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Division II  
State of Washington  
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NO. 52189-0-II  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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JAMES SALING,

Appellant,

vs.

GAITHER & SONS CONSTRUCTION, CO.,

Respondent.

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APPEAL FROM THE SUPERIOR COURT

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HONORABLE ROBERT LEWIS

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OPENING BRIEF OF APPELLANT

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## APPELLANT'S OPENING BRIEF

### ASSIGNMENT OF ERROR

1. The trial court erred in entering its Order dated June 29, 2018, granting Respondent's Motion for Summary Judgment and dismissing Appellant's claims against Respondent.

### ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does a worker's written agreement at the inception of employment to prospectively waive third party claims against his employer's customers if injured at a customer's job site violate provisions of the Industrial Insurance Act?
2. Does the language of the same agreement signed by the worker prior to assignment to any of the employer's customers' job sites circumvent the same statutory prohibitions under the Act by requiring the worker to prospectively consent to (a) every customer's having control of his work and (b) becoming every customer's "special employee"?
3. Were there genuine issues of material fact as whether Appellant was an employee of Respondent?

4. Did the written agreement which (1) prospectively waived Appellant's third party right to sue Respondent's customers for workplace injuries; (2) prospectively granted consent to every customer having control over his work, and (3) prospectively consented to an employee-employer relationship with every customer violate public policy under *Wagenblast v. Odessa School District*, 110 Wn.2d 840, 913 P.2d 779 (1996)?

#### STATEMENT OF THE CASE

Appellant James Saling applied for work as a temporary laborer through Labor Ready, Inc. On January 8, 2015, he signed a Labor Ready document entitled Employment Terms & Acknowledgements (hereinafter "ETA"). (CP 38-39) and (CP 90) The first sentence of the ETA read that Appellant understood and agreed that Labor Ready was his employer. (CP 38) Appellant's first work assignment by Labor Ready after signing the ETA was on February 17, 2015. (CP 45) The assignment was to a construction site of Respondent's in Vancouver. (CP 136) The project was construction of a 91-unit apartment complex. (CP 108-09) Respondent was the general contractor on the project. (CP 119-20)

The description of the job assignment was that Appellant was to “move 100-125 lb. doors from one stack to another.” (CP 117) Appellant and Daniel Pittman were assigned to the site to perform that task. (CP 57-58) The two men arrived at the job site on February 17, 2015 between 8:00 am and 8:15 am. (CP 58) They met briefly with Respondent’s superintendent Kevin Billups in an on-site trailer. (CP 58-59) Mr. Billups then introduced them to his assistant Scott Zitterkopf outside the trailer. (CP 59-60) Mr. Zitterkopf walked Appellant and Mr. Pittman to a building where the doors were located. (CP 60) The area of the building in which the doors were located was known as the community center. (CP 108) It was described as a “large lobby type of area” on the ground floor of the building. (CP 108)

Mr. Zitterkopf informed the two men the doors were to be moved up “multiple flights” of stairs. (CP 60) Mr. Zitterkopf placed an “X” on the door frames where each door was to be delivered. (CP 59-60) Mr. Zitterkopf showed the men where the doors were to be taken, and then “had other stuff he needed to go do.” (CP 62) Appellant and Mr. Pittman “devised a plan on how we were going to pick [the doors] up and move them and . . . went to work.” (CP 62) In response to a question regarding the nature of that conversation, Appellant described he and Mr. Pittman discussing

[H]ow we were going to lift them and move them. How we were going to remove them from the front of the stack, because they were leaning against each other, and how we were going to pick them up and move them to the fourth floor.

(CP 62-63) There was no evidence that Mr. Zitterkopf or any other employee of Respondent's was involved in that discussion. There was no evidence that Mr. Zitterkopf or any employee instructed the men on how to transport the doors from one location to another, or otherwise directed their activities.

Appellant was injured at approximately 10:00 a.m. when a line of doors that had been set on edge fell on him. (CP 98 and CP 117) He sustained crush injuries to his chest and abdomen, multiple contusions and injuries to his right ankle and shoulder. (CP 70 and CP 98)

Labor Ready provided workers compensation coverage for its employees. (CP 20) Appellant filed a workers compensation claim with the Department of Labor and Industries ("the Department") arising from the incident and the claim was accepted. (CP 70 and CP 98) Labor Ready was the assigned employer for the claim. (CP 99) On March 10, 2015, Appellant signed a third-party election form, informing the Department he intended to pursue a third party action against the responsible third party.

(CP 147) In a letter dated April 10, 2018, the Department informed

Appellant that its statutory lien totalled \$16,372.68. (CP 148)

The ETA was two pages in length. (CP 37-38) The Agreement was delineated by paragraph numbers. Near the bottom of second page was paragraph 14, containing the title “Release of Claims Against the Employer’s Customers and Transitional (Light) Duty Work Assignment”.

(CP 38) The text of paragraph 14 was contained entirely under that heading, and read in relevant part as follows:

I understand that my employer provides temporary workers for its customers to work at the customers’ project site. While working at the customer’s job site, I agree and consent that the customer is my special employer (“Special Employer”) and that the customer directs, controls, and supervises my work.

...

**Workers’ Compensation shall be my sole remedy for  
on the job injuries.**

If I am ever injured in the course of my work I agree that I will elect, and solely rely upon [Labor Ready’s] Workers’ Compensation coverage for any recovery for such injuries, and not seek any recovery whether civil or through workers’ compensation of any other party, including, but not limited to, a Special Employer. I further waive any claim I or my heirs and assigns may now have or that may later accrue against a special employer.

...

(emphasis in original).

Appellant testified he “reviewed” the ETA prior to signing it on January 8, 2015. (CP 54) At the time he signed it he had never heard of Gaither and Sons Construction, or been informed that at some time in the future he would be assigned to its work site. (CP 90) At all relevant times he considered himself an employee of Labor Ready. (CP 51) He believed the provision regarding waiver of claims against third parties was a condition of his employment with Labor Ready, and that in signing the ETA he was waiving his right to sue Labor Ready (CP 91) On February 17, 2015 – or any time prior to that -- he did not consent to Respondent being his employer. (CP 91)

The ETA was signed 40 days prior to Appellant sustaining his injuries at Respondent’s job site.

During discovery, Respondent produced no agreements between it and Labor Ready addressing Respondent’s use of Labor Ready workers. In response to Appellant’s request for production for any operating agreements between Respondent and Labor Ready in effect during the first six months of 2015, Respondent stated as follows:

. . . [Respondents] are not in possession of any other operating agreements between [Respondent] and Labor Ready except for documents identified as follows: [CP 133-143]

In response to further inquiry about any such agreements, Respondent's counsel stated without reservation that no such agreement existed. (CP 144-146) Similarly, Respondent provided no documentation or agreement in support of its motion for summary judgment showing that Appellant was its employee, "special employee" or any other evidence of an employment relationship between it and Appellant.

Respondent moved for summary judgment, and argued that because Appellant had signed the ETA and consented to being Respondent's "special employee", he had waived his right to maintain a third party action against Respondent. The trial court heard oral argument on the motion on June 15, 2018 and granted summary judgment. Appellant then appealed.

## ARGUMENT

### I. Summary of Argument

The language of paragraph 14 the ETA waiving Appellant's right to sue Respondent's customers as a third party for workplace injuries overtly violated the express public policy prohibiting a worker from waiving the benefits of the Industrial Insurance Act. The language of paragraph 14 requiring a worker to (1) consent to a customer's control of his work and (2) to an employment relationship is a disguised waiver of

precisely the same statutory rights. An employment relationship is established for workers compensation purposes when the facts show the parties mutually agreed to the relationship, the employer controls the worker and the employee consents to the relationship. RCW 51.04.060 prohibits a worker from entering into “any” contract or agreement that waives the benefits of the Act. The language of paragraph 14 requiring Appellant to consent to control and to an employment relationship waived the benefits of the Act and is void.

The language of paragraph 14 also violates the public policy of the Act to reduce suffering and economic loss caused by workplace injuries, which includes a worker’s right to assert injury claims against negligent third parties. The language also violates the public policy allowing the Department of Labor and Industries to obtain reimbursement for benefits paid to workers because of the negligence of third parties.

Issues of material fact existed as to whether in fact an employment relationship existed between Appellant and Respondent. Issues of fact also exist as to Respondent’s control of Appellant’s work and his consent to be Respondent’s employee.

The ETA also violated public policy under the six-factor analysis of *Wagenblast v. Odessa School District*, 110 Wn.2d 840, 913 P.2d 779 (1996).

## II. Standard of Review

The trial court granted Respondent's motion for summary judgment. That decision is subject to *de novo* review. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009). Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. When determining if an issue of material fact exists, the court construes all facts and inferences in favor of the nonmoving party. A genuine issue of material fact exists only where reasonable minds could reach different conclusions. *Michael v. Mosquera-Lacy*, 165 Wn.2d at 601.

## III. The ETA Violates Public Policy Embodied in the Industrial Insurance Act; Therefore, the Trial Court Erred in Granting Respondent's Motion for Summary Judgment

When enacting workers compensation legislation, the Legislature declared that all aspects of workplace injuries were

withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, *except as otherwise provided in this title . . .*

RCW 51.04.010 (emphasis added).

The immunity against suit stemming from workplace injuries is not all-encompassing. The Industrial Insurance Act ("the Act") permits

actions against a worker's employer when the worker can establish the employer intentionally causes injury. RCW 51.24.020. The Legislature also expressly granted employees the right to sue a third party for damages resulting from an on-the-job injury. RCW 51.24.030(1).

The Legislature also declared under the Act that "[n]o employer or worker shall exempt himself or herself from the burden or waive the benefits of [the Act] by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be pro tanto void." RCW 51.04.060. No employer or employee may "exempt himself from the burdens which [the Act] imposes, nor by contract waive the benefits thereof in the sense that he can bar himself from the right to claim its benefits." *Shaughnessy v. Northland S.S.Co.*, 94 Wash. 325, 329, 162 P. 546 (1917).

For workers who obtain successful judgments or settlements in third party claims, the Act specifically allocates benefits to the worker equaling at least 25 percent of the balance of the award after payment of costs and attorney fees and the Department's proportionate share for reimbursement of benefits paid. RCW 51.24.060; *Mandery v. Costco Wholesale Corp.*, 126 Wn.2d 851, 854-55, 110 P.3d 788 (2005). Under the express terms of RCW 51.04.060, a worker "cannot waive by contract

her right to pursue those potential statutory benefits.” *Id.*, 126 Wn.2d at 855.

If the worker elects to pursue a third party action and recovers from the third party, the Department of Labor and Industries (“the Department”) is entitled to share in the recovery to reimburse a portion of benefits paid to the injured worker. RCW 51.24.060(1)(a)-(c). The Department is granted a statutory lien to the extent of the benefits to which it is entitled to recover. RCW 51.24.060(2).

Courts liberally construe the Act in order to achieve the Act’s purpose of providing compensation to covered employees injured in their employment. RCW 51.12.010; *Spivey v. City of Bellevue*, 187 Wn.2d 716, 726, 389 P.3d 504 (2017). Since the provisions of the Act are to be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries occurring in the course of employment, courts must also liberally construe the legislature’s exception to the Act’s otherwise exclusive coverage. *Michelbrink v. WSP*, 180 Wn.App. 656, 663, 323 P.3d 620 (2014), *affirmed following remand*, 191 Wn.App. 414, 363 P.3d (2015) (addressing exception to coverage when injury caused by deliberate intent of employer).

A. The Language of Paragraph 14 of the ETA Violates the Express Public Policy of the Industrial Insurance Act Against

Waiver of Appellant's Right to Compensation and is Therefore  
Void

The express language of RCW 51.04.060 states an agreement which waives the benefits or exempts from the burdens of Title 51 is void. The benefits to workers include medical treatment, time loss, as well as a sure and swift remedy when injured. The benefits also include the right to pursue a private action for injuries caused by persons not employed by the worker's employer. RCW 51.24.030(1).

In *Mandery v. Costco Wholesale Corp.*, 126 Wn.App. 851, 110 P.3d 788 (2005), the worker was employed by Western Demo Services, Inc. ("WDS") to demonstrate and display products at Costco stores. She signed an employment agreement with WDS when she was hired in 2001. The agreement provided that the worker understood that her work would be performed at Costco and that WDS would provide workers compensation coverage while she worked on Costco's premises. The agreement stated she would "look solely" to WDS and its insurer's workers compensation policy for all damages related to any injuries sustained on Costco's premises. 126 Wn.App. at 852. The worker agreed that the policy was "adequate and fully compensatory". She "release[d], waive[d], discharge[d] and covenant[ed] not to sue Costco. She further

agreed the release was as “broad and as inclusive as is permitted by the laws of the . . . states” where WDS operated. 126 Wn.App. at 853.

The worker was injured while working at Costco, 14 months after signing the agreement. She filed a third party action against Costco. Costco filed for summary judgment and argued the worker had waived any negligence claims when she signed the agreement. The trial court agreed and entered summary judgment in favor of Costco, and the worker appealed.

Division I reversed. The Court noted that the employer required the worker

through her employment contract, to waive her right to seek damages from Costco. However, the legislature has expressly granted employees the right to sue a third party to collect damages resulting from workplace injury.

*Mandery*, 126 Wn.App. at 854 (citing RCW 51.24.030(1)). The Court further pointed out that under the Act a worker who recovers in a third party action is entitled to at least 25 percent of the balance of the award. 126 Wn.App at 854-55. Thus,

under the express terms of RCW 51.04.060, Mandery cannot waive by contract her right to pursue these potential statutory benefits.

As such, the contract provision purporting to release Costco from liability is void.

*Mandery*, at 855.

Here, Appellant signed an agreement with Labor Ready stating his sole remedy if injured while working was that provided by workers compensation benefits. The agreement specified the benefits would be provided through Labor Ready's workers compensation coverage. The agreement stated Appellant would not seek recovery for any third-party recovery or through any other party's workers compensation coverage. In those respects, the language of the ETA closely resembles that of the agreement in *Mandery*. There can be no serious argument that the latter half of the paragraph – beginning with the words “If I am ever injured . . .” and ending with “against [Labor Ready's] Workers Compensation coverage” -- is as violative of public policy as was the language in *Mandery*.

Where the ETA differs is the inclusion of language that indirectly accomplishes the precise result prohibited by RCW 51.04.060 through intentionally specific language contained in the second sentence of paragraph 14. In that sentence, the worker

“agree[s] and *consent[s]* that the customer is

my special employer (“Special Employer”)  
and that the customer *directs, controls and*  
*supervises* my work.”

(emphasis added).

For the purposes of workers’ compensation, an employment relationship exists only when (1) the employer has the right to control the servant’s physical conduct in the performance of his duties and (2) there is consent by the employee to this relationship. *Jaimes v. NDTs Constr., Inc.* 195 Wn.App. 1, 6, 381 P.3d 67 (2016), citing, *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d 550, 553, 588 P.2d 11 74 (1979). “Unlike the common law, compensation law demands that, in order to find an employer-employee relation, a *mutual* agreement must exist between the employer and employee.” *Fisher v. City of Seattle*, 62 Wn.2d 800, 804, 384 P.2d 852 (1963) (emphasis in original).

The above-quoted sentence of paragraph 14 could not have been more closely tailored to mimic the elements necessary to “establish” an employer-employee relationship under *Novenson*. The inclusion of that specific language is not accidental or coincidental. Unlike the overtly void exculpatory language in *Mandery*, the wording of paragraph 14 is crafted to covertly accomplish the precise result prohibited by RCW 51.04.060. But even if the wording of the sentence was coincidental, the effect would be the same. The statute states plainly that “[n]o employer or worker shall

exempt himself . . . from the burden or waive the benefits of this title by *any* contract [or] agreement . . .” (emphasis added). Both the direct and indirect language of paragraph 14 waive Appellant’s rights under Title 51 and relieve Respondent of the burden of third-party claims.

The only reason the language regarding “special employer” is contained in the ETA is to require a leased worker to prospectively waive his right to ever bring a third-party claim against a Labor Ready customer. By requiring him to consent that every contractor to whom he is assigned is his “special employer”, the ETA required Appellant to prospectively waive all third-party rights he had under the Industrial Insurance Act. The specific sentence in paragraph 14 contains legally-significant language that would be lost on a non-lawyer, let alone a 10<sup>th</sup>-grade drop-out with demonstrable deficiencies in spelling and punctuation. (CP 33-36 and CP 130)

In *Novenson*, an employee of Kelly Labor of Northwest, Inc. was dispatched to a customer of Kelly and was injured on his third day of work. The Supreme Court focused the consent analysis on the language from *Fisher v. City of Seattle, supra*, that a “mutual agreement must exist between the employer and the employee.” *Novenson*, 91 Wn.2d at 553.

The Court's reference to "the employer" was to Kelly Labor's customer.

The Court quoted Larson<sup>1</sup>:

Compensation law . . . is a mutual arrangement between the employer and the employee under which both give up and gain certain things. Since the rights to be adjusted are reciprocal rights between employer and employee, it is not only logical but mandatory to resort to the agreement between them to discover the relationship. To thrust upon a worker an employee status to which he has never consented . . . might well deprive him of valuable rights under the compensation act, notably the right to sue his own employer for common-law damages . . .

*Novenson*, 91 Wn.2d at 554.

The *Mandery* decision held that the prospective waiver of workplace injury rights is against public policy. *Novenson* held that consent is a factual issue regarding the relationship between the employer and the employee, in this case Respondent and Appellant. Under *Fisher*, *supra*, that relationship must be mutual between – in this case – Appellant and Respondent. The ETA was not a mutual agreement between Respondent and Appellant. The ETA was signed weeks prior to Appellant knowing he would work for Respondent. He could not have consented to an employment relationship that did not exist when the ETA was signed. Respondent was not a party to the agreement. In the parlance of

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<sup>1</sup> 1 Larson, Workmen's Compensation Law § 47.10 (1952)

*Novenson*, Appellant unknowingly gave up “valuable rights” under the Act before ever stepping foot on Respondent’s job site. Respondent gave up nothing.

Respondent was a third-party beneficiary to an agreement that violated a clearly-expressed public policy. Under these facts, the “special employer” language of the ETA served no purpose other than to circumvent the ETA’s overtly void language the Court of Appeals has held violates public policy. Requiring a worker to waive the control and consent issues accomplishes precisely the same result as that contemplated by the overt language. Accordingly, this Court should reverse the trial court’s grant of summary judgment on the basis that the language of paragraph 14 of the ETA violates the public policy embodied in RCW 51.04.060.

B. The Language of Paragraph 14 of the ETA Violates Public Policy by Depriving the Department of Labor and Industries of Its Statutory Right of Reimbursement in Third Party Cases

In *Mandery*, the Court noted that the release in that case impermissibly interfered with the Department’s statutory right to reimbursement of a third-party recovery. 126 Wn.App at 855. Under RCW 51.24.030(2), the Department has a statutory lien as to the proceeds

of a third-party recovery. The purpose of the lien is to protect the state fund by providing reimbursement, and such reimbursement is

mandated so that (1) the accident and medical funds are not charged for damages caused by a third party and (2) the worker does not make a double recovery. the purposes of the workers' compensation act would be defeated if the Department's right to reimbursement were [sic] impaired.

*Mandery*, 126 Wn.App. at 855-56. (citations omitted).

Because paragraph 14 of the ETA violated the public policy underlying reimbursement to the Department from third party claims, the agreement is void. A contractual prohibition nullifying the Department's right to reimbursement "cannot stand". *Mandery*, 126 Wn.App. at 856. Accordingly, the trial court erred in granting summary judgment and on that basis, this Court should reverse the order granting it.

#### IV. There are Issues of Fact as to Whether an Employer-Employee Relationship Existed Between Appellant and Respondent

Notwithstanding paragraph 14 of the ETA, issues of fact exist as to whether an employer-employee relationship existed between the parties. In addition, there are issues of fact with respect to the issues of Respondent's control of the work and Appellant's consent to the relationship.

A. Employer-Employee Relationship

There must be a mutual agreement between the parties for an employer-employee relationship to exist. *Fisher, supra*. Respondent provided no evidence establishing that it and Appellant had a mutual agreement. Respondent's position is that Appellant consented to the relationship as of the date he signed the ETA. Because the agreement had to be mutual, Appellant could not have agreed to a relationship before it existed.

An employment relationship exists only when the employer has the right to control the servant's physical conduct in the performance of his duties and there is consent by the employee to the relationship. *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d 550, 553, 588 P.2d 1174 (1979). According to Respondent, Appellant prospectively consented to an employment relationship with Respondent prior to the existence of the relationship.

Respondent provided no documentation showing that Respondent and Labor Ready had an understanding, let alone an agreement, that Respondent was a co-employer of any worker referred by Labor Ready. Just as in *Novenson*, the contractual agreement entered between Labor Ready and Respondent mentioned no contract between Appellant and

Respondent. *Novenson*, 91 Wn.2d at 555. Respondent has produced no contractual agreement between it and Appellant.

There are multiple facts in the record showing that no employer-employee relationship existed between the parties. Other than learning he was going to a job site of Respondent's the day before, Appellant had never heard of Gaither and Sons Construction until the day he was injured. He never received a paycheck or anything in writing from Respondent. There was no evidence that Respondent kept Appellant on its payroll. Appellant was paid by Labor Ready. Appellant was an employee of Labor Ready's for workers compensation purposes. Less than two hours elapsed between the time Appellant came to Respondent's job site and when he was injured. According to his testimony, the amount of time spent working around any of Respondent's employees was considerably less. Reasonable minds could differ as to the existence of an employer-employee relationship.

B. Right to Control Appellant's Conduct

The only evidence in the record on this issue is that Respondent's assistant superintendent showed Appellant and Mr. Pittman where the doors were and where they were to be moved. The assistant then left to attend to other tasks. No evidence was presented that Respondent provided any direction or control over how the doors were to be moved or

how they were to be stored once they were moved. Appellant and Mr. Pittman devised the plan on how to get the doors to their ultimate destinations. There are issues of fact as to the issue of control.

C. Consent to the Employment Relationship

Appellant knew nothing about Respondent until the day he was injured. There is no evidence in the record that at any time during the less than two hours he worked at the site that he consented to the relationship. To the contrary, the fact that he and Mr. Pittman were left to their own devices as to how to perform their assigned task speaks more of an independent contractor relationship than one of employer and employee.

The first sentence of the ETA plainly stated that Labor Ready was Appellant's employer. At all times on the morning of February 17, 2015, Appellant considered himself an employee of Labor Ready and no one else. Neither of Respondent's employees with whom he spoke that morning said anything about him being an employee of Respondent. No one from Labor Ready told him that morning he was a special employee of Respondent's.

Consent may be given expressly or impliedly and may be inferred from the attending circumstances. *Fisher v. City of Seattle*, 62 Wn.2d 800, 806, 384 P.2d 852 (1963). Appellant spent a minimal amount of

time on the job. He spent a minimal amount of time talking to any employee of Respondent. No employee of Respondent ever spoke to him about him being an employee or “special” employee. He believed at all times he was an employee of Labor Ready. No employee of Respondent directed the manner in which the work was to be done or oversaw the work as it was being done. These facts create an inference of an absence of consent. Conversely, Respondent provided no facts that Appellant consented to an employer-employee relationship specifically with Respondent. Taken in the light most favorable to Appellant, there is a genuine issue of material fact as to whether Appellant consented to an employer-employee relationship with Respondent. *Jaimes v. NDTs Constr.*, 195 Wn.App. 1, 8-9, 381 P.3d 67 (2016).

V. The Trial Court Erred in Concluding the Language of Paragraph 14 of the ETA was not Void as Against Public Policy under *Wagenblast v. Odessa School District*

In *Wagenblast v. Odessa School District*, 110 Wn.2d 845, 913 P.2d 779 (1996) the Supreme Court was faced with the issue of whether a public school district could require students and their parents to sign liability waivers as a condition of student participation in interscholastic sports. Cases for declaratory and injunctive relief filed in Lincoln County

and King County were consolidated and eventually transferred directly to the Supreme Court. The Supreme Court held the exculpatory releases were invalid because they violated public policy. The Court initially observed that this state's appellate courts had upheld as valid exculpatory releases regarding the following activities: Toboggan sliding, scuba diving classes, mountain climbing instruction, automobile demolition derbies and ski jumping. 110 Wn.2d at 849.

The Court listed six factors it would consider in deciding if an exculpatory contract violated public policy:

- (1) The agreement concerns an endeavor of a type generally thought suitable for public regulation;
- (2) The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public;
- (3) such party holds itself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards;
- (4) because of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks the services;
- (5) in exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence, and
- (6) the person or property of members of the public seeking such services must be placed under the control of the

furnisher of the services, subject to the risk of carelessness on the part of the furnisher, its employees or agents.

*Wagenblast*, 110 Wn.2d at 852-856.

The more of the six characteristics that appear in a given exculpatory agreement, the more likely it is the agreement will be found invalid on public policy grounds. 110 Wn.2d at 852.

As to the first factor, it is of little dispute that workplace safety and prevention of injuries to workers is -- and is in fact -- suitable for public regulation. The Legislature declared that in the exercise of its police power, as well as the mandates of portions of the Washington Constitution, “to create, maintain, continue and enhance the industrial safety and health program of the state . . . “ RCW 49.17.010. Similarly, the “welfare of the state depends upon its industries, and even more upon the welfare of its wage worker.” RCW 51.04.010 (emphasis added). The statute does not differentiate between a temporary worker and an employee; in fact, it specifically refers to the wage “worker”. Neither does it differentiate by the work performed.

The *Wagenblast* court cited *McCutcheon v. United Homes Corp.*, 79 Wn.2d 443, 486 P.2d 1093 (1971) in its analysis of the second factor. The Court emphasized that matters of “great importance to the public” are often matters “of practical necessity” for some members of the public by

reference to where citizens work as well as where they live. 110 Wn.2d at 854. In *McCutcheon*, a landlord's month-to-month rental agreement contained an exculpatory clause releasing tenants' personal injury claims for landlord negligence. The landlord argued the agreement related exclusively to the personal and private affairs of two parties on equal footing and was therefore not a matter of public interest. 79 Wn.2d at 448. The court responded to the argument as follows:

. . . [W]e are not faced merely with the theoretical duty of construing a provision in an isolated contract specifically bargained for by *one landlord and one tenant* as a purely "private affair." Considered realistically, we are asked to construe an exculpatory clause, the generalized use of which may have an impact upon thousands of potential tenants. Under these circumstances, it cannot be said that such exculpatory clauses are "purely a private affair" or that they are "not a matter of public interest."

*McCutcheon*, 79 Wn.2d at 449-50. (emphasis in original).

At the conclusion of the opinion, the court held that the type of exculpatory clause involved in that case

contravenes long established common law rules of tort liability that exist in the landlord-tenant relationship. As so employed, it offends the public policy of the state and will not be enforced by the courts. *It makes little sense for us to insist, on the one hand, that a workman have a safe place in which to work, but on the other hand, to deny him a reasonably safe place in which to live.*

*McCutcheon*, 79 Wn.2d at 450. (emphasis added).

The McCutcheon opinion equated home safety and security with workplace safety in determining that a dispute between one landlord and one tenant was of great importance regarding a matter of practical necessity. It is clear that just as with “private” contracts between a single landlord and a single tenant, a “private” arrangement involving a worker, a labor staffing company and a customer of that company is a matter of public interest.

As to the third *Wagenblast* factor, Respondent’s witnesses testified that Respondent used Labor Ready’s services for unskilled labor. (CP 120-121) Respondent’s representatives agreed that like other labor supply vendors, Labor Ready employees were “competent” for the work assignments Respondent sought. (CP 121)

The fourth *Wagenblast* factor states the party invoking exculpation must possess a decisive advantage of bargaining strength against any member of the public who seeks the services. As a third party beneficiary to the ETA, Respondent acquired a decisive advantage against any worker who signed the agreement. Respondent did not pay Appellant; Respondent did not have to provide workers compensation coverage for Appellant. Respondent had the best of both worlds: low-wage workers not on its payroll and protection under Labor Ready’s workers compensation coverage as though the workers were Respondent’s own. *See, Novenson,*

91 Wn.2d at 855. Conversely, Appellant had one option, which was to accept the arrangement or forego employment. There is little question that a decisive advantage in bargaining strength in Respondent's favor imbued the arrangement.

The fifth factor is whether Respondent was the beneficiary of a standard adhesion contract of exculpation. According to Appellant, the agreement was a condition of his employment with Labor Ready. No evidence was produced at the trial court that Labor Ready would or would not permit alterations of paragraph 14 such that a worker could assert the statutory right of a third party claim against a Labor Ready customer. Appellant's belief that the conditions of his employment with Labor Ready included signing the ETA suggests that an alteration would not have been permitted. Respondent had the burden at summary judgment to establish that this factor did not apply to the ETA. It did not meet that burden.

The final *Wagenblast* factor is that Appellant be under the control of the furnisher of the services, and be subject to the risk on the part of the furnishers, its employees or agents. Respondent acknowledged that it had the primary responsibility for safety at the job site. (CP 120) Appellant was subject to the risks of negligence created by anyone at the site. The doors Appellant was assigned to move were positioned in a manner that

caused them to fall on him. Neither Appellant or Mr. Pittman positioned them in that manner. Respondent specifically asked for the services of individuals to move doors positioned in a manner that could cause them to fall and injure people. There is no question that this factor weighs against Respondent and toward invalidity.

Taken together, the factors present in the ETA weigh heavily against the validity of the exculpation provisions in paragraph 14. The fact that the language violates express provisions of Title 51 and is void as a result is simply one more reason paragraph 14 violates public policy under *Wagenblast*. Accordingly, the trial court erred on this basis in granting summary judgment and on that basis the judgment should be reversed.

#### CONCLUSION

The Order granting Summary Judgment should be reversed. This case should be remanded to the trial court for further proceedings.

Dated this 22<sup>nd</sup> day of October, 2018.

Respectfully submitted,



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Attorney for Appellant Saling

**CARON, COLVEN, ROBISON & SHAFTON PS**

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