

FILED  
Court of Appeals  
Division II  
State of Washington  
12/20/2018 4:41 PM

NO. 52189-0-II  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

---

JAMES SALING,

Appellant,

vs.

GAITHER & SONS CONSTRUCTION, CO.,

Respondent.

---

APPEAL FROM THE SUPERIOR COURT

---

HONORABLE ROBERT LEWIS

---

REPLY BRIEF OF APPELLANT

---

BRUCE R. COLVEN  
Attorney for Appellant James Saling  
Caron, Colven, Robison & Shafton  
900 Washington Street, Suite 1000  
Vancouver, WA 98660  
(360) 699-3001

**Table of Contents**

Reply to Brief of Respondent .....1

I. An Appellate Court Engages in De Novo Review of a Grant of Summary Judgment Based Upon All Materials Submitted to the Trial Court; Accordingly, Gaither and Son’s “Clarification” of the Issues Before This Court Is Without Foundation.....1

II. The Plain Language of Paragraph 14 Establishes that the Intent Behind it was to Extinguish Mr. Saling’s Third Party Rights.....3

III. Mr. Saling Did Not Consent to an Employment Relationship with Gaither When He Signed the ETA, Nor was the ETA a Mutual Agreement to an Employee-Employer Relationship.....4

IV. Nothing in the Record Supports Gaither’s Claims the Trial Court Disregarded Mr. Saling’s Declaration or Ruled it Inadmissible, or that the Declaration Contradicted Mr. Saling’s Deposition Testimony.....6

V. Because Mr. Saling’s Declaration does not Directly Contradict the ETA and Because Gaither was not a Party to the ETA, the Declaration and the Statements in it are Not Barred by the Parole Evidence Rule.....9

VI. Gaither’s Assertion that Neither the *Novenson* or the *Mandery* Case Apply to These Facts is Incorrect.....11

A. *Mandery v. Costco Wholesale Corp.*, 126 Wn.App. 851 (2005).....11

B. *Novenson v. Spokane Culvert*, 91 Wn.2d 550 (1979).....13

VII. Issues of Fact Exist as to Mr. Saling’s Subjective Belief Regarding an Employee-Employer Relationship with Gaither.....14

|   |    |
|---|----|
| VIII. Case Law in Washington Supports Mr. Saling’s<br>Position..... | 18 |
| Conclusion.....   | 20 |

**Table of Authorities**

**Cases:**

|   |              |
|---|--------------|
| <i>Cantor Fitzgerald, L.P. v. Cantor</i> , 724 A.2d 571, (1998).....              | 3            |
| <i>Fisher v. Seattle</i> , 62 Wn.2d 800, 384 P.2d 852 (1963).....                 | 5, 6, 10, 15 |
| <i>Folsom v. Burger King</i> , 135 Wn.2d 658, 958 P.2d 301 (1998).....            | 1            |
| <i>In re Prior Brothers</i> , 29 Wn.App. 905, 632 P.2d 522 (1981).....            | 10           |
| <i>Jaimes v. NDTS Constr., Inc.</i> 195 Wn.App. 1, 381<br>P.3d 67 (2016).....     | 11, 17       |
| <i>Jackson v. Harvey</i> , 72 Wn.App. 507, 864 P.2d 975 (1994).....               | 15, 17       |
| <i>Jones v. Halvorson-Berg</i> , 69 Wn.App. 117, 847 P.2d 945 (1993).....         | 18           |
| <i>Keck v. Collins</i> , 181 Wn.App. 67, 325 P.3d 306 (2014).....                 | 1            |
| <i>Kofmehl v. Baseline Lake, LLC</i> , 177 Wn.2d 584, 305 P.3d<br>230 (2013)..... | 3            |
| <i>Mandery v. Costco Wholesale Corp.</i> , 126 Wn.App. 851 (2005).....            | 11, 12       |
| <i>Marshall v. AC&amp;S, Inc.</i> , 56 Wn.App. 181, 782 P.2d<br>1107 (1989).....  | 7, 8, 9      |

*Novenson v. Spokane Culvert*, 91 Wn.2d 551, 588  
P.2d 1174 (1979).....4, 5, 6, 11, 13, 14, 17, 18, 19

*Rideau v. Cort Furniture Rental*, 110 Wn.App. 301, 39 P.3d  
1006 (2002).....6, 15, 16, 17, 18, 19

*Smick v. Bumup & Sims*, 35 Wn.App. 276, 666 P.2d 926 (1983).....18

*Wagenblast v. Odessa School District*, 110 Wn.2d 845, 758  
P.2d 968 (1988).....2

*Witenberg v. Sylvia*, 35 Wn.2d 626, 214 P.2d 690 (1950).....10, 11

**Washington Statutes:**

RCW 51.04.010.....19

RCW 51.04.060.....18, 19, 20

RCW 51.24.030.....19

**Secondary Sources**

5 Larson Workers' Compensation § 67.02.....5, 7, 11

**REPLY TO BRIEF OF RESPONDENT**

**I. An Appellate Court Engages in De Novo Review of a Grant of Summary Judgment Based Upon All Materials Submitted to the Trial Court; Accordingly, Gaither and Son's "Clarification" of the Issues Before This Court is Without Foundation.**

Gaither and Sons's, Inc. (hereinafter "Gaither") argues the issues for review by this Court are limited because of comments made by the trial court regarding the exculpatory clause in paragraph 14 of the Employment Terms and Acknowledgments (hereinafter "ETA"). *See* Brief of Respondent, pgs. 2-4. Gaither cites no authority for its argument.

An appellate court cannot properly review a summary judgment order without independently "examin[ing] *all* the evidence presented to the trial court." *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). (emphasis in original). An appellate court cannot fully engage in the same inquiry as the trial court, or construe all evidence and reasonable inferences in the light most favorable to the nonmoving party, unless the appellate court evaluates anew all evidence available to the trial court for potential consideration on summary judgment. *Keck v. Collins*, 181 Wn.App. 67, 81, 325 P.3d 306 (2014).

Evidence is available to an appellate court if it was “on file” with the trial court, and “called to the attention of the trial court” on summary judgment. *Keck*, 181 Wn.App., at 81-82 (citations omitted). Evidence was on file and called to the attention of the trial court regarding several issues, including (a) Labor Ready was Mr. Saling’s employer; (b) that when working for Gaither, Mr. Saling considered Labor Ready to be his employer; (c) that Gaither was not identified or designated as a “special employer” of Mr. Saling; (d) that Gaither did not mutually assent to employ Mr. Saling; (e) that no employment agreement existed between Gaither and Mr. Saling; (f) that no agreement existed between Labor Ready and Gaither that Gaither was a special employer of any of Labor Ready’s employees; (g) that the exculpatory clause in paragraph 14 violated public policy under *Wagenblast*, or (h) that the exculpatory clause in paragraph 14 violated public policy underlying the Industrial Insurance Act. As to the latter two issues, the quotation in Respondent’s brief from the Report of Proceedings demonstrates quite clearly the trial court was presented with plenty of evidence.

Gaither’s argument invites the Court to disregard its role and responsibility to engage in de novo review. The Court should decline Respondent’s invitation.

## **II. The Plain Language of Paragraph 14 Establishes that the Intent**

### **Behind it was to Extinguish Mr. Saling's Third Party Rights**

Gaither and Sons contends the language of paragraph 14 of the Employment Terms and Acknowledgments (“ETA”) is “specifically tailored to comply with requisites to consensually create a clear borrowed servant relationship between customers and Labor Ready employees”. This claim is also unsupported. Gaither presented no evidence to the trial court to support the contention that the purpose of the paragraph was to “consensually create” a borrowed servant relationship between Labor Ready’s employees and customers such as Gaither. As the moving party on summary judgment, it is Gaither’s burden to prove its interpretation of the agreement is correct. *Kofmehl v. Baseline Lake, LLC*, 177 Wn.2d 584, 598, 305 P.3d 230 (2013). Gaither failed to meet that burden.

The contention is expressly at odds with the language of the paragraph. The heading expressly states the intent of the language that follows is to waive third party rights of Labor Ready employees. Although not controlling evidence of a contract’s substantive provisions, contract headings may be considered as evidence to support those provisions. *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 582, n.35 (1998). Had the drafter of the agreement truly intended to inform Labor Ready employees they were special employees of all of Labor Ready

customers, the drafter could have easily done so in a separate paragraph, with a heading calling attention to such a provision. Instead, the language is buried in the language under a heading regarding waiver of third-party claims and light duty options following an industrial injury.

### **III. Mr. Saling Did Not Consent to an Employment**

#### **Relationship with Gaither When He Signed the ETA, Nor was the ETA a Mutual Agreement to an Employee-Employer Relationship**

Gaither was never a party to an express agreement with Mr. Saling to – paraphrasing Gaither – consensually create a borrowed servant relationship with him. (See Brief of Respondent, page 21). The Supreme Court recognized that a “mutual agreement must exist between the employee and employer to establish an employee-employer relationship.” *Novenson v. Spokane Culvert*, 91 Wn.2d 551, 553, 588 P.2d 1174 (1979). The Court’s declaration of that requirement came in the context of the same factual scenario as here, namely a temporary worker injured while working on a site controlled by a customer of Kelly Labor, a supplier of temporary laborers. Just as in *Novenson*, the “contractual agreement entered by [Labor Ready and Gaither] mentions no contract between [Mr. Saling and Gaither]”. *Novenson*, 91 Wn.2d at 555. (CP 134; CP 144-46). Gaither provided no evidence of a *mutual* agreement which must exist

between Mr. Saling and Gaither to establish an employee-employer relationship. *See Novenson*, 91 Wn.2d at 553-554 (quoting *Fisher v. Seattle*, 62 Wn.2d 800, 804-05, 384 P.2d 852 (1963) (emphasis in original)).

Gaither argues that Mr. Saling's January 8, 2015 signature on Labor Ready's ETA amounted to his consent to an employer-employee relationship with Gaither, whom Mr. Saling had never heard of and whose job site he never saw until the morning he was hurt, 40 days later. That argument also fails. 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. *Novenson*, 91 Wn.2d at 553 (emphasis added). Mr. Saling could not consent to the relationship with Gaither by way of the ETA because he did not know who Gaither was when he signed the document. A worker cannot consent to an employment relationship with an unknown employer. 5 Larson Workers' Compensation § 67.02. Accordingly, Mr. Saling did not and could not consent to an employment relationship with Gaither when he signed the ETA.

Furthermore, because Gaither was not a party to the ETA, a mutual express agreement to an employment relationship between the parties never existed. Because a mutual agreement must exist between the

employee and the employer to establish the relationship, the ETA cannot be the basis of a mutual agreement between these parties:

we find that the case law is clear; both control of the employer and consent of the employee are required to establish an employment relationship. With respect to consent, there must be clear evidence of a mutual agreement between the employee and employer such that the employee consented to be the “employee” of the “employer.”

*Rideau v. Cort Furniture Rental*, 110 Wn.App. 301, 304, 39 P.3d 1006 (2002) (citing *Novenson*, 91 Wn.2d at 553-554; *Fisher*, 62 Wn.2d at 804-05).

**IV. Nothing in the Record Supports Gaither’s Claims the Trial Court Disregarded Mr. Saling’s Declaration or Ruled it Inadmissible, or that the Declaration Contradicted Mr. Saling’s Deposition Testimony**

With no reference to the record, Gaither (a) overtly claims the trial court disregarded Mr. Saling’s declaration and (b) impliedly claims ruled the declaration inadmissible. *See* Brief of Respondent, page 25, including footnote 3. The record does not support those claims. *See* CP 188-190 and Report of Proceedings, pgs. 3-5, 7-9 and 11-12.

Gaither also argues that Mr. Saling’s declaration contradicts his deposition testimony and the ETA. In his declaration, Mr. Saling stated he did not think Gaither was his employer, nor that he consented to

employment with Gaither. The ETA and Mr. Saling's deposition testimony established he was an employee of Labor Ready. At the time he signed the ETA he did not know who Gaither was. A worker cannot consent to an employment relationship with an unknown employer. 5 Larson Workers' Compensation § 67.02. Accordingly, Mr. Saling's declaration does not contradict the ETA.

The deposition testimony Gaither claims was contradictory was that Mr. Saling would consider a Labor Ready customer "anybody that [Labor Ready] sent me to." A self-serving declaration is one that contradicts previously given

. . . clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact.

*Marshall v. AC&S, Inc.*, 56 Wn.App. 181, 185, 782 P.2d 1107 (1989). (citations omitted). In *Marshall* (cited by Gaither at page 26 of Brief of Respondent), the Plaintiff in an asbestos case signed an affidavit in response to a defense summary judgment motion that he did not have breathing problems until 1983 and was not told until 1985 that he had an asbestos-related disease; medical records and his workers compensation claim form showed the Plaintiff first became aware of the disease in July 1982. The Court of Appeals affirmed the trial court's order granting summary judgment because the statute of limitations had expired, holding

that the plaintiff's affidavit contradicted the evidence of his earlier statements regarding the date of onset of the disease.

Here, Mr. Saling was asked at a deposition in August 2017 who he would consider a customer of Labor Ready. His answer at that time was anyone to whom Labor Ready sent him. He was also asked at his deposition if it was his understanding that term special employer

Q: . . . includes the company that you were sent out on assignment to work for?

A: I'm not going to say that it would include them.

CP 51.

There is no contradiction between Mr. Saling's declaration and the deposition testimony relied upon by Respondent. The latter was a response regarding who Mr. Saling would consider to be a *customer* of Labor Ready; the former is his statement that he did not consider nor consent to Gaither being his *employer*. The holding in *Marshall* is that a later-given affidavit is self-serving when the "party has given clear answers to [earlier] unambiguous deposition questions." *Marshall*, 56 Wn.App. at 185. The question asked by Respondent sought Mr. Saling's interpretation of a term in a contract drafted by his employer. His declaration was a statement of his belief regarding his relationship with Gaither. No contradiction exists between those two sworn statements,

especially when compared with the statements in *Marshall*, the case Gaither relies upon.

Furthermore, Mr. Saling's deposition testimony regarding his belief regarding the relationship with Gaither was consistent with his declaration. In the former he testified the term special employer would not include the company to whom Labor Ready sent him on assignment. His declaration statement was that he did not consider Gaither to be his employer, and never consented to that relationship. Accordingly, Gaither's argument fails on multiple levels: Gaither provided no support that the trial court "disregarded" Mr. Saling's declaration. Gaither provided nothing to support its implied claim the trial court found the declaration to be inadmissible. Finally, Gaither failed to establish the declaration contradicted Mr. Saling's deposition testimony.

**V. Because Mr. Saling's Declaration does not Directly Contradict the  
ETA and Because Gaither was not a Party to the ETA, the  
Declaration and the Statements in it are Not Barred by the Parole  
Evidence Rule**

Gaither argues that Mr. Saling is barred by the parole evidence rule from "directly contradicting" the ETA. As an initial matter, Mr. Saling incorporates herein by reference the argument in the preceding section that

his declaration did not contradict the ETA. In addition, an “employee” cannot agree to an employment with an unknown employer, which is what Gaither was when Mr. Saling signed the agreement. *Fisher v. Seattle*, 62 Wn.2d 800, 804-05, 384 P.2d 852 (1963). Accordingly, the ETA cannot be the basis of an express employment contract between Gaither and Mr. Saling, which renders the parole evidence rule moot.

Further, the general rule is that third parties to a contract are not bound by, nor may they use, the parole evidence rule against parties to a writing. *Witenberg v. Sylvia*, 35 Wn.2d 626, 629, 214 P.2d 690 (1950). Mr. Saling points out that Washington does recognize an exception to this rule for third party beneficiary contracts. *In re Prior Brothers*, 29 Wn.App. 905, 911, 632 P.2d 522 (1981). However, other than a brief passage in its reply brief at the trial court (CP 181), Gaither has provided no support for its claim that it was a third-party beneficiary of the ETA.

Most importantly, even if Gaither had provided evidence it was a third-party beneficiary, such evidence could not overcome the absence of a contract for hire between it and Mr. Saling. According to Larson, it is

necessary to stress once more that the workers compensation lent-employee problem is different in one significant respect: there can be no compensation liability in the absence of a contract for hire between the employee and the special employer . . . The need for a contract for in the lent employee situation is based on the fact that the employee loses certain rights

along with those gained when striking up a new employment relation. Most important of all, he or she loses the right to sue the special employer at common law for negligence.

5 Larson's Workers' Compensation Law § 67.02. See also *Novenson*, supra, 91 Wn.2d 550, 554-55.

Gaither's assertions to the contrary, there was no contract for hire between the parties in this case. Since *Novenson*, Washington's appellate courts have continued to recognize the reason as well as the significance of the necessity of such a contract. See e.g., *Jaimés v. NDTs Constr., Inc.* 195 Wn.App. 1, 6-7, 381 P.3d 67 (2016). Because there was no contract, the rule of *Witenberg* applies, which means Mr. Saling is not bound by and Gaither may not use the parol evidence rule.

**VI. Gaither's Assertion that Neither the *Novenson* or the *Mandery* Case Apply to These Facts is Incorrect**

Gaither is incorrect that the *Novenson* and *Mandery* cases do not apply to these facts.

A. *Mandery v. Costco Wholesale Corp.*, 126 Wn.App. 851 (2005)

Gaither argues that *Mandery* concerned an agreement that waived liability of a third party (Costco) related to the injured person's work on Costco's property, and the enforceability of an exculpatory clause.

Gaither's argument is based upon the incorrect assertion that the ETA created an employee-employer relationship between the parties in this case.

Gaither argues that unlike Costco in *Mandery*, it was Mr. Saling's special employer. Gaither provided no facts at summary judgment of a mutual agreement between it and Mr. Saling created by the ETA. It provided no facts or argument that Mr. Saling consented to an employee-employer relationship with Gaither by signing the ETA. It provided no agreements or other documents between it and Labor Ready designating that Labor Ready workers would be Gaither employees. The only agreement between Gaither and Labor Ready before the trial court said nothing about Gaither being the employer – "special" or not – of any Labor Ready employee, let alone Mr. Saling specifically. The first sentence of Mr. Saling's contract with Labor Ready stated he was Labor Ready's employee. Gaither did not pay Mr. Saling's wages, nor provide workers compensation coverage if he was injured on the job.

The ETA did not create an employee-employer relationship between the parties. Gaither was therefore not Mr. Saling's special employer. Contrary to Gaither's assertion, the facts here present the same issue as in *Mandery*.

B. *Novenson v. Spokane Culvert*, 91 Wn.2d 550 (1979)

Gaither claims that in *Novenson*, issues of fact existed as to the issue of consent (which is accurate), “based upon the lack of any express agreement related to the creation of a borrowed servant relationship” (which is misleading). (Brief of Respondent, page 22). The only reference in *Novenson* to “the lack of any express agreement” was the absence of one between Kelly Labor and its customers. No such agreement in this case exists between Labor Ready and Gaither either.

Gaither’s claim is also misleading because it is based upon the incorrect premise that an “express agreement related to the creation of a borrowed servant relationship” exists in this case. It is clear Mr. Saling could not and did not consent to an employment relationship with an unknown special employer by signing the ETA. *See*, 5 Larson, *supra*, § 67.02, and *Fisher*, *supra*, 62 Wn.2d at 805 (employee cannot have employer thrust upon him against his will or without his knowledge). Further, it is clear under Washington law that creation of an express or an implied employee-employer relationship requires a mutual agreement between the employee *and the employer*. The employer in this analysis is Gaither, and with respect to the ETA, there was no evidence presented at summary judgment of a mutual agreement to an employee-employer relationship between the parties.

The facts here are similar to *Novenson* in some respects: Both involve an employee of a labor service injured at the job site of a customer. Neither involve an express agreement to an employment relationship between the employee and the customer. In both cases, agreements between the labor service and the customer said nothing about an employment relationship between the former's employees and the customer. In *Novenson* the employee was injured after working three days on the customer's site; here, Mr. Saling was injured after working less than three hours at Gaither's job site. As Respondent pointed out in its response, the Supreme Court held that issues of fact existed with regard to consent and control. The same is true here.

#### **VII. Issues of Fact Exist as to Mr. Saling's Subjective Belief**

##### **Regarding an Employee-Employer Relationship with Gaither**

With one exception, Appellant relies upon the facts and arguments presented in his opening brief as to the issues of fact regarding consent and control at Gaither's job site on February 17, 2015 (Opening Brief of Appellant, Section IV, pages 19-23). Mr. Saling will address a point raised in Gaither's Response regarding a worker's subjective belief and the impact of such belief on the issue of consent to an employee-employer relationship.

Consent to an employment relationship 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). In this case, there is no evidence that Mr. Saling expressly agreed to an employee-employer relationship with Gaither. The issue for this court to decide is whether an implied relationship can be inferred from the attending circumstances. The parties presented conflicting facts on that issue in their opening briefs, thereby creating an issue of fact, which warrants reversal of the order granting summary judgment.

Gaither argued in its Response that a “worker’s bare assertion of his belief that he or she worked for this or that employer does not establish an employment relationship.” *Jackson v. Harvey*, 72 Wn.App. 507, 519, 864 P.2d 975 (1994). Gaither cited that portion of Division I’s opinion in support of its argument that Mr. Saling consented to Gaither as his special employer. Brief of Respondent, pgs. 16-17. Gaither did not reference this court to Division I’s later pronouncement that an employee’s subjective belief as to the existence of an employer-employee relationship is material to the issue of consent. *Rideau v. Cort Furniture Rental*, 110 Wn.App. 301, 308, 39 P.3d 1006 (2002) (citation omitted).

*Rideau* is another case involving an employee of a labor service company – Occupational Resource Management, Inc. (“ORM”) -- injured

while in the course and scope of his work with a customer (Cort Furniture Rental) of the labor service company. Mr. Rideau was injured as a passenger in a car crash caused by the driver of the car, an ORM employee. Like here, Mr. Rideau was paid by the labor service company. Cort Furniture supervised Mr. Rideau's work, Mr. Rideau followed Cort's directions and expressed no concern about Cort's supervision.

However, Mr. Rideau stated he did not believe Cort was his employer or that he was Cort's employee; rather, he considered ORM to be his employer. Division I stated that "this fact alone raises the question of whether Rideau consented to the role of "employee" to Cort and whether a mutual agreement existed." 110 Wn.App. 301, at 307-08.

Here, the first sentence of the ETA stated that Labor Ready was Mr. Saling's employer. Labor Ready paid his wages. Labor Ready provided his workers compensation coverage. Mr. Saling provided responses to a safety assessment for Labor Ready. (CP 39). He provided written responses to requests regarding work experience and skills on a Labor Ready form. (CP 27-28). He signed a Labor Ready authorization to allow Labor Ready to conduct a background investigation. (CP 31-32). He signed an at-will disclosure and resolution agreement that (a) stated Labor Ready was his employer and (b) outlined a resolution process involving "any claim arising out of or relating to [Mr. Saling's]

employment, application for employment, and/or termination of employment” with Labor Ready. (CP 32). He provided resumes to Labor Ready. (CP 33-36). Gaither presented no evidence that it sought or obtained such information from Mr. Saling.

Ample evidence was presented at the trial court to support Mr. Saling’s subjective belief that he reasonably believed Labor Ready was his employer. *Rideau, supra*, 110 Wn.App. at 307-08. *See also, Jackson, supra*, 72 Wn.App. at 519. It is undisputed that the amount of time Mr. Saling spent at Gaither’s job site was far less than that of any temporary laborer in the reported Washington cases cited herein in which a customer sought the protection of workers compensation immunity: Three days in *Novenson*; six weeks in *Rideau*; three months in *Jaimes v. NDTs Constr., Inc.* 195 Wn.App. 1, 381 P.3d 67 (2016). In each of these cases, the Court of Appeals found that issues of fact existed as to whether the injured worker consented to an employee-employer relationship. To the extent the length of time the worker performed services for the customer prior to injury is a factor in a worker’s subjective belief, that factor weighs heavily in Mr. Saling’s favor in this case.

A “mutual agreement must exist between the employee and employer to establish an employee-employer relationship.” *Novenson*, 91 Wn.2d at 553. Whether the two-pronged test of *Novenson* is proven is a

question of fact (i.e., right to control of employer and consent of the employee). *Smick v. Bumup & Sims*, 35 Wn.App. 276, 279, 666 P.2d 926 (1983). The court must consider the material evidence and all reasonable inferences therefrom most favorably to Mr. Saling. *Novenson*, 91 Wn.2d at 552. The facts presented to the trial court established that reasonable persons could reach different conclusions on the issue of Mr. Saling's consent to an employee-employer relationship with Gaither. *Novenson*, 91 Wn.2d at 552. (citation omitted).

#### **VIII. Case Law in Washington Supports Mr. Saling's Position**

In *Rideau v. Cort Furniture Rental*, 110 Wn.App. 301, 303- 307, 39 P.3d 1006 (2002), Division I engaged in an extensive discussion of the law of the loaned servant doctrine. *Rideau*, 110 Wn.App. 301, 303-307. The analysis included review of or reference to the decisions in *Fisher* and *Novenson*, supra, as well as *Jones v. Halvorson-Berg*, 69 Wn.App. 117, 847 P.2d 945 (1993).

At the end of that discussion, the Court declined to address Mr. Rideau's request that it hold as a matter of law that the loaned servant doctrine was inapplicable to employees of temporary employment agencies under RCW 51.04.060 ("No employer or worker shall exempt himself . . . from the burden or waive the benefits of this title by any

contract, agreement . . . and any such contract, agreement . . . shall be pro tanto void.”). However, the Court

expressed skepticism that after the *Novenson* line of cases, companies contracting with these temporary agencies for their employment needs can ever obtain immunity from common law suit under the loaned servant doctrine. The clear line of cases after *Fisher* and *Novenson* illustrate that borrowing employers like Cort have a high burden in Washington to prove consent of the employee in order to gain the shield of [statutory immunity under RCW 51.04.010].

*Rideau*, 110 Wn.App. at 308.

In addition, it has not been lost on our courts that employers utilizing temporary workers seek the best of both worlds – inexpensive labor, no workers compensation premiums and immunity from third party suits. Having

chosen to garner the benefits of conducting business in this manner, it is not unreasonable to require [Gaither, in this case] to assume the burdens. A potential burden . . . may well be the application of RCW 51.24.030, which permits a common-law action for negligence.

*Novenson*, 91 Wn.2d 550, 555.

Gaither’s argument is a thinly-veiled attempt to circumvent the burdens of RCW 51.24.030, as well as RCW 51.04.060, under the guise of promoting certainty in working relationships involving temporary laborers. Gaither failed to establish that no issues of material fact exist as

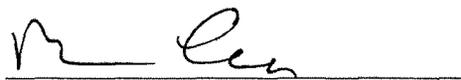
to whether a contract for hire existed between it and Mr. Saling, or that he impliedly consented to an employee-employer relationship. In addition, Gaither failed to establish as a matter of law that the ETA did not violate RCW 51.04.060. Accordingly, it was error for the trial court to grant summary judgment and dismiss Mr. Saling's case.

**CONCLUSION**

For the reasons given herein, Mr. Saling asks this court to reverse the trial court's order granting summary judgment and dismissal of his case, and remand the case to the trial court for further proceedings.

Dated this 20<sup>th</sup> day of December, 2018.

Respectfully submitted,



Bruce R. Colven, WSBA # 18708  
Attorney for Appellant Saling

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

**December 20, 2018 - 4:41 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52189-0  
**Appellate Court Case Title:** James Saling, Appellant v Gaither & Sons Construction, Co., Respondent  
**Superior Court Case Number:** 16-2-05140-9

**The following documents have been uploaded:**

- 521890\_Briefs\_20181220163605D2960541\_8293.pdf  
This File Contains:  
Briefs - Appellants Reply - Modifier: Supplemental  
*The Original File Name was Reply Brief of Appellant-Saling 18-12-20.pdf*

**A copy of the uploaded files will be sent to:**

- jack.reid24@gmail.com
- jreid@lorberlaw.com
- lconte@ccrslaw.com
- ztomlin@lorberlaw.com

**Comments:**

---

Sender Name: Laura Conte - Email: lconte@ccrslaw.com

**Filing on Behalf of:** Bruce Colven - Email: bcolven@ccrslaw.com (Alternate Email: )

Address:  
900 WASHINGTON ST STE 1000  
VANCOUVER, WA, 98660-3455  
Phone: (360) 699-3001

**Note: The Filing Id is 20181220163605D2960541**