., 2012 COA 208, 292 P.3d 1232 (road construction contractor had duty of care to motorists re: hazards it created).

In addition, the general test uses to determine whether to impose a duty favors Mr. Blakesley. That test involves weighing and applying multiple factors:

> "the risk involved, the foreseeability and likelihood of injury as weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against injury or harm, and the consequences of placing the burden upon the actor."

Taco Bell, Inc. v. Lannon, 744 P.2d 43, 46 (Colo. 1987) (quoting *Smith v. City & Cnty. of Denver*, 726 P.2d 1125, 1127 (Colo. 1986)). Other potentially relevant factors include the parties' relative loss-bearing capacity and a policy of preventing future injuries. *Whitlock*, 744 P.2d at 57 n.2.

The duty of reasonable care for which Blakesley advocates would apply where an entity having the right to control operations within a cramped worksite where heavy machinery is operating exercises that control in a way that decreases the available space and renders the injured worker less visible to heavy equipment operators. The pertinent factors favor imposing a duty of reasonable care:

- The risk at issue was extraordinarily high. The risks of serious injury and death associated with being run over by a track hoe are obvious.

- Foreseeability favors imposing a duty. "A legal duty to use reasonable care arises in response to a foreseeable risk of injury to others." *Palmer v. A.H.*

Robins Co., 684 P.2d 187, 209 (Colo. 1984). BNSF's knowledge of the cramped conditions, the track hoe's close proximity to Mr. Blakesley, and absence of high-visibility protective clothing rendered the injury eminently foreseeable.

- Social utility concerns favor imposing a duty. BNSF had control over the jobsite. It exercised that control in ways that rendered Mr. Blakesley less visible and made the Site more cramped. The entity that helped create the danger should take reasonable steps to keep the danger from causing harm.

- The magnitude of the burden involved in imposing a duty is minuscule. The job was readily observable from Gallowicz's location, and preventing the injury would have been as simple as issuing a stop-work order.

- The consequences of placing a burden on persons in BNSF's position are acceptable. Per the Agreement, BNSF had extensive rights of control. It required non-BNSF contractors to comply with a vast array of BNSF rules. It exercised its authority in ways a jury could reasonably find contributed to Mr. Blakesley's injury. Imposing a duty of reasonable care on a company having that much right to control and actual control over a work site is unobjectionable.

- As to loss-bearing capacity, persons like Mr. Blakesley earn their living job by job. By contrast, BNSF "is one of North America's leading freight transportation companies, with a rail network of 32,500 route miles in 28 states and

three Canadian provinces." http://www.bnsf.com/about-bnsf/pdf/fact_sheet.pdf. It has 44,000 employees and $4.3 billion in capital investments. *Id.*

- Prevention of future injuries favors recognizing a duty. The duty at issue would apply where a company with extensive rights of control exercises those rights in a manner that increases danger. The policy of injury prevention favors imposing a duty on the entity with the ultimate right of control, BNSF.

In conclusion, every applicable factor favors recognizing a duty on the facts of this case. For this additional reason, the Court should recognize that BNSF owed Mr. Blakesley a common law duty of reasonable care and reverse the trial court's order granting BNSF's summary judgment motion.

CONCLUSION

For the foregoing reasons, Richard Blakesley respectfully requests that this Court reverse the trial court's September 8, 2015 order granting the Construction Defendants' motion for partial summary judgment, the April 13, 2016 order granting BNSF's motion for summary judgment, and the April 13, 2016 order dismissing the case. Mr. Blakesley asks that this Court remand for trial.

Date: September 9, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2016, I served and filed the foregoing **OPENING BRIEF** as follows:

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