NO. 91610-1

SUPREME COURT OF THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent,

v.

LYONS ENTERPRISES, INC.
d/b/a JAN-PRO CLEANING SYSTEMS,

Petitioner.

DEPARTMENT OF LABOR AND INDUSTRIES' ANSWER TO AMICUS CURIAE BRIEF OF INTERNATIONAL FRANCHISE ASSOCIATION

ROBERT W. FERGUSON
Attorney General

STEVE VINYARD
Assistant Attorney General
WSBA No. 29737
Office Id. No. 91022
Labor and Industries Division
7141 Cleanwater Drive SW
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7715

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

Amicus International Franchise Association (IFA) asks, without any statutory or case law support, for franchisees to be treated differently than all other independent contractors under the Industrial Insurance Act. But the Legislature treats all independent contractors equally. All independent contractors—including franchisees—are covered by the Industrial Insurance Act if they provide personal labor to an employer and no statute exempts them from coverage. Lyons's franchisees provide personal labor to Lyons and they are not exempt under RCW 51.08.195 because they are not "free" of Lyons's direction and control and they are not "customarily engaged" in an "independently established" trade or business. Therefore, they are Lyons's workers. IFA essentially asks this Court to rewrite RCW 51.08.195 to ensure the viability of franchising as a business model. Such a request is best directed to the Legislature.

This Court should reject IFA's arguments and deny Lyons's petition for review.

II. ARGUMENT

The Industrial Insurance Act makes no distinction between independent contractors who happen to be franchisees and other independent contractors. RCW 51.08.070. When deciding if a franchisee who is an independent contractor is protected by the Industrial Insurance

Act, the issues are the same as for any independent contractor: whether the essence of the work under the contract was personal labor and whether the franchisee met all of the elements for an exemption under RCW 51.08.195. IFA does not argue that the essence of Lyons's franchisees' work was not personal labor, thus conceding the point. Instead, it contends that RCW 51.08.195 should be less exacting when it is applied to a franchisee as opposed to other independent contractors. Amicus 5-10. There is no basis in the law for IFA's policy request.

A. IFA's Argument Does Not Present an Issue of Substantial Public Interest as It Lacks Any Statutory Support

Under RCW 51.08.070 an employer is subject to the Industrial Insurance Act if it utilizes a contractor to perform personal labor. RCW 51.08.195 provides an exemption from coverage if an independent contractor meets six criteria. IFA does not dispute that the essence of Lyons's franchisees' work was personal labor: it argues only that the franchisees are exempt under RCW 51.08.195. Amicus 5-10. They are not.

Two of RCW 51.08.195's requirements are plainly not met here. First, Lyons's franchisees are not "free from control or direction over the performance of the service" by the employer who contracted for the personal labor as RCW 51.08.195(1) requires. Second, Lyons's franchisees are neither "customarily engaged" in an "independently

established" trade or business, nor do they have a principal place of business that qualifies for a business deduction under the federal tax code as RCW 51.08.195(3) requires.

1. An Independent Contractor Who Is a Franchisee Is Exempt Under RCW 51.08.195(1) Only if He Is Free of the Franchisor's Direction or Control

IFA recognizes that Lyons's franchisees cannot meet the statutory requirement that they be free from Lyons's direction and control. Amicus 6-7; RCW 51.08.195(1). It admits that "'controls' are universally recognized as a hallmark of a franchise relationship." Amicus 7. It argues that RCW 51.08.195 should be modified to make it possible for a franchisee to meet the exemption. IFA argues that RCW 51.08.195(1) is met if a franchisor does not control the "methods and details" of the franchisee's work. Amicus 7. This argument fails for three reasons.

First, under the plain language of RCW 51.08.195(1), the independent contractor must be "free" from direction or control. Nothing in the statute suggests that a less exacting standard should be used when the independent contractor happens to be a franchisee. IFA suggests that because the history of franchising post dates the passage of the Industrial Insurance Act, the Act should not be understood to apply literally to franchisees. Amicus 3, 6. However, the Industrial Insurance Act has been amended significantly since it was first adopted, and, even after

franchising became widespread, the Act not amended to either exclude franchisors from coverage or to relax its requirements with regard to them.

Second, IFA conflates the standard that determines whether an employer-employee relationship exists with the standard that determines whether an independent contractor is exempt from coverage. For an employer-employee relationship to exist, the employer must exercise control over the "methods and details" of the worker's performance. *Risher v. Dep't of Labor & Indus.*, 55 Wn.2d 830, 834, 350 P.2d 645 (1960) (stating "the decisive test by which to determine whether the relationship is employer-employee or independent contractor is whether the alleged employer has the right of direction and control over the alleged employee as to methods and details of doing the work."). By definition, an employer does not control the methods and details of an independent contractor's performance: if it did, an employer-employee relationship would exist instead. *See Risher*, 55 Wn.2d at 834. The Legislature expanded the definition of "employer" and "worker" under the Industrial Insurance Act to cover independent contractors as well as employees, thereby extending coverage to workers who are *not* subject to control regarding the methods and details of the performance of the work. RCW 51.08.070, .180. The Legislature could not have understood RCW 51.08.195(1)'s reference to an independent contractor being "free"

of "control or direction" to mean a lack of control over the methods and details of the work, because the worker would not be classified as an independent contractor in the first place if the employer exercised that degree of control over the worker. *See Risher*, 55 Wn.2d at 834.

Third, IFA's assertion that it would be impossible for a franchisee to ever be free of direction or control is unsupported and incorrect. *See* Amicus 7. Regardless of the content of federal law regulating franchises, the issue under the Industrial Insurance Act is not whether a franchisor has some controls in place to protect its trademark, but whether the franchisor exercises some degree of control over the performance of the work under the contract. *See* RCW 51.08.195(1). This is a fact-specific inquiry. Here, Lyons exercises control over more than its trademark: it controls its franchisees' work performance because it owns all of the cleaning contracts that it assigns to the franchisees and can reassign a cleaning contract from one franchisee to another at any time. CP 316, 318, 1908, 1918. Furthermore, it regularly audits its franchisees' work and can remove a franchisee from a cleaning contract—with no obligation to find another contract for the franchisee—if it finds that the work was faulty. CP 318, 2173-74. Having failed to satisfy the first element of the six-part requirement, Lyons cannot qualify for the exemption.

2. A Franchisee Who Has Not Pursued a Trade or Business Independently of a Franchisor Is Not Customarily Engaged in an Independently Established Trade or Business

Lyons's franchisees also do not meet the third element for an exemption under RCW 51.08.195. *See* RCW 51.08.195(3). RCW 51.08.195(3) unambiguously provides that an independent contractor must be "customarily engaged" in an "independently established" trade or business. IFA suggests that a franchisee satisfies RCW 51.08.195(3) so long as it paid its own expenses and insurance, filed its own taxes, made staffing decisions, and assumed the risk of business failure, regardless of whether it ever pursued the business or trade that is the subject of the franchise before becoming a franchisee and regardless of whether a noncompete clause would forbid it from pursuing that business after the franchise agreement ended. Amicus 8. IFA effectively reads "customarily engaged" and "independently established" out of the statute, as its reading gives no effect to either term. IFA's argument fails as it is contrary to the statute's plain language.

IFA asks for special treatment for franchisees, suggesting that RCW 51.08.195(3) is too restrictive if it is applied literally to franchisees. Amicus 8-9. IFA's suggestion that the statute should have a different meaning when applied to franchisees—when the statute itself makes no

such distinction—is unsupported and contrary to law. It is not an employer's business model that determines exemption from coverage, but whether the elements of RCW 51.08.195 are met.

Furthermore, IFA ignores that a franchisee could also satisfy RCW 51.08.195(3) if it had a place of business that qualified for a tax deduction. *See* Amicus 8-9. IFA points to no reason why it would be impossible or even impractical for a franchisee to have such a place of business. *Id.* It is not necessary to distort RCW 51.08.195(3)'s language in order to make it possible for a franchisee to meet it.

B. This Court Should Not Consider an Argument That Lyons Raised for the First time in Its Petition

IFA joins Lyons in an argument that Lyons raised for the first time in its petition for review: namely, that franchisees should be exempt from coverage under RCW 51.12.020(5) and (8), which exempt sole proprietors and some business officers from mandatory coverage as employees. Amicus 5-6, Pet. 11. Since Lyons did not raise this issue to the Court of Appeals, this Court should not consider it. *See Pappas v. Hershberger*, 85 Wn.2d 152, 153-54, 530 P.2d 642 (1975).

In any event, the argument should be rejected, as it would render RCW 51.08.070 meaningless. It is true that sole proprietors and the officers of certain business entities are exempt from coverage as

employees under RCW 51.12.020(5) and (8). However, RCW 51.08.070 provides that independent contractors are covered when they perform work under a contract and the essence of the contract is their personal labor. Any person who pursues a business independently (rather than as the employee of an employer) is a "sole proprietor" under the law, unless another type of business entity is created. *See Dolby v. Worthy*, 141 Wn. App. 813, 816, 173 P.3d 946 (2007). If RCW 51.12.020(5) and RCW 51.12.020(8) are read to exempt all independent contractors from coverage if they are sole proprietors or officers of a business entity, it would render RCW 51.08.070 meaningless, as an independent contractor who does not have any employees will always be a sole proprietor or, if an LLC or corporation was formed, an officer of it. It is implausible that the Legislature intended for RCW 51.08.070 to have no effect.

IFA wrongly claims that the Court of Appeals opinion places franchisors at a competitive disadvantage, arguing that the franchisees were Lyons's employees "solely because they are parties to a franchise agreement" and that they otherwise would have been exempt under RCW 51.12.020(5) and (8). Amicus 5. IFA's premise is false: RCW 51.12.020(5) and (8) do not exempt independent contractors from coverage, whether they are franchisees or not. Nowhere does the Court of Appeals' opinion suggest that RCW 51.12.020(5) and (8) would have

exempted Lyons's workers from coverage had they not been franchisees. *See Department of Labor & Indus. v. Lyons Enterprises, Inc.*, __ Wn. App. __, 347 P.3d 464 (2015). IFA complains of unfair treatment, but in truth IFA seeks special treatment.

C. This Court Should Not Consider an Argument Raised Only by an Amicus

IFA also raises an argument not raised by Lyons: that the Industrial Insurance Act should not cover franchisees because franchisors would never be able to file the quarterly reports with the Department that it would have to file if its franchisees are its workers. Amicus 9-10. This Court does not consider an argument raised only by an amicus. RAP 12.1(a); *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962).

Even if the Court considers the argument, it fails. IFA provides no support for its claim that franchisors are "universally" incapable of obtaining access to their franchisees' employment records. Amicus 10. Franchisors customarily require franchisees to provide various reports to them, and there is no reason why a franchisor could not request access to a franchisee's employment records. IFA suggests that a franchisor would risk incurring tort liability for the franchisee's actions if it asked for employment records, but the cases it cites stand for the proposition that a franchisor is not liable for a franchisee's torts unless it controls the

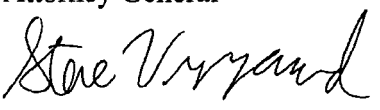
methods and details of the franchisee's work, and in no way support the idea that simply receiving copies of employment records would create such liability. *See* Amicus 10, citing *Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998); *Patterson v. Domino's Pizza, LLC*, 60 Cal. 4th 474, 333 P.3d 723 (2014). In any event, it is an employer's duty to ensure that he or she complies with the requirements of the Industrial Insurance Act, not the Industrial Insurance Act's duty to make sure its requirements mirror an employer's business practices.

III. CONCLUSION

The Court should reject IFA's call for a distorted reading of the Industrial Insurance Act. As the Act does not distinguish between franchisees and other independent contractors, there is no basis to apply the law differently to franchisees. This Court should reject the arguments in IFA's amicus curiae brief and affirm the superior court's decision.

RESPECTFULLY SUBMITTED this 12th day of August, 2015.

ROBERT W. FERGUSON
Attorney General



STEVE VINYARD
Assistant Attorney General
WSBA No. 29737
Office Id. No. 91022
P.O. Box 40121
Olympia, WA 98504-0121

NO. 91610-1

SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent, v. LYONS ENTERPRISES, INC., d/b/a JAN-PRO CLEANING SYSTEMS, Appellant.	DECLARATION OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Department of Labor and Industries' Answer to Amicus Curiae Brief of International Franchise Association and this Declaration of Service to all parties on record by U.S. Mail and Email as follows:

Ryan P. McBride
Lane Powell, PC
P.O. Box 91302
Seattle, WA 98111-1302
mcbrider@lanepowell.com

Douglas Berry
Miller Nash Graham & Dunn, LLP
2801 Alaskan Way, Pier 70, Suite 300
Seattle, WA 98121-1128
dberry@grahamdunn.com

DATED this 12th day of August, 2015, at Tumwater, Washington.

AUTUMN MARSHALL
Legal Assistant 3
(360) 586-7737

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, August 12, 2015 9:47 AM
To: 'Marshall, Autumn (ATG)'
Subject: RE: DLI v Lyons Enterprises, Inc., Cause No. 91610-1

Rec'd on 08/12/2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

-----Original Message-----
From: Marshall, Autumn (ATG) [mailto:AutumnM@ATG.WA.GOV]
Sent: Wednesday, August 12, 2015 9:02 AM
To: OFFICE RECEPTIONIST, CLERK
Subject: DLI v Lyons Enterprises, Inc., Cause No. 91610-1
Importance: High

Good morning Mr. Carpenter,

Please find attached for filing the Department's Answer to Amicus Curiae Brief of International Franchise Association and Declaration of Service for the above matter. Thank you.

Steve Vinyard
(360) 586-7715
WSBA# 29737
Stevev1@atg.wa.gov

Your message is ready to be sent with the following file or link attachments:

DeptsAnswerToAmicusBrief.pdf

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.