73148-3

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Court of Appeals
Division I
State of Washington

NO. 73148-3-I

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

JOSE JAIMES,
Appellant,

v.

NDTS CONSTRUCTION, INC. a Washington Corporation; SUPERIOR FLOORS & COUNTERTOPS, LLC, a Washington Corporation; PACIFIC HUTS AND CASTLES, INC., a Washington Corporation; PACIFIC HUTS AND CASTLES CONSTRUCTION, a Washington business; GREG QUINN, an individual and/or agent; DALE QUINN, an individual and/or agent; DIXIE QUINN, an individual and/or agent; MARY QUINN, an individual and/or agent; PAVEL STRIZHEUS, an individual and/or agent; TIMOFEY STRIZHEUS, an individual and/or agent; VASILIY STRIZHEUS, an individual and/or agent; NIKOLAY DZYUBAK, an individual and/or agent; VIVEK GUPTA and BHAWNA GUPTA, husband and wife and the marital community composed thereof; EMPLOYEES, COMPANIES, and CORPORATIONS A-D,

Respondents.

REPLY BRIEF

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TABLE OF CONTENTS

INTRODUCTION 1

REPLY RE STATEMENT OF THE CASE 2

A. SF's argumentative Statement merely raises numerous genuine issues of material fact. 2

B. After raising numerous factual disputes, SF unfortunately descends into falsehood. 4

C. SF properly concedes that this Court should not consider the Lampman Declaration. 7

REPY ARGUMENT 8

A. This Court's review is *de novo*. 8

B. Taking the facts in the light most favorable to Jaimes, the trial court erroneously dismissed SF as a matter of law. 8

C. At best, SF created fact questions, rendering summary judgment inappropriate here. 10

D. SF, a third-party subject to suit under the IIA, may not buy immunity by paying NDTS's IIA premiums. 13

E. SF's new arguments on appeal are unavailing. 15

F. Jaimes accepts SF's concession regarding the Lampman declaration. 18

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

Cases

AB v. Rhinebeck Cent. Sch. Dist.,
361 F. Supp.2d 312 (S.D.N.Y. 2005) 16

Arp v. Riley,
Wash. Court of Appeals No. 72613-7-I (published
Dec. 28, 2015) 17

Doty v. Town of South Prairie,
155 Wn.2d 527, 120 P.3d 941 (2005) 10

Duckworth v. Langland,
95 Wn. App. 1, 988 P.2d 967 (1998), *review*
denied, 138 Wn.2d 1002 (1999) 16

Falkner v. Foshaug,
108 Wn. App. 113, 29 P.3d 771 (2001) 18

Hildahl v. Bringolf,
101 Wn. App. 634, 5 P.3d 38 (2000), *rev. denied*,
142 Wn.2d 1020 (2001) 13, 15

Manor v. Nestle Food Co.,
131 Wn.2d 439, 932 P.2d 628 (1997), *overruled in*
part on other grounds, ***Wash. Indep. Tel. Ass'n v.***
Wash. Util. & Transp. Comm'n, 148 Wn.2d 887,
64 P.3d 606 (2003) 13, 14, 15

Marshall v. AC&S Inc.,
56 Wn. App. 181, 782 P.2d 1107 (1989) 16, 17

McCormick v. Lake Wash. Sch. Dist.,
99 Wn. App. 107, 992 P.2d 511 (1999) 16

Novenson v. Spokane Culvert & Fabricating Co.,
91 Wn.2d 550, 588 P.2d 1174 (1979) 10, 13

Schonauer v. DCR Entm't, Inc.,
79 Wn. App. 808, 905 P.2d 392 (1995), *review denied*, 129 Wn.2d 1014 (1996) 17

State Farm Mut. Auto. Ins. Co. v. Treciak,
117 Wn. App. 402, 71 P.3d 703 (2003) 16, 17

Unigard Ins. Co. v. Leven,
97 Wn. App. 417, 983 P.2d 1155 (2000) 16

Wilkie v. Dep't of Labor & Indus.,
53 Wn.2d 371, 334 P.2d 181 (1959).....12, 13

Other Authorities

CR 8(f) 4

RAP 9.12 .....7, 15

RAP 10.3(a)(5)..... 2

INTRODUCTION

Superior Floors' (SF's) Introduction is replete with unsupported, conclusory, and contradicted assertions of "fact." BR 1-3. Although SF acknowledges that all facts must be taken in the light most favorable to Jaimes (BR 14, 30) its Statement of the Case – and its entire brief – belies the applicable standard. The Court should disregard SF's nonresponsive arguments postured as facts.

And on rare occasions, the proverbial 800 lb. gorilla must come out of its corner: Jaimes is arguing – as he did below – that the Strizheus brothers are fraudulently manipulating their corporate forms. They are playing hide the pea. Their shell game – to coin a phrase – is a fraudulent misuse of the corporate form to defraud both Jaimes and the trial court. They succeeded with the trial court.

But here, it is clear that if the proper standard is applied, the facts most favorable to Jaimes prove that he was not SF's employee – SF had no right to control his work, and he did not consent to employment with SF. At the very least, myriad genuine issues of material fact preclude summary judgment here.

This Court should reverse and remand for trial.

REPLY RE STATEMENT OF THE CASE

A. SF's argumentative Statement merely raises numerous genuine issues of material fact.

SF's argumentative assertions of "fact" are improper on summary judgment, much less in an appellate Statement of the Case. *See* RAP 10.3(a)(5) (requiring a "fair statement of the facts . . . without argument"). And in any event, they merely establish that numerous genuine issues of material fact precluded summary judgment here. A few examples will suffice:

- While SF claims at BR 4-5 that NDTS "Did Not Exist" in August 2012 (when Jaimes was injured on the job) SF ignores the following contrary evidence that Jaimes reasonably believed that he worked for NDTS, a genuine issue of material fact:
  - BA 5-8 (citing CP 26, 54, 57-59, 725-26, 736, 779, 790, 932-34,[1] 938-39,[2] 952);
  - BA 34-36 (citing CP 6, 30, 54-55, 117, 119, 122, 136, 725, 741, 1070-72, 1153-55[3]);
- SF also ignores the following contrary evidence that NDTS did exist through August 2012, and at least until October 1, 2013, again raising a genuine issue of material fact:
  - BA 31-33 (citing CP 32, 188, 613, 725, 731, 779, 790, 938-39, 947, 956,[4] 1122-23; 12/19 RP 37);

---

[1] This cite is to co-worker Hernandez's declaration, which SF completely ignores. It is attached to this brief as Appendix A.

[2] This L&I registration form is attached as App. B.

[3] CP 1153-55 is Timofey's certification that the grounds for dissolving NDTS "did not exist or have been eliminated." It is attached as App. C.

[4] This Secretary of State record shows that NDTS first became inactive on October 1, 2013, over a year after Jaimes' fall. It is attached as App. D.

- While SF claims at BR 5-6 that it used the Pacific Huts trade name, it ignores evidence that NDTS used that trade name:
    - BA 31-32 & 37 (citing CP 725, 779, 790, 938-39, 947, 956, 1122-23);
- evidence that SF never used that trade name
    - BA 32 (citing CP 952-54);
- and evidence that L&I linked the name to NDTS, not to SF
    - CP 32, 188, 613, 938, 947, 956; 12/19 RP 37-39;
- again, SF just raises genuine issues of material fact;
- While SF claims at BR 6-7 that Timofey hired Jaimes to work for SF, it ignores the evidence cited above that Jaimes reasonably believed he worked for NDTS;
- Similarly, SF asserts that it set Jaimes' hours and supplied his tools, etc. (BR 6) all of which is contrary to the sworn statements of Jaimes and Hernandez (*see, e.g.*, CP 58, 74, 85, 272, 932-34) – yet more genuine issues of material fact;
- SF makes a big deal about Jaimes listing Pacific Huts as his employer in his L&I claim, but ignores the evidence cited above that NDTS did business as Pacific Huts, that L&I also linked those entities, and that Jaimes reasonably believed NDTS was his employer – again, just raising genuine issues of material fact;
- Finally, SF claims that L&I was just "confused" about Pacific Huts, but it makes a crucial admission at BR 9:
    - "NDTS . . . in 2012 . . . was still the official registered owner of the [*sic*] Pacific Huts."[5]

---

[5] The full quote is this: "Although NDTS was not operational in 2012, that entity was still the official registered owner of the [*sic*] Pacific Huts." BR 9. Whether NDTS was "operational" in 2012 is a material disputed issue, but it is impossible for a *nonexistent* entity to own anything. Since NDTS did exist as a legal entity in 2012, it was reasonable for Jaimes to conclude – based on Timofey's representations – that NDTS employed him.

B. After raising numerous factual disputes, SF unfortunately descends into falsehood.

After raising these many disputed issues, SF unfortunately descends into a series of false assertions. BR 9-13. First, SF's *heading* falsely asserts that Jaimes' complaints "Asserted that He was an Employee" of SF, but the Complaint actually says (CP 6):

> At the time of the incident, plaintiff was an employee of Pacific Huts and Castles, Inc., a construction company licensed to do business in the State of Washington, which, upon information and belief, <u>is a subsidiary of NDTS Construction, Inc. and/or Superior Floors and Countertops, LLC and/or Pacific Huts and Castles Construction</u>. [Underlining added.]

The Amended Complaint says exactly the same thing. CP 14. In other words, Jaimes did not have any clear idea of who owned *Pacific Huts* when he filed these complaints, but he did know that he worked for NDTS. 2/13 RP 36.[6]

SF's next heading falsely asserts: "In Initial and Supplemental Answers to Interrogatories, Mr. Jaimes Listed [SF] as an Employer." BR 10. But Jaimes' initial answers actually said, "Pacific Huts and Cabinets [*sic*] aka Superior Floors and Counter tops, aka NTDS [*sic*] Construction aka Pavel Striheuas [*sic*]." CP 113, 117. Jaimes thus asserted that he could not yet parse these entities, but in the same

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[6] His confusion is hardly surprising in light of the confusing assertions SF makes – even to this Court – NDTS did not then do business, but did own Pacific Huts, etc. In any event, pleadings are construed to do substantial justice. CR 8(f).

Answers he unequivocally asserted that he had filed an L&I claim with "Pacific Huts and Castles aka NDTS Construction Inc.," confirming that NDTS was his employer. CP 122.

While Jaimes' first supplemental answers said nothing about this issue, it is highly misleading – particularly in light of Jaimes' pointing it out at BA 35 – for SF to omit that in his second supplemental answers, Jaimes said that he was a day laborer working for NDTS d/b/a Pacific Huts. CP 1071-72.[7] This sort of omission explains how the trial court was misled.

SF next mischaracterizes some of the oral statements the trial court made during the hearing on the first set of summary judgments (which are not even at issue here) claiming that "the trial court found" something. BR 10. That was a summary judgment: the trial court made no findings. CP 310-11 (Order on Summary Judgment).

SF next falsely states that Jaimes "could not adequately respond to the trial court's question: 'How does that square with their evidence that their license with L&I of NDTS expired in August of 2011?'" BR 11. As an initial matter, that is the wrong question. Jaimes had just explained to the court some of the evidence that

[7] Copy attached as App. E.

NDTS was still alive and kicking in 2012. 2/13 RP 19-20. That evidence does not – and need not – "square" with SF's claims.

And in any event, Jaimes gave an adequate response:

> MR. LE: I don't see that, Your Honor.
>
> THE COURT: They provided it.
>
> MR. LE: No, they didn't. Your Honor . . . – it doesn't square – first of all, let's assume that that's the case. That's not with [*sic*; should be what] the records that we [have] show. Because here, look. You had an unpaid warrant. You had a warrant that paid for worker's compensation. And even if they did expire, Your Honor, the fact that they represented to Mr. Jose Jaimes that they were – that they were NDTS, and the fact that they were still operational and fully active in 2012 and 2013 doesn't vitiate that.
>
> They – this is the problem. Many of them were working for these entities, they were operational without following the law, without paying a worker's comp claim. . . . – here, Your Honor. This is 2013. This warrant here[8] was because they did not pay. There was an L&I claim that was open for Mr. Jaimes and they did not pay the worker's comp claim. They operated under Pacific Huts & Castles.
>
> ... This is about the [*sic*, should be as] smoking gun as you can get. "I certify that there was no dissolution." This is from Mr. Strizheus himself. . . . In 2012, he wrote that. He swore under penalty of perjury that NDTS was not dissolved. This is . . . with the Secretary of State.[9]
>
> And so whether or not they – they want to tell you, let's assume – let's assume that that's the case. We just showed you evidence that contradicts that. Let's assume. There's nothing to say they didn't hire Mr. Jaimes to work, even if their

---

[8] Counsel was referring to the L&I warrant to NDTS in October 2013 for unpaid IIA premiums, at CP 947-48, attached as App. F.

[9] This document is in App. C.

> license was suspended. There's nothing to do that. There's nothing – it doesn't eliminate that there's a controversy (Inaudible). They're saying, "Well, we have these bank records that show that we paid." Interestingly, that's not the story. . . . There was references to them paying L&I benefits for Mr. Jaimes, Your Honor. Here's what you need to know, that they didn't pay for it 'til three years after the fact.

2/13 RP 20-22.

SF selectively quotes the trial court. BR 11-13. The standard of review is *de novo*, so these quotations are superfluous.

C. SF properly concedes that this Court should not consider the Lampman Declaration.

SF concedes that "Ms. Lampman's declaration, admittedly, contains hearsay statements regarding comments reportedly made by an L&I employee." BR 13. Of course, it is *entirely* based on hearsay. *See* CP 346-48. SF goes on to state that the trial court "did not take into account Ms. Lampman's declaration as a part of her ruling . . . ." *Id.* Since the trial court did not consider it, this Court will not do so. RAP 9.12.

REPY ARGUMENT

A. This Court's review is *de novo.*

Superior Floors concedes that the standard of review is *de novo*. BR 13-15. But it fails to acknowledge the effect of that standard, instead asserting only allegations favorable to it – contrary to the requirement that the Court must take all facts and reasonable inferences in the light most favorable to Jaimes. This tactic simply demonstrates that genuine issues of material fact precluded summary judgment here.

B. Taking the facts in the light most favorable to Jaimes, the trial court erroneously dismissed SF as a matter of law.

Jaimes' first argument is that the trial court erred as a matter of law because – taking the facts in the light most favorable to him – SF was not his employer. BA 19-30. Worker status could not be thrust upon him, and under the applicable two-part test, SF did not control his physical conduct, and he did not consent to employment with SF. *Id.* Nor was he SF's "worker." BA 29-30. SF offers no direct response to these arguments.

But it does address the two-part test at BR 25-31. On the right to control, SF (as usual) ignores the mountains of evidence that it exercised no control over Jaimes (or Hernandez). *See, e.g.*, BA 25-26 (citing CP 27, 44, 54-55, 56-60, 74-76, 85, 272, 733, 735, 741,

743, 772, 785, 933-55). Taking *this* evidence in the light most favorable to Jaimes, SF had no right to control his work.

On consent, SF again ignores the copious evidence that – taken in the proper light – establishes Jaimes did not consent to employment with SF. *Compare* BA 26-28 (citing 54, 55, 57-58, 187-88, 271, 932, 938) *with* BR 29-31 (citing only its disputed, self-serving, and confusing allegations). Indeed, it is surprising that SF relies on seven allegations that Jaimes worked for *Pacific Huts*. BR 30. That is immaterial because Pacific Huts is just a trade name. What is material is *who owned Pacific Huts*. And in this appeal, SF has conceded (as it must) that in 2012, NDTS was still "the official registered owner" of Pacific Huts. BR 9; *see also* App. B (CP 938-39). Jaimes did not consent to employment with SF.

Finally on the two-part test, SF baldly asserts that despite all of the evidence it ignores, Jaimes "unreasonably" believed that he worked for NDTS – a classic question of fact. BR 30-31. Its series of meaningless and irrelevant hypothetical questions simply incorporate its false factual assertions identified *supra*. *Id.* Jaimes does not argue that SF has *no* evidence (although it is true that it has no documentary evidence that Jaimes was ever an SF employee); rather, Jaimes argues that, taking the facts in the light most favorable

to him, he did not consent to work for SF. SF cannot refute this argument – and has not.

SF completely fails to respond to Jaimes' argument that he was not its "worker." *Compare* BA 29-30 *with* BR. This Court should reverse the trial court's ruling to the extent it relied on this status.

But SF does attempt to add a third "prong" into the two-part test, adding wages. BR 26 (citing ***Novenson v. Spokane Culvert & Fabricating Co.***, 91 Wn.2d 550, 553, 588 P.2d 1174 (1979); ***Doty v. Town of South Prairie***, 155 Wn.2d 527, 540-42, 120 P.3d 941 (2005)). ***Novenson*** (which holds that this is a two-part test, and says nothing about wages) and ***Doty*** (which addresses an inapposite issue, whether a firefighter who receives a stipend or other benefits is nonetheless a "volunteer") do not support SF's assertion that the two-part test is really a three-prong test.

SF displays a remarkable knack for understatement in its footnote 22, admitting that wages are "typically not discussed" in this context. They are never discussed. They are not relevant.

C. At best, SF created fact questions, rendering summary judgment inappropriate here.

As the Reply Re Statement of the Case makes clear, numerous genuine issues of material fact precluded summary

judgment here. SF simply fails to confront the facts that NDTS owned Pacific Huts, that the Strizheus brothers' self-serving and unsupported allegations just raise disputed issues for trial, and that the brothers may not misuse their corporate forms to defraud Jaimes or our courts. BA 30-41.

Remarkably, SF never addresses these arguments. Reversal and remand is the appropriate remedy.

SF begins its assorted nonresponsive arguments with a discursion on the IIA. BR 17-20. None of this background helps here.

SF also argues that NDTS was not an "employer" in 2012, so it did not employ Jaimes. BR 21-22. But the real issue is whether *SF* employed Jaimes. As explained *supra*, that is at best a genuine issue of material fact.

SF asserts that Jaimes worked for SF, d/b/a Pacific Huts, when he was injured. BA 23. That is a disputed issue. It also asserts that "there is no dispute in the record that, as of August 27, 2012, the workplace in which Mr. Jaimes was injured was governed by a contract between EVF, Inc. and [SF] doing business as Pacific Huts." *Id.* (citing CP 614-37). The cited record does not even fully support this assertion, much less show that SF had the right to control

Jaimes' work and that he agreed to employment with SF. This too is irrelevant.[10]

Relying on ***Wilkie v. Dep't of Labor & Indus.***, 53 Wn.2d 371, 374-75, 334 P.2d 181 (1959), SF argues that Jaimes' "course of dealings" somehow shows that SF employed him. BA 23-24. The issue in ***Wilkie*** was whether the trial court erred in granting JNOV, where the jury found a contract of employment based on evidence that the employer solicited the employee's services, and intended to pay a reasonable wage; that the employee expected to be paid; that an employment agreement involving extrahazardous duties was thus formed; and that this employment still existed when the worker was injured. 53 Wn.2d at 376. The upshot of the jury's findings was that the worker received IIA benefits.

Wilkie is inapposite for many reasons, but three should suffice. First, the issue here is not whether Jaimes should receive IIA benefits – this is a third-party action. Second, the issue here is not whether a judge erred in setting aside a jury verdict – this was summary judgment. Third, "different social values are at stake" where, as here, an injured person is seeking benefits, as opposed to

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[10] The assertion is unsupported and irrelevant because the contract alleged to be between EVF and SF is signed only by Vasilly Strizheus, not by EVF, and it says nothing about Jaimes' employment. CP 614-37.

in ***Wilkie***, where the employer was trying to avoid them. ***Novenson***, 91 Wn.2d at 554-55. Thus, SF cites no apposite authority supporting this argument, and the Court should reject it.

D. SF, a third-party subject to suit under the IIA, may not buy immunity by paying NDTS's IIA premiums.

Jaimes pointed out that no "dual employment" or "loaned servant" issues arise here. BA 41-42. SF concedes that "[n]one of these situations apply [*sic*] here." BR 27. Those issues are moot.

But SF appears to argue that it bought IIA immunity by paying Jaimes' L&I premiums on behalf of NDTS. BR 25. It does so without even addressing (much less attempting to distinguish) Jaimes' citation to ***Hildahl v. Bringolf***, 101 Wn. App. 634, 644, 646, 5 P.3d 38 (2000), *rev. denied*, 142 Wn.2d 1020 (2001), which holds that immunity does not automatically flow from premium payments because that would defeat the IIA's very purpose. BA 43. Instead of addressing this controlling authority, SF cites ***Manor v. Nestle Food Co.***, 131 Wn.2d 439, 456, 932 P.2d 628 (1997), *overruled in part on other grounds*, ***Wash. Indep. Tel. Ass'n v. Wash. Util. & Transp. Comm'n***, 148 Wn.2d 887, 906, 64 P.3d 606 (2003)). BR 25.

Manor – like most of SF's authorities – is inapposite. There, a truck driver was injured during a delivery when a forklift ran over his

foot. 131 Wn.2d at 442-43. Unlike SF, the parent company of the employer was self-insured. *Id.* at 443. Unlike SF, that parent company paid more than $455,000 in medical and time-loss benefits directly to the employee, who in gratitude sued the parent for more. *Id.* at 442. The Supreme Court held that a regulation requiring self-insurers to cover every subsidiary's employees was constitutional because (among many other reasons) it was a rational measure to prevent parent companies from spinning off their risky subsidiaries to state-fund coverage. *Id.* at 444-45. ***Manor*** has no bearing on this case, where no company was self-insured, and no constitutional argument is raised.

And importantly here, the Supreme Court began its opinion with the following salient footnote (*id.* at 443 n.1):

> There is no indication in the record of manipulation of the corporate form by [the parent corporation] to avoid actions by employees. . . . .

By contrast, here there is every indication that the brothers are manipulating their corporate forms to avoid Jaimes' claims. *See* BA 38-41. Moreover, while a self-insurer must cover subsidiaries' employees, sister corporations like SF and NDTS have no such requirements. As noted in the opening brief – and in trial counsel's

oral argument quoted *supra* – SF cannot buy immunity by allegedly volunteering to pay its sister's debt. BA 43.

Finally, ***Hildahl*** – which is cited throughout the opening brief, but which SF studiously avoids mentioning – expressly rejects SF's argument regarding ***Manor*** (101 Wn. App at 648 & n.16):

> ***Manor*** emphasizes that immunity flows from "compensation responsibility," not from *premium* responsibility. Here, Bringolf did not compensate Hildahl; he paid only the premium into the state industrial insurance fund, which had *already* compensated Hildahl for his injuries.[16]
>
> [16] Further, as we pointed out earlier, Bringolf's contention that immunity flows from premium payment fails because, at the time of Hildahl's accident, he had not paid the premium into the state industrial insurance fund. [Emphases in original.]

Since SF fails to distinguish this controlling and dispositive authority – much less to request its rejection or overruling – this Court should reverse and remand for trial.

E. SF's new arguments on appeal are unavailing.

Under RAP 9.12, this Court will not address new arguments raised for the first time on appeal that were not called to the attention of the trial court. This is true of the vast majority of SF's arguments on appeal. *Compare* CP 21-23 (SF Motion for Summary judgment) *and* CP 316-18 (SF Motion for Reconsideration) *with* BR (39 pages). This Court should not address SF's new arguments.

Most of SF's new arguments are addressed above, but two remain. First, SF claims that Jaimes cannot "create a genuine issue of material fact . . . by submitting testimony that controverts his prior testimony." BR 33-35 (citing ***Marshall v. AC&S Inc.***, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989); ***McCormick v. Lake Wash. Sch. Dist.***, 99 Wn. App. 107, 111-12, 992 P.2d 511 (1999); ***Unigard Ins. Co. v. Leven***, 97 Wn. App. 417, 430-31, 983 P.2d 1155 (2000); ***AB v. Rhinebeck Cent. Sch. Dist.***, 361 F. Supp.2d 312, 316 (S.D.N.Y. 2005)).[11] Oddly, despite citing all of these cases, SF fails to specify how Jaimes contradicted himself. BR 33-35.

Even more oddly, SF fails to tell this Court (as it failed to tell the trial court) that ***Marshall*** has been substantially limited in numerous cases. *See, e.g.*, ***Duckworth v. Langland***, 95 Wn. App. 1, 7-8, 988 P.2d 967 (1998) (***Marshall*** does not require trial court to exclude contradicting declaration), *review denied*, 138 Wn.2d 1002 (1999); ***State Farm Mut. Auto. Ins. Co. v. Treciak***, 117 Wn. App. 402, 408, 71 P.3d 703 (2003) (***Marshall*** does not stand for the proposition that "'statements in a party's affidavit are inadmissible . . . if the affidavit is inconsistent with an earlier deposition and fails to

[11] SF did cite ***Marshall*** in its summary judgment *reply*, but for a different alleged contradiction. CP 281-82. It also *cited* ***Marshall*** in its motion for reconsideration, but did not develop any argument based upon it. CP 316.

explain the inconsistency'") (quoting ***Schonauer v. DCR Entm't, Inc.***, 79 Wn. App. 808, 817, 905 P.2d 392 (1995), *review denied*, 129 Wn.2d 1014 (1996)), *review denied*, 151 Wn.2d 1006 (2004).

Rather, the ***Marshall*** court addressed the sufficiency, not admissibility, of the testimony because it looked at whether a material issue of disputed fact existed to withstand summary judgment. ***Treciak***, 117 Wn. App. at 408 (citing ***Marshall***, 56 Wn. App. at 185). And there exists a "basic evidential premise that on summary judgment, a later declaration should be considered in light of other evidence presented in the case to determine whether sufficient evidence raises a factual issue." *Id.* at 408.

Since SF fails to point to any direct contradiction, it is impossible to respond. Jaimes did not contradict himself. Rather, he consistently named Pacific Huts, but honestly reflected his uncertainty as to who actually owned it. No contradiction exists.

SF's second remaining new argument raises judicial estoppel. BR 35-36. This Court very recently addressed a trial court decision that *actually addressed judicial estoppel* due to (among other things) a failure to consider all of the necessary factors. ***Arp v. Riley***, Wash. Court of Appeals No. 72613-7-I (published Dec. 28, 2015). Where, as here, the doctrine was never even raised, *a fortiori* the trial court

could not have properly considered its elements. The Court should disregard this unraised and insufficiently briefed new argument.

In any event, Judicial Estoppel does not apply. SF misrepresents Jaimes' allegations at BR 36. Jaimes consistently named Pacific Huts – which is just a d/b/a – but identified *both* SF and NDTS as possible owners. There is nothing "inconsistent" about that. And Jaimes did not prevail, so the court could not possibly have been misled. ***Falkner v. Foshaug***, 108 Wn. App. 113, 125, 29 P.3d 771 (2001). Well, at least not by Jaimes.

F. Jaimes accepts SF's concession regarding the Lampman declaration.

Jaimes accepts SF's concession of error on this issue. BR 36-38. This Court should not consider Lampman's Declaration.

CONCLUSION

For the reasons stated *supra*, and in the opening brief, this Court should reverse and remand for trial.

RESPECTFULLY SUBMITTED this 30th day of December 2015.

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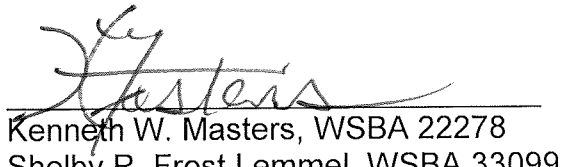

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CERTIFICATE OF SERVICE BY MAIL AND/OR EMAIL

I certify that I caused to be mailed postage prepaid, via U.S. mail, and/or emailed, a copy of the foregoing **REPLY BRIEF** on the 30th day of December, 2015, to the following counsel of record at the following addresses:

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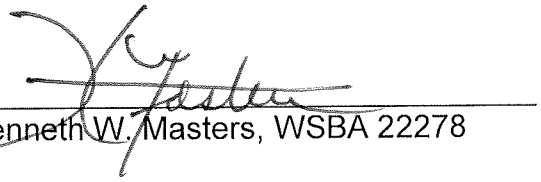
Jeremy Rogers Smith Freed & Eberhard, P.C. 705 Second Avenue, Ste 1700 Seattle, Washington 98104	____ U.S. Mail ✓ E-Mail ____ Facsimile



Kenneth W. Masters, WSBA 22278

DECLARATION OF SINUHE HERNANDEZ

I, Sinuhe Hernandez, declare under penalty of perjury under the laws of the state of Washington as follows:

A. FORMER RELATIONSHIP WITH NDTS CONSTRUCTION

I am a former independent contractor/day laborer for NDTS construction. I was retained approximately July 2012 to perform general construction duties as a day laborer for NDTS construction. At the time that I was hired, I was specifically told by Timofey Strizheus that his construction company, NDTS Construction, needed "pick up" work which involved working as a general laborer around the construction worksite. Timofey also told me that I would be retained in the same manner as José Jaimes: 1) that we would be doing manual labor, 2) we would be both paid in cash, 3) that we should expect to work on our own, 4) that he didn't care what time we came or how long we have to work as long as the assignment was done, 5) that there would be no supervision, and 6) that he would pay us only we got the projects done.

During the two months that I work with and NDTS, I would often go to work with José and would work alongside him. We came and work at our own hours. There were no set hours. Sometimes we would work more than 10 hours and sometimes, we would work less than 4 hours. As long as the task was done, both I and Jose were paid for the day. However, the reality was we work more hours on the projects that were given to us by Timofey. Work assignments were communicated by phone or when we showed up. I can attest that during the time that I work with José, he was working on other construction projects with other homeowners and contractors. Working for NDTS was not the exclusive project that Jose and I were working on from May to August 2012. Indeed, Jose and I also work on other job sites on the weekends. We always felt we were independent contractors who are day laborers and got paid by the project.

It was always understood between I, José, and Timofey that we were independent contractors rather than employees. We were essentially offering our labor in exchange for payment of cash. During the time that I worked there, neither I nor José had ever filled out a job application , had our taxes withheld, was told how long we had to work, nor required to contribute to unemployment insurance, workers comp insurance, or had deductions taken for any other type of governmental withholdings such as Social Security, FICA, or taxes.

In fact, I was with José at a meeting with both Pavel and Timofey after José's fall. At that meeting, when José asked for information regarding health insurance and Worker's Compensation information, both Pavel and Timofey told Jose that he was responsible for paying his own worker's comp and health insurance because Jose was <u>not</u> an employee that they had to

cover. Both also told Jose they had no duty to pay for workers comp, health insurance, or any type of benefits to him.

When José mentioned that it was unlikely he would be ever be employed again, they told him that it was not their problem and that he was responsible for his own fate. When Jose asked him for payment on the days he worked that week, they refused to pay him.

B. LACK OF TRAINING, SUPERVISION, ACCIDENT PREVENTION, AND FALL PROTECTION PROGRAM

During the time that I work at NDTS and Timofey, I and José work without any supervision, direction, or training from anyone at NDTS or Timofey. Indeed, Timofey and made it very specifically clear that the reason he hired us was because we needed to be able to work unsupervised. The only direction he ever provided to either I or José were to communicate tasks that needed to be done or the precise measurement of things that needed to be cut and installed. There was never any training, orientation, meetings, hazard assessment, or anything like that.

For example, from the first day I want to work, there was never any general safety training or any specific training as to construction hazards. I was not made aware of any hazards that could occur on the jobsite. No safety meetings ever took place and no accident prevention program was ever disclosed either to me or José. On the first day that I came to work, I basically hit the ground running. There was no orientation to me or to José anytime about the particular hazards of the worksite. No one gave us any safety orientation, training, or even help us identify and notice potential hazards of the jobsite.

We worked unsupervised on our own 95% of the time. Further, we were never given any instructions on how to perform our job. We were told to use our own judgment and discretion on how complete the tasks that Timofey assigned us which is what we did. Tim was never concerned with the manner or technique as how our job was completed. Tim was also never concerned with explaining to us the sequence of steps or methodology on how to complete the work. He never gave us any training or protective equipment to do any job. He left it up to me and Jose to coordinate between ourselves how to complete the tasks that he assigned us.

For example, when Jose got hurt installing the windows, he never explained to us how to install the windows. The only thing he gave us was the measurements and dimensions needed to cut the hole to install the window. He left it up to me and Jose as to how to install the window.

We occasionally had to work at elevated heights above 12 feet on numerous occasions such as installing windows, siding and stucco, lights and lamps, window frames, and cutting/nailing

wood and timber. Further, we occasionally had to paint, weatherproof, or primed materials and elevated heights.

At the Yarrow Point jobsite, no personal protective equipment was ever provided to us such as body harness, anchoring systems, ropes, or ladder securing devices. No scaffolding was ever erected nor any type of lift devices ever available for us to work at elevated heights. Yet, at the other job sites that we worked on for Timofey, which was at the same time as the Yarrow Point construction, scaffolding was erected for other workers to work at elevated heights.

However, at the Yarrow Point jobsite, there were no fall protection, fall restraint, or fall arrest program ever created, implemented, or enforced. Workers like José and I were generally left to our own devices to do the tasks without the benefit of any fall protection or arrest system. We had no experience with ladders or working at heights. Hence, when we were installing the window on the second floor, neither José nor I knew what the standard safe practices were with regards to the installation of windows. We were never taught nor instructed on how to set up ladders, secure it, brace it, or the manner on how to work while on a ladder. We are also never taught on the safe manner on how to install window at elevated heights. The only direction we were given was on the dimensions to cut the window opening so that the properly sized window could fit. We were never given direction on whether the window should be installed on the inside or on the outside. We were never given manuals that came with the window manufacturer nor will we ever given a demonstration as to how the windows should be installed.

Tim saw us work at elevated heights on numerous occasions. He also saw us climb ladders when we were up 12 feet or 16 feet. However, he never told us day workers whether we should wear a body harness or provide us with a body harness. Certainly, he never attempted to erect the scaffold for us or any of the other workers.

He was always pushing us to work faster so that the construction project could be completed on time. Hence, if we ever tried voiced concerns about safety, he would tell us to either do the job or leave. As an example, when we were cutting wood, I would ask whether there were goggles and gloves that would be provided and he said no. He told us that we needed to get her job done as soon as possible. Also, I had once asked whether there were hardhats and he would also say no.

C. DESCRIPTION OF THE INCIDENT

The day before Jose fell, we were instructed by Timofey to install the window on the second story of the house. The window weighed approximately 150 pounds. Tim told us to cut a hole in the wall and to measure the window. There were fins on the window that required someone to install it from the outside of the house.

We did as Timofey asked. We cut a hole in the wall, measured it to align with the measurements of the window. Afterwards, both I and José used two extension ladders to carry the window. We lifted the window and partially place it inside the window opening. However, to set the window so that we could nail the fins, I had to climb down the ladder and go inside the house to work with Jose on the interior side of the window. At this time, José was on the outside of the house and on the ladder. As he and I were trying to adjust the window to fit in the opening, the ladder that José was on begin to shift and slide against the siding on the outside of the house due to the rocking movement of the installation process. After the ladder began to shift and slide, the base of the ladder also slid away from the wall, causing the ladder to slope away from the wall. As a result of the instability, Jose fell approximately 12- 16 feet down. He landed face first with both of his hands outstretched. I saw him fall and slammed his head into the ground and broke his wrist. I started to yell out to him to see if he was okay. He was unresponsive and knocked out for a few minutes or so. I then ran down to check on him. As he came to, he appeared dazed and confused. His head was bleeding and I noticed a big cut on his lip and blood all over his face.

SHS

He indicated that he was blind and not able to see. After his vision came back 30 seconds later, he started screaming in pain. I ~~and another worker~~ carried him to a car. I rushed him to the hospital emergency room and he was there for a day or so. During this period of time here appeared to be in great shock and pain. I was told that the doctors operated on him.

While I was at the hospital, I called Timofey to let him know about what happened. Timofey appeared to be unconcerned and blamed us for causing him lost times in completing the home project. He said that he was already late finishing the project as it is. .

Two days later, I and José went to meet with Timofey and Pavel. We wanted to be paid for the work that was done. Tim said that because we did not complete our project, he could not pay us. José tried to explain to them that he was told he will never be able to work in construction again. José also said that he has a lot of medical bills that would be a lot of money. José then asked about insurance benefits such as health insurers and workers comp. Tim and Pavel said that since we were not employees, there is no health or workers comp insurance for Jose. A fight ensued between José and Pavel about wages and health insurance. Pavel insisted that they had no duty to provide health insurance to José since he was not an employee.

Neither I nor Jose knew any of our rights. We did not know that a day worker, even if he is not an employee, had rights. Neither Timofey nor Pavel ever told us about this. We had no idea on how to report this incident or fill out any forms. In fact, it was Jose's surgeon who helped us fill out the industrial accident form.

D. EXPERIENCE AND KNOWLEDGE ABOUT CONSTRUCTION INDUSTRY STANDARDS AND PRACTICES

Throughout the times that I work with Timofey and NDTS, we were not trained or educated about any of the hazards and dangers that existed with the construction industry. Obviously if we had, we would have done our best to avoid them. My primary experience was in the food industry. Prior to working with José, I had no experience in the construction industry. Since I am familiar with José, I also know that while he has some experience with construction, it was mainly limited to landscaping in his previous job, paving concrete, and doing general labor work.

This declaration was translated to me in full.

Dated this 1st day of September, 2014 at Renton, Washington.

Sinuhe Hernandez

Washington State Department of
Labor & Industries

NDTS CONSTRUCTION INC

Owner or tradesperson
STRIZHEUS, TIMOFEY V
Principals
STRIZHEUS, TIMOFEY V, PRESIDENT
Doing business as
NDTS CONSTRUCTION INC

13433 NE 20th Street
BELLEVUE, WA 98005
425-283-4167
KING County

WA UBI No.
602 400 789

Business type
Corporation

License

Verify the contractor's active registration / license / certification (depending on trade) and any past violations.

Construction Contractor

Expired.
License holder did not renew.

License specialties
GENERAL
License no.
NDTSCCI963PK
Effective — expiration
10/12/2004— 01/17/2013

Suspend date
08/09/2011

Bond
No current bond account. See the bond history.

Bond history

Insurance
No current insurance account. See the insurance history.

Insurance history

Savings
No savings accounts during the previous 6 year period.

Lawsuits against the bond or savings
No lawsuits against the bond or savings accounts during the previous 6 year period.

L&I Tax debts

Tax debt no.
288682

Paid

Filed by
Department of Labor and Industries

Cause no

Filing date

13-2-35566-3SEA

Tax amount
$602.43

10/11/2013

County
KING

License Violations
No license violations during the previous 6 year period.

Workers' comp

Do you know if the business has employees? If so, verify the business is up-to-date on workers' comp premiums.

L&I Account ID
069,300-00

Account is closed.

Doing business as
PACIFIC HUTS & CASTLES

Estimated workers reported
N/A

L&I account representative
T1 / IDA HAYNES (360)902-5635 - Email: HAYN235@lni.wa.gov

Workplace safety and health

No inspections during the previous 6 year period.

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Access Washington®
Official State Government Web Site

STATE OF WASHINGTON
SECRETARY OF STATE

Domestic Corporation Reinstatement Report

Chapter 23B.14.220 RCW

This Box For Office Use Only

09/11/12 2256289-001
$269.00 R
id: 2385485
FILED
SECRETARY OF STATE
SEP 11 2012
STATE OF WASHINGTON

Entity Name: **NDTS CONSTRUCTION INC.**
Current Registered Agent/Office Address:
TIMOFEY STRIZHEUS
13433 NE 20TH ST STE F
BELLEVUE WA 98005

UBI Number:602 400 789

☐ **EXPEDITE (Add $50.00 to the amount shown below.)**

Please submit completed paperwork with the required fee.
For an explanation of fees please refer to the instruction page.

Reinstatement period: 7/1/2011 – 6/30/2013*

Date of incorporation: **6/3/2004**

Date of dissolution: **10/3/2011**

Delinquent license fees:	**$129.00**
Reinstatement fee:	$140.00
Annual renewal fee for: -	-
TOTAL FEES DUE:	**$269.00**

If the last date of the reinstatement period* shown above has passed, please call 360-725-0377 as new forms and fees will be required. 9/7/12 TH

SECTION 1: New registered agent information

(Required if changing registered agent or registered agent address(es))

Name: _____

Physical Street Address *(required)* _____

City _____ WA Zip Code _____

Mailing or Postal Address *(optional)*: _____

City _____ WA Zip Code _____

CONSENT TO SERVE AS REGISTERED AGENT (If new agent):

I consent to serve as Registered Agent in the State of Washington for the above named corporation. I understand it will be my responsibility to accept Service of Process on behalf of the corporation; to forward mail to the corporation; and to immediately notify the Office of the Secretary of State if I resign or change the Registered Office Address.

X _____

Signature of NEW Registered Agent Printed Name Date

Sections 2 – 4 are required in order to complete your filing.

SECTION 2: Principal Place of Business

Address: 13433 NE 20th St. Suite F

City Bellevue, WA WA Zip Code 98005

SECTION 3: Nature of Business

Briefly describe the business the Corporation is conducting in the State of Washington:

General Contractor

SECTION 4: List Names and Addresses of Officers and Directors:
(attach additional list if needed)

President: Timofey Strizhevs

Address: 3321 Oas Dr. W

City University Place State WA Zip Code 98466

Vice President:

Address:

City State Zip Code

Secretary: Vasiliy Strizhevs

Address: 6491 Francis Loop SE

City Auburn State WA Zip Code 98092

Treasurer:

Address:

City State Zip Code

Chair Bd of Directors:

Address:

City State Zip Code

Director:

Address:

City State Zip Code

 Sections 5 - 6 are required in order to complete your filing.

SECTION 5: Controlling Interest Transfer

Ownership of real property

•Does the company own land, buildings, or other real property in Washington? ☐ Yes OR ☒ No

Controlling Interest Transfer

A Controlling Interest Transfer is when 50% or more of the ownership in an entity changes hands as defined under RCW 82.45.010(2).

•Has there been a transfer of stock, other financial interest change, or an option agreement exercised during the last 12 months that resulted in a transfer of controlling interest? ☐ Yes OR ☒ No

•Has an option agreement been executed in the last 12 months allowing for the future purchase or acquisition of the entity, that, if exercised would result in a transfer of controlling interest? ☐ Yes OR ☒ No

If the company owns land, buildings, or other real estate in Washington State, you must contact the Washington State Department of Revenue to report a transfer of Controlling Interest. Failure to report the transfer is subject to the penalty of RCW 82.45.220

For more information please call the Dept. of Revenue at (360) 570-3265 and choose option 1, or visit their website at www.dor.wa.gov.

SECTION 6: Signature

•I certify that the grounds for dissolution either did not exist or have been eliminated and that the corporation's name satisfies the requirements of RCW 23B.14.220.

This document is hereby executed under penalties of perjury, and is, to the best of my knowledge, true and correct.

X	Timothy Strichaus President	9-10-12	4253514338
Signature of Officer or Chair Bd of Directors	Printed Name and Title	Date	Phone Number

- THE DOMESTIC CORPORATION REINSTATEMENT APPLICATION AND APPLICABLE FEES MUST BE DELIVERED (MAILED) TO:
  - Corporations Division
  - Office of the Secretary of State
  - 801 Capitol Way South
  - PO BOX 40234
  - Olympia, WA 98504-0234
- THE REINSTATEMENT FEE IS $140.00 PLUS ALL DELINQUENT LICENSE OR ANNUAL REPORT.
- EXPEDITED SERVICES ARE AVAILABLE FOR AN ADDITIONAL $50.00. PLEASE WRITE "EXPEDITE" ON YOUR COVER LETTER OR ON THE OUTSIDE OF YOUR ENVELOPE.
- **THE REINSTATEMENT DOCUMENTS MUST BE FILED WITHIN FIVE (5) YEARS OF THE EFFECTIVE DATE OF THE ADMINISTRATIVE DISSOLUTION.**

NDTS CONSTRUCTION INC.

UBI Number	602400789
Category	REG
Profit/Nonprofit	Profit
Active/Inactive	Inactive
State Of Incorporation	WA
WA Filing Date	06/03/2004
Expiration Date	06/30/2013
Inactive Date	10/01/2013
Duration	Perpetual

Registered Agent Information

Agent Name	TIMOFEY STRIZHEUS
Address	13433 NE 20TH ST STE F
City	BELLEVUE
State	WA
ZIP	980052024

Special Address Information

Address	
City	
State	
Zip	

Governing Persons

Title	Name	Address
President,Chairman	STRIZHEUS , TIMOFEY	8447 EASTSIDE DRIVE NE TACOMA , WA 98422
Secretary,Treasurer	STRIZHEUS, VASILIY	6125 KENNEDY AVE SE 7P AUBURN, WA 98092

SECOND SUPPLEMENTAL RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 2: State your employment history during the last ten years, including name and address of each employer dates of employment.

SECOND SUPPLEMENTALANSWER:

I am amending this response based upon discovery that I have obtained and received which provides better information about the entities who I was working for.

From 2004 two 2007, I worked at a family-owned farm. From 2007 two 2008, I work for CLP resources the address and information which is our been provided to you. From 2008 2010, I work for case construction company. For a brief time in 2012, I work at Elim construction. During that same year, I worked as a contractor and a day laborer for N DTS Construction, Inc doing under the trade name of Pacific Huts & Castle.

To clarify my earlier response, I was not an employee of Superior Floors & Countertops and did not learn of their existence until I was informed about their existence through my attorney.

INTERROGATORY NO. 6: At the time of the accident on August 27, 2012, were you performing activities for work or services for an employer? If so, provide the name, address and phone number for that employer and dates of employment.

SECOND SUPPLEMENTALANSWER:

No. I was a day laborer and consider myself a worker whose essence of my job was to provide personal labor. Further, I was not treated as an employee by any of the defendants in this

EDWARD K. LE, PLLC
ATTORNEYS AT LAW
135 Park Avenue North
Renton, WA 98057
(425) 336-2255

case. For example, 1) I was retained to provide general construction projects without any employment agreement, 2) I was retained to perform his own tasks wholly unsupervised and expected to complete projects on my own, 3) I had no set hours or hourly pay, 4) I could come to work and leave when I wanted, 5) no one supervised my work, 6) no one trained me on the job nor explained to me how to perform these tasks, 7) no one ever included me in any employee meeting, 8) I was paid in cash without hours being kept, 9) no paychecks were ever written to I and he was paid like any other project vendor, 10) no employment files were kept on him by any principals at SFC or NDTS, 11) no W-2s were ever issued to me, 12) no federal or state withholdings was ever done, 13) no payroll wages were ever reported by the Strizheus brothers, 13) no unemployment insurance or workers compensation insurance were ever paid on my behalf, 14) no employment health insurance or work fringe benefits were ever provided to me, 18) defendants did not provide me with the proper safety equipments and instructions such as hardhats, body harnesses, anchors, and lanyards. In essence, the defendants always treated me like a contractor and a casual laborer rather than an employee.

EDWARD K. LE, PLLC
ATTORNEYS AT LAW
135 Park Avenue North
Renton, WA 98057
(425) 336-2255

FILED
13 OCT 11 AM 9:10

KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 13-2-35566-3 SEA

WARRANT

Department of Labor & Industries COLLECTIONS Olympia, Washington 98504-4170	Cause No. Warrant No. 0288682 for Unpaid Workers' Compensation Taxes
IN THE MATTER OF THE ASSESSMENT OF WORKERS' COMPENSATION TAXES AGAINST:	
NDTS CONSTRUCTION INC A CORPORATION, DBA PACIFIC HUTS & CASYLES 13433 NE 20TH STREET SUITE F BELLEVUE WA 98005	
An Employer, Account ID 069,300-00 Unified Business Identifier (UBI) 602400789	

THE DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON:

TO THE CLERK OF KING COUNTY, STATE OF WASHINGTON,

WHEREAS, a Notice and Order of Assessment of Workers' Compensation Taxes NO. 0587591 in the amount of $2,679.43 was served, pursuant to RCW 51.48.120, on the above named employer, and WHEREAS, the above named employer has not filed or pursued an appeal with the Board of Industrial Insurance Appeals or the Director of the Department of Labor & Industries within thirty days of the date of service of the Notice and Order of Assessment, and WHEREAS the Notice and Order of Assessment therefore became final and established in the remaining unpaid balance of $2,696.22, which includes penalties, interest and fees through October 31, 2013.

069,300-00 1196609

WARRANT
DEPARTMENT OF LABOR & INDUSTRIES

WARRANT NO. 0288682

An employer, Account ID 069,300-00
UBI: 602400789

NOW THEREFORE, pursuant to RCW 51.48.140, the Clerk of KING County shall designate a Superior Court cause number for this Warrant and cause to be entered in the judgment docket under the cause number assigned, the name of the listed employer, the date of the filing of the Warrant, and the **warrant amount of Two Thousand, Eight Hundred Twenty and 19/100 Dollars, ($2,820.19), which includes the statutory filing fee of Twenty Dollars and the statutory surcharge of Twenty Dollars.**

The aggregate amount of this Warrant as docketed is a lien upon the title to, and interest in all real and personal property of the employer against whom this Warrant is issued, the same as a judgment in a civil case duly docketed in the office of such clerk, and is sufficient to support the issuance of writs of garnishment in favor of the state in a manner provided by law in case of judgment, wholly or partially unsatisfied.

Delinquent taxes shall bear interest at the rate of one percent of the delinquent amount per month or fraction thereof from and after the due date until payment, increases, and penalties are received by the department (RCW 51.48.210)

Dated this 11th day of October 2013
For the Director of the
DEPARTMENT OF LABOR & INDUSTRIES

By: Dexter Froyalde
Revenue Agent
Phone: (425) 990-1478
Dept. of Labor & Industries
616 120th Avenue NE, Ste C201
Bellevue WA 98005-3037

STATUTORY REFERENCES ATTACHED
069,300-00 1196609

Page: 2