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Division II  
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Appellate Court No. 52189-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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JAMES SALING, Appellant

v.

GAITHER & SONS CONSTRUCTION, CO., Respondent

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APPEAL FROM THE SUPERIOR COURT  
HONORABLE ROBERT LEWIS

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**BRIEF OF RESPONDENT**

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**TABLE OF CONTENTS**

I. INTRODUCTION..... 1

II. CLARIFICATION OF APPELLANT’S ASSIGNMENT OF ERROR..... 2

III. RESPONSE TO STATEMENT OF THE CASE..... 4

    A. Saling’s History and Agreement with Labor Ready..... 5

    B. Saling Submits to Gaither’s Control Over His Labor..... 6

    C. Saling Collected Workers’ Compensation Following his Alleged Injuries..... 8

IV. SUMMARY OF ARGUMENT..... 9

V. ARGUMENT..... 10

    A. Standard of Review..... 10

    B. Gaither is Immune from Civil Suit Under the Washington Industrial Insurance Act..... 11

        i. Gaither Controlled Saling’s Conduct on the Jobsite..... 13

        ii. Saling Consented to Gaither as his Special Employer..... 16

    C. The Presence of an Exculpatory Clause Within the Agreement is Irrelevant to Saling’s Express Agreement to the “Borrowed Servant” Relationship..... 18

        i. Saling’s Reliance Upon *Mandery* and *Novenson* is Misplaced..... 22

    D. Saling is Barred from Directly Contradicting Terms of the Agreement by the Parol Evidence Rule..... 24

    E. The Trial Court Properly Disregarded Plaintiff’s Self-Serving Declaration..... 25

VI. CONCLUSION..... 26

## TABLE OF AUTHORITIES

### Cases:

<i>Bennerstrom v. Dep't of Labor &amp; Indus.</i> 120 Wash. App. 853, 86 P.3d 826, 831 (2004).....	13, 17
<i>Brown v. Labor Ready Nw., Inc.</i> 113 Wn. App. 643, 54 P.3d 166 (2002).....	15, 16
<i>Fisher v. City of Seattle</i> 62 Wn.2d 800, 384 P.2d 852 (1963).....	9, 12, 16, 17, 20, 21
<i>Jackson v. Harvey</i> 72 Wash. App. 507, 864 P.2d 975 (1994).....	16
<i>Lamon v. McDonnell Douglas Corp.</i> 91 Wn.2d 345, 588 P.2d 1346 (1979).....	11
<i>Lunday v. Dept. Labor &amp; Indus.</i> 200 Wn. 620, 94 P.2d 744 (1939).....	12
<i>Malcolm v. Yakima Cty. Consol. Sch. Dist. No. 90</i> 23 Wash. 2d 80,159 P.2d 394 (1945).....	21
<i>Mandery v. Costco Wholesale Corp.</i> 126 Wn.App. 851, 110 P.3d 788 (2005).....	22
<i>Marshall v. AC&amp;S Inc.,</i> 56 Wn. App. 181, 782 P.2d 1107 (1989).....	26
<i>Marsland v. Bullitt Co.</i> 71 Wn.2d 343, 428 P.2d 586 (1967).....	9, 12
<i>Martin v. Smith</i> 192 Wn. App. 527, 532, 368 P.3d 227, 230 (2016).....	24
<i>Max L. Wells Tr. by Horning v. Grand Cent. Sauna &amp; Hot Tub Co. of Seattle,</i> 62 Wn. App. 593, 815 P.2d 284 (1991).....	24

<i>McDonald v. Moore</i> 57 Wash. App. 778, 790 P.2d 213 (1990).....	3
<i>Messer v. Dep't of Labor &amp; Indus. of State of Washington</i> 118 Wash. App. 635, 77 P.3d 1184 (2003).....	11, 12
<i>National Bank of Washington v. Equity Investors</i> 81 Wn.2d 886, 506 P.2d 20 (1973).....	17
<i>Novenson v. Spokane Culvert &amp; Fabricating Co.</i> 91 Wash. 2d 550, 588 P.2d 1174 (1979)....	16, 17, 20, 22, 23
<i>Pelly v. Panasyuk,</i> 2 Wash.App.2d 848, 413 P.3d 619 (2018).....	21
<i>Perry v. Continental Ins. Co.</i> 178 Wash. 2d, 33 P.2d 661 (1934).....	24
<i>Shellenbarger v. Longview Fibre Co.</i> 125 Wn. App. 41, 103 P.3d 807 (2004).....	10, 11
<i>State v. Scherner</i> 153 Wn. App. 621, 225 P.3d 248 (2009).....	25
<i>Stocker v Shell Oil Co.</i> 105 Wn.2d 546, 716 P.2d 306 (1986).....	12, 20
<i>Tallerday v. DeLong</i> 68 Wn. App. 351, 842 P.2d 1023 (1993).....	11
<i>Trimble v. Washington State Univ.</i> 140 Wash. 2d 88, 993 P.2d 259 (2000).....	11
<i>Turner v. Wexler</i> 14 Wn. App. 143, 538 P.2d 877 (1975).....	24
<i>Walston v. Boeing Co.</i> 181 Wn.2d 391, 334 P.3d 519 (2014).....	11

**Washington Statutes:**

RCW 51.04.010.....1, 9, 10, 12, 27

RCW 51.04.060.....18, 19

**Secondary Sources:**

Black's Law Dictionary (10th ed. 2014) "Pro Tanto" .....19

## I. INTRODUCTION

Respondent, Gaither & Sons Construction Co. (hereinafter “Gaither”) was granted summary judgment based upon the immunity from civil suit provided to employers pursuant to the Washington Industrial Insurance Act. RCW 51.04.010. Appellant James Saling (hereinafter “Saling”) appeals the Trial Court’s ruling, asserting that he did not “consent” to his employment relationship with Gaither. Saling’s contention is false.

The undisputed evidence in the record shows that Saling consented, expressly and unambiguously, to Gaither as his special employer and that Gaither had authority and control over Saling’s labor on the date of alleged injury. As a result, Gaither is immune from liability for Saling’s injuries pursuant to Washington’s Industrial Insurance Act as Saling’s special employer.

Rather than address the single appealable issue, Saling’s opening brief devolves into a discussion of an issue (i.e. the enforceability of an exculpatory clause set forth in Saling’s employment agreement) that is not properly before this court. Saling then conflates the unenforceability of that exculpatory clause with the remaining terms of an unambiguous and enforceable employment agreement. Ultimately, Saling’s labored discussion of the enforceability of the exculpatory clause is a red herring,

which has neither factual nor legal significance to the enforcement of the remaining terms of Saling's employment agreement.

The Trial Court determined that the undisputed evidence established that Gaither was Saling's special employer, thus making it immune from suit. RP at 12. In so ruling, the Trial Court considered the following two determinative factual questions: (1) Was there control by Gaither over Saling's labor on the date of the alleged injury? and (2) Was there consent by Saling to Gaither as his "special employer"? RP at 12. The Trial Court answered both questions in the affirmative. RP at 12.

Saling fails to submit a single piece of admissible evidence, nor credible argument, supporting his contention that Gaither was not his special employer at the time of his alleged injury. Gaither respectfully requests that this court deny Saling's appeal and affirm the Trial Court's order granting summary judgment.

**II. CLARIFICATION OF APPELLANT'S ASSIGNMENT OF ERROR**

The sole question before this court is whether the undisputed facts establish that Gaither was Saling's special employer at the time of his alleged injuries, and thus immune from liability.

Saling claims this Court must address the Trial Court's ruling on the enforceability of the exculpatory clause within Saling's temporary

employment agreement. This is false. There is no right of appeal from a ruling that is not adverse to the appealing party. This is especially true regarding orders *denying* summary judgment. *McDonald v. Moore*, 57 Wash. App. 778, 779, 790 P.2d 213, 214 (1990). The purported “errors” that Saling raises regarding the exculpatory clause are moot, as the Trial Court expressly denied Gaither’s motion regarding the enforcement of the exculpatory clause. The Trial Court expressly stated that it was not considering this issue in its ruling:

There’s far too much time spent by both parties on this exculpatory clause. It's clear that it is not something that either side can rely on and so I wouldn't grant summary judgment based on that in any event, so I'm not going to go through all the reasons for that.

RP at 11-12 [emphasis added].

The court granted Gaither’s motion for summary judgment based on the question of whether Gaither was Saling’s special employer:

So the questions that took the first couple of pages and it is dispositive here is under the facts of this case, which appear to me to be undisputed, is Gaither & Sons was special employer of Mr. Saling at the time he was moving the doors around. And did they have control over him? Did he consent to being their special employee? The answer to both of those under the evidence is yes.

RP at 12.

The sole appealable issue before this court is whether material issues of disputed fact exist regarding Saling and Gaither’s employer-

employee relationship. Gaither respectfully submits that this court need not address the issue of the exculpatory clause.

### **III. RESPONSE TO STATEMENT OF THE CASE**

Saling's appeal is founded on the notion that Gaither presented no evidence to establish that Saling was Gaither's borrowed servant at the time of Saling's alleged injury. The record establishes that this assertion is false. Gaither presented Saling's written and testimonial admissions that he consented to Gaither as his special employer and was controlled by Gaither on the day of his alleged injury. The record leaves no question of fact, Gaither was Saling's special employer:

On February 17, 2015, Saling alleges he was injured while attempting to move or "spread"<sup>1</sup> large wooden doors, as instructed by Gaither, on Gaither's construction jobsite ("the Incident). CP at 2. Gaither is a general contractor. Related to February 17, 2015, Gaither contracted with Labor Ready to supply temporary employees to perform manual labor tasks that do not require specialized skills. CP at 18 and 20. Labor

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<sup>1</sup> "Spreading" is a construction term utilized to describe the process to taking doors from the location where they are delivered in bulk on a jobsite and placing them within the specific rooms/locations where they will later be installed by others.

Ready is a temporary employee company that provides temporary employees at the request of employers like Gaither. CP at 23:11-20. On February 17, 2015 Saling was a temporary employee supplied by Labor Ready to Gaither, to perform manual labor. CP at 58:19-25 and 58:5-10.

**A. Saling's History and Agreement with Labor Ready**

Saling first applied to Labor Ready and was assigned to another employer's jobsite in 2013 for a temporary employment assignment. CP at 45:3-11. Before beginning his work on Gaither's jobsite, Saling reapplied to Labor Ready on January 8, 2015. CP at 27-40. On this date, Saling voluntarily signed the employment agreement ("the Agreement") with Labor Ready which contained the following language:

I understand that my employer [True Blue/Labor Ready] provides temporary workers for its customers to work at the customers' project site. While working at the customers' 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.

CP at 38. [emphasis added]

During his deposition, Saling testified that he signed the Agreement voluntarily and without coercion. CP at 54:4-25 and 55:1-6. Pursuant to the Agreement, Saling expressly consented to and acknowledged that any customer of Labor Ready would be Saling's special employer. CP at 38. Saling admits that he understood that the term

“Customer” when used in the Agreement referred to the employer he would be assigned to by Labor Ready:

Q. Who would you consider a customer of Labor Ready?

A. Anybody that they send me to.

CP at 52:9-11.

At no time did Saling object to any of the terms of the Agreement. CP at 54:17-21.

**B. Saling Submits to Gaither’s Control Over His Labor**

In early February 2015, Gaither submitted a request to Labor Ready for two temporary employees to move large doors at its jobsite. CP at 18. The doors weighed around 120 lbs and required two people to move them. CP at 18. Saling was assigned to the Gaither jobsite on February 16, 2015. CP at 57:7-23. The morning of February 17, 2015, Saling arrived at Gaither’s jobsite, along with his uncle, Daniel Pittman (“Pittman”), to begin his duties as a temporary employee for Gaither. CP at 57:19-25 and 58:1-7. Before starting his work on the jobsite, Saling and Pittman met with Gaither employee, and supervisor, Kevin Billups. CP at 58:8-25 and 59:1-18. A meeting was held to go over safety protocols and to ensure Saling and Pittman had the proper safety equipment. CP at 58:8-25 and 59:1-18.

Following the meeting with Mr. Billups, Saling and Pittman met with Scott Zitterkopf, another Gaither employee, who would supervise and direct Saling's work. CP at 59:19-25 and 60:1-10. Mr. Zitterkopf led Saling to the area of the jobsite where he would work. CP at 60:7-21. Once they arrived at the area, Mr. Zitterkopf instructed Saling and Pittman that they would be moving large doors from one location to the various floors and units being constructed. CP at 60:13-25 and 61:1-10. Mr. Zitterkopf then showed Saling and Pittman what doors they were to begin moving, and the doors' ultimate destinations. CP at 60:1-13 and 61:1-10. Saling and Pittman then began moving the doors together. CP at 63:14-16. Saling and Pittman completed the task on the second and third floor of the area as instructed by Mr. Zitterkopf. CP at 63:17-23.

At this time, Saling and Pittman approached Mr. Zitterkopf to ask permission to take a lunch break before continuing their work. CP at 65:1-23. Mr. Zitterkopf instructed Saling and Pittman that they were allowed to take a lunch break and proceeded to show Saling what he would be doing after they returned from lunch. CP at 65:1-23. Following his lunch break, Saling was instructed to continue moving doors on the first floor of the designated area. CP at 65:1-23. After moving 12 doors on the first floor with the help of Pittman, Saling attempted to move a door without any

help. CP at 66:2-22. Saling was unable to move the door safely causing the door to fall and injure Saling. CP at 66:2-22.

**C. Saling Collected Workers' Compensation Following his  
Alleged Injuries**

As a result of his alleged injury, Saling filed a workers' compensation claim. CP at 56:9-20. Saling was awarded benefits under his workers' compensation claim. CP at 70. Saling then filed his complaint on March 16, 2016. CP at 1-3. Discovery and depositions were conducted by both parties between April 2016 and October 2017.

On May 15, 2018, Gaither filed its Motion for Summary Judgment. CP 71-89. Following Gaither's filing, Saling sent an informal e-mail to address an alleged year-old discovery issue. CP at 144-146. Gaither responded, highlighting the fact that Saling's last minute request was misguided. CP at 144. Upon review of Saling's response to the motion for summary judgment, it appears the request for additional agreements was simply a tactic to attempt to shroud Saling's absolute absence of admissible evidence in opposition to summary judgment. Gaither filed its reply on June 11, 2018. CP at 179.

On June 15, 2018, the trial court heard oral argument on Gaither's motion for summary judgment. RP at 1. Based on the evidence presented, the trial court ruled in favor of Gaither, finding Gaither immune from suit

as Saling's special employer. CP at 194-195. Saling thereafter filed this appeal.

#### **IV. SUMMARY OF ARGUMENT**

As Sailing's special employer, Gaither is immune from any liability for workplace injuries occasioned by negligence. RCW 51.04.010. Gaither's immunity is rooted in a long standing "borrowed servant" doctrine.<sup>2</sup> The "borrowed servant" doctrine stands for the principle that an employee may be the employee of more than one employer concurrently for purposes of Title 51 immunity, a general (full-time) employer, and a borrowing (temporary) employer.

An employment relationship exists with the "borrowing" employer when: (1) the borrowing employer has the right to control the servant's conduct in the performance of his duties, and (2) there is consent by the employee to this relationship. *Marsland v. Bullitt Co.*, 71 Wn.2d 343, 345, 428 P.2d 586 (1967); see also *Fisher v. City of Seattle*, 62 Wn.2d 800, 804, 384 P.2d 852 (1963). The undisputed evidence presented by Gaither establishes the factual reality that: 1) Plaintiff signed the

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<sup>2</sup> Case law utilizes the terms "Borrowed Servant" "Loaned Servant" and "Special Employer" interchangeably. All refer to the same doctrine regarding temporary labor.

Agreement with Labor Ready; (CP at 38); 2) Plaintiff voluntarily consented to Gaither as his special employer in the Agreement; (CP at 52:9-11 and 55:3-6); and 3) Saling was under the control of Gaither at all times relevant. CP at 58:5 through 65:23.

Saling presents no admissible evidence to support his contention that Gaither was not his special employer. Saling's only attempt to controvert Gaither's motion was to submit a conclusory self-serving declaration. CP at 90. This declaration consists of only the conclusion that "At no time did I think I was an employee of Gaither and Sons Construction, nor did I consent to be an employee of Gaither and Sons Construction." CP at 91. However, this self-serving conclusion directly contradicts both the Agreement and Saling's sworn testimony. CP at 52:9-11. Saling is not able to avoid the impact of his clear agreements and admissions through a self-serving declaration. The Trial Court's ruling on summary judgment should be affirmed.

## **V. ARGUMENT**

### **A. Standard of Review**

This Court reviews an order granting summary judgment de novo. *Shellenbarger v. Longview Fibre Co.*, 125 Wn. App. 41, 46, 103 P.3d 807 (2004). 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. *Id.* Summary judgment may be granted only where there is but one conclusion that could be reached by a reasonable person. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 349, 588 P.2d 1346 (1979).

Bare assertions that a genuine material issue exists will not defeat a summary judgment motion in the absence of actual evidence. *Trimble v. Washington State Univ.*, 140 Wash. 2d 88, 93, 993 P.2d 259, 261–62 (2000).

**B. Gaither is Immune from Civil Suit Under the Washington  
Industrial Insurance Act**

Under the Industrial Insurance Act, an employer is generally immune from suits filed by employees, and the workers' compensation system provides the exclusive remedy in such cases. *Walston v. Boeing Co.*, 181 Wn.2d 391, 334 P.3d 519 (2014). The goal is to provide sure and certain relief to injured workers, in exchange for which the employee waives the right to pursue tort damages against the employer. *Tallerday v. Delong*, 68 Wn. App. 351, 356, 842 P.2d 1023 (1993).

The Industrial Insurance Act is a direct compromise between employer and employee – to reduce the injured workers economic loss by providing efficient compensation and to provide economic certainty to employers. *Messer v. Dep't of Labor & Indus. of State of Washington*, 118

Wash. App. 635, 640, 77 P.3d 1184, 1187 (2003). Saling was awarded workers compensation benefits for his injuries. CP at 70. Saling now attempts a second bite of the apple through this lawsuit against Gaither, his special employer. Saling's efforts to obtain further compensation from his special employer must be denied.

For purposes of the immunity provided by RCW 51.04.010, an individual may be the employee of more than one entity. *Lunday v. Dept. Labor & Indus.*, 200 Wn. 620, 94 P.2d 744 (1939). When a general employer loans an employee to another "special" employer, that employee will be considered a borrowed servant of the special employer. *Stocker v. Shell Oil Co.*, 105 Wn.2d 546, 548, 716 P.2d 306, 308 (1986). An employment relationship exists with the "borrowing" employer 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. *Marsland v. Bullitt Co.*, 71 Wn.2d 343, 345, 428 P.2d 586 (1967); see also *Fisher v. City of Seattle*, 62 Wn.2d 800, 804, 384 P.2d 852 (1963). The undisputed evidence establishes both requisite factors as between Gaither and Saling.

i. Gaither Controlled Saling's Conduct on the Jobsite

Gaither had exclusive and absolute control over Saling while he was on Gaither's jobsite. In evaluating the presence of control, Courts may examine the following factors:

(1) who controls the work to be done; (2) who determines the qualifications; (3) setting pay and hours of work and issuing paychecks; (4) day-to-day supervision responsibilities; (5) providing work equipment; (6) directing what work is to be done; and (7) conducting safety training.

*Bennerstrom v. Dep't of Labor & Indus.*, 120 Wash. App. 853, 863, 86 P.3d 826, 831 (2004).

There is only one reasonable conclusion from the record on appeal: Gaither had absolute control over Saling's labor. The following facts establish same:

1. Saling reported to Gaither's jobsite the morning of the incident. CP at 58:5-10.
2. Saling met with a Gaither supervisor upon arriving at the jobsite. CP at 58:8-23.
3. Saling had a meeting with a Gaither supervisor regarding what safety Gaither required for the job. CP at 58:24-25 and 59:1-15.

4. Saling met with a second Gaither supervisor who instructed Gaither on his duties for the day, and how to accomplish same. CP at 59:19 through 61:10.
5. Saling was instructed by a Gaither supervisor on what doors he would be moving and where he would be moving them to. CP at 60:13-25 and 61:1-10.
6. The Gaither Supervisor marked "X's" on the door frames to identify for Saling the destination of each door. CP at 60:13-25 and 61:1-10.
7. Saling went to a Gaither supervisor to request permission to take a lunch break and continue his work thereafter. CP at 65:6-23.
8. Saling was instructed and shown by a Gaither supervisor as to his duties following his lunch break. CP at 65:6-23.
9. Saling expressly agreed that Gaither, as a customer of Labor Ready, would have control over his labor when on Gaither's jobsite. CP at 38.

Saling provides no evidence supporting the conclusion that he had independent charge or supervision of his work. The contrary is apparent from Saling's own conduct. As set forth above, Gaither at all times had authority over Saling and his actions on the jobsite. Indeed, Saling could not begin or complete his duties without Gaither's instruction and

supervision over all aspects of his work, from safety equipment to lunch breaks.

Directly on point on the issue of control, the Court of appeal in *Brown v. Labor Ready Nw., Inc.*, 113 Wn. App. 643, 652, 54 P.3d 166, 171 (2002) found sufficient control existed where the borrowed servant was performing work at the general contractor's jobsite, under the direction of the general contractor's workers. *Id.* at 652. In that action, the borrowed servant had to report to the general contractor's employee supervisors, who instructed the borrowed servant on his duties. *Id.* The Court in *Brown v Labor Ready*, in discussing the requisite control over a borrowed servant, noted the following:

[The borrowed servant] was performing his work at the CMI yard under the direction of CMI workers, and was operating a CMI forklift. CMI, and only CMI, had control over [the borrowed servant] at the job site. Each day, [the borrowed servant] reported to and had his timecards signed by CMI's yard supervisor, Stevens, who instructed [the borrowed servant] regarding his duties and monitored his work. CMI provided the equipment necessary to perform the job. Moreover, there was no Labor Ready employee on site to supervise the work of the dispatched temporary employees.

*Brown v. Labor Ready Nw., Inc.*, 113 Wn. App. 643, 652, 54 P.3d 166, 171 (2002)

The facts in *Brown v Labor Ready* mirror those in the present action. Saling reported to Gaither's supervisors at the start of his work

day, received explicit direction regarding his work, which was evaluated and supervised by Gaither's employees, and Labor Ready was not present on the Gaither jobsite. CP at 57:19-25 and 58:1-4.

Additionally, the Court in *Brown v Labor Ready* found that arguments regarding the amount of time worked and limited independence in how to accomplish certain tasks unpersuasive. *Brown v. Labor Ready, supra*. Indeed, the Court in *Brown v Labor Ready* emphasized that the *right* and *authority* to control the borrowed servant's work are the key factors in determining the existence of control. *Brown v. Labor Ready, supra* at 652-653.

As in *Brown v Labor Ready*, the evidence here indicates that Gaither had absolute authority and control over Saling's labor.

ii. Saling Consented to Gaither as his Special Employer

Saling consented to Gaither as his special employer. For an employer-employee relationship to exist under the borrowed servant doctrine, the servant must expressly or by implication consent to the transfer of his services to the new master. *Fisher v. City of Seattle*, 62 Wash. 2d 800, 805, 384 P.2d 852, 855 (1963). A worker's bare assertion of belief that he or she did not work for a particular employer is not sufficient. *Jackson v. Harvey*, 72 Wash. App. 507, 519, 864 P.2d 975, 982 (1994).

A contract is an important factor in determining whether there was expressed or implied consent to form an employer-employee relationship. *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wash. App. 853, 861, 86 P.3d 826, 831 (2004). It is the general rule that “a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents.” *National Bank of Washington v. Equity Investors*, 81 Wn.2d 886, 912, 506 P.2d 20 (1973) [internal citations omitted].

Additionally, consent may be given expressly or impliedly and may be inferred from the attending circumstances. *Fisher v City of Seattle*, *supra* at 805. The Court in *Fisher* reasoned that when there is a dispute over consent, the Court must evaluate the agreement between the parties and what the employee understood at the time of the agreement. *Id.*

Saling expressly consented, in writing, to a special employment relationship with Labor Ready’s customers to whom Saling was assigned. CP at 38. The Agreement signed with Labor Ready expressly states, “***I agree and consent*** that the customer is my special employer (“Special Employer”) and that the ***customer directs, controls and supervises my work.***” CP at 38 [emphasis added]. Saling testified that he read and understood the agreement before signing it. CP at 54:12-16. Saling further

confirmed that he understood that any company he was assigned to work for would be considered a customer of Labor Ready.

Q. Who would you consider a customer of Labor Ready?

A. Anybody that they send me to.

CP at 52:9-11.

The express language in the Agreement, combined with Saling's testimony unequivocally establishes Saling's consent to the employment relationship with Gaither. Saling's submission to Gaither's control further comports with his assent to Gaither as his special employer. As both elements to create a borrowed servant relationship are present, the Trial Court's grant of summary judgment should be affirmed.

**C. The Presence of an Exculpatory Clause Within the Agreement is Irrelevant to Saling's Express Agreement to the "Borrowed Servant" Relationship**

Recognizing the indisputable nature of Saling's consent to the borrowed servant relationship with Gaither, Saling resorts to the erroneous contention that the express consent manifested at paragraph 14 of the Agreement is void pursuant to RCW 51.04.060. However, Saling's efforts to sidestep the enforceable terms of the Agreement must fail. Saling improperly conflates the statutory provisions prohibiting *exculpatory language* within the Agreement, with the valid and enforceable language

*expressly creating* the special employment relationship between Saling and Gaither. RCW 51.04.060 provides:

No employer or worker shall exempt himself or herself from the burden or waive the benefits of this title by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be pro tanto void.

The plain language of this statute makes two matters clear: 1.) that no employer or worker may *exempt* itself from the burden or benefits of the title; and 2.) that any agreement that purports to do so is only void “pro tanto” or only “to that extent.” Black's Law Dictionary (10th ed. 2014). However, an employer bringing itself, and its customers, within the scope of the title does not violate the plain language of RCW 51.04.060.

Focusing on paragraph 14 of the Agreement, Saling argues that the second half of that paragraph (clearly separated by a bolded title) which purports to exculpate any of Labor Ready's customers from tort liability somehow infects and invalidates the first half of the paragraph which clearly defines Saling's relationship with both Labor Ready and Labor Ready's customers. Saling's position has no basis in the aforementioned statutory language, nor the rules of contractual construction. Indeed, Saling's position falsely assumes that employers and employees are barred from clearly defining their relationship and job duties at the outset of the employment relationship.

The nonsensical nature of Saling's position is exposed by the mere existence of substantial controlling precedent enforcing the "borrowed servant" doctrine. See *Fisher v. City of Seattle*, 62 Wash. 2d 800, 805, 384 P.2d 852, 855 (1963); see also *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wash. 2d 550, 552, 588 P.2d 1174, 1175 (1979); *Stocker v. Shell Oil Co.*, 105 Wn.2d 546, 548, 716 P.2d 306, 308 (1986). Saling's position simply cannot be reconciled with the "consent" requirement to establish a "borrowed servant" relationship. Specifically, that loaned servant must manifest mutual assent to their relationship with a special employer.

The court's ruling in *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wash. 2d 550, 552, 588 P.2d 1174, 1175 (1979), which Saling heavily relies upon, makes clear that a manifestation of assent from the employee is necessary to create a "borrowed servant" relationship. However, Saling's position would expressly prohibit such assent being confirmed in writing, adding ambiguity to temporary employment relations. Neither statute nor public policy supports the introduction of greater ambiguity into economic relations between employer and employee.

The language of the first half of paragraph 14 of the Agreement is in no way "crafted to covertly accomplish the precise result prohibited by

RCW 51.04.060” as argued by Saling. Rather, the language specifically tailored to comply with the requisites to consensually create a clear borrowed servant relationship between Labor Ready’s customers and its employees, including Saling. Saling was not compelled, coerced or forced into employment with Labor Ready, or its customers. He should not be heard to complain of the results of his own voluntary conduct. As the Supreme Court in *Fisher v. City of Seattle*, 62 Wash. 2d 800, 805, 384 P.2d 852, 855 (1963) made clear, unambiguous writings defining the roles of employer and employee are essential to stable economic relationships between employees and their employers.

Gaither’s position has the further advantage of comporting with long standing rules of contractual construction, that where an agreement contains language that is void as against public policy, it does not render the whole contract, nor any other term of the agreement void. *Malcolm v. Yakima Cty. Consol. Sch. Dist. No. 90*, 23 Wash. 2d 80, 84, 159 P.2d 394, 396 (1945); See also *Pelly v. Panasyuk*, 2 Wash.App.2d 848, 865, 413 P.3d 619, 629 (2018) (“[i]nterpretations giving lawful effect to all the provisions in a contract are favored over those that render some of the language meaningless or ineffective.”) Saling’s consent to the borrowed servant relationship with Labor Ready’s customers is not void, and supports the affirmation of the Trial Court’s grant of summary judgment.

i. Saling's Reliance Upon *Mandery* and *Novenson* is  
Misplaced

Saling discusses *Mandery v. Costco Wholesale Corp.*, 126 Wn.App. 851, 110 P.3d 788 (2005) in support of his “consent” argument. However, *Mandery* does not pertain to the factors necessary to establish an employer-employee relationship. *Mandery* concerns an agreement that waived the liability of a third party, Costco, related to the plaintiff's presence as vendor in its warehouses.

*Mandery* addresses the enforceability of an exculpatory clause – which is not at issue on this appeal. Gaither is not a third-party, but Saling's special employer. The agreement at issue in *Mandery* did not contemplate a special employer relationship, and thus, has no application to the Agreement or the issues before this Court on appeal.

Saling further cites to *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wash. 2d 550, 552, 588 P.2d 1174, 1175 (1979), to argue that consent by Saling has not been established by Gaither. However, the *Novenson* ruling is easily distinguishable from the case at bar. The Supreme Court in *Novenson* found that issues of fact existed as to the issue of consent to the special employment relationship, based upon the lack of any express agreement related to the creation of a borrowed servant relationship.

Indeed, the only agreement discussed in *Novenson* was between the temporary laborer supplier Kelly Labor, and the company receiving the temporary employee, Spokane Culvert. Novenson did not sign an express agreement stating he agreed that any customer of Kelly Labor a special employer. *Novenson v. Spokane Culvert & Fabricating Co., supra.* at 556.

Here, the Agreement unambiguously manifests Saling's consent to a special employment relationship with Gaither. CP at 38. The agreement specifically identifies any Labor Ready customer as Saling's special employer. CP at 38. Saling confirmed that he reviewed this language and understood the status of Labor Ready's customers through his deposition testimony. CP at 49:5 through 55:6. Thus, unlike in *Novenson*, there is direct and irrefutable evidence establishing Saling's consent to the special employment relationship.

Saling's self-serving conclusion that he did not "think" that Gaither was his special employer is insufficient to defeat summary judgment.

**D. Saling is Barred from Directly Contradicting the Terms of  
the Agreement by the Parol Evidence Rule**

Parole evidence cannot be used cannot be used to show an intention independent of the written words of the contract or to show a party's unilateral or subjective intent as to the meaning of the words or terms in the contract. *Turner v. Wexler*, 14 Wn. App. 143, 148, 538 P.2d 877 (1975). "Absent fraud, deceit or coercion, a voluntary signatory is bound to a signed contract *even if ignorant of its terms.*" *Max L. Wells Tr. by Horning v. Grand Cent. Sauna & Hot Tub Co. of Seattle*, 62 Wn. App. 593, 602, 815 P.2d 284, 290 (1991) [emphasis added].

We impute an intention corresponding to the reasonable meaning of the words used. The parties' subjective intent is irrelevant if we can ascertain their intent from the words in the agreement.

*Martin v. Smith*, 192 Wn. App. 527, 532, 368 P.3d 227, 230 (2016), *review denied*, 186 Wn.2d 1011, 380 P.3d 501 (2016)

The terms of the agreement were not ambiguous or technical in nature, and Saling voluntarily assented to same. CP at 55:3-6. Saling's assertion that he did not understand the "legally-significant language" has no bearing on the legal effect of his agreement. A party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents. *Perry v. Continental Ins. Co.*, 178 Wash. 24, 33 P.2d 661 (1934).

Thus, Plaintiff's self-serving declaration is not admissible to contradict the terms of the Agreement, and was properly disregarded by the Trial Court. Indeed, Saling admitted in his deposition that he understood the language of the contract identifying any customer of Labor Ready to whom he was assigned as his special employer. CP at 52:9-11. Saling admitted he knew that anywhere he was sent would be considered a customer of Labor Ready. CP at 52:9-11. A declaration made three years after Saling signed the Agreement, and one year after he testified regarding his understanding of the Agreement, cannot be used to rewrite the terms of same. Saling's self-serving declaration is a clear use of parole evidence in an attempt to contradict the plain language of the Agreement. Thus, it should not be considered as admissible or persuasive evidence on appeal.<sup>3</sup>

**E. The Trial Court Properly Disregarded Plaintiff's Self-Serving Declaration**

Saling's declaration submitted in opposition to summary judgment was further properly disregarded by the Trial Court as an inadmissible

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<sup>3</sup> The Trial Court's exclusion of evidence is reviewed on an abuse of discretion standard. See *State v. Scherner*, 153 Wn. App. 621, 656, 225 P.3d 248, 264 (2009).

self-serving statement. Gaither expressly objected to the admissibility and consideration of the Plaintiff's self-serving declaration. CP at 183-184. *Marshall v. AC&S Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107, 1109 (1989) succinctly summarized the rule regarding the exclusion of self-serving declarations:

When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.

Saling's declaration seeks to create a triable issue of fact regarding the issue of "consent" to the special employment relationship. However, Saling's contradictory testimony in his self-serving declaration that he "did not think" that he was an employee of Gaither is directly contrary to his deposition testimony confirming his execution of the Agreement, and his understanding that any "customer" of Labor Ready would be his special employer.

The Trial Court properly disregarded Saling's self-serving declaration, and did not abuse its discretion in refusing to consider same.

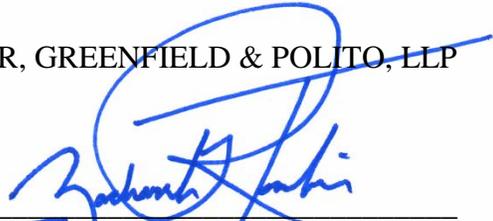
## **VI. CONCLUSION**

The admissible facts and evidence in the record point to only one conclusion: Gaither was Saling's special employer on the date of Saling's

alleged injury, and is immune from liability pursuant to RCW 51.04.010. The evidence establishing control and consent is undisputed and incontrovertible. Gaither respectfully requests that the Court affirm the order granting summary judgment.

Dated: November 21, 2018

LORBER, GREENFIELD & POLITO, LLP



Zachariah R. Tomlin, WSBA# 52520  
Attorneys for Respondent Gaither & Sons  
Construction Co.

**DECLARATION OF SERVICE**

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years.

On the date given below, I caused to be served the foregoing RESPONDENT’S BRIEF on the following persons in the manner indicated:

Attorneys for Appellant:

Bruce Colven

Caron, Colven, Robison & Shafton, P.S.

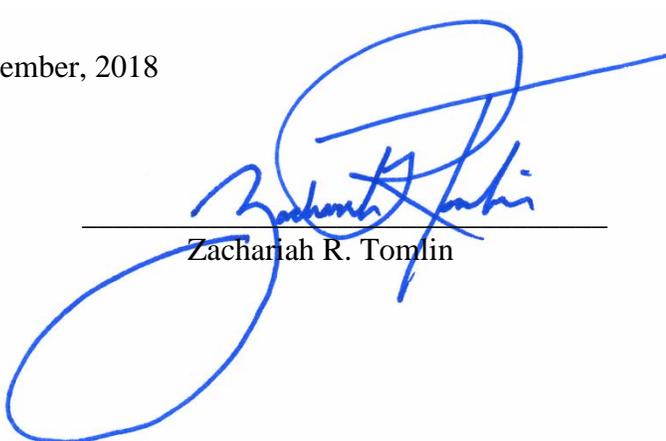
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Vancouver, WA 98660

Via Court of Appeals

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Signed this 21<sup>st</sup> day of November, 2018

  
\_\_\_\_\_  
Zachariah R. Tomlin

**LORBER GREENFIELD & POLITO, LLP**

**November 21, 2018 - 12:31 PM**

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