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No. 90858-3

SUPREME COURT
OF THE STATE OF WASHINGTON

LARRY CURRIER, LARRY CURRIER d/b/a AMERICAN CONTAINER EXPRESS, and AMERICAN CONTAINER EXPRESS, INC.,

Respondents,

v.

NORTHLAND SERVICES, INC.,

Petitioner.

AMICUS MEMORANDUM OF THE WASHINGTON TRUCKING ASSOCIATIONS

FILED
DEC 22 2014
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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ORIGINAL

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A. INTEREST OF AMICUS CURIAE

The interest of the Washington Trucking Associations ("WTA") is set forth in its motion for leave to submit this amicus memorandum in support of Northland's petition for review.

B. STATEMENT OF THE CASE

WTA relies on the factual recitation in the Court of Appeals opinion, and the statements of the case in Northland's petition for review and Currier's answer to same, but supplements those factual recitations with information specifically relevant to the trucking industry.

This Court should further note that Washington's trucking industry is reliant upon the use of independent contractors, particularly "owner/operators." Given the volatile and fluctuating demand for trucking services, trucking carriers often contract with independent contractors to perform services generally and to lease trucking equipment on an as-needed basis to meet peak load requirements. Owner/operators, the most common type of independent contractors in the industry, have been part of the American trucking industry since the early Twentieth Century.[1]

Owner/operators have their own businesses and own their trucking equipment, which consists of the truck tractor, and occasionally the trailer,

[1] There is even a national owner/operators organization, Owner Operator Independent Drivers Association. *See* OOIDA.com (the Association's website).

used to haul cargo. These tractors and trailers are expensive pieces of equipment, sometimes costing in the hundreds of thousands of dollars to purchase new. Under federal motor carrier law[2], owner/operators are permitted to lease their trucking equipment to trucking carriers. The relationship between a carrier and an owner/operator is contractual: the carrier leases the equipment from the owner/operator in return for payment. Owner/operators may operate the leased equipment personally or may hire their own employees to do so.

Washington law has also recognized the use of owner/operators in the trucking industry.[3]

Owner/operators are true independent contractors. Once they undertake to haul a load, owner/operators have the right to select their own delivery route, and take rest breaks, make meal stops, and decide where to

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[2] Federal statutes and regulations dictate the terms and conditions under which trucking carriers may perform authorized transportation in trucking equipment that they do not own. Specifically, federal laws and regulations dictate the actual contractual terms and practices for owner/operators. 49 C.F.R. § 376.12. Any leased equipment must be operated under the federal "license" or operating authority of the trucking carrier leasing the equipment; the carrier is required to maintain exclusive possession, control, and use of the equipment for the duration of the lease. The leasing contracts must contain provisions that specify which party is going to pay certain expenses like vehicle taxes, fuel, maintenance. *Id.*

[3] RCW 51.08.180, for example, exempts owner/operators from coverage as employee of trucking carriers under Washington's worker compensation laws. *Wash. State Dep't of Labor & Indus. v. Mitchell Bros. Truck Line, Inc.*, 713 Wn. App. 700, 54 P.3d 711 (2002). Owner/operators have similarly been exempted from Washington's unemployment compensation laws. *Penick v. Employment Sec. Dep't*, 82 Wn. App. 30, 917 P.2d 136, *review denied,* 130 Wn.2d 1004 (1996).

end their day's work at their discretion. A trucking carrier's dispatcher has no control over the conversations such owner/operators might have with one another, in some instances hundreds or even thousands of miles from a dispatch center. This stands in stark contrast, for example, to an office worker whose supervisor may be only a few feet away and can be overheard by that supervisor when talking to colleagues personally or others by phone.

Currier, through his firm, American Container Express, was an independent contractor for Northland. Similarly, Mr. Martinez and other drivers who made slurs against him were independent contractors for Northland. All of these Northland independent contractors were not owner/operators under the federal regulations but were small trucking companies with their own USDOT operating authority performing services on an as-needed basis for Northland as true independent contractors.[4]

C. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court of Appeals decision represents a major expansion of Washington's Law Against Discrimination, RCW 49.60 ("WLAD") by the

[4] The legal distinction between owner/operators, the most common type of independent contractors in the trucking industry, and Northland's independent contractors, is not pertinent to the Court's analysis of the applicability of the WLAD to them.

judiciary contrary to the express language of RCW 49.60.180 and RCW 49.60.210, without legislative amendment of the WLAD. This judicial intrusion into the Legislature's legislative function is an issue of substantial public importance meriting this Court's review. RAP 13.4(b)(4). Moreover, the approach taken by the Court of Appeals to this judicial expansion of the WLAD is contrary to this Court's precedent on the WLAD and independent contractors, and ordinary common law principles on the liability of principals for acts of independent contractors meriting review under RAP 13.4(b)(1).

(1) Currier Failed to State a Claim under RCW 49.60.210 Against Northland

In order to state a claim under RCW 49.60.210, by its terms, the plaintiff must be a protected party indentified by that statute *and* must oppose practices by the employer (or in this case, the principal) forbidden by the WLAD. The Court of Appeals ignores the former requirement, simply *assuming* that it can be ignored because of the policy of RCW 49.60.030(1) and this Court's decision in *Marquis*. Op. at 8-11. The court was wrong.

(a) Currier Is Not Within the Statutorily-Specified Protected Class of RCW 49.60.210

While RCW 49.60.030(1)[5] employs language barring discrimination with respect to the obtaining or holding employment, and in *Marquis v. City of Spokane*, 130 Wn.2d 97, 922 P.2d 43 (1996), this Court determined that an independent contractor had a claim under the general principles of that statute for direct discrimination by a principal,[6] this did not allow the Court of Appeals to ignore the statutory language of RCW 49.60.210.

By direct contrast to the situation in *Marquis*, the Legislature here has squarely articulated the necessity of an *employment relationship* to state a retaliation claim. The plain language of .210 restricts retaliation

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[5] Fundamentally, the issue presented in this case is one of statutory interpretation. This Court's protocol for statutory interpretation is well understood. *State, Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). This Court endeavors to carry out the Legislature's intent in enacting a statute. *Id.*

[6] The Marquis court concluded that the language of RCW 49.60.030(1) supported a claim under the WLAD by a golf professional, an independent contractor, against her principal who engaged in direct gender discrimination against her, in the absence of any language in the WLAD applying the policy in RCW 49.60.030(1) to independent contractors. 130 Wn.2d at 112-13. Indeed, this Court observed that RCW 49.60.030(1) was "unclear to the extent that it makes a broad statement of rights, without defining the scope of those rights." *Id.* at 107. The Court was then left to interpret the Legislature's intent, and ruled that its interpretation was consistent with the liberal interpretation imperative in RCW 49.60.020 and rules of the Human Rights Commission. *Id.* at 111-12.

claims to employers.[7] This is *not* a case of legislative silence.[8] Moreover, the Human Rights Commission itself recognizes that its jurisdiction does not extend to the claims of an independent contractor under RCW 49.60.180. WAC 162-16-230(1-2). Clearly, the Commission's rationale is based on the express language of RCW 49.60.180. The *same rationale* applies to Currier's specific statutory claim under RCW 49.60.210.

Finally, in cases involving the general tort liability of principals for the acts of contractors or their employees, Washington has adhered to the rule that a person who engages an independent contractor is generally not liable in tort to the employees of that independent contractor, absent a

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[7] RCW 49.60.040(11) specifically defines "employer" and does not include the principal of an independent contractor. The Court of Appeals relied on the term "any person" in allowing a claim. Op. at 6-7. But the court misreads the qualifying parties under the statute. RCW 49.60.210(1) references an employer "or other person" but "person" is also defined in RCW 49.60.040(19) and does not embrace the principal of an independent contractor. RCW 49.60.040(1) and (10) respectively define "aggrieved person" and "employer." Neither definition encompasses independent contractors in cases like the present case.

[8] That *Marquis* was based on legislative silence on the application of the WLAD to independent contractor for direct discrimination is confirmed by this Court's decision in *Griffin v. Eller*, 130 Wn.2d 58, 63, 922 P.2d 788 (1996) ("[u]nlike *Marquis* ..., we are here addressing the issue of a statutory exemption for small employers rather than statutory silence as to independent contractors.").

retention by the principal of the right to control the contractor's work.[9] The rationale for this immunity is that it would be inequitable to hold the principal liable for conduct by its contractor that it lacks the right or the power to control. *Hennig v. Crosby Group, Inc.*, 116 Wn.2d 131, 133-34, 802 P.2d 790 (1991). Here, of course, Northland did not retain such control over any of the contractors at issue to be liable under the common law principles articulated by this Court, and, in fact, it would be inequitable to hold it liable for over-the-road chatter by independent contractors over whom it had no theoretical or actual right of control, chatter it fully explained to such independent contractors was unacceptable.

While it is entirely likely that Currier will claim a "common law" retaliation claim arising out of RCW 49.60.030(1), this Court should not presume to create such a cause of action where the Legislature has clearly articulated the basis for a retaliation claim in RCW 49.60.210. Courts have rejected efforts to utilize RCW 49.60.030 to circumvent that strict language of other WLAD provisions barring claims. For example, in *MacDonald v. Grace Church Seattle*, 457 F.3d 1079 (9th Cir. 2006), the plaintiff's employment discrimination under RCW 49.60.180 was barred

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[9] *See, e.g., Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 330, 582 P.2d 500 (1978) (general contractor as principal); *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 119-22, 52 P.3d 472 (2002) (premises owner).

by the express terms of the WLAD that exempt religious organizations. The plaintiff contended she had a claim under RCW 49.60.030 and RCW 49.60.210. The Ninth Circuit *rejected* that argument in the fact of the express statutory exemption. *Id.* at 1087.

Because Currier is not Northland's employee, he is not protected by RCW 49.60.210.

(b) Currier Did Not Oppose WLAD-Forbidden Practices by Northland

It is also critical that Currier cannot meet the opposition element of RCW 49.60.210. By its terms, RCW 49.60.210 restricts a retaliation claim to discriminatory action *by the employer*. *Hollenback v. Shriners Hosp. for Children*, 149 Wn. App. 810, 821, 206 P.3d 337 (2009); *Mattson v. United Parcel Service, Inc.*, 872 F. Supp.2d 1131, 1142 (W.D. Wash. 2012). *Coville v. Cobarc Services, Inc.*, 73 Wn. App. 433, 869 P.2d 1103 (1994) (claim of retaliation for report of alleged sexual discrimination by female employee who walked into room where her supervisor was masturbating properly dismissed because there was no protected opposition activity, i.e. discrimination, imputable to employer).

But even if this Court were to say that *Marquis* permits an independent contractor to raise "job-based" WLAD practices, the conduct

offending the WLAD must be *by the employer or principal.*[10] Here, as the Court of Appeals indicated, *Northland* did not engage in any WLAD-offensive practices; rather, Currier was opposing practices *by other independent contractor drivers*. Op. at 2-3.

The practical implications of the Court of Appeals' expansion of RCW 49.60.210 liability are breathtaking and would create contradictory laws impossible for a principal to comply with, i.e., the Hobson's choice of violating contract law by controlling the contractor's activities (to the extent the principal can be aware) or violate WLAD.[11] This Court should grant review. RAP 13.4(b)(4).

(2) The Court of Appeals Decision Is Particularly Unfair Where Trucking Industry Independent Contractors Are Involved

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[10] By its express terms, RCW 49.60.180 applies *only* to job-related discrimination by employers. Marquis did not make a claim under RCW 49.60.180. 130 Wn.2d at 106 n.4. Cases discussing a prima facie claim under that statute have also expressly recognized the need for an employment relationship. *E.g., Mattson,* 872 F. Supp.2d at 1137 RCW 49.60.180 would not support a potential claim by Marco Martinez against Northland (were he to make one) for the discriminatory statements of his fellow independent contractor of which Northland had no knowledge and that it did not adopt in any way (In fact, it told both contractors such conduct was unwelcome). Thus, Currier was not opposing activities actionable under the WLAD *against Northland.*

[11] This Court should note that the principle espoused in the Court of Appeals' opinion that .210 liability applies even in the absence of WLAD-forbidden activities by the principal applies to principals with *multiple* independent contractors. If a carrier utilized 50 independent contractors, and one made a slur to another unbeknownst to the carrier, would *any* of the other 48 independent contractors be able to claim .210 retaliation if they overhead the slur and their contract was later terminated?

Evidencing the reason that any expansion of RCW 49.60.180 and RCW 49.60.210 to independent contractors should be left to the Legislature and its more expansive public participation process than the courts, liability for a trucking carrier for conduct of owner/operators and other true independent contractors is peculiarly unfair.

As noted *supra*, a trucking carrier may dispatch an owner/operator to carry cargo on a long-haul basis over the road. Such a trip by an owner/operator may cover many days, thousands of miles, and untold stops in the course of such a journey. Even where independent contractors are used on shorter trips, the independent contractors act *independently,* as the description implies. A carrier has *no control* over what an owner/operator might say, and to whom, during such activities. Unlike the situation of an employer who may himself or herself, or through supervisory staff, observe and oversee an employee's conduct, a trucking carrier does not have either the theoretical or actual right to control the independent contractors' inappropriate behavior.

The Court of Appeals' opinion achieves an inequitable result. Review is merited. RAP 13.4(b)(4).

D. CONCLUSION

The Court of Appeals decision misreads the WLAD and represents an aggressive expansion of the reach of that statute that should be

undertaken by the Legislature and not the judiciary. This expansion is particularly harmful to the trucking industry that relies so heavily on owner/operators and other true independent contractors. This Court should grant Northland's petition for review. RAP 13.4(b).

DATED this 29th day of October, 2014.

Respectfully submitted,

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APPENDIX

RCW 49.60.180:

It is an unfair practice for any employer:

(1) To refuse to hire any person because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability, unless based upon a bona fide occupational qualification: PROVIDED, That the prohibition against discrimination because of such disability shall not apply if the particular disability prevents the proper performance of the particular worker involved: PROVIDED, That this section shall not be construed to require an employer to establish employment goals or quotas based on sexual orientation.

(2) To discharge or bar any person from employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability.

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability: PROVIDED, That it shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex, or to base other terms and conditions of employment on the sex of employees where the commission by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes.

(4) To print, or circulate, or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses any limitation, specification, or discrimination as to age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a

trained dog guide or service animal by a person with a disability, or any intent to make any such limitation, specification, or discrimination, unless based upon a bona fide occupational qualification: PROVIDED, Nothing contained herein shall prohibit advertising in a foreign language.

RCW 49.60.210:

(1) It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.

(2) It is an unfair practice for a government agency or government manager or supervisor to retaliate against a whistleblower as defined in chapter 42.40 RCW.

(3) It is an unfair practice for any employer, employment agency, labor union, government agency, government manager, or government supervisor to discharge, expel, discriminate, or otherwise retaliate against an individual assisting with an office of fraud and accountability investigation under RCW 74.04.012, unless the individual has willfully disregarded the truth in providing information to the office.

WAC 162-16-230:

(1) Purpose of section. RCW 49.60.180 defines unfair practices in employment. A person who works or seeks work as an independent contractor, rather than as an employee, is not entitled to the protection of RCW 49.60.180. This section outlines the standards that we will use to determine whether a person is an employee as distinguished from an independent contractor for the purpose of entitlement to the protection of RCW 49.60.180.

(2) Rights of independent contractor. While an independent contractor does not have the protection of RCW 49.60.180, the contractor is protected by RCW 49.60.030(1). The general civil right defined in RCW 49.60.030(1) is enforceable by private lawsuit in court under RCW

49.60.030(2) but not by actions of the Washington state human rights commission.

(3) General approach. We will consider all the relevant facts, particularly those bearing on the following factors. No one factor is determinative, but the most important is the extent to which the purchaser of work controls the manner and means of performance of the work.

(a) Control of work. An employment relationship probably exists where the purchaser of work has the right to control and direct the work of the worker, not only as to the result to be achieved, but also as to the details by which the result is achieved.

(b) Tools and place of work. Does the purchaser of the work or the worker furnish the equipment used and the place of work? Generally, the purchaser of work furnishes tools and equipment for employees while independent contractors furnish their own. Some employees furnish some of their own tools, however.

(c) Skill level involved. The skill required in the particular occupation. Skilled workers are typically less closely supervised than unskilled workers, but they are employees if indicia of employment other than close supervision are present.

(d) Type of work involved. The kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision. Some persons, such as lawyers or doctors, may be employees even though they are not closely supervised. The test for such specialists is not whether the lawyer or doctor is closely supervised, but whether he or she is treated the way that employed lawyers or doctors are commonly treated. Lawyers and doctors are typically independent contractors, however, with respect to their clients or patients.

(e) Duration of work. The length of time during which the person has worked or the length of time that the job will last. Independent contractors typically are hired for a job of relatively short duration, but there are instances of independent contracts for an indefinite period - for example, contracts for janitorial service.

(f) Method of payment. The method of payment, whether by time or by the job. Independent contractors are usually paid by the job but are sometimes paid by time. Employees are usually paid by time but are sometimes paid by the job.

(g) Ending the work relationship. Whether the work relationship is terminable by one party or both parties, with or without notice and explanation. An employee is usually free to quit and is usually subject to discharge or layoff without breach of the employment contract. An independent contractor usually has more fixed obligations.

(h) Leave. Whether annual leave is afforded. Leave with pay is almost exclusively accorded to employees.

(i) Integration of the work in the purchaser's operations. Whether the work is an integral part of the business of the purchaser of it. Usually, employees rather than independent contractors do the regular work of a business.

(j) Accrual of benefits. Whether the worker accumulates retirement benefits. Retirement benefits are almost exclusively accorded to employees.

(k) Taxation. Whether with respect to the worker the purchaser of work pays taxes levied on employers, such as the social security tax, unemployment compensation tax, and worker's compensation tax, or withholds federal income tax. The tax laws do not have the same purposes as the law against discrimination, so employee status for tax purposes is helpful but not controlling.

(l) Salary or income. Whether the worker treats income from the work as salary or as business income. See subsection (3)(k) of this section.

(m) Employer records. Whether with respect to the worker the purchaser of work keeps and transmits records and reports required of employers, such as those required under the worker's compensation act. Worker's compensation coverage, like tax coverage, is helpful but not conclusive.

(n) The intention of the parties. The fact that a contract says that the worker is an independent contractor will be considered in this respect, but it is not conclusive for the purpose of coverage of RCW 49.60.180.

(4) Burden of persuasion. The party asserting that the complainant is an independent contractor has the burden of proving that status.

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DECLARATION OF SERVICE

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On said day below, I emailed courtesy copies and deposited with the U.S. Postal Service for service true and accurate copies of the WTA'S MOTION FOR LEAVE TO FILE AMICUS CURIAE MEMORANDUM and AMICUS MEMORANDUM OF THE WASHINGTON TRUCKING ASSOCIATIONS in Supreme Court Cause No. 90858-3 to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated: October 29, 2014 at Seattle, Washington.

Carey Black,
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Subject: RE: Larry Currier, et al. v Northland Services, Inc. Cause No. 90858-3

Received 10/29/2014.

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Subject: RE: Larry Currier, et al. v Northland Services, Inc. Cause No. 90858-3

Good afternoon:

Attached, please find WTA'S MOTION FOR LEAVE TO FILE AMICUS CURIAE MEMORANDUM and AMICUS MEMORANDUM OF THE WASHINGTON TRUCKING ASSOCIATIONS in Supreme Court Cause No. 90858-3 for today's filing.

Thank you,

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