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No. 658204

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION I
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DEVID MORALES-CRUZ, a single person

Appellant,

v.

PACIFIC COAST CONTAINER, INC., a Washington Corporation

Respondent.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

Appellant, Devid Morales-Cruz, Plaintiff below, assigns error to that decision of the trial court entered July 30, 2010 (CP 115-116) which granted Respondent, Pacific Coast Container, Inc.'s (hereinafter "PCC"), Motion for Summary Judgment. PCC was Defendant below.

A. Issues Pertaining to the Assignment of Error

1. Is Summary Judgment in favor of PCC on the issue of immunity from suit under RCW 51.04.010 appropriate where Mr. Morales-Cruz consented solely to an employee/employer relationship with Accord Human Services, and did not consent to be a direct employee of Respondent PCC?
2. Is PCC vicariously liable to Mr. Morales-Cruz for the negligence of a worker laboring on its premises, and whose actions PCC had the right to control, where that worker and Mr. Morales-Cruz were both temporary employees placed at PCC, and were both directly employed by Accord Human Resources.

B. Appellant Morales-Cruz's Position on Issues Pertaining to Assignment of Error

1. The evidence presented by PCC is insufficient to require all reasonable minds to find that Mr. Morales-Cruz consented to employment not with Accord Human Resources, Inc. (hereinafter Accord), but with PCC. Mr. Morales-Cruz's statement that he considered Accord to be his sole employer, together with analysis of virtually every other normal indicia of the employment relationship is sufficient to create a genuine issue of material fact as to whether Mr. Morales-Cruz is a direct employee of PCC, providing PCC immunity from suit under the Industrial Insurance Act.
2. PCC is vicariously liability for the negligence of a temporary (Accord) employee whose actions PCC had the exclusive right to control while in the PCC workplace. Even if the temporary worker is a co-employee of Mr. Morales-Cruz at Accord for the purpose of the industrial insurance laws, PCC is the co-worker's employer for purposes of negligence claims by virtue of PCC's retention of the exclusive right to control the co-workers actions in the workplace.

II. STATEMENT OF THE CASE

Appellant, Plaintiff below, Devid Morales-Cruz, was directly employed by Accord Human Services, Inc. CP. 112-113. Accord is a temporary employment agency which provides workers to its client, PCC. CP411. Accord provides workers pursuant to a contract between PCC and Accord, to which Mr. Morales-Cruz is not a party. CP 40-54. This contract attempts to create what Respondent characterizes as a "co-employer" relationship between the two companies, with each sharing some of the responsibilities of the traditional employer. CP 36. Accord accepted and processed Plaintiff's employment application, Accord directly hired him. Accord had the responsibility of paying all of Mr. Morales-Cruz's wages, providing health insurance and other benefits, paying industrial insurance premiums, and was responsible for paying all other taxes associated with Mr. Morales-Cruz's employment. CP 37. Accord was required to be the responsible employer, providing coverage and claims administration services on the Worker's Compensation claim file related to the injury which is the subject of this action. CP 46. PCC pays Accord a fee for every hour Mr. Morales-Cruz works on its

premises, has the right to control work on its premises, and does not pay Mr. Morales-Cruz directly. CP 40-44.

PCC can retain or dismiss Mr. Morales-Cruz from their premises (same as any other worker provided by Accord), and agreed to maintain a workplace in compliance with all state, local, and federal laws. CP 50-51.

The only employment application ever filled out by Mr. Morales-Cruz was for employment at Accord, and was in Spanish. CP 60, 112. This application makes no reference whatsoever to PCC or any client company of Accord. CP 60. Mr. Morales-Cruz also stated in his declaration that the only employer that he ever consented to work for was Accord. CP 113. Following submitting his completed application with Accord, he was told to go to work at PCC by the people at Accord. *Id.*

In the course of his employment with Accord, Mr. Morales-Cruz was intermittently assigned to work at PCC's Tacoma facility. CP 55-6. His duties there included unloading railroad cars, semi truck containers, and otherwise handling freight inside and outside the warehouse. CP 113. All of his work at the Tacoma facility was directed by agents or employees of PCC. *Id.* Accord expressly

disclosed the obligation to train workers provided to PCC, and disclaimed responsibility for ensuring that any Accord employee was suitable for PCC's purposes. CP 43.

On June 15, 2007, Mr. Morales-Cruz took a break from his duties while working on PCC's premises to walk to the lunch area and get a drink of water. CP 113. Suddenly Mr. Morales-Cruz was struck by a forklift being operated in reverse, which ran over his left foot. CP 62. The forklift was operated by another temporary worker supplied to PCC by Accord, named Marco-Antonia Ramirez. CP 56. Mr. Ramirez was looking over his left shoulder while backing up, but failed to see Mr. Morales-Cruz as apparently his field of vision was restricted by a pile of pallets. CP 65.

Following his injuries, Mr. Morales-Cruz filed suit against PCC. He alleged that PCC was negligent in two respects. The first claim of negligence was in PCC's directly failing to follow Washington Workplace Industrial Safety and Health Regulations on their premises. The second claim of negligence asserted that PCC was vicariously liable for the negligence of Mr. Ramirez in the operation of his forklift. CP 1-5. PCC filed a motion for Summary Judgment asserting it was immune from liability to Plaintiff under the industrial

insurance statutes (RCW 51.04). CP 26. The motion was granted by order of Judge Richard Eadie on July 30, 2010. CP 115.

III. ARGUMENT

A. Standard of Review

“On review... [the] court must decide whether the affidavits, facts, and records have created an issue of fact, and if so whether such an issue of fact is material to the cause of action.” *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 12, 721 P.2d 1 (1986). See also CR 56(c). A motion for summary judgment is reviewed de novo, and an appellate court engages in the same inquiry as the trial court. *Lake v. Woodcreek Homeowners Association*, 168 Wn.2d 694, 704-4, 229 P.3d 791 (2010). All facts and reasonable inferences therefrom are construed in the favor of the non-moving party. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009). Claimed errors of law, like all aspects of the summary judgment proceeding are reviewed de novo. *Lane v. Harborview Medical Center*, 154 Wn. App. 279, 288, 227 P.3d 297 (2010). Summary judgment granted based on erroneous interpretation of the law requires reversal. *Lewis v. Whatcom County*, 136 Wn. App. 450, 149 P.3d 686 (2006).

B. Only Accord is Entitled to Immunity Under the Industrial Insurance Act for Injuries Occurring to Mr. Morales-Cruz on PCC's Premises. PCC is Responsible to Mr. Morales-Cruz for Damages Resulting from Negligent Actions of All Workers Laboring on Its Premises, Even if Those Workers were Directly Employed by Accord.

A temporary employment agency (here Accord) may take advantage of the immunity from civil suit afforded by the Industrial Insurance Act (RCW 51.04.010) when it demonstrates that it had both the right to control the worker's activities **AND** that the worker consented to be its employee. Temporary employment agency employees, like Mr. Morales-Cruz, receive workers compensation benefits from the temporary employment agency (here Accord) when injured on the premises of the workplace employer (here PCC) where the worker was placed. See *In Re: Richard Brixxy*, BIIA Dock. No. 02 14516. No reported case, no statutory enactment nor any other authority allows both the temporary employment agency and the workplace employer to claim immunity under the Act for an injury occurring to the temporary employment agency employee. The so-called "co-employee" designation being advanced by Respondent,

which would allow PCC and Accord to each claim statutory immunity from suit by an injured worker has never been allowed in Washington State.

The evidence in the record compels the conclusion that Mr. Morales-Cruz consented only to be the employee of Accord, leaving Accord as the only employer with immunity. At a minimum, the evidence requires submission of the consent for employment relationship issue to the trier of fact.

- 1. Consent of the employee is a required element in proving the existence of the employment relationship. A high burden of proof of consent is imposed on any putative employer before workers compensation immunity can be established.**

Washington courts have consistently and unequivocally held that there is a two part test to determine an employment relationship for the purposes of establishing workers compensation immunity. See *Fisher v. City of Seattle, Standard Oil Co. Of CA, Western Operations, Inc.*, 62 Wn.2d 800, 384 P.2d 852 (1963); *Novenson v. Spokane Culvert*, 91 Wn.2d 550, 588 P.2d 1174 (1979). First, the employer must retain the right to control the employee's physical conduct in the performance of his duties. *Novenson*, 91 Wn.2d at 553. Second, the employee must consent to the relationship. *Id.*

Both control and consent must be proven. In *Fisher v. City of Seattle*, supra, the Washington Supreme Court firmly established the importance of requiring worker consent before an employer-employee relationship can be found in the workers compensation context:

[Workers] compensation law, however, is a mutual agreement between the employer and the employee under which both give up and gain certain things. Since the rights to be adjusted are reciprocal rights between employer and employee, *it is not only logical but mandatory to resort to the agreement between them to discover their relationship.*

Emphasis added. *Fisher v. City of Seattle*, 62 Wn.2d at 85.

Fisher was initially employed by Standard Stations, Inc. to work in a gas station it operated. The station was actually owned by Standard Oil Company of California. Fisher was never even notified, and certainly did not consent to any change of employer at any time during his tenure. By the time he was injured when the gas station blew up, the operational work of Standard Stations, Inc. had been taken over by a company called Western Operations. *Id.* at 802.

Fisher had only agreed to work for Standard Stations, Inc. before operations were taken over by defendant Western Operations. The court determined that Fisher could not have an employer-employee relationship with Western Operations unknowingly thrust

upon him against his will by corporate agreements to which he was not a party. *Id.* at 805. Fisher must have positively agreed to an employment relationship with each succeeding company before workers compensation immunity barred his suit against the replacement employers. Hence, his action was allowed to proceed against Western Operations the entity taking over from the employer with whom he consented to be employed. No immunity was allowed for Western Operations.

In *Rideau v. Cort Furniture Rental*, 110 Wn. App. 301, 39 P.3d 1006 (2002), the Court of Appeals reversed the trial court's order granting summary judgment to a temporary employer in a negligence action, noting:

With respect to consent, there must be clear evidence of a *mutual agreement* between the employee and the employer such that the employee has clearly consented to be the "employee" of the "employer".

(Quotes and italics in original.) *Id.* at 307.

The burden here is on PCC to provide clear evidence of Mr. Morales-Cruz's knowing affirmative consent to an employment relationship. PCC cannot definitively prove that Mr. Morales-Cruz consented to be an employee of PCC, as there is no credible

evidence to support such affirmative actual consent. PCC therefore has no immunity from this negligence action being brought by Mr. Morales-Cruz, and granting PCC summary judgment on that basis is erroneous.

The *Rideau* court stated that:

[W]hile an employer may “loan” an employee to another, the borrowing employer will not become an “employer” for purposes of Title 51 RCW unless a mutual agreement exists between the loaned servant or “borrowed employee” and the borrowing employer. The burden of avoiding liability on the basis of the Loaned Servant Doctrine is on the person claiming it, the party attempting to gain the benefits of statutory immunity from common law suit. Where the facts on the record conflict on this issue, summary judgment is improper.

(Quotes in original.) *Id.* at 304.

Unlike a minority of other states, Washington Courts have not held that a temporary worker consents to borrowed servant status. Tort immunity does not shift to the temporary employer, merely by a worker’s acquiescing to the workplace control exercised by the temporary employer. ¹In fact, in *Novenson*, the Washington Supreme court specifically rejected the contention that *Novenson*’s

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However; see also *Wiseman v. Dynair Tech.*, 192 Airz. 413, 416, 966 P.2d 1017 (1998); *Daniel v. MacGregor Co.*, 2 Ohio St.2d 89, 206 N.E.2d 554 (1965), for example of states which have legislatively granted immunity to workplace employers of temporary agency employees.

direct requests to his employment agency to work at Spokane Culvert's job site were sufficient to establish consent. 91 Wn.2d at 551. It is clear that, in the case at bar, knowledge on the part of Mr. Morales-Cruz that his actions are controlled by PCC while working on its premises is insufficient alone to establish the necessary consent, and no implication can be drawn therefrom. The required showing of consent on the workplace employer is actually much higher, as the court in *Rideau* (supra) noted:

We express skepticism that after the Novenson line of cases, companies contracting with these temporary agencies for their employment needs can ever obtain immunity from common law suit under the Loaned Servant Doctrine.

110 Wn. App. at 308.

Neither our courts nor the legislature have ever retreated, even slightly from this principal. Certainly, no authority exists to support PCC's bare assertion that PCC and Accord are "co-employers" of Mr. Morales-Cruz, who are both entitled to the Title 51 immunity pursuant to RCW 51.04.010

2. There is a genuine issue of material fact as to whether Mr. Morales-Cruz consented to be employed by PCC, rendering summary judgment erroneous.

Washington courts have made it clear that consent to the employment relationship is generally an issue of fact. Whether Mr. Morales-Cruz consented to work for PCC must be a question resolved by the trier of fact. In *Jones v. Halvorson-Berg*, 69 Wn. App. 117, 847 P.2d 945 (1993), Jones was hired as a laborer by Halvorson-Berg, the general contractor, but was briefly assigned to assist a sub-contractor, Flour City in unloading supplies. Jones was injured while assisting Flour City. The Court of Appeals reversed the trial court's ruling that Jones was not a loaned servant as a matter of law:

Normally the determination of loaned servant status is a factual issue. A trial court may not rule as a matter of law on this issue if substantial evidence exists in the record upon which reasonable minds could differ.

69 Wn. App. at 121 (citing *Nyman v. McRae Bros. Construction Co.*, 69 Wn.2d 285, 288, 418 P.2d 253 (1966)).

Only when the facts are undisputed does the issue of borrowed servant status get decided as a matter of law. *Pichler v. Pacific Mechanical Constructors*, 1 Wn. App. 447, 462 P.2d 960 (1969).

PCC cannot begin to meet the high burden of proof of consent to which it is held before it can be allowed to reap the benefit of immunity from suit under the workers compensation law. The only employment application which Mr. Morales-Cruz ever filled out was for Accord, and this is the only company for which there is any evidence of *mutual* employment agreement. Mr. Morales-Cruz never even applied to work directly with PCC. There is no evidence PCC even offered to make Mr. Morales-Cruz its direct employee. All of Mr. Morales-Cruz's paychecks came from Accord. All industrial insurance premiums were paid by Accord, all employment records were kept by Accord, and Accord paid payroll taxes. Accord accepted the burden of Mr. Morales-Cruz's claim as his employer under the workers compensation laws. PCC paid Accord (not Mr. Morales-Cruz) a single, hourly fee for Mr. Morales-Cruz and for all of the laborers Accord provided. PCC retained only the right to control Mr. Morales-Cruz's daily activities on the job site, located on PCC's premises. These facts make PCC analogous to the defendant, Spokane Culvert, in *Novenson*:

Spokane Culvert seeks the best of two worlds – minimum wage laborers not on its payroll, and also protection under the Workers Compensation Act as

though such a laborer were its own employee. Having chosen to garner the benefits of conducting business in this manner, it is not unreasonable to require Spokane Culvert to assume its burdens. A potential burden, in this instance, may well be the application of [former] RCW 51.24.010, which permits a common law action for negligence.

91 Wn.2d at 555. The Supreme Court made it clear in *Novenson* that the courts should be extremely hesitant to find employment relationship, and corresponding industrial immunity, under these circumstances. The court should not allow PCC the “best of two worlds” in light of the clear absence of evidence of consent by Mr. Morales-Cruz.

Mr. Morales-Cruz stated in his Declaration in Support of Plaintiff’s Memorandum Opposition to Summary Judgment (CP 77), that he considered Accord to be his sole employer. This statement is sufficient, in and of itself to raise a genuine issue of material fact concerning the employment relationship. In *Rideau*, supra, this court reversed summary judgment in favor of the employer, Cort. The trial court had erroneously determined Cort, and not the temporary agency to be Rideau’s employer for tort immunity purposes. Rideau, like Mr. Morales-Cruz had stated in an affidavit that he considered the temporary employment agency his sole employer. The court held:

An employee's subjective belief as to the existence of an employer-employee relationship is material to the issue of consent. Although Rideau accepted a job with Cort from O.R.M. [employment agency] Rideau also stated that he considered O.R.M. to be his sole employer. This fact alone raises the question of whether Rideau consented to the role of "employee" to Cort and whether mutual agreement existed. Considering all material evidence and all reasonable inferences most favorably toward Rideau, the evidence shows there is a genuine dispute to the issue of consent.

110 Wn. App. at 307-8. Mr. Morales-Cruz's belief that he was the sole employee of Accord is highly material to the issue of consent. Therefore, his Declaration should be considered sufficient evidence by itself to preclude the summary judgment awarded in favor of PCC. See also *Jackson v. Harvey*, 72 Wn. App. 507, 864 P.2d 975 (1994).

C. Mr. Ramirez is an Employee of PCC for Vicarious Liability Purposes, Therefore He and Mr. Morales-Cruz are Not Workers in the Same Employ so as to Bar Mr. Morales-Cruz's Negligence Action Against PCC by Virtue of the Fellow Servant Rule.

In its motion for summary judgment, PCC relied primarily on the so-called fellow servant rule to claim Mr. Morales-Cruz's Action against PCC was barred.

The fellow servant rule is codified at RCW 51.24.030(1) which provides:

If a third person, **not in a worker's same employ**, is or may become liable to pay damages on account of a worker's injury for which benefits and compensation are provided under this title, the injured worker or beneficiary may elect to seek damages from the third person. (Emphasis added.)

PCC argued that since Mr. Ramirez and Mr. Morales-Cruz have the same employment relationship with Accord, and both were placed at PCC, they must be workers in the same employ. PCC asserts that if Mr. Ramirez is immune from Mr. Morales-Cruz's suit as a worker in the same employ pursuant to RCW 51.24.030(1), then PCC is also immune from responsibility from Mr. Ramirez's negligence based on vicarious liability principles. The fatal flaw in this argument is that Mr. Ramirez and Mr. Morales-Cruz are not workers in the same employ within the meaning of RCW 51.24.030(1) in the circumstances of their temporary employment with PCC. Mr. Morales-Cruz's relationship with Accord for purposes of adjudicating his workers compensation rights is different than the relationship he had with the workplace or "borrowing" employer, PCC, and the Accord employees working at PCC.

RCW 51.04.010, and RCW 51.24.030(1) prohibit an injured worker from bringing a tort action against his or her employer based on the negligence of a fellow employee of that same employer. In this case, the negligence suit immunity provided by the Industrial Insurance Act runs only to Mr. Morales-Cruz's employer. That employer is Accord, not PCC. Mr. Morales-Cruz is barred from holding Accord vicariously responsible based on the negligence of his fellow employee, Mr. Ramirez. That bar does not extend to PCC. Mr. Ramirez was operating the forklift on PCC's premises and was subject to PCC's control at the time Mr. Morales-Cruz was injured. For that reason, PCC is responsible for Mr. Ramirez's negligent conduct.

In *Fisher v. City of Seattle* (supra) the Washington Supreme Court stated unequivocally that merely because two workers have identical relationships vis-a-vis two companies, they are not necessarily considered to have the same employment relationship between those two companies when it comes to analyzing an employer's vicarious responsibility for tort claims.

Under the same set of facts, an employer-employee relation may or may not exist depending upon the purpose for which the determination is desired. Thus,

a workman might be deemed an employee for the purpose of vicarious liability of a master to a third party while, under the same facts he may not be an employee for purposes of workers compensation issues.

62 Wn.2d at 805.

So it is in the case at bar. For the purpose of vicarious liability of PCC, Mr. Ramirez is its employer because PCC had the right to control his activity in the workplace regardless of whether Mr. Ramirez consented to be PCC's employee or not. For the purpose of industrial insurance immunity, both Mr. Ramirez and Mr. Morales-Cruz were employees of Accord, who is immune. This is an outcome mandated by the dual criteria of employer right to control and employee consent that defines the employee-employer relationship in the industrial insurance context.

The Supreme Court, in *Fisher*, elaborated in detail on the rationale for the two different tests:

The reason for the difference between the two concepts is readily explained by the difference between the nature of the two liabilities involved. The end product of a vicarious liability case is not an adjustment of rights between employer and employee on the strength of their mutual agreement, but a unilateral liability of the master to a stranger. The sole concern for the vicarious liability rule then, is with the master: Did he accept and control the service that led to the stranger's injury? If he did, it is of no particular importance between him and

the stranger whether the servant enjoyed any reciprocal or contractual rights vis a vis the master.

The Court of Appeals subsequently elaborated on the practical application of the two tests related to vicarious liability of an employee established in *Fisher*. In *Brown v. Labor Ready*, 113 Wn. App. 643, 54 P.3d 166 (2002), a permanent employee of CMI (the workplace employer) was injured by the negligence of a temporary worker whose employment relationship was with Labor Ready. The court stated that the “dispositive question here is whether Henson [temporary employee from Labor Ready] was Brown’s [permanent employee of CMI’s] co-worker.” 113 Wn. App. at 647.

The Borrowed Servant Doctrine, as recited in *Brown*, provides:

If it can be established that the servant had borrowed servant status at the time of the performance of such transaction, the servant’s general employer can escape liability for damages or injuries flowing from the transaction.

113 Wn. App. at 647, citing *Stocker v. Shell Oil Company*, 105 Wn.2d 546, 716 P.2d 306 (1996). If Mr. Morales-Cruz became PCC’s borrowed servant, then PCC is immune from suit from him because he is an employee of PCC. However, the borrowed servant doctrine also

requires the consent of Mr. Morales-Cruz to the employee-employer relationship.

The *Brown* court specifically outlined the test it used to determine if Henson and Brown were co-workers:

Where a workers compensation issue is involved, borrowed servant status exists where 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.

Since, as has already been discussed, Mr. Morales-Cruz did not consent to an employment relationship with PCC. The borrowed servant doctrine is therefor inapplicable.

In analyzing the vicarious responsibility of the workplace employer (referenced in *Brown* as the "general employer") for negligence of a temporary employee working on its premises, the court utilized another test requiring only that the workplace employer have the right to control the temporary employee. The court ruled:

The proper test under these circumstances, however, requires only proof of control, not consent. As the court noted in *Novenson v. Spokane Culvert*, the sole concern for vicarious liability (as opposed to workers compensation immunity) is whether the master accepted and controlled the service that led to the injury. Consent of the borrowed employee is thus irrelevant where the borrowed employee is not the claimant.

In *Labor Ready*, as here, the critical vicarious liability question is who had the right to control the negligent worker in the workplace. Since the forklift operator, Ramirez, was under the control of PCC while working on its premises, PCC is responsible for Ramirez's negligent conduct under a standard respondeat superior analysis. Mr. Morales-Cruz, in light of his lack of consent to the employment relationship with PCC, is not a borrowed servant. Therefore, PCC is not entitled to claim employer immunity under the industrial insurance laws. Mr. Morales-Cruz and Mr. Ramirez both remained direct employees of Accord. Consequently, the fellow servant rule and RCW 51.24.030(1) would not result in a determination that they were in the same employ for the purposes of an action against PCC. Mr. Morales-Cruz is only barred from bringing suit against their mutual employer, Accord, for the negligent conduct of his co-worker, Mr. Ramirez. It is frequently the case that a temporary or borrowed worker may be the servant of the workplace (borrowing) employer for some acts but not as to others. See *Nyman v. Macrae Brothers Const. Co.*, 69 Wn.2d 285, 288, 418 P.2d 253 (1966), citing Restatement 2d Agency, section 277 (1958).

The key take away from *Labor Ready* is that Henson, the temporary employee, was considered an employee of CMI for liability imputation purposes, not of Labor Ready. Mr. Ramirez is an employee of PCC for vicarious liability purposes, not an employee of Accord. This results because Accord lacked the right to control his work while on the job site. The court in *Labor Ready* made it clear that the proper method for analyzing vicarious liability for the actions of a temporary employee is to consider the Plaintiff as though he or she were a third party:

Brown is in the position of any third party pursuing a claim for vicarious liability. Had Henson's negligence caused injury to a customer of CMI, the customer's cause of action would be against CMI, not Labor Ready, because CMI had control of Henson at the time of the acts giving rise to injury. Brown's position is different from the customers only because the workers compensation statutes prevent her from suing her own employer.

113 Wn. App. at 654-5.

Just like injured the worker in *Labor Ready*, Mr. Morales-Cruz is in the same position as any customer pursuing an action against PCC. However, unlike the employee in *Labor Ready*, he is not barred from bringing this suit because PCC is not his employer for purposes of industrial insurance immunity. Like the temporary worker in *Labor*

Ready, Mr. Ramirez is not an employee of Accord for vicarious liability purposes because Accord had no right to control his daily activities (a point PCC repeatedly emphasized throughout the lower court proceedings). CP 27. Therefore, because employment for industrial immunity purposes is distinct from employment for vicarious liability purposes, Mr. Ramirez is not in the same employ as Mr. Morales-Cruz in this context. As a result of that distinction, RCW 51.24.030(1) does not bar this action and dismissal on summary judgment was erroneous.

D. A Material Question of Fact Exists as to PCC's Negligence Based on PCC's Own Acts or Omissions, Irrespective of the Conduct of the Individual Operating the Forklift Who was Involved with Plaintiff's Injury. Consequently, Granting Summary Judgment of Dismissal was Improper.

In its Complaint, Mr. Morales-Cruz alleged that PCC was negligent for "failing to properly train or re-train the operator of its forklift and failure to ensure the operator of its forklift was competent to operate this forklift." CP 4.

No evidence of operation training or testing of competency in forklift operation was placed in the record by PCC in the summary

judgment proceeding. The only reference to operator training or competency evaluation is found in the declaration of Bonnie Geray, the Unit Business Manager for PCC. She declares that "Accord was solely responsible for training and certifying laborers it leased to PCC." CP 58. This is a legal conclusion, and as will be detailed, an inaccurate one. It is also directly contrary to the provisions of the contract between PCC and Accord. The contract provides "Accord shall have no obligation or liability to client with respect to the suitability of any covered employee for his or her job responsibilities." CP 43. Ms. Geray's statement was also a tacit admission that PCC took no steps to provide forklift operator training, retraining, or test for competency.

WAC 296-863-60005 requires not only that operators of powered industrial trucks (which includes forklifts) "successfully complete an operator program before operating PITS," it also requires specific components to be included in that training. WAC 296-863-60005, requires, inter alia, that operators of powered industrial trucks (PITS) receive:

- Formal instruction, such as lecture and discussion, interactive computer learning, videotapes, and written material

- Practical training, such as demonstrations done by the trainer and practical exercises performed by trainees.
- Evaluation of trainee performance.

Table 4 lists required training topics for forklift operators specific to the premises where the PIT is to be used, including, inter alia:

Topics related to your workplace:

- Surface conditions where the PIT will be operated.
- ...pedestrian traffic in areas where [powered industrial trucks] will be operated...
- other unique or potentially hazardous environmental conditions in the workplace that could affect safe operation.

These specific requirements are additional to the general training categories of:

- Operating instructions.
- Steering and maneuvering.
- Visibility (including restrictions due to loading).

WAC 296-863-60005 goes on to mandate that:

- You must keep written records of operator training that include the following information:

- Name of the operator.
- Date of the training.
- Date of the evaluation.
- Name of the person giving the training or evaluation.

Through this language, WAC 296-863-60005 requires safety training specific to the particular place in which the forklift will be operated. PCC did not make any showing that Accord trained Mr. Ramirez on the hazards specific to PCC's Tacoma facility, nor did PCC show any compliance with the relevant WAC provisions. There is no evidence of any kind that Mr. Ramirez was trained in the PCC workplace, nor is such training alleged. Clearly, genuine issues of material fact concerning the adequacy of training, and attainment of operator competency, independent of Mr. Ramirez's operational negligence, exist sufficient to defeat Defendant's Motion for Summary Judgment. Critically, the supporting documentation of operator competency required by WAC 296-863-6005 is wholly lacking.

Under Washington law, PCC has an obligation to exercise reasonable care in keeping its workplace safe for workers, who are business invitees. There is a genuine issue of material fact as to

whether PCC has violated this duty of care by failing to comply with the cited Washington industrial safety and health regulations promulgated by the Department of Labor and Industries related to forklift operator training and certification. Any safety regulation violation would constitute evidence of negligence pursuant RCW 5.40.050, sufficient to preclude summary judgment in favor of the Defendant on the issue of PCC's direct negligence. Mr. Morales-Cruz's allegations of training deficiencies are unrebutted in the record.

Case law establishes PCC's duty to exercise reasonable care to provide all workers with safe premises upon which to work.

In *McKinnon v. Washington Fed. Sav. & Loan Ass'n.*, 69 Wn.2d 664, 414 P.2d 773 (1966), the court laid out two types of invitees, a business invitee and a public invitee. A business invitee is:

One who is either expressly or impliedly invited onto the premises of another for some purpose connected with the business in which the owner or occupant is then engaged. To qualify as an invitee under this definition, it must be shown that the business or purpose for which the visitor comes upon the premises is of actual or potential benefit to the owner or occupier thereof.

Id. at 648-9.

In *Hartman v. Port of Seattle*, 63 Wn.2d 879, 389 P.2d 669 (1964), an independent contractor was hired to perform electrical

work, and was badly burned working on a defective wire. The court determined that the independent contractor was a business invitee, and the workplace employer had a duty to:

Exercise reasonable care to maintain the premises in a reasonably safe condition, or to warn the invitee of any danger which is known or discoverable by reasonable inspection on the part of the occupier and not known or not discoverable by the invitee using reasonable care.

63 Wn.2d at 882-3.

PCC therefore had a duty to use reasonable care to keep its workplace safe for any business invitee, including Mr. Morales-Cruz.

There is no doubt that Mr. Morales-Cruz fits this definition of business invitee. He was invited onto the premises for the sole purpose of working for PCC, and that work was of sufficient business benefit to PCC that Mr. Morales-Cruz was paid by Accord to perform it.

Encompassed in the concept of reasonable care is compliance with safety regulations designed to ensure that workers are properly trained in the use of dangerous instrumentalities. PCC had an obligation to train Mr. Ramirez on the proper use of a forklift under WAC 296-863-600, and ensure he was certified as a competent operator. In *Brown v. Labor Ready*, 113 Wn. App. at 656-7, Brown's

liability theory against Labor Ready was centered on Labor Ready's obligation to train the temporary employee, Henson, on the proper use of the forklift. The court noted:

The employer permitting Henson to operate the forklift on the day in question was CMI, not Labor Ready. CMI, not Labor Ready, therefore had the duty to ensure that Henson was properly certified.

In noting this duty, the Labor Ready court cited former WAC 296-24-23025 which is substantively identical to the current WAC 296-863-600. Just as was the case in *Labor Ready*, PCC had an obligation to ensure that Mr. Ramirez was properly certified on a forklift before it allowed him to operate one on its premises. As discussed, PCC has presented insufficient evidence indeed conflicting evidence through Ms. Geray's Declaration. That bare statement alone is insufficient to demonstrate that there was no genuine issue of material fact regarding PCC's compliance with WAC 296-863-600.

IV. CONCLUSION

PCC is engaging in an effort to immunize itself from tort liability through incorrect interpretation of industrial insurance statutes that do not afford PCC the protection it seeks. Mr. Morales-Cruz provided abundant direct evidence of his lack of consent to an employment

relationship with PCC, and in support of his position that he was in an employment relationship only with Accord. Consequently, he can be deemed neither a direct employee or a borrowed servant of PCC. The loss of a chose in action is a valuable property right, even if the action is unliquidated. See *Woody's Olympia Lumber, Inc. v. Roney*, 9 Wn. App. 626, 629-30, 513 P.2d 849 (1973). A negligence claim against ones employer is a chose in action which existed at common law until the implementation of the Industrial Insurance Act in 1911. See *State v. Mountain Timber*, 75 Wash. 581, 583-4, 135 P. 645 (1913).

Any statute which is in derogation of the common law must be strictly construed and no intent to change that law will be found unless it appears with clarity in the legislative enactment. *Potter v. Washington State Patrol*, 165 Wn.2d 67, 77, 196 P.3d 691 (2008).

There is no legislative intent expressed in the workers compensation laws to allow the expansion of tort immunity, through any artifice or process, to any individual or entity that is not a workers direct employer as defined by the Industrial Insurance Act. Applying the rule of strict construction, Accord alone is entitled to immunity and

no statutory or case law exists in Washington that makes PCC a “co-employer” with Accord for immunity purposes.

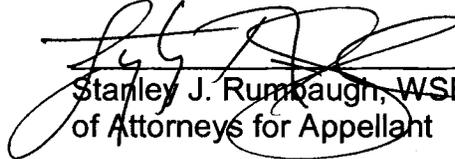
To keep the boundaries of immunity within the scope of legislative intention, courts have persistently disallowed a temporary employer from enjoying the benefit of an immunity which did not exist at common law. In the *Fisher, Rideau, and Novenson* (supra) line of cases, this principal was established with clarity. Restricting immunity to the statutory intent and purpose of the industrial insurance laws is why the *Brown* (supra) court explained, at length, that a temporary employee on the premises, and under the control of the workplace employer is considered the employee of the workplace employer for purposes of negligence law. The associated rules of vicarious liability therefore apply to the workplace employer.

Mr. Morales-Cruz was injured both as a result of PCC's direct negligence in allowing an untrained forklift operator to work on its work site, and as a result of the negligence of that forklift operator. Therefore, it is at least a question of fact as to whether PCC should be liable for Mr. Morales-Cruz's damages on the basis of PCC's direct negligence, or by imputation of the negligence of the forklift operator.

The trial court's order of dismissal on summary judgment should be reversed, and the case remanded for trial on the merits.

DATED this 21 day of October, 2010.

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CERTIFICATE OF SERVICE

I certify that on the date entered below, I sent via legal messenger a copy of this brief to:

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DATED this 21 day of October, 2010.


Patricia Green

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