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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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REPLY 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 5,612 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

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: December 2, 2016.

Respectfully submitted,

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INTRODUCTION

Appellant Richard Blakesley respectfully submits his reply brief. For the reasons that follow, Mr. 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.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING THE CONSTRUCTION DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT.

A. The Construction Defendants are not statutory employers because the certified welding services Mr. Blakesley was performing at the time of injury were not part of BTC's regular business.

1. Preservation:

The Construction Defendants aver that Mr. Blakesley failed to preserve his arguments regarding the regular business test. (Amended Answer Brief ["AAB"] at 13-14.) That is incorrect.

In their summary judgment motion, the Construction Defendants claimed that the regular business test was "superfluous" per *Monell v. Cherokee River, Inc.*, 2015 COA 21, 347 P.3d 1179 because the scope of the contracted work was clear. (R. Supr. p. 8.) Mr. Blakesley responded in part with two alternative arguments. First, he asserted that, per *Monell*, the Construction Defendants' motion should be

denied without regard to the regular business test because the work Mr. Blakesley was doing was clearly outside the work that BTC contracted to MM Welding, Mr. Blakesley's direct employer. (R. CF p. 192.) Alternatively, he asserted that if the regular business test applied, the motion should still be denied because the work was not part of BTC's regular business. The regular business test arguments in the Opening Brief were preserved at R. CF pp. 192-197.

On appeal, Mr. Blakesley does not pursue his prior argument that the work he was doing at the time of injury fell outside the scope of the work BTC contracted to MM Welding. He instead asserts that the regular business test applies regardless of the scope-of-work issue, arguing *inter alia* that *Monell* was wrongly decided and that the regular business test applies in all cases where statutory employer status is at issue. (Opening Brief at 19-22.)

The Construction Defendants correctly note that Mr. Blakesley did not argue to the trial court that *Monell* was wrongly decided. (AAB at 13.) He was not obliged to make that argument. *Monell* is a published decision and thus was binding on the trial court. *See* C.A.R. 35(f) ("opinions designated for official publication shall be followed as precedent by the trial judges of the state of Colorado"). Since the trial court was obliged to follow *Monell*, arguing to the trial court that *Monell* was wrongly decided would have been futile. A party need not

present such futile arguments to preserve them for appeal. *See Peterson v. Shearson/American Express, Inc.*, 849 F.2d 464, 466 (10th Cir. 1988) (party need not present an argument that would be futile under existing appellate case law); *see also Cook v. Medical Sav. Ins. Co.*, 287 Fed. Appx. 657, 666 (10th Cir. 2008).

2. The Construction Defendants misstate the burden of proof.

The Construction Defendants suggest that Mr. Blakesley bears the burden of proving that the injurious activity was part of BTC's regular business. (AAB at 6.) That is incorrect. The Construction Defendants based their summary judgment motion on workers' compensation immunity. That is an affirmative defense which the defendant must prove. *Popovich v. Irlando*, 811 P.2d 379, 385 (Colo. 1991); *Bain v. Town of Avon*, 820 P.2d 1133, 1136 (Colo. App. 1991). Mr. Blakesley was not obliged to prove anything. The Construction Defendants must prove that the work Mr. Blakesley was doing was part of BTC's "regular business."

3. The Construction Defendants misstate Mr. Blakesley's argument.

The Construction Defendants aver that "Blakesley contends that the specific task of *cutting* casing pipe [sic] was not contracted out to his direct employer . . . ." (AAB at 7; *see also id.* at 16, 23.) That is false. Mr. Blakesley made that argument to the trial court. (R. CF pp. 190-192.) However, Mr. Blakesley is not pursuing that argument on appeal. No such argument appears in the Opening Brief.

4. The Construction Defendants misstate the applicable rule of statutory construction.

Citing *Finlay v. Storage Tech. Corp.*, 764 P.2d 62 (Colo. 1988), the Construction Defendants aver that the immunity provision of the workers' compensation act "is broadly construed." (AAB at 17.) Mr. Blakesley disagrees.

The *Finlay* Court noted that the purpose of the statutory employer rule is "making general contractors ultimately responsible for injuries to employees of subcontractors . . . ." 764 P.2d at 66. Thus, if an employee of a subcontractor is injured on the job and his direct employer does not have workers' compensation coverage, the injured worker can collect workers' compensation benefits from the general contractor. *See* C.R.S. § 8-41-401(1)(a)(I). That accords with the "long-recognized rule that the [workers' compensation act] is to be liberally construed to accomplish its humanitarian purpose of assisting injured workers and their families." *Garner v. Vanadium Corp.*, 572 P.2d 1205, 1206-07 (Colo. 1977).

This case does not involve an injured worker seeking benefits from an up-the-line contractor pursuant to the statutory employer rule. MM Welding, Mr. Blakesley's direct employer, met its obligations and provided workers' compensation coverage. The question here is not whether BTC is obliged to pay workers' compensation benefits but instead whether it is immune from any common law consequences for its egregious negligence.

Mr. Blakesley recognizes that appellate courts broadly construe workers' compensation immunity where a direct employer-employee relationship exists and the injury-producing event falls within the scope of the workers' compensation act's coverage. *E.g.*, *Henderson v. Bear*, 968 P.2d 144, 146 (Colo. App. 1998). In those situations, immunity bars a civil action against the employer even if the damages at issue are not available as workers' compensation benefits. *Id.* (employer was immune from wrongful death action). That is not the situation here. No direct employer-employee relationship existed between Mr. Blakesley and the Construction Defendants, and Mr. Blakesley has not sued his direct employer.

Here, the injured worker received benefits from his direct employer. The act's "humanitarian purpose of assisting injured workers and their families" was satisfied because MM Welding met its obligations. *See Garner*, 572 P.2d at 1206-07. Construing the statutory employer rule broadly would do nothing to "assist[] injured workers and their families" but instead lead to an unjust, anti-worker result. It would confer immunity on a negligent contractor that did not employ the worker, that ordered him to work in a dangerous situation, and then crushed his foot with a ten ton machine. That is unfair, not only to Mr. Blakesley, but to all workers.

The rule of construction applicable here requires that the workers' compensation code be construed liberally in favor of the worker. *City of Brighton*

v. Rodriguez, 2014 CO 7, ¶ 13, 318 P.3d 496, 501; *Specialty Restaurants Corp. v. Nelson*, 231 P.3d 393, 398 (Colo. 2010). Mr. Blakesley respectfully submits that, on these facts, the statutory employer rule should receive a narrow reading.

5. A jury should determine whether or not the certified welding services Mr. Blakesley was performing at the time BTC injured him were part of BTC's regular business.

Once again, "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 v. CF&I Steel*, 2013 COA 32, ¶ 25, 307 P.3d 1116. Statutory employer status exists "only if the [contracted] work is part of an entity's regular business, as defined by its total business operation." *Id.* ¶ 25. The regular business test provides:

> [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).

The Construction Defendants aver that approximately half of BTC's work involved open-pit trenching and installation of water, sanitary sewer and storm sewer lines, along with electrical conduits. (AAB at 14-15.) They aver that since

welding and cutting pipe is part of installing utilities, the work BTC contracted out to MM Welding was part of BTC's regular business as a matter of law, and that BTC therefore qualified as Mr. Blakesley's statutory employer. (*Id.* at 15-16.)

The Construction Defendants' argument is based on a false equivalence. The job Mr. Blakesley was doing, and the work BTC contracted to MM Welding, did not involve ordinary welding. Everyone agrees that the work BTC agreed to do for DTC on the Gold Line of the RTD commuter light rail project required certified welding. (R. Supr. p. 90; R. CF p. 261 [testimony of BTC, stating that DTC required certified welders].) The difference between certified welders such as Mr. Blakesley and the welders on BTC's payroll is addressed in the affidavit of welding expert Jesse Grantham (R. CF p. 244, ¶ 5.)

The issue is not whether generic "welding" was part of BTC's regular business but instead whether certified welding was part of BTC's regular business. On the facts of this case, a jury could reasonably find that certified welding was not part of BTC's regular business and that BTC was not a statutory employer.

At no relevant time did BTC ever have a certified welder on its own payroll. BTC's vice president testified:

> Q. Okay. And at the time of Mr. Blakesley's injury, BT did not have on the payroll any of their own employees that were certified to perform the kind of welding that was necessary for the Olde Town project?

A. Correct.

(BTC dep. p. 28:4-8, R. CF p. 248.) Before Mr. Blakesley's injury BTC had "a couple of guys that have worked for us that stated they were certified welders" but those certifications – if they existed at all – belonged to the welders' former employers. (R. CF pp. 248-49.) Likewise, BTC never had a certified welder after Mr. Blakesley's injury. (*Id.* p. 249.)

BTC not only never had a certified welder but also never had anyone capable of becoming a certified welder. BTC has sent all least three employees to take the certification test, including Defendant Joe Barger, the BTC foreman on duty at the time of Mr. Blakesley's injury. All failed the test. (*Id.* pp. 251-52.)

The Construction Defendants claim Mr. Blakesley is arguing "that even if welding is part of a utility installer's business, certified welding cannot be part of that business if certified welders on [sic] not on the statutory employer's payroll[.]" (AAB at 17.) That is a straw man. Mr. Blakesley recognizes that there is "no absolute requirement that the tasks ordinarily be performed by the statutory employer's own employees." *Campbell v. Black Mountain Spruce, Inc.*, 677 P.2d 379, 381 (Colo. App. 1983). The test involves examining the employer's total business operation and assessing whether the service at issue is so integral to the operation that, absent farming out the service to a contractor, the putative statutory

employer would necessarily have to train its own employees to do the job. *Id.*; *Findlay*, 764 P.2d at 67-68 (janitorial services were sufficiently integral to statutory employer's business that it would have had to train its own employees to perform those services had it not contracted the work); *Melody Homes, Inc. v. Lay*, 610 P.2d 1081, 1083 (Colo. App. 1980) (construction company liable for workers' compensation benefits to employee of security company; construction site security was sufficiently important to the construction company that absent contracting-out the company would have had to train its own employees to do security work).

In this case, though, it is not just a simple matter of assessing in the abstract whether certified welding services were important enough to BTC's business operation that it would have had to train its own employees to do such work. Indeed, such an abstract exercise would be pointless since the record establishes that training BTC employees to perform certified welding services was quite impossible. The deposition testimony of BTC's vice president is evidence from which a jury could reasonably conclude not only that BTC never had any certified welders but also that it never had anyone capable of becoming a certified welder. How can a service reasonably be considered part of a company's regular business for workers' compensation purposes if the company never had anyone who could perform those services, despite repeated failed efforts?

Moreover, the regular business test also focuses on the "routineness" and "regularity" of the work. *Findlay*, 764 P.2d at 66. As the parties with the burden of proof on the defense of immunity, the Construction Defendants were obliged to present evidence on those issues. Although they presented evidence that a sizable portion BTC's business involved generic cutting and welding, the Construction Defendants provided virtually no evidence regarding the "regularity" of certified welding to BTC's total operation. As the evidence shows, certified welding services and garden-variety welding services are qualitatively different. The record shows that BTC agreed to perform certified welding services for DTC on the Gold Line of the light rail project, but is silent as to the "routineness" and "regularity" with which BTC agrees to perform certified welding in its "**total** business operation." 764 P.2d at 66 (emphasis added). For all we know, BTC's work on the Gold Line was the only work on which it obliged itself to use certified welders. Accordingly, the Construction Defendants did not meet their burden of proof on the statutory employer issue and the trial court erred in granting their motion.

For purposes of this appeal, Mr. Blakesley is not arguing that the workers' compensation immunity defense fails as a matter of law. He simply asserts that, on the record in this case, a jury should decide the issue. Case law supports that position. In *Fraser v. Kysor Indus. Corp.*, 607 P.2d 1296 (Colo. App. 1979), *rev'd*

on other grounds, 642 P.2d 908 (Colo. 1982), for instance, this Court relied heavily not only upon the alleged statutory employer's inability to perform the contracted-out services but also on the fact that "the need for these services is rare" in deciding that the services in question were not part of the alleged statutory employer's regular business. *Id.* at 1303. Here, the limited record supports a finding that BTC's Gold Line contract with DTC may well have been the only time BTC committed itself to providing certified welding services of the sort at issue.

In *Ledbetter v. Wal-Mart Stores, Inc.*, No. 06-cv-01958-WYD-MJW, 2008 U.S. Dist. LEXIS 38065 (D. Colo. May 9, 2008), a federal court applying Colorado law denied a putative statutory employer's motion for summary judgment where the record established issues of fact as to whether the defendant "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 [the defendant's] employees." *Id.* at *13-14. As in *Ledbetter*, evidence in this case indicates that BTC always used contractors to provide certified welding services.

Although there is no "absolute requirement" that the work at issue is usually done by the statutory employer's own employees, the issue of whether the work is "business which the company would ordinarily accomplish with its own employees" is a relevant factor. *Campbell*, 677 P.2d at 381. Evidence from which a

jury could reasonably find that BTC was incapable of performing the certified welding services at issue renders this case inappropriate for summary judgment.

In *Cowger v. Henderson Heavy Haul Trucking, Inc.*, 170 P.3d 116 (Colo. App. 2007), the defendant was a company that transported oil well drilling equipment. When it transported equipment that exceeded the capacity of its own cranes, it contracted with the plaintiff's employer for crane services. Plaintiff was an employee of the subcontractor. During one particular job, a large piece of oil rig equipment became entangled in overhead power lines. An employee of the defendant told the plaintiff to push the power lines out of the way while the heavy equipment passed underneath. Everyone assumed that the power line was a low-voltage telecommunications line. The plaintiff was electrocuted and severely injured when he took hold of the power line with his gloved hand. Plaintiff filed a negligence action against the company that hired his direct employer.

The trial court dismissed the case on summary judgment, ruling that the defendant was the plaintiff's statutory employer and was immune. The court found that the injury happened while the defendant was moving heavy equipment from one place to another, which was the defendant's "regular business." *Id.* at 119-120.

This Court reversed. The plaintiff was injured not from moving heavy equipment from one place to another but instead as a result of the defendant's

instruction that he move the power line. Whether moving the power line was part of the defendant's regular business was a question of fact for a jury. *Id.* at 120.

Here, as noted above, issues of fact exist as to whether certified welding services were part of BTC's regular business precluded summary judgment. Moreover, as in *Cowger*, Mr. Blakesley was not injured while welding or cutting. He was injured while trying to maneuver a 20-foot length of pipe casing in position to cut. The injury resulted not from using his cutting torch but as a result of BTC requiring him to work in close proximity to an operating track hoe in a cramped workspace of BTC's making. On those facts, a jury should decide whether Mr. Blakesley was injured in course of doing BTC's "regular business."

In conclusion, the evidence and inferences – construed in the light most favorable to Mr. Blakesley as C.R.C.P. 56 mandates, *Lombard v. Colorado Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 570 (Colo. 2008) – support a finding that the work Mr. Blakesley was doing at the time of injury was not part of BTC's regular business. Thus, it cannot be said as a matter of law that BTC was Mr. Blakesley's statutory employer. And if BTC was not a statutory employer, then neither was any "upstream" contractor. *See Buzard v. Super Walls, Inc.*, 681 P.2d 520, 522-23 (Colo. 1984). The trial court erred in granting summary judgment.

B. **The Construction Defendants were not immune because there was no complying contract between BTC and MM Welding, and no meeting of the minds.**

1. Preservation:

The Construction Defendants' suggestion that Mr. Blakesley did not preserve this issue (AAB at 10) is false. Mr. Blakesley's preserved his arguments at R. CF p. 190-191.

2. The Construction Defendants failed to follow their own contract formation rules.

The Construction Defendants complain that "work on the FasTracks project was fast paced and it was common that BTC would be directed by DTC to proceed with certain work" and that the "paperwork would lag behind[.]" (AAB at 22.) That may be true, but it is beside the point.

The Construction Defendants ignore the key provision of BTC's contract with DTC, which expressly provided that BTC could not subcontract any of its work without notifying DTC and obtaining DTC's written acceptance. (R. CF p. 229, Article 7.1.) So far as the record discloses, at no time did BTC ever notify DTC of its intention to subcontract certified welding services to MM Welding. At no time did BTC ever seek or receive DTC's permission to subcontract its contractual duty to provide certified welding services.

Contract Modification 28, the document created and signed by BTC and DTC representatives months after Mr. Blakesley's injury, does not contain a single word about BTC subcontracting its certified welding obligations. To the contrary, BTC agreed to perform its work at the Wadsworth project "in accordance with all of the terms and conditions" of the main DTC-BTC contract. (R. Supr. p. 150.) There is no evidence that DTC ever "waived" is contractual rights to receive written notice of and to approve or veto in writing BTC's choice of subcontractors. BTC's subcontract with MM Welding was a violation of its obligations to provide written notice of proposed subcontracts and receive DTC's written approval before subcontracting any of its obligations.

The Construction Defendants note that there is no statute or case law requiring that subcontracts be in writing. As stated on page 26 of the Opening Brief, Mr. Blakesley agrees. However, the Construction Defendant themselves mandated written subcontracts. DTC required written approval for BTC to subcontract its work. Section 8-41-401 takes the contracting entities as it finds them. Since the Construction Defendants chose to order their affairs by requiring written permission for BTC to subcontract, they should be required to follow their own rules to claim statutory employer status. That approach accords with the rule that the workers' compensation code must be construed in the worker's favor.

Finally, Mr. Blakesley asserted that there was no "meeting of the minds" regarding exactly what BTC wanted MM Welding to do on the day of the injury. Absent a meeting of the minds, there could be no "contract[ing] out" as C.R.S. § 8-41-401(1)(a)(I) requires. (Opening Brief at 28-29.) The Construction Defendants are silent on that point, so Mr. Blakesley's argument in that regard stands unaddressed. For this additional reason, the trial court should be reversed.

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

A. **BNSF was a "landowner" as C.R.S. § 13-21-115 defines that term.**

1. Preservation:

BNSF's suggestion that Mr. Blakesley did not preserve these issues (AAB at 24) is false. Mr. Blakesley's preserved his arguments regarding landowner status at R. CF p. 574-579 (landowner status based on control) and 579-580 (landowner status based on legal responsibility for dangerous condition).

2. The "BNSF Contractor" materials are relevant and admissible.

BNSF contends that the "BNSF Contractor" course published by BNSF on the website www.bnsfcontractor.com was not authenticated by affidavit per C.R.C.P. 56(e) and did not apply to the jobsite at issue here. (AAB at 32-35.) The vigor with which BNSF pursues that contention indicates its belief that the

documents are outcome determinative and warranted denial of summary judgment. In any event, "BNSF Contractor" materials are applicable and admissible.

Relying on the same arguments it advances here, BNSF moved to strike the "BNSF Contractor" documents in the trial court. (R. CF pp. 646-650 [demands to strike appear at pp. 646 and 650].) The trial court never ruled on the motion to strike. (*See id.* pp. 662-667.) Where a trial court is silent on a motion to strike evidence presented in summary judgment proceedings, the motion to strike is deemed denied. *E.g., State v. Hill*, 848 P.2d 1375, 1385 (Ariz. 1993) (motion not ruled upon deemed denied); *Bergeron v. Argonaut Great Cent. Ins. Co.*, 64 So. 3d 255, 262 (La. App. 2011) (motion to strike summary judgment evidence that the trial court did not rule upon deemed denied); *Hignite v. Glick, Layman & Assocs.*, No. 95782, 2011 Ohio App. LEXIS 1470, ¶ 6 (Ohio App. Apr. 7, 2011). Thus, BNSF's motion to strike the "BNSF Contractor" materials was deemed denied.

BNSF did not cross-appeal the denial of its motion to strike. Accordingly, the "BNSF Contractor" materials are applicable and admissible. *E.g., City of Delta v. Thompson*, 548 P.2d 1292, 1294 (Colo. 1975) (stating general rule that appellee must cross-appeal adverse trial court rulings).

More important, BNSF's contention that "BNSF Contractor" materials "only apply to contractors hired by BNSF's Engineering Department" (AAB p. 33) is

incorrect. The safety training located on www.bnsfcontractor.com is "required for **any/all contractors working on/with BNSF Railway properties**." http://bnsfcontractor.com/ (last viewed Nov. 25, 2016) (emphasis added). The materials plainly applied to the work at issue here.

As to authentication, BNSF misstates the testimony of Glenn Gallowicz, the BNSF employee in charge on the day in question. (AAB at 35.) Although he could not say definitively that the subject "BNSF Contractor" materials are "the policy of BNSF," Mr. Gallowicz testified that the materials appeared to be taken from BNSF's "engineering instructions." (Gallowicz dep., R. CF pp 596-597.)

3. BNSF had sufficient possession of and control over the worksite to qualify as a "landowner."

BNSF relies heavily on the provision of its contract with BNSF stating that it "has no duty or obligation to observe or inspect, or to halt work by any Non-BNSF contractor" (AAB at 26.) Indeed, BNSF strongly suggests that the contract automatically forecloses any statutory or common law liability.

BNSF virtually ignores the fact that its Agreement with RTD 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.) Moreover, although parties to an agreement may generally contract away their statutory and common law obligations to each other, they may not contract away their obligations to third

parties. *Lamb v. Milliken*, 243 P. 624, 625 (Colo. 1926). To the extent BNSF claims that the contract absolved it of any affirmative duty to Mr. Blakesley "to observe or inspect, or to halt work" of a non-BNSF contractor such as BTC, its claim is incorrect as a matter of law.

"Landowner" includes "a person in possession of real property . . . ." C.R.S. § 13-21-115(1). The evidence in this case establishes triable issues of fact regarding whether BNSF had sufficient possession of the fenced-in worksite to qualify as a landowner under the Premises Liability Act.

- A jury could conclude that the injury happened within BNSF's easement. (Opening Brief at 9, 31 [citing evidence].) BNSF did not dispute the right-of-way issue until the reply brief supporting its summary judgment, which was too late. *See Wallman v. Kelley*, 976 P.2d 330, 331-332 (Colo. App. 1998).

- Where, as here, an injury happens on the defendant's property, only a complete surrender of possession and control will preclude a "landowner" finding. *Pierson v. Black Canyon Aggregates, Inc.*, 48 P.3d 1215, 1220 (Colo. 2002).

- BNSF did not completely surrender possession and control of the fenced-in area. It retained authority to shut down any activities within that area.

- BNSF's contention that it had nothing to do with contractor work inside the fenced-in area where Mr. Blakesley was injured is not true. Once again,

BNSF actually issued the permits that BTC needed to do its work in that area on June 4, 2012. (R. CF p. 136, ¶ 55 [third amended complaint]; *id.* ¶ 42 [answer].)

- BNSF required contractors 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.)

- Even if one does not consider the "BNSF Contractor" materials at all, Mr. Blakesley testified that he took BNSF's required safety orientation course and learned therein that the BNSF flagman had "overall control" of the site. (Blakesley dep. at 147:16 – 148:10, R. CF p. 461.)

- Per the "BNSF Contractor" documents, BNSF had the final say regarding material storage at the site. (R. CF p. 501.)

- BNSF rules expressly required outside contractors to wear high-visibility, non-flammable safety vests. It is undisputed that Mr. Gallowicz waived that requirement for Mr. Blakesley on the day of the injury. (Gallowicz depo. at 29:4-11, R. CF p. 435.) Gallowicz knew when he gave permission that Mr. Blakesley would be working with BTC inside the fenced-in area. That evidence conclusively refutes the notion that BNSF had no authority within the area.

- As discussed in the Opening Brief, a jury could reasonably conclude that the absence of a high-visibility vest played a part in the injury.

- BTC had to give BNSF a detailed description of what BTC planned to do before starting work. (Barger depo. at 33:18 – 34:1, R. CF p. 468.) That fact further belies the notion that BNSF had no control.

- BNSF cites evidence it claims proves that BNSF's sole authority at the site was limited to train and railroad track safety issues, and that BNSF had no authority to control BTC's work. (AAB at 25-26, 29-30.) As always, though, the record must be construed in the nonmoving party's favor. *Lombard*, 187 P.3d at 570. Moreover, a court may not weigh the evidence or assess the credibility of witnesses. *Kaiser Foundation Health Plan v. Sharp*, 741 P.2d 714, 718 (Colo. 1987). Based on Mr. Blakesley's evidence, a jury could reasonably find that BNSF did in fact have possession and control of the site.

On the facts herein, reasonable minds could conclude that BNSF had "possession" of the area where Mr. Blakesley was injured and was a "landowner" per C.R.S § 13-21-115(1). The trial court erred in granting summary judgment.

4. A jury could also find that BNSF was legally responsible for the conditions and activities at issue.

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). A person is "legally responsible" where he "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.

For the reasons set forth in Section II.A.2, *supra*, the BNSF safety training materials available on www.bnsfcontractor.com are relevant and admissible. Once again, the safety training on that site is "required for any/all contractors working on/with BNSF Railway properties." Since BTC was plainly a contractor working "on/with BNSF Railway properties," the safety rules on the website applied here.

Those rules mandated that "[p]roposed storage locations need to be approved by the BNSF project representative." (R. CF p. 501.) Although the rule was "particularly important" for storage locations within 25 feet of tracks, the rule's effect was not limited to those spaces. (*Id.*) BNSF considered the rule "critical to the prevention of many slip, trip and fall, and struck-on injuries." (*Id.*)

The fact that BNSF required contractors to obtain BNSF's approval for all on-site proposed storage locations gives rise to a reasonable inference that BNSF approved the storage arrangements inside the fenced area. As detailed in the opening brief, those arrangements involved pipe casing and dunnage in dangerously close proximity to massive mobile construction equipment in an enclosed area measuring only 35 feet square. BTC's investigation listed "[l]imited space to complete the necessary work" as the first contributing factor. (R. CF p.

551.) Based on the inference that BNSF exercised its authority by approving the very storage conditions that contributed to the injury, a jury could reasonably find that BNSF was a landowner by being "legally responsible for creating a condition" on the property that contributed to Mr. Blakesley's injury. For this additional reason, summary judgment was improper.

B. Alternatively, the trial court erred in holding that BNSF owed Mr. Blakesley no common law duty of care.

1. Preservation:

BNSF's suggestion that Mr. Blakesley did not preserve this issue (AAB at 24) is false. Mr. Blakesley preserved his alternative argument regarding common law negligence at R. CF pp. 581-585.

2. Relevant factors favor recognizing that BNSF owed Mr. Blakesley a common law duty of reasonable care.

BNSF again suggests that its contract with RTD precludes the existence of any duty. (AAB at 39-40.) That is incorrect. *See Lamb,* 243 P. at 625 (contracting parties could not contract away the rights of a nonparty). The case BNSF cites stands for the unremarkable proposition that a contract may give rise to tort duties as between the contracting parties. *Lewis v. Emil Clayton Plumbing Co.,* 25 P.3d 1254, 1256 (Colo. App. 2000). *Lewis* does not suggest that the contracting parties can obliterate the common law rights of third parties.

Foreseeability of harm is a key factor in determining whether to recognize a duty. *Perreira v. State*, 768 P.2d 1198, 1209 (Colo. 1986). BNSF avers that the injury was not foreseeable from BNSF's standpoint because Mr. Blakesley was experienced, BTC provided a spotter, and BNSF's expertise is limited to railroad operations. (AAB at 40-41.) However, as noted above, the evidence supports a reasonable inference that BNSF approved storing the pipe casing and dunnage in close proximity to the track hoe. BNSF's own safety materials state that BNSF has the final say regarding contractor storage locations. (R. CF p. 501.) It was eminently foreseeable that the crowded conditions BNSF approved would pose a serious risk of injury to anyone working on the pipe casings in close proximity to an operating track hoe. Despite BNSF's claim to the contrary, Mr. Gallowicz could see the work. (Gallowicz dep. at 58:24 – 59:2, R. CF p. 438 [Gallowicz "periodically" observed the BTC worksite before the injury]; R. CF p. 396 [Gallowicz drawing depicting his truck in relation to excavation site].)

Recognizing a duty is a determination that the plaintiff's interests are entitled to protection. *Casebolt v. Cowan*, 829 P.2d 352, 356 (Colo. 1992). The record contains evidence from which a jury could find that the injury happened on BNSF property, that BNSF retained authority to shut down the work of any contractor, and that BNSF exercised substantial control within the fenced area. The

trial court's conflations notwithstanding, it was BNSF's employee in charge who authorized Mr. Blakesley to remove his high-visibility vest before entering the enclosed work area on the day of the injury. (See Opening Brief at 36.) On these facts, there is nothing unfair or unreasonable about imposing a duty.

CONCLUSION

Appellant 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.

Date: December 2, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2016, I served and filed the foregoing **REPLY BRIEF** as follows:

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