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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

↑ COURT USE ONLY ↑

Plaintiff/Appellant: RICHARD BLAKESLEY

Defendants/Appellees: BT CONSTRUCTION, INC., a Colorado corporation, BNSF RAILWAY COMPANY, a Delaware corporation; DENVER TRANSIT PARTNERS, LLC; DENVER TRANSIT CONSTRUCTORS, LLC, a Delaware limited liability company; JOE BARGER; LOUIS SANGUINETTE; and ERNESTO IBARRA

Court of Appeals Case Number: 2016CA763

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AMENDED ANSWER BRIEF

C.A.R. 32(h) CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these 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).

It contains **9,492** 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.

X **In response to each issue raised, the appellee** must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

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.

/s/ Daniel M. Fowler, Esq.
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I. STATEMENT OF THE CASE:

A. Nature of the Case:

This is a personal injury negligence action arising from a construction worksite accident. The accident occurred during work to construct the Regional Transportation District's ("RTD") Gold Line, which is part of RTD's FasTracks commuter light rail project. At the time of the accident, FasTracks utility subcontractor BT Construction was installing an upgraded sanitary sewer line under active train tracks. To perform its utility relocation work, BT Construction contracted with Mountain Man Welding for hourly welding services. Plaintiff Richard Blakesley is a welder whose direct employer was Mountain Man Welding. Blakesley's foot was caught under BT Construction's excavating machine when Blakesley positioned himself next to – and with his back to - the excavator to push a section of pipe casing that he was in the process of cutting, which had rolled from his work area towards the excavator.

The construction of RTD's FasTracks project was and is insured under a project wide Owner Controlled Insurance Program ("OCIP") that included workers' compensation insurance for all project contractors and subcontractors as required by the Colorado Workers' Compensation Act. Pursuant to that insurance coverage, Mr. Blakesley received, and continues to receive, workers'

compensation benefits for the injury at issue. CF, p. 344 & n.12 (Order); R. Supr., p. 106-108.

Seeking relief beyond that coverage, Blakesley brought claims against his statutory employers who are immune from liability under the Workers' Compensation Act. Blakesley also asserted claims against BNSF who was not participating in the utility work at issue, and who had no duty to supervise, observe, inspect, or to halt the utility work. For those reasons the trial court dismissed all claims.

B. Relevant Facts:

The work and worksite at issue: Blakeley's injury occurred in a fenced-in utility installation worksite located on Olde Wadsworth Boulevard where it crosses over BNSF's railway tracks in Olde Town Arvada. Olde Wadsworth Boulevard was completely closed off to all traffic during the work and accident.

At the time of the accident Blakesley was providing welding services as part of FasTracks Subcontractor BT Construction's work to install an upgraded sanitary sewer line under, and perpendicular to, BNSF's existing train tracks. To protect the sanitary sewer line, strong metal pipe casing is installed first, and the sewer line is then placed within the protective pipe casing. The casing used for this utility work is twenty inches in diameter, and was manufactured and delivered to the site

in twenty foot sections.

A pit was excavated to install the casing and sewer line under the train tracks. From that pit the casing pipe is pushed under the tracks with tunneling equipment. Due to site limitations, the pit could not be excavated to accommodate a full twenty foot section of pipe casing. Accordingly, BT Construction told Blakesley to cut the casing into ten foot sections with his torch so it could be lowered into the pit and welded back together again as each successive piece was pushed under the tracks.

These basic work and worksite facts are not in dispute, and are consistent with Mr. Blakesley's Third Amended Complaint (CF, pp. 130-143, ¶¶ 51, 62), the Affidavit of Harper Daniel who is BT Construction's Vice President and Project Manager (R. Supr., pp 148-149), and Mr. Blakesley's Opening Brief. Photographs of the worksite are at CF, pp. 398-400.

Workers' compensation insurance and the chain of subcontracts for the work at issue: Blakesley does not dispute that all contractors in the contractual chain had workers' compensation insurance compliant with the Act in force on the day of the accident. Blakesley also does not dispute the contractual chain for the utility work at issue, from RTD down to his direct employer, Mountain Man Welding. The undisputed facts about insurance and the contractual chain for the utility work

are set forth at R.Supr., pp. 2-6, including a contract flowchart. Blakesley does dispute how some of the contracts were administered, which is addressed in the argument below.

Due to the word limit imposed on this Brief, and because Appellees are defending two Orders granting summary judgment in their favor that consider different law and facts, the facts that are material to this Brief are discussed in the argument sections below. Within each of Appellees' trial court briefs listed in the Section below, are statements of undisputed facts, supported by the record.

C. Procedural History and Orders Presented by Appellant for Review:

Defendants' Motion for Partial Summary Judgment demonstrated immunity from suit and liability under the Colorado Workers' Compensation Act. That was a Motion for *Partial* Summary Judgment because BNSF did not seek immunity relief. When Blakesley filed his Response to that Motion, all persons who were at the scene of the accident had been deposed and BT Construction had been deposed under C.R.C.P. 30(b)(6).

Defendants Denver Transit Partners, LLC ("DTP"), Denver Transit Constructors, LLC ("DTC"), BT Construction, Inc., and employees of BT Construction, Joe Barger, Ernesto Ibarra, and Louis Sanguinette (collectively,

"Construction Defendants") Motion for Partial Summary Judgment is at R.Supr., pp. 1-12. Blakesley's Response to the Construction Defendant's immunity Motion is at CF, pp. 174-198. The Construction Defendants' Reply in Support of their dispositive Motion is at CF, p. 302-309.

The trial court granted Construction Defendants' Motion for Partial Summary Judgment. CF, pp. 343-348. Blakesley appealed that Order.

Blakesley also filed a Cross-Motion for Summary Judgment and Brief seeking dismissal of the Workers' Compensation Act immunity defense. CF, pp. 199, 273. The Construction Defendant's Response Brief is at CF, p. 333-339. Blakesley did not file a reply in support of his Cross-Motion for Summary Judgment. CF, p. 349. Because BNSF had never argued that it was immune under the Act (CF, p. 352), the trial court granted Blakesley's Cross-Motion as to BNSF only, and denied it as to all other Defendants. CF, pp. 349-352. Blakesley did not appeal that Order.

Following entry of the Orders discussed above, BNSF filed its Motion for Summary Judgment. CF, p. 416-430. Blakesley's Response to that Motion is at CF, pp. 567-587, and BNSF's Reply Brief is at CF, pp. 645-658.

On April 13, 2016, the trial Court granted BNSF's Motion for Summary Judgment. CF, pp. 662-667. On that same day the trial court vacated trial and

dismissed the case with prejudice. CF, p. 661. Blakesley appealed those two Orders.

II. SUMMARY OF ARGUMENT

The trial court's Orders should be affirmed because each are correct and the issues raised on appeal are not material, but are largely based on unsupported argument of counsel.

The Construction Defendants are immune from liability under C.R.S. § 8-41-401(2) because each of them was Blakesley's statutory employer. Blakesley's argument on appeal that welding and cutting the utility pipes is not part of BT Construction's regular business operations is unsupported argument of counsel. The record demonstrates that BT Construction is a utility installation contractor. There is no evidence that cutting and welding the utility pipe being installed is not part of that business.

Blakesley's argument that *certified* welding cannot be part of BT Construction's business, unless BT Construction also employed a *certified* welder, is contrary to the conclusion in *Campbell* that "there is no absolute requirement that the tasks ordinarily be performed by the statutory employer's own employees. Instead, the court must examine the nature of the business as a whole and

determine whether, absent the contractor's services, the service would of necessity be provided by the employer's own employees."

Blakesley contends that the specific task of *cutting* casing pipe was not contracted out to his direct employer, or to BT Construction, because that step in the utility installation process was not specifically listed on a contract, and, oral contracts for the work at issue were not reduced to writing until after the work was completed. Those arguments are immaterial as a matter of law because the dispositive question is whether cutting and welding utility pipes is part of BT Construction's regular business, and under the *Buzard* case work can be contracted out "under any type of contract".

Blakesley (and the Construction Defendants) expressly told the trial court that the regular business test need not be applied in this case under *Monell.* Based on that consensus, the trial court's Order addressed every disputed contention and correctly concluded that welding services Blakesley was performing were properly contracted out by his statutory employers. Blakesley now contends, however, that the trial court erred by not applying the regular business test. To the extent that the trial court erred by not expressly stating that test, its Order should be affirmed because the record clearly supports the trial court's conclusion that the Construction Defendants are immune statutory employers.

A BNSF Foreman was across the tracks from the fenced-in worksite at the time of the accident for reasons that are tangential to the utility work at issue. In the FasTracks Agreement between BNSF and RTD for the use of BNSF's track corridor, both agreed RTD (through its subcontractors) was solely responsible for the utility work and the work would be performed by contractors hired by RTD, using a defined term "Non-BNSF Contractors". Under that Agreement, BNSF required that it also be at the location of work to monitor passing trains, protect its track and equipment from construction activity, and warn workers of dangers posed by passing trains.

Blakesley's premises liability claim against BNSF was properly dismissed because BNSF was not a "landowner". BNSF was not in possession of real property with intent to control it because under the RTD/BNSF Agreement, which can be determinative of a landowner's intent to control under the *Jordan* case, the intent was that BNSF would not control, supervise or participate in the utility work. Consistent with that Agreement, there is no evidence that BNSF did control or intend to control any of the utility work.

BNSF does not fall within the second definition of landowner either; a person legally entitled to be on the land *and* responsible for creating the condition or conducting an activity that caused injury. That is because there is no evidence

that BNSF was involved in the utility work, and, specifically, there is no evidence that BNSF was responsible for the events that allegedly caused the accident.

In support of his premises liability and negligence claims, Blakesley's primary arguments are that BNSF purportedly controlled material storage within the fenced-in utility worksite and controlled when safety vests are worn. Those materials were not submitted with a C.R.C.P. 56(e) affidavit attesting that the materials are authentic and applicable to the utility work. The RTD/BNSF Agreement makes it clear that those course materials do not apply to the Non-BNSF Contractors' utility work at issue here. Because Blakesley's material storage and safety vest arguments are not supported by competent evidence, and argument of counsel cannot establish a material fact, this Court should not consider those arguments.

III. STATUTORY EMPLOYER ARGUMENT

A. THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF THE CONSTRUCTION DEFENDANTS SHOULD BE UPHELD.

Standard of Review: The standard of review at Opening Brief page 15 is correct, but incomplete.

Of import to this appeal, a "material fact" is a fact that will affect the outcome of the case. *Sender v. Powell*, 902 P.2d 947, 950 (Colo. App. 1995). A

"genuine issue" of material fact cannot be raised simply by argument by counsel, be it before the trial court or this Court. *Sullivan v. Davis*, 474 P.2d 218, 221 (Colo. 1970). The non-moving party cannot rely on "pretense, or apparent formal controversy," to avoid summary judgment. *People In Interest of S.N. v. S.N.*, 329 P.3d 276, 281–82, ¶¶ 16-19 (Colo. 2104).

The issues raised also involve contract interpretation, which is a question of law for the Court. *Dorman v. Petrol Aspen, Inc*., 914 P.2d 909, 912 (Colo. 1996).

Preservation of issue: Blakeley's Opening Brief contains two preservation of issue statements, however, both cite to the trial court's Orders that he appealed. Opening Brief, pp. 15, 29. As to the actual issues Blakesley argues on appeal, his preservation of issue statements do not show where each issue was raised before the trial court.

As to the applicable law set forth below, the Construction Defendants raised the same in each of their trial court Briefs. R.Supr., pp, 7-10; CF, pp. 305-308; CF, pp. 335-338.

1. Statutory Employer Law

The primary purpose of the Colorado Worker's Compensation Act ("Act") is to provide a quick and efficient remedy for job-related injuries without regard to fault. *Frank M. Hall & Co. Inc., v. Newsom*, 124 P.3d 444, 446 (Colo. 2005). The

Act operates in a *quid pro quo* fashion; in exchange for compensating an employee who is injured on the job without any regard to fault, an employer who has complied with the Act is granted immunity from all causes of action and claims that an injured employee may assert. C.R.S. § 8-41-102; *Kandt v. E.B. Evans*, 645 P.2d 1300, 1302-03 (Colo. 1982).

C.R.S. § 8–41–401(1)(a)(I) expands the definition of "employer" under the Act to include any entity who contracts out any part or all of the work. Under the statutory employer doctrine, "[a]lthough a given company might not be a claimant's employer as understood in the ordinary nomenclature of the common law, it nevertheless might be a statutory employer for workers' compensation coverage and immunity purposes." *Finlay v. Storage Technology Corp*., 764 P.2d 62, 64 (Colo. 1988). Subsection 401(1)(b) requires that statutory employers comply with Act's insurance requirements to the same extent that a direct employer is so obligated. Subsection 401(2) of the Act provides the immunity at issue here; if a subcontractor has obtained workers' compensation insurance its employee cannot reach 'upstream' to the general contractor to establish tort liability, and the general contractor is immune from suit as any insured employer would be. *Finlay,* 764 P.2d at 64.

Whether a builder is a subcontractor, a sub-subcontractor, or a sub-sub-

subcontractor, etc., does not matter as long as each contractor in the contractual chain is a statutory employer because "the statute is intended to cover every business conducted by one through the activities of another under any kind of a contract." *Buzard v. Super Walls, Inc*., 681 P.2d 520, 522 (Colo. 1984).

Whether an employer is an immune statutory employer under C.R.S. § 8–41–401(2) is determined by considering how the contracted-out work relates to the statutory employer's "total business operations, 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 66-67. The "importance" element can be proven by showing that the statutory employer would use its own employees to perform the contracted-out work, if necessary, rather than forego the work entirely (*id*.), or, if need be, by additional training of its own employees. *Id.*, at 68.

The scope of immunity provided under C.R.S. § 8-41-401(2) is not limited to the statutory employer, but also bars any cause of action against the statutory employer's "employees, servants or agents." C.R.S. § 8-41-401(2). Blakesley's Opening Brief does not dispute that if BT Construction is an immune statutory employer, its direct employees, Defendants Barger, Sanguinette, and Ibarra, are also immune.

2. The work contracted out, cutting and welding utility pipes, is part of BT Construction's total business operations.

Standard of Review: The standard of review set forth above at Section III(A) applies here.

Preservation of Issue: Blakesley did not state where he preserved his argument beginning at Opening Brief page 17 that the "regular business test applies".

That omission is significant as to Blakesley's new argument raised on appeal about the *Monell* case. Blakesley's "regular business test applies" argument on appeal asserts that the trial court erred when it did *not* apply the test discussed in *Finlay*, and that *Monell v. Cherokee River*, 347 P.3d 1179 (Colo. App. 2015) should not be followed because it was wrongly decided. However, no argument was made to the trial court that *Monell* was wrongly decided and should not be followed. Instead, in his trial court Response Brief, Blakesley affirmatively cited *Monell* for its conclusion that when the contracted out scope of work is clear, and a plaintiff was injured while performing that scope of work, the regular business test need not be applied. CF, p. 177.

Blakesley's second legal argument to the trial court begins with the heading "Since the Evidence Supports a Reasonable Finding that the Work was Outside the Scope of Mountain Man's Agreed-Upon Duties, This Court Need Not Apply the

Regular Business Test." CF, p. 192 (emphasis added). That argument is the exact opposite of Blakesley's argument on appeal, that the trial court erred by *not* applying the regular business test. Because Blakesley's contradictory *Monell* argument on appeal was not raised in the court below, this Court should decline to consider it on appeal. *See e.g., JW Constr. Co., Inc. v. Elliott*, 253 P.3d 1265, 1271 (Colo. App. 2011).

The Construction Defendants' preserved their *Monell* argument in each of their trial court Briefs. R.Supr. pp, 8-10; CF, pp. 308; CF, pp. 338.

Total business operations argument: At Opening Brief page 2, Blakesley states in his relevant facts section that "BTC's business is excavating", with no citation to the record. At no other point in his Brief does Blakesley further describe BT Construction's business or correct that misrepresentation. Presumably, that misrepresentation of BT Construction's business was to invoke this Court's common understanding of what an excavator does - grade, shape, and dig soil - to support the misleading argument that welding is not part of an *excavator's* total business operations.

BT Construction is a utility contractor. BT Construction testified through its C.R.C.P. 30(b)(6) designee, Harper Daniel, about its total business operations:

> About half our work is what we discussed was the open-cut trenching, installing waterlines, sanitary sewer, storm sewer lines. We also, by that

> same method, install some high-pressure cooling and heating loops downtown and some conduits for Xcel electrical conduits.
>
> Then about half our work is what we call tunneling and boring, is making small to larger tunnels under railroads, highways, congested intersections for utilities -- various utilities.

CF, pp. 305, 312 (22:2-14).

As indicated by that citation to the record, Blakesley's argument at Opening Brief pages 24-25 that BT Construction presented no evidence of its total business operations is untrue. BT Construction, through Harper Daniel, also testified: that tunneling and boring for utility lines is its specialty, that a normal excavation company does not do that kind of work, and BT Construction has the experience and equipment to do that work. CF, p. 253.

Further evidence that cutting and welding metal utility pipes is an important part of the utility installation business is that Mountain Man Welding, and Blakesley himself, had previously *cut and welded together again* pipe casing for RTD at another location, but for a different utility contractor. CF, pp. 327-328. While BT Construction did not employ certified welders at the time of the accident, it did employ welders who had been previously certified by other employers, but who had not yet passed the certification test for BT Construction. CF, p. 250-252. That testimony of its own welders and their training efforts to be certified is also evidence of the importance and regularity of welding work for BT

Construction's installation of metal utility piping.

Aside from Blakesley's arguments here, there is no evidence that anyone, including Blakesley and his direct employer, claimed that cutting is not part of the welding services that Mountain Man agreed to provide. CF, p. 341 (¶4) (cutting pipe is a welding service); p. 207 (100:10-17) (Blakesley testified he already had his cutting equipment, oxygen and his acetylene torch, in his truck and laid out his work so he could make a cut with the torch that was capable of being welded together again).

The crux of Blakesley's regular business test argument is further argument of counsel: "BTC had to use level 6G certified welders" and because BT Construction itself did not employ such welders, "BTC cannot claim that 6G welding is part of its regular business". Opening Brief, pp. 22-23. Blakesley also asserts as a relevant fact that "construction standards required a level 6G certified welder to weld the casing", and "DTC mandated that welding be done by welders with a level 6G certification." Opening Brief, pp. 2, 13. There is absolutely no evidence that a 6G level welding certification was required for the FasTracks work and Blakesley offered no record support for any of those propositions. BT Construction's contract with DTC simply required "Certified Welders must follow Denver Water Standard Specifications." R.Supr., p. 90 (Art. 3.1.8); *see also,* CF,

p. 261 (74:1-4) (certified welders are not generally required by the City of Arvada, but that was a requirement of DTC).

Blakesley cites the pre-*Finlay* case *Frazier v. Kysor Industrial Corp.*, 607 P.2d 1296 (Colo. App. 1979), as support for the proposition that an employer be able to perform the work at issue itself, before it can contract out such work in order to be a statutory employer under the Act. In that case a division of this Court concluded that a saw distributer, DLM, was not a statutory employer when it hired Duffy (whose injured employee brought suit) to move a heavy saw because moving equipment was not part of DLM regular business, and DLM did not have equipment to move the saw because "the need for such services is rare." *Id.*, at 1303. *Frazier* is factually distinguished from this action because cutting and joining utility piping together to install utility lines *is* BT Construction's regular business, and there is no evidence that cutting and welding utility pipes is a rare occurrence for BT Construction's utility business.

The new fine line Blakesley attempts to draw in Colorado law – that even if welding is part of a utility installer's business, certified welding cannot be part of that business if certified welders on not on the statutory employer's payroll – is not legally supported and would be an unwise departure from the Act's immunity provision, which is broadly construed. *Finlay*, 764 P.2d, 66-67.

> Contrary to Plaintiff's contention, there is no absolute requirement that the tasks ordinarily be performed by the statutory employer's own employees. Instead, the court must examine the nature of the business as a whole and determine whether, absent the contractor's services, the service would of necessity be provided by the employer's own employees.

Campbell v. Black Mountain Spruce, Inc., 677 P.2d 379, 381 (Colo. App. 1983); *see also, Finlay*, 764 P.2d at 68 (training own employees); *Melody Homes v. Lay*, 641 P.2d 1081 (Colo.App. 1980) (construction site security services are within a home builder's regular business because the builder would have to perform security services itself, by hiring and training its own employees to do so); *San Isabel Electrical Association v. Bramer*, 510 P.2d 438 (Colo. 1973) (flying small aircraft to inspect utility lines is within an electrical association's regular business).

If Blakesley's position was the law, in order for an employer to contract out work and remain a statutory employer under the Act, that employer would have to employ members of every trade required for the work, at every level of certification that may apply, before part of its regular business operation could be contracted out, which is unreasonable and would hamstring Colorado general contractors. As applied to this case, Blakesley's position would mean that every FasTracks contractor, from RTD on down (*see*, R.Supr., p. 6), would also have to employ a certified welder (and every other trade required to construct FasTracks), before FasTracks work could be contracted out under the Act.

This Court should conclude as a matter of law that there is no disputed material fact that BT Construction is a utility installation contractor whose business includes cutting and welding the utility pipes it installs.

The Trial Court's Order:[1] Notwithstanding the undisputed material facts, Blakesley contends that the trial court's Order cannot be affirmed because it did not apply the regular business test. Both Blakesley and the Construction Defendants argued that the regular business test need not be applied under *Monell*. *See*, Preservation of Issues, Section III(A)(2) *supra*. The Construction Defendants also demonstrated that if applied, the regular business test is satisfied. R.Supr., pp. 7-10; CF, pp. 303-308. The trial court did not expressly state the regular business test, but cited to the test as set forth in *Finlay*, and discussed the requirements of the underlying statutory employer statute, C.R.S. § 8-41-401. CF, p. 346-347.

The trial court Briefs filed by the parties show that the Court resolved each disputed issue. Blakesley's argument about the trial court's Order is not supported by any authority that requires a trial court to expressly detail its findings as to the regular business test. Under these circumstances, where the trial court addressed each of the parties' disputed contentions, the Order's findings should not be

[1] For the convenience of the Court, this section of argument is included here, instead of at the end of this Brief's Sections about immunity, to be consistent with the Opening Brief's order of arguments.

deemed deficient because it did not address undisputed issues. That is especially true when Blakesley stated to the trial court his position that "This Court Need Not Apply The Regular Business Test". CF, p. 192.

Should this Court disagree, it may still affirm the trial court's Order because the record supports all bases on which the district court properly could have granted summary judgment. *See, e.g., Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 406 (Colo. App. 2004) (court of appeals may affirm on any ground supported by the record).

Mr. Blakesley was injured while performing welding services for his statutory employer BT Construction whose utility installation business regularly and necessarily includes cutting and welding the utility pipes that are installed, and, all Construction Defendants successively contracted that work out to Blakesley's direct employer, and, all Construction Defendants complied with the Act's insurance requirements. Because all of these facts are supported by the record and the applicable statutory employer law set forth herein, this Court should affirm the trial court's Order. *Id.*

Blakesley's contract argument is not supported by law or fact.

Blakesley's contract arguments that there was no written contract between BT Construction and Mountain Man Welding for cutting the pipe, and that oral

work agreements were not reduced to written contracts until after the accident, are not material. Those arguments were refuted in full by the Construction Defendants at CF, p. 303-308.

BT Construction hired Mountain Man Welding to provide hourly welding services at BT Construction's first FastTrack's utility work location, the "Milwaukee Street Project". R.Supr., p. 115. That Subcontract set forth an hourly rate for the estimated number of hours ("All quantities are estimates only"). The Second Affidavit of Harper Daniell, BT Construction's Project Manager, explains that when the Milwaukee Street Project ended, BT Construction was awarded additional FastTrack's utility work. Mountain Man orally agreed to provide welding services under the Milwaukee Street Project Subcontract for BT Construction's additional FasTracks work, at the previously agreed to hourly rate. As the FasTracks project progressed, BT Construction would call or send an email to Mountain Man to advise when and where welding services were required next. Because the negotiated hourly rate applied to all welding services that BT Construction contracted out to Mountain Man at the FasTracks project, the specific scope of welding services for each project location was not discussed or negotiated beforehand. CF, p. 340-342; *see also* CF, p.318 (46:4-15); p. 316-317 (42:22-43:23). BT Construction and Mountain Man had worked together on BT

Construction projects for eight years and Mountain Man was very familiar with BT Construction's on-going work at each project, including the FasTracks project, and would supply welders as needed. CF, p. 318-320 (58:24-60:21).

Harper Daniell also explained in his Affidavit that the letter agreement (R. Supr., p. 116) "existed only to document in writing BT Construction's and Mountain Man Welding's prior oral agreement that Mountain Man Welding's additional FasTrack's work would be subject to the parties' previously agreed to General Conditions." CF, 341 (¶6).

BT Construction's agreements with DTC for additional FastTracks work, including the work at issue, were incorporated into the DTC contract by Contract Modifications. Contract Modification 28 (R.Supr., p. 150) is for the work at issue. CF, p. 321 (61:1-9). As explained by Mr. Daniell of BT Construction, work on the FasTracks project was fast paced and it was common that BT Construction would be directed by DTC to proceed with certain work. The paper work for each Contract Modification would lag behind, however, due to the enormity of the project, which explains why Contract Modification 28 was not agreed to before the work commenced. CF, p. 323-325 (63:8-65-24). As evident by Contract Modification 28, the value of BT Construction's contract with DTC increased to $5.1m from the initial value of the Milwaukee Street work ($39k); evidence that

this process was accepted and ongoing.

Aside from Blakesley's arguments on appeal, there is no evidence that anyone, including Blakesley, Mountain Man, BT Construction, or DTC, objected to any of these contract procedures. CF, p. 340-342. Further, there is no evidence in the record that anyone has claimed that cutting is not part of the hourly welding services that Mountain Man agreed to provide. CF, p. 341 (¶4) (cutting pipe is a welding service); p. 207 (100:10-17) (Blakesley cutting equipment in his truck).

There is no case law or statute that requires that a contract be written for the statutory employer immunity statute to apply. The statute "is intended to cover every business conducted by one through the activities of another under any kind of a contract." *Buzard*, 681 P.2d at 522 (emphasis added).

Instead, the dispositive question here is whether cutting and welding utility lines is part of BT Construction's total utility installation business operations. This Brief and the record demonstrates that the answer to that dispositive question is "yes".

The trial Court's Order granting summary judgment in favor of the Construction Defendants should be affirmed.

III. SUMMARY JUDGMENT WAS CORRECTLY ENTERED IN FAVOR OF BNSF RAILWAY COMPANY

A. BNSF WAS NOT A LANDOWNER UNDER THE PREMISES LIABILITY ACT.

Standard of Review: The standard of review set forth above at Section III(A) applies here. In addition, when considering whether BNSF was a landowner the Court cannot apply a totality of the circumstances analysis, but must reach a legal conclusion based on the most relevant undisputed facts. *Jordan v. Panorama Orthopedics & Spine Ctr., PC*, 346 P.3d 1035, 1042 n.7 (Colo. 2015).

Preservation of Issue: Blakesley did not state where the issues raised on appeal were raised before the trial court, thus Appellees cannot respond.

BNSF's arguments set forth below were raised by Appellees in its Motion for Summary Judgment (CF, p. 416-430) and Reply in support thereof (CF, pp. 645-658). BNSF's arguments below state specifically where each issue was raised before the trial court.

BNSF did not occupy the fenced-in worksite with intent to control.

Plaintiff's Fourth Claim for Relief incorrectly alleges that BNSF was a landowner under C.R.S. § 13-21-115, Colorado's Premises Liability Act ("PLA"). "Landowner" is defined in the PLA to include, "without limitation an authorized agent or a person in possession of real property and a person 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).

The first part of the landowner definition, "in possession of real property", means one who occupies land with intent to control it. *Jordan,* 346 P.3d at 1041-42, ¶¶ 23, 28.

It is a material fact that there is no Complaint allegation (CF, p. 130) that Plaintiff's injury was caused by, or in any way involved, a train or BNSF's track equipment, nor any other aspect of BNSF's railway operations.

Whether the purported landowner controls or intends to control the real property can be determined by contract. *Jordan,* 346 P.3d at ¶ 29 (court construed maintenance obligations in lease). For the construction of the Gold Line, and for improvements to be made to BNSF's rail lines, RTD and BNSF entered into a Relocation and Construction Agreement ("Agreement"). CF, pp. 353-375; p. 418-419, Facts D-E (Motion).

Included within the Agreement's Construction Standards and Procedures for RTD's "Initial Improvements" work, is "Other Improvements" work, which includes the utility wok at issue. RTD was responsible for the performance of the Other Improvements utility work as part of its RTD Initial Improvements work. CF, p. 362 (Art II, § 2.4(C)); p. 418, Fact E.

BNSF's Agreement with RTD clearly states in its Safety/Security provision

that RTD is solely responsible for the safe completion of Initial Improvements work (which includes the "Other Improvements" utility work at issue), and that BNSF is not responsible for that work:

> During the construction of the RTD Initial Improvements RTD, at RTD's sole cost, shall perform all activities and work in such a manner as to preclude personal injury or property damage to BNSF or any other party, and shall ensure that there is no interference with the railroad operations or other activities of BNSF, or anyone present on either or both Corridors or other BNSF property with the authority or permission of BNSF."

CF, p. 361 (Art II, § 2.4(B), emphasis added).

With regard to the construction work at issue here, the final sentence of the Safety/Security Agreement obligations confirms:

> Notwithstanding the foregoing, BNSF has no duty or obligation to observe or inspect, or to halt work by any Non-BNSF Contractor on either Corridor, it being solely RTD's responsibility to ensure that work performed by any Non-BNSF Contractor is conducted in compliance with the terms of this Construction Agreement, the Joint Corridor Use Agreement, all Laws and the applicable Approved Plans.

CF, p. 361-362 (Art II, § 2.4(B), emphasis added).

While the Agreement was discussed throughout BNSF's trial court Motion (CF, pp. 416), Blakesley's Response Brief did not address nor even mention those provisions (CF, pp. 567-587; *see also*, p. 645), and his Opening Brief only alludes to that important language once, at page 8, in truncated fashion. Blakesley has

never argued that the Agreement language quoted above (nor any other contract in the record) is ambiguous.

BNSF's presence was required by the Agreement to protect BNSF against an activity that may "Foul" BNSF's tracks that remained active during the work. CF, p. 362 (Art. II, §2.4(D); p. 135-136, ¶ 45 (Complaint). "Fouling" is a defined term: "'Fouling' shall mean the existence, movement or placement of material, equipment and/or personnel on any track or within twenty-five (25) feet vertically or laterally of the centerline of any track, or any other activity which in BNSF's reasonable opinion may interfere with any BNSF operations." CF, 602 (Art. I, §1.1, Joint Use Agreement); *see also* CF, p. 353 (Art. I, § 1.1) (terms and provision of Joint Use Agreement are incorporated into Construction Agreement). Accordingly, the only distance fact that could be relevant, 25 feet, is only relevant to define BNSF's responsibility to prevent Fouling of its tracks.

Under the Agreement, BNSF had "no duty or obligation to observe or inspect, or to halt work by any Non-BNSF Contractor". "Non-BNSF Contractor" is also a defined term, and that definition is important to this appeal and the Agreement provisions quoted herein: "Non-BNSF Contractor shall mean any provider or providers of any portion of RTD Activity on either Corridor other than BNSF and any Non-BNSF Operator and/or RTD acting on its own behalf." CF,

602 (Art. I, §1.1, Joint Use Agreement); *see also* CF, p. 353 (Art. I, § 1.1). As discussed above the Construction Defendants were part of RTD's contractual chain for FasTracks utility work, and it is undisputed that none of them were hired by BNSF. Accordingly, the Agreement clearly provides that RTD and its subcontractors (the Construction Defendants) are "Non-BNSF Contractors", thus BNSF had had "no duty or obligation to observe or inspect, or to halt work by any [of the Construction Defendants]".

Facts that show BNSF did not occupy the fenced-in worksite with intent to control it: To protect the track from being Fouled, BNSF's Foreman and Flagger Glen Gallowicz testified that his safety briefings concerned only train safety issues and precautions about Fouling BNSF's track. CF, pp. 377-376 (20:25-21:6), 379 (27:13-28:8), 385 (90:1-92:4). BNSF Foreman Gallowicz also testified about BNSF's "Form B" protection procedures where he becomes the active train dispatcher for trains as they approach and pass the worksite. CF, pp. 380-381 (30:5-36:19); *see also*, pp 393-395 (68:6-69:23) (similar testimony by BT Construction's supervisor Joe Barger). Within that testimony Gallowicz also explained that he was not on site to control or supervise utility work in the fenced-in work area.

As to the utility work, BNSF foreman Gallowicz testified with regard to BT Construction that "I don't supervise their work" and he was only concerned about the utility work when/if it could damage BNSF's track. Gallowicz also clarified that BNSF is not on site to tell BT Construction how to do its work in the fenced-in area, that BNSF is not responsible for safety the excavator because "when they're fenced-in, that's their work area" and he would only look in that area himself out of curiosity; "But, you know, I'm not going to tell them, you know, how to work until, you know, that equipment is going to, you know, foul our track." When asked whether the fenced-in work area (where Blakesley was injured) was under BNSF's control, BNSF's foreman stated "no", "they do what they want in there inside that fence", "that's their work zone". That testimony, in the same order as discussed, is at CF, p. 384 (77:12-20); p. 385 (91:20-92:4); p. 379 (26:9-27:12); *see also*, p. 386 (110:7-14 & 111:5-18) (BNSF has no authority or responsibility to control work in BT Constructions fenced work area, and, BNSF does not control BT Construction's crew and does not control how the fenced-in work space was organized, because train safety was BNSF's mission); pp. 396-397 (diagrams by Gallowicz discussed in his deposition). Mr. Barger, BT Construction's supervisor, testified consistent with Gallowicz CF, p. 390 (22:22-24:22); p. 391 (28:9-16); p. 395 (82:20-84:3).

There is no dispute that the utility work area was completely fenced-in during the work, aside from an access opening on the opposite side from the tracks. CF, p. 396. Photographs of the site taken after the accident show an opening along the tracks, but it is undisputed that the fence was enclosed along the tracks when the accident occurred. CF, pp. 396-400; pp. 419-420, Facts H-K & n.3. As seen in the photographs and diagram, the casing material was stored and cut within the fenced work area, thereby permitting the excavator's boom to reach the casing material to lift and lower it into the pit. *Id.*

Blakesley testified that all of his work, and the accident, occurred within the fenced in work area, and that the fence closest to the tracks was in place when the accident occurred. Blakesley testified that BT Construction's spotter was responsible for watching out for safety issues around the excavator. Blakesley agreed that Gallowicz wasn't supervising the work, and wasn't asked to join the conversation prior to the accident about Blakesley working close to the excavator because BNSF's flagger didn't need to be involved in the conversation. Mr. Blakesley further testified that he understood that the BNSF flagger was the "railroad safety coordinator" who had authority over railroad property. CF, p. 402-403 (83:18-85:25); p. 412-413 (168:20-169:25).

Blakesley, however, through incorrect argument of counsel asserts that

BNSF does not dispute that the injury occurred within its right of way that extends 50-150 feet from either side of the track, and that the injury "happened on BNSF property". Opening Brief, p. 31. BNSF's trial court Reply Brief thoroughly demonstrated that contention to be false. CF, p. 650-652. In support of his 50-150 foot BNSF right of way "fact", Blakesley relies solely on Barger's deposition testimony. Barger, actually testified that he did not know how wide BNSF's right of way was, and did not know whether the injury occurred in BNSF's right of way. CF, p. 472 (49:4-51:23). Gallowicz testified his duties were to protect the track structure and signals, not the ground property, and his authority extends: "For the track structure, you know, and their -- you know, what they -- their switches might be 5 feet off the track. They might have some stuff 10 feet off the track. If a guy's changing his oil on the right-of-way, I'm not throwing him off. I mean, I'm there to -- you know, to protect the track, what's going on there." CF, p. 595 (70:9-72:19); *see also*, p. 596 (77:15-20) ("I don't supervise their work. I make sure that it's not affecting, you know, my work and my -- . . . -- work would be to keep trains going, to check for, you know, track structure, deviation of – you know, of the track.").

A 50-150 foot BNSF "right of way" or "easement" is not supported anywhere in the record and is argument of counsel. The only relevant distance fact applies only to BNSF's duty to warn of train hazards and watch for any

construction activity within 25 feet of its tracks that could Foul the tracks.

Blakesley submits that BNSF's control is established by the Agreement because it permits BNSF to stop work under certain situations described in the Agreement, quoted at Opening Brief page 8, and at CF, p. 361 (Art II, § 2.4(B)). That argument fails because, first, that language is in the same paragraph that concludes with the provision quoted above "*Notwithstanding the foregoing*, BNSF has no duty or obligation to observe or inspect, or to halt work by any Non-BNSF Contractor. . ." Second, the *right* to stop work does not establish control, nor the intent to control, under the PLA. *Jordan,* 346 P.3d at 1042-41, ¶ 29.

Both of Blakesley's premises liability arguments also include sleight-of-hand argument of counsel concerning an instructional course administered by BNSF. Blakesley, without support, contends that a "BNSF Contractor" course gave BNSF authority to regulate certain aspects of the fenced worksite, including material storage and safety vests. That purported instructional course work document begins at CF, p. 496. As argued in detail to the trial court (CF, pp. 646-650), that document is not material to the work at issue and should not be considered.

The "BNSF Contractor" document was not submitted to the trial court with an affidavit attesting to its authenticity and application. C.R.C.P. 56(e). That

document was not disclosed by BNSF. Instead, Blakesley's counsel downloaded the document from the internet at BNSFContracor.com. CF, p. 598 (86:19-87:1). Gallowicz testified that he had not seen the course materials before (Deposition Exhibit 37, same as at CF, p. 496) and he could not confirm they represent the policy of BNSF. CF, p. 596-597 (80:9-81:15).

The Agreement does not mention a course at BNSFContracor.com. The Agreement specifically states in its Construction and Contractor Requirements provision that RTD shall cause all Non-BNSF Contractor(s) to comply with all of BNSF's applicable safety and security rules and regulations and complete the safety orientation program at the www.contractororientation.com website. CF, p. 361 § 2.4(B) The BNSFContractors.com course materials that Blakesley relies on only apply to contractors hired by BNSF's Engineering Department to perform work BNSF may require on its infrastructure, as indicated by its General Information sentence that begins "BNSF Railway Engineering contractors are required . . ." CF, p. 497. None of the Construction Defendants were a "BNSF contractor". Each of them were a "Non-BNSF Contractor" as defined above because they were not hired by BNSF.

The Agreement required RTD to "cause all Non-BNSF Contractors to comply, with the obligations set forth in Exhibit C". CF, p. 361 (§2.4(A)). Exhibit

C sets forth "Contractor Requirements" and states, consistent with the Agreement, that it is the contractor's (BT Construction's) obligation to comply with health and safety regulations, and, like the Agreement, it also requires (three times) that no employee of a contractor may proceed to work without first taking the Safety Orientation class at www.contractororientation.com. CF, pp. 637-639, 642 (§§ 1.01.05, 1.02.01, 1.04.01, 1.06.08). The Agreement's Exhibit C does not mention the course materials at BNSFContractor.com, and does not require Non-BNSF Contractors to take that course. Accordingly, Blakesley's material storage and vest arguments - based solely on course materials counsel obtained from the internet - are not supported by evidence compliant with C.R.C.P. 56(e).

As to material storage, the only requirement in the Agreement's Exhibit C is that materials may not be stored within 25 feet of the track's centerline. CF, p. 642 (§1.06.09). There is no evidence that BNSF controlled or was involved with determining where the casing and other materials were stored within the fenced worksite. It is reasonable that casing was stored and cut where the excavator's boom could reach it, and under the Agreement, RTD (and, its Construction Defendant subcontractors) was responsible for the worksite and all utility work.

As to his safety vest, Blakesley claims that BNSF required it be worn in the right of way and within 50 feet of equipment, citing to the inapplicable

BNSFContracor.com course materials. Opening Brief, pp. 8-9. Gallowicz testified, however, visibility vests need to be worn if the worker is "within foul of the BN track", and that utility workers had to put vests on when leaving the fenced worksite. CF, p. 592 (28:2-5); p. 599 (91:15-92:9).

Consistent with the Agreement's requirement that a BNSF flagger be on site to protect against Fouling the track and warn workers of oncoming trains, BNSF was not involved in the actual utility work. Under that Agreement, "BNSF has no duty or obligation to observe or inspect, or to halt work by any Non-BNSF Contractor" because it was "solely RTD's responsibility" to ensure compliance with the Agreement. Blakesley cannot as a matter of law satisfy the first definition of landowner, "in possession of real property", because there is no evidence that BNSF controlled, agreed to control, or intended to control, the fenced worksite. *Jordan*, 346 P.3d at 1041-42, ¶¶ 23, 28.

BNSF was not legally responsible for the activities conducted in the fenced-in worksite.

The second definition of landowner is a person who is "legally responsible", meaning "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 v. Black Canyon Aggregates, Inc.*, 48 P.3d 1215, 1221

(Colo. 2002) (emphasis added); *Jordan*, 346 P.3d at 1041-1044, ¶¶ 24, 25, 31-37.

The *Pierson* court explained that

> such focus properly serves the intent of the statute by: (i) limiting the protection of the statute to a person or entity with legal authority to be on the property; and (ii) placing prospective liability with the person or entity that created the condition or conducted the activity on the real property that, in turn, caused injury to someone.

Blakesley's first PLA argument is that the trial court made causation determinations notwithstanding that BNSF made no causation argument, and that he had no opportunity to respond. Opening Brief, p. 29. That is not true. Pursuant to *Pierson* BNSF's Motion argued extensively that BNSF was not responsible for, and did not cause, the accident. CF, p 425-427. Throughout his Response Brief, Blakeley made many of the same causation arguments that he does on appeal. CF, pp. 567-586.

Whether BNSF is "legally responsible" for the activities conducted in the fenced work-site can also be determined by contract. *Jordan*, 346 P.3d. at 1044, ¶¶ 34-37. The Agreement quoted above states that BNSF is not legally responsible for the utility work, it being RTD's sole responsibility.

Colorado's premises liability statute does not apply to any tort that happens to occur on another's property. *Larrieu v. Best Buy Stores, L.P.*, 303 P.3d 558, 563 ¶ 18 (Colo. 2013). Consistent with the *Pierson* language quoted above, under

Subsection (2) of the statute, the General Assembly constrained the relief available "by tying the cause—not just the occurrence—of a plaintiff's injury to the landowner's property, and thereby ensuring that landowners are fairly held liable for such injuries." *Larrieu,* 303 P.3d at ¶¶ 21-26 (emphasis added).

All of the undisputed fact testimony demonstrates that BNSF was not working in BTC's fenced work site, nor was BNSF controlling utility work within the fenced worksite. Accordingly, no jury could conclude that BNSF was "legally responsible" for the cause of accident under *Pierson* or *Larrieu*. Complaint paragraphs 62-69 (CF, p. 137) concerning the events that allegedly caused the Plaintiff's injury, include no mention of BNSF or its flagger as being involved in the accident.

Blakesley again points to the vest issue and his unsupported notion that BNSF was legally responsible for safety vest decisions and determining where the casing materials were stored in the fenced worksite. Those arguments, based solely on the document counsel downloaded from "BNSFContractor.com", are refuted above.

Because there is no evidence that shows BNSF caused the accident, and because there is no evidence that BNSF was responsible for creating a condition or conducting an activity that caused Blakesley's injury (*Pierson, supra)* the trial

court's entry of summary judgment in BNSF's favor should be affirmed.

B. THE TRIAL COURT CORRECTLY DISMISSED BLAKESLEY'S NEGLIGENCE CLAIM

Standard of Review: The standard of review set forth above at Section III(A) applies here.

Preservation of Issue: Blakesley did not state where the issues raised on appeal were raised before the trial court, thus Appellees cannot respond.

BNSF's arguments below were raised in its Motion for Summary Judgment (CF, p. 416-430) and Reply in support thereof (CF, pp. 645-658). BNSF's arguments below state specifically where each issue was raised before he trial court.

BNSF did not have a duty to supervise the welding work, the utility work, nor any work within the fenced worksite.

To establish his negligence claim, Blakesley must show that BNSF owed him a legal duty of care, that BNSF breached that duty, and that the breach was a proximate cause of Plaintiff's injury. *Ryder v. Mitchell*, 54 P.3d 885, 889 (Colo. 2002). If a negligence action is based on facts that do not impose a duty of care upon a defendant for a plaintiff's benefit, the claim will fail. *Id.*

While a contractual obligation is not the final measure of one's tort liability, a tort duty may arise under a contract because a "contractual obligation is the

matrix from which an independent duty may arise". *Lewis v. Emil Clayton Plumbing*, 25 P.3d 1254, 1256 (Colo. App. 2000). In *Lewis*, the defendant plumber was hired to replace a residential water heater. The Court of Appeals affirmed the trial court's entry of summary judgment in the plumber's favor upon concluding that the plumber's contractual services were limited to installing a water heater and work related to the water heater. Thus, the plumber had no duty to inspect the gas stove that it was not hired to perform work on. *Id.*, at 1256-1257.

The RTD/BNSF Agreement provides the matrix of the involved parties' duties: RTD was solely obligated to safely install the utility line in a workmanlike manner pursuant to plans, while BNSF was obligated to provide a foreman/flagger to guard against damage to BNSF's property and protect workers from danger posed by passing trains. Like the plumber in *Lewis,* BNSF had no contract obligation regarding the actual utility work that allegedly caused Plaintiff's injury, and BNSF had no tort duty regarding the same. BNSF's and BT Construction's different duties were clearly defined, and did not overlap.

The *Lewis* decision is also based on tort considerations of (1) the risk involved, (2) the foreseeability and likely hood of injury as weighed against the social utility of the actor's conduct, (3) the magnitude of the burden of guarding

against injury, and (4) the consequences of placing the burden on the actor. *Id.; see also, Taco Bell, Inc. v. Lannon,* 744 P.2d 43, 46 (Colo. 1987).

Application of those factors here, like in *Lewis,* do not support that BNSF, in addition to its duty to guard against danger posed to or by passing trains, *also* had a duty to supervise the utility work. In *Lewis,* the court concluded that it would be "unreasonable to hold that such providers have a duty to investigate and remedy all other conditions nearby" and that such an "extensive" expansion of the plumber's duties would be both costly and impractical. *Lewis,* 25 P.3d at 1257. The same is true here. The magnitude and consequences of imposing on BNSF a duty to supervise municipal utility work would be an extensive expansion of its train safety duties. The consequence of placing that additional tort duty on BNSF would *contradict* what BNSF was hired to do – provide a flagger for train safety and to protect railroad property - which weighs against imposing an additional construction work supervision duty on BNSF. *Taco Bell,* 744 P.2d at 46, 49.

Further, as to the second factor listed above, it is not sufficiently reasonably foreseeable that a skilled construction worker would step in front of large moving construction machinery such that the social utility of imposing a redundant and additional duty on a *train* company to supervise the municipal utility work is warranted, especially when BT Construction had its own spotter who had spoken

with Blakesley about the cutting work just before the accident. BNSF is in the business of, and skilled at, operating and protecting its railway infrastructure, and recognizing dangers that could be caused by large moving freight trains; none of which were involved in causing Plaintiff's injury. BNSF is not a utility contractor and there is little, if any, social utility of placing additional non-train related construction supervision duties on a train company like BNSF to protect against unforeseeable accidents such as Plaintiff's, which occurred over a few short moments in time.

Taco Bell clarifies that in addition to the factors discussed in *Lewis* "the question of whether a duty should be imposed in a particular case is essentially one of fairness under contemporary standards." *Taco Bell,* 744 P.2d at 46. It would be unfair under contemporary standards for the Court to impose a new duty on a freight train and track operator to supervise utility installation construction work, simply because that work is somewhat close to BNSF's tracks, when such a duty would be unrelated to BNSF's train business and acumen. The *Taco Bell,* and *Lewis* factors for determining whether a tort duty exists are not met here as a matter of law.

Blakesley contends that the trial court erred when it found no evidence to support the argument of counsel that BNSF directed his work. CF, p. 666. The

trial court was correct. There is no evidence that BNSF directed the utility work, Blakesley's welding services, or movement of the excavator machine. Blakesley's contends that his question to Gallowicz about wearing his vest is evidence of BNSF's direction of the utility work. Gallowicz, however, testified that BNSF's role was to watch for activities that could affect the tracks and trains, thus visibility vests need to be worn if the worker is "within foul of the BN track" and utility workers had to put vests on when leaving the fenced worksite. CF, p. 592 (28:2-5); p. 598-599 (88:8-92:9). Those vest advisements related only to BNSF's train and track concerns, not the utility work.

Blakesley's material storage argument is addressed above and that discussion also applies here. There is no evidence that BNSF controlled, decided, or participated in any decisions about material storage, and there is no evidence that supports the notion that BNSF had such a duty. Again, the sole basis for that contention is the BNSFContractor.com instructional materials, that are unsupported by a C.R.C.P. 56(e) affidavit and inapplicable to the utility work.

Based solely Blakesley's counsel's review of a photograph and Gallowicz's diagram (CF, pp. 396, 400), he asserts as a fact that Gallowicz, who was in his truck at the time of the accident (CF, p. 382 (59:5-15)), had a direct line of sight to the Plaintiff. Gallowicz's BNSF truck is visible on the far right side of the

photograph at CF, p. 400, across the tracks from the worksite. Gallowicz testified that he could see across the tracks, but: "I don't know if I was actually able to see into their job site". *Id.*

Consistent with BNSF's Agreement obligations, the Court should conclude that BNSF did not have an independent duty in tort to protect Plaintiff from non-train related dangers while Plaintiff was working in BT Construction's fenced-in worksite. *Lewis, supra; Taco Bell, supra; see also, Mid-Century Ins. Co. v. InsulVail, LLC*, 592 F. App'x 677, 683-84 (10th Cir. 2014). Because BNSF had no such legal duty, and because it is undisputed that Plaintiff was injured while working under BT Construction's control and in its fenced-in worksite, Plaintiff's negligence claim against BNSF should remain dismissed as matter of law. *Id.*

IV. CONCLUSION

Upon review of the record and this Answer Brief, this Court should affirm the Orders granting summary judgment in favor of Appellees.

DATED this 4th day of November, 2016.

FOWLER, SCHIMBERG, FLANAGAN & MCLETCHIE, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 2016, I caused a true and correct copy of the foregoing **AMENDED ANSWER BRIEF** to be filed and served via the State of Colorado's Integrated Colorado Courts E-Filing System (ICCES) upon the following:

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