

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
3/15/2018 2:08 PM  
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95556-5  
95246-9  
95442-9

**SUPREME COURT OF THE STATE OF WASHINGTON**

GULICK TRUCKING, INC., a Washington corporation,

Petitioner,

v.

STATE OF WASHINGTON, EMPLOYMENT SECURITY  
DEPARTMENT,

Respondent.

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SWANSON HAY COMPANY;  
HATFIELD ENTERPRIZES, INC., a Washington corporation;  
and  
SYSTEM-TWT TRANSPORT, a Washington corporation,

Petitioners,

v.

STATE OF WASHINGTON  
EMPLOYMENT SECURITY DEPARTMENT,

Respondent.

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MACMILLAN-PIPER, INC.,

Petitioner,

v.

STATE OF WASHINGTON  
EMPLOYMENT SECURITY DEPARTMENT,

Respondent.

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PETITIONER GULICK TRUCKING, INC.'S  
MOTION TO CONSOLIDATE  
PURSUANT TO RAP 3.3(b)

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1. IDENTITY OF MOVING PARTY

Petitioner Gulick Trucking Inc. (“Gulick”) seeks the relief designated in Part 2.

2. RELIEF REQUESTED

Gulick requests that this Court consolidate its appeal with two other cases—*Swanson Hay et al. v. ESD*, Case No. 95246-9, and *MacMillan-Piper v. ESD*, Case No. 95442-9—both of which raise issues that are legally identical to the issues raised in Gulick’s petition for review.

3. FACTS RELEVANT TO MOTION

Gulick is a federally licensed motor carrier. Its business principally involves the transportation of perishable goods via trucking equipment with refrigerated trailers. Like most motor carriers, Gulick uses two sources of trucking equipment: (1) equipment owned by Gulick and driven by “employee drivers”; and (2) equipment owned by the truck drivers, known in the industry as “owner/operators.” Federal law requires Gulick to engage owner/operators through a written lease contract. Federal regulations mandate that the lease contracts contain certain specified terms, including that the motor carrier must have exclusive possession, custody, and control of the leased equipment.

Gulick appeals the assessment of unemployment taxes against it by Respondent Washington State Employment Security Department (“ESD”). The compensation on which ESD purports to impose taxes is remuneration that Gulick paid to owner/operators. ESD’s assessment was based on its determination that the owner/operators were Gulick’s employees and that

Gulick could not establish the independent-contractor exception in RCW 50.04.140. Gulick is just one of hundreds of motor carriers in Washington targeted by ESD in an illicit effort to change the longstanding practice of treating owner/operators as independent contractors.

The appeals of three such carriers—Swanson Hay Co., Hatfield Enterprizes, Inc., and System-TWT Transport—were consolidated in Division III of the Court of Appeals. Division III ruled against them in *Swanson Hay Co. v. State Employment Sec. Dep't*, 404 P.3d 517 (Wn. App. 2017). Shortly thereafter, Division I decided the same issues adversely to the carrier in MacMillan-Piper's appeal.

The carriers in the foregoing cases all filed petitions for review that are currently pending before this Court. *See* Case Nos. 95246-9 and 95442-9. They then moved to consolidate the two cases, which motion is also still pending.

Division II of the Court of Appeals affirmed the assessment against Gulick on January 23, 2018. Division II's opinion expressly stated that it was following Division III's decision in *Swanson Hay*. Gulick filed a timely petition for review.

Gulick's petition for review disputes Division II's conclusion that the independent-contractor exception in RCW 50.04.140 is not met here. This challenge raises three central issues: (1) whether the Court of Appeals properly refused to apply the common-law understanding of "control" to the legislatively undefined words "control or direction" in

RCW 50.04.140(1)(a); (2) whether Division II correctly permitted ESD to consider federally required contract terms in its “control or direction” analysis; and (3) whether Division II gave inordinate weight to a single fact—whether owner/operators possess their own federal operating authority—in deciding whether they were “independently established” under RCW 50.04.140(1)(c). In addition, Gulick’s petition for review asserts that ESD’s assessments are preempted by federal law under the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c)(1).

All of these issues are raised in the *Swanson Hay* and *MacMillan-Piper* appeals.

#### 4. GROUNDS FOR RELIEF AND ARGUMENT

The appellate rules expressly permit this Court to consolidate pending cases “if consolidation would save time and expense and provide for a fair review of the cases.” RAP 3.3(b). This standard is unquestionably met here. The precise issues that are raised in Gulick’s petition for review are already before the Court in the *Swanson Hay* and *MacMillan-Piper* cases. Considering all of these cases together will save substantial time and expense.

ESD may point out that there are differences in the procedural history and underlying facts of these cases. While this is true, it is no more so than in many other consolidated appeals, and this Court is perfectly capable of accounting for the minor differences. These differences pose no


barrier to fair review, and any challenges are far outweighed by the efficiency of deciding the central issues together.

5. CONCLUSION

To promote orderly administration of these cases, this Court should consolidate Gulick's appeal with the other appeals identified above.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of March, 2018.

OGDEN MURPHY WALLACE, P.L.L.C.

By:   
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Aaron P. Riensche, WSBA #37202  
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Gulick Trucking, Inc.

## DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of Petitioner Gulick Trucking, Inc.'s Motion to Consolidate to the following parties:

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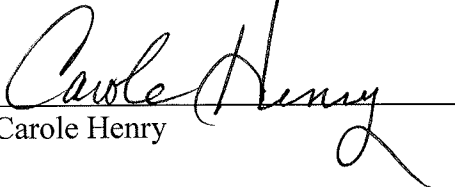
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated this 15<sup>th</sup> day of March, 2018 at Seattle, Washington

  
Carole Henry



**OGDEN MURPHY WALLACE, PLLC**

**March 15, 2018 - 2:08 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 95246-9  
**Appellate Court Case Title:** Swanson Hay Company, et al v. Employment Security Department  
**Superior Court Case Number:** 15-2-03704-2

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