

No. 73148-3-I

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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS FOR
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; VASILY 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.

BRIEF OF APPELLANT

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INTRODUCTION

Jose Jaimes was seriously injured when he fell 12-to-16 feet, with the 250-300 pound window he was installing crashing onto him. Jaimes was providing labor for NDTs Construction, whose owner told Jaimes to install the window. After denying it employed Jaimes, NDTs paid the premiums and interest L&I assessed post-injury.

Jaimes filed suit against NDTs and its tradename Pacific Huts and Castles, and the general contractor Superior Floors and Countertops, which shared one owner with NDTs. The trial court dismissed all three on summary judgment, ruling first that Jaimes was employed by, or was a worker for, NDTs d/b/a/ Pacific Huts, and later that Jaimes was employed by Superior Floors d/b/a Pacific Huts. In sum, the court was persuaded that Superior Floors acquired the Pacific Huts tradename and dissolved NDTs before Jaimes' was injured, such that Jaimes worked for Superior Floors, not NDTs.

Jaimes never consented to employment with Superior Floors, which did not control his physical conduct. Numerous L&I documents link Jaimes to NDTs d/b/a Pacific Huts after Jaimes' injury. None link Jaimes – or Pacific Huts – to Superior Floors. The only evidence supporting Superior Floors' claims is its owners' self-serving assertions. This Court should reverse and remand for trial.

ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing Superior Floors and Countertops, LLC on summary judgment. CP 410-11.

2. The trial court erred in granting Superior Floors and Countertops, LLC's motion for reconsideration. CP 410-11.

3. The trial court erred in considering the declaration of Kimberly Lampman. 2/13 RP 12-13.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Under the Industrial Insurance Act, an employment relationship exists only when the employer has the right to control the purported employee's physical conduct, and the purported employee consents to the employment relationship. The trial court dismissed Superior Floors and Countertops LLC on summary judgment, ruling as a matter of law that Superior Floors employed Jose Jaimes, or alternatively that Jaimes was a "worker" for Superior Floors. Was summary judgment inappropriate, where: (a) Jaimes set his own hours, brought most of his own tools, and performed the tasks he was given however he saw fit; (b) Jaimes stated that he worked for NDTs, not Superior Floors; (c) numerous L&I documents link Jaimes to NDTs, doing business as Pacific Huts and Cabinets; and (d) no such documents link Jaimes to Superior Floors?

2. Where NDTs and Superior Floors are two distinct corporate entities, and where Jaimes never consented to an employment relationship with Superior Floors, is Superior Floors a third party subject to suit under the IIA?

3. Where Kimberly Lampman's declaration repeats out-of-court statements and draws conclusions based on out-of-court statements, both going directly to the heart of Superior Floors' defense, did the trial court erroneously consider the declaration over Jaimes' hearsay objection?

STATEMENT OF THE CASE

A. Jose Jaimes came to this Country seeking a better future for his family.

Jose Jaimes lives in Federal Way, Washington, with his wife and two daughters, now approximately ages 5 and 9. CP 44. Born in Mexico, Jaimes came to the United States in 2005 under a Visa. *Id.* Like many people, Jaimes came here looking for a better future for his family. CP 46.

Jaimes moved to Fresno, where a family friend could put him up for a while. *Id.* Jaimes found sporadic work with different local farmers, cleaning and cutting fruit, weeding, and planting. CP 46-48. This was his only work, on and off, for three years. CP 46-47.

Work dried up in 2008, and Jaimes was unable to find anything else in Fresno. CP 48. Jaimes moved to Kent, Washington, where he had some cousins he could stay with. *Id.* Here, Jaimes found work as a day laborer. CP 49-51.

Jaimes first worked for Tukwilla-based-company CLP, cleaning construction sites. CP 49-50. Work was sporadic, and when there was work, Jaimes averaged about 30-to-35 hours per week. CP 50. Work ran out after six months. *Id.*

Jaimes then started working for Case Construction, again sporadically. *Id.* Jaimes occasionally had consistent work for a month or more. CP 51. When there was work, Jaimes averaged about 40 hours per week. CP 51. This too dried up. *Id.*

From that point on, Jaimes worked as a day laborer, working “here and there at one or another place.” CP 51. As a day worker, “you go, you do your job, and you leave.” *Id.* Jaimes found jobs by asking acquaintances if anyone needed work. *Id.* He cannot identify any particular person or company he worked for – there were “a lot.” *Id.* Sometimes he had work, and sometimes he did not. *Id.*

B. Jaimes began providing day labor for NDTs in June 2014.

It was in his capacity as a day laborer that Jaimes began work for NDTs. CP 57. Jaimes approached a Spanish-speaking person driving a construction truck, asked him if he needed anyone to work, and gave him his phone number. *Id.* The driver later called Jaimes, telling him that a man named Timofey Strizheus needed help with some small jobs on a construction site. *Id.*

Jaimes met Timofey on a job site in an affluent neighborhood near Bellevue. *Id.* Timofey and his business partner Nikolay Drzyaback owned NDTs, which did business as Pacific Huts and Castles. CP 26, 725, 779, 790, 938. Timofey also owned a one-third interest in Superior Floors and Countertops, along with his brothers, Pavel and Vasiliy, Superior Floors' principals. CP 726, 952. Superior Floors, the general contractor on the jobsite, also used the Pacific Huts tradename. CP 725, 736. These entities and their use of the Pacific Huts tradename is fully addressed *infra*, Argument § C.1.

Timofey told Jaimes that he needed someone to do small things that the contractors had left unfinished. CP 57. They communicated “[s]ometimes with signals and sometimes with the little English [Jaimes] speaks.” *Id.* Jaimes’ English is very basic –

he can ask for a hamburger or order a meal, and grocery shop if he does not have to talk. CP 44. Jaimes had an interpreter at his deposition, and he uses a friend or interpreter to fill out forms. CP 43, 56, 68, 80.

Timofey told Jaimes that he would start at \$100 a day, and work up to \$200. CP 57. Timofey paid Jaimes in cash at week's end. *Id.* Jaimes never knew whether he would work for one day, or for one year. CP 57-58.

Jaimes worked for Timofey on about six different houses, four located within one mile of each other. CP 58. During this time, Jaimes spoke mostly with Timofey, and occasionally with Pavel and Vasiliy. *Id.* None of the three brothers ever mentioned Jaimes' employment status. *Id.* Timofey simply said "You're going to do this. And when you're done, you go home." *Id.*

In short, Jaimes considered himself a day laborer – he came and went as he pleased and worked unsupervised. CP 85. The brothers never addressed whether they intended to hire Jaimes as an employee, and Jaimes never asked. CP 58. It was not important to Jaimes, who "just went and did [his] job." *Id.*

C. Jaimes often worked with Sinuhe Hernandez, whose experience with NDTs was remarkably similar.

In July 2012, about one month after Jaimes began work for NDTs, Sinuhe Hernandez began providing day labor for NDTs as well. CP 26, 932. Timofey told Hernandez that his construction company, NDTs, needed “pick up” work involving general labor around the construction site. CP 932. Timofey told Hernandez he would be retained in the same manner as Jaimes (*id.*):

- ◆ They would be doing manual labor;
- ◆ They should expect to work on their own;
- ◆ They would not be supervised;
- ◆ They could start and end their workday however they chose, so long as the work got done; and
- ◆ They would be paid, in cash, when the job was done.

For the next two months, Jaimes and Hernandez often worked alongside one another. CP 932. They were given instructions over the phone, or when they showed up on site. *Id.* They worked their own hours – sometimes 4, sometimes 10. *Id.* Both Jaimes and Hernandez picked up other day jobs on weekends. *Id.*

Timofey understood that Jaimes and Hernandez were day laborers, not employees. *Id.* There were no employment contracts, no withholdings, no set hours. *Id.* There was no training or supervision, no meetings or orientation. CP 933.

Specifically, worksite safety was never discussed. *Id.* No one pointed out potential hazards onsite. *Id.* No one provided safety equipment. CP 933, 934. If Jaimes or Hernandez ever raised a safety concern, Timofey told them “either do the job or leave.” CP 934. Timofey pushed them to work faster so he could complete construction on time. *Id.*

D. Jaimes was seriously injured when he fell 12-to-16 feet from a ladder, with a 250-to-300 pound window landing on top of him.

After working for NDTs for about three months, Jaimes fell 12-to-16 feet while trying to install a large window with Hernandez, who witnessed the fall. CP 26, 59-63, 934-35. Again, Jaimes was working for NDTs. CP 54, 59.

On a Friday in August 2012, Timofey directed Jaimes to build a frame and install a window on the following Monday. CP 59-61. From inside the house, Timofey marked where he wanted Jaimes and Hernandez to cut an opening for the window. CP 59-60. He gave no further direction. CP 59-60, 85, 933.

Timofey did not explain how to install the window, or provide a manual or directions from the manufacturer. CP 933-34. He did not say whether to install it from the inside or the outside of the house, but it appeared to Jaimes and Hernandez that it would be

impossible to install the window from the inside. CP 60, 934. There was no scaffolding or harness, and Jaimes was not given any training on how to set up or secure ladders, or use them safely. CP 85, 934.

Jaimes and Hernandez began cutting the hole for the window on Friday. CP 59-60, 61. On Monday, Jaimes and Hernandez each climbed a ladder side-by-side, carrying the window to the opening 12-to-16 feet above ground. CP 62-63. The window weighed 250-to-350 pounds. CP 59.

They successfully fitted the bottom of the window into the opening, but the top got stuck on a piece of paper and would not fit in. CP 62. Hernandez climbed down and went inside to remove the paper, while Jaimes attempted to hold the window alone. *Id.*

The ladder slipped. *Id.* Jaimes fell 12-to-16 feet to the rocky ground, landing on his face with both hands outstretched. CP 62, 65, 935. The corner of the window landed five inches from Jaimes' head, and the window then fell on top of him without breaking. CP 63. Jaimes split his lip on a rock, and the window split open the back of his head. CP 66. The window also landed on Jaimes' lower back, causing injuries to much of his upper body. CP 66-67. His right wrist broke in several places. CP 72.

Hernandez yelled down to Jaimes, who did not respond. CP 935. Hernandez ran down to his side, but he was “knocked out for a few minutes or so,” his face covered in blood. CP 67, 935. When Jaimes awoke, he appeared dazed and confused, and could not see. *Id.* When his vision returned about 30 seconds later, he began screaming in pain. *Id.*

Hernandez carried Jaimes to a car and rushed him to the Overlake Hospital Emergency Room, where doctors operated. CP 67, 72, 935. Hernandez called Timofey from the hospital, but he appeared unconcerned. CP 935. Timofey blamed Jaimes and Hernandez for causing him to lose time on the project, complaining that they were already behind schedule. *Id.*

E. Jaimes continues to suffer from severe physical pain and psychological injuries.

In addition to the physical injuries to his head, face, wrist and back, the fall left Jaimes with lasting pain from his head and neck all the way down the right side of his body. CP 66-67. Jaimes now experiences intermittent ringing in his ears, and at times slurs his speech to such a degree that people cannot understand him. CP 71. Jaimes has frequent severe headaches and blurred vision, neither of which were issues before the fall. CP 66, 70.

Jaimes now requires glasses, and his eyes get very red and watery. CP 70. There is not much of a scar where doctors stitched up his lip, but the stitches left Jaimes' mouth tighter, and he is forced to keep it "kind of closed." CP 67.

At times, Jaimes cannot remember things or concentrate – neither was a problem before the fall. CP 71. He also now suffers from depression, anxiety, and erectile dysfunction. CP 66. As Jaimes describes his emotional state, he will suddenly start crying, or become "angry at everything," or want to separate, unable to tolerate things that never used to bother him. CP 71.

F. Jaimes can no longer work as a day laborer.

Jaimes has already had three operations on his right wrist. CP 72-73. In the first, doctors placed screws, pins, and a metal plate and bar, some of which were intended to be temporary. CP 72. In the second surgery about 4-months later, doctors removed the screws and bar. *Id.* In the third surgery, doctors removed more hardware that Jaimes' body appeared to be rejecting. CP 72-73.

Jaimes is left with daily pain in his right arm and hand. CP 73. With only slight movement, his hand swells up, and the pain intensifies. *Id.* The pain centers around a one-inch loose bone fragment left in his hand and areas where Jaimes has developed

arthritis. *Id.* Doctors predict that Jaimes will require a fourth surgery to repair the arthritis, in which they will remove bone, replacing it with plastic. *Id.* In the future, it is possible that Jaimes will not be able to move his hand at all. *Id.*

Jaimes has not worked since the accident. CP 74. Jaimes' doctors and therapists told him that he could not return to construction, the only thing he really knows. CP 75-76. A vocational therapist told Jaimes that they would need to look into something where he would work with computers, but his English is not good enough for vocational training in that area. *Id.*

Jaimes has submitted many job applications with help from English-speaking friends, but has not found work, and has to borrow money to pay rent. *Id.* He is worried about his family's future, not knowing how he will support them or what will happen to them. CP 71, 76.

G. After Jaimes was injured on their job site, NDTS owner Timofey Strizheus and his brothers made it very clear that they did not employ him and did not owe him anything.

Days after the fall, Hernandez accompanied Jaimes to a meeting with Timofey and Pavel. CP 932-33, 935. The brothers were unmoved by that fact that Jaimes may never work again, stating

“that it was not their problem and that he was responsible for his own fate.” CP 933. When Jaimes asked for information regarding health insurance and workers’ compensation, Timofey and Pavel unequivocally stated that they did not employ Jaimes and that they were not responsible for providing health insurance or paying into workers’ compensation. CP 272, 933. The brothers even refused to pay Hernandez and Jaimes for the day Jaimes was injured, stating that they had failed to complete the job. CP 933, 935.

H. Procedural history.

One of Jaime’s doctors filed an industrial Insurance claim on his behalf on August 30, 2012. CP 187, 273. On September 11, 2012, L&I asked Pacific Huts for the gross monthly wage and health benefits it was paying Jaimes when he was injured. CP 190. Weeks later, L&I assessed an Industrial Insurance premium against Pacific Huts. CP 32, 613. On October 1, 2013, L&I assessed interest in outstanding premiums against Pacific Huts, and weeks later, filed a warrant in King County Superior Court for NDTs doing business as Pacific Hut’s failure to pay Workers Compensation taxes. CP 32, 613, 947. L&I assessed more interest on outstanding premiums in November, and NDTs finally paid the premiums with interest, later that month. CP 32, 613.

After Jaimes' L&I claim was closed in early 2014, he filed a complaint against NDTs Construction, Inc., Superior Floors and Countertops, LLC, and Pacific Huts and Castles, Inc. CP 1, 76. Jaimes filed an amended complaint on March 7, 2014. CP 10.

All defendants moved for summary judgment in November, 2014, and Jaimes responded in December. CP 244. The following week, the defendants replied, and also moved to strike portions of declarations filed by Jaimes and his attorney. CP 274, 275.

The trial court heard both motions on December 19, 2014. 12/19 RP 4-5.¹ The court granted partial summary judgment, dismissing NDTs and Pacific Huts as a matter of law. CP 310-11. The court ruled that Jaimes was "held to" statements that he was employed by NDTs and Pacific Huts and that, even if he was not an employee, he was a "worker" under RCW 51.08.180. 12/19 RP 36-37. The Court reasoned that since NDTs and Pacific Huts made L&I payments on Jaimes' behalf, Jaimes could not recover against them. *Id.* at 37-38.

The court reserved ruling on Superior Floors, finding questions of material fact as to whether Superior Floors was a

¹ The transcripts were not paginated consecutively, so the dates are provided to avoid confusion.

corporate entity distinct from NDTS and whether Superior Floors and NDTS could use the same trade name, Pacific Huts. CP 310-11; 12/19 RP 38-39. The court noted that L&I plainly linked the Pacific Huts tradename to NDTS. 12/19 RP 38-39. Acknowledging that corporate structure was not its strength, the court invited the parties to set another motion to further address Superior Floors, or alternatively to submit additional briefing. 12/19 RP 39-40.

The court granted-in-part defendants' motion to strike, allowing Jaimes' declaration, but striking the factual portions of counsel's declaration other than those related to authenticating exhibits. 12/19 RP 4-5. The court denied the motion to strike portions of Hernandez's declaration as hearsay, ruling that the motion was untimely and that the declaration was not sufficiently relevant to warrant the time required to rule on specific hearsay objections. *Id.*

The court also addressed Jaimes' motion for partial summary judgment that certain medical expenses were reasonable. 12/19 RP 40-41, 46. The court continued hearing on that motion to February 13, 2015, asking for greater "depth" from the experts addressing this issue. *Id.* at 42-43, 44-46.

On December 29, Superior Floors moved the court to reconsider its ruling on partial summary judgment. CP 312. Jaimes responded on January 1, 2015, also moving to strike the motion for reconsideration as untimely. CP 320. Days later, Superior Floors objected to Jaimes' response on the grounds that the court did not call for it, but also filed a reply. CP 329-30. Superior Floors claims that it filed a note for hearing on or around January 7, 2015, but there is no file stamp and Jaimes denied receiving notice. CP 356-57, 383.

Superior Floors answered Jaimes' Complaint on January 30, 2015. CP 333. On February 9, it filed a "Second Rebuttal Brief in Support of its Motion for Summary Judgment," submitting declarations from Pavel Strizheus² and Kimberly Lampman (a paralegal at the firm representing Superior Floors) in support of the motion for summary judgment. CP 340, 346, 1092. On February 10, 2015, Jaimes moved to strike the second rebuttal brief and both declarations, arguing that they were untimely and that both declarations were based on hearsay. CP 356-68. Superior Floors opposed the motion on the 12th. CP 372.

² Superior Floors did not file Pavel Strizheus' declaration with the court. However, Jaimes filed a copy attached to Le's declaration in support of Jaimes' motion to strike found at CP 1092-1130. The parties all seem to agree that the declaration was submitted to the court for consideration.

When the parties arrived for hearing on February 13, 2015, the court agreed with Jaimes that the motion to reconsider summary judgment as to Superior Floors “was not set for argument.” 2/13 RP 13-15. But over Jaime’s objection, the Court stated that it would rule on Superior Floors’ motion for reconsideration, with or without argument. *Id.*

The court declined to consider statements regarding L&I documents pertaining to NDTs, and statements from both attorneys about the depositions taken shortly before the hearing. 2/13 RP 43. But the court nonetheless allowed the “flurry” of additional pleadings, noting that they should have been presented with the underlying summary judgment motion, but that it was “very complicated.” 2/13 RP 12, 13. Although these pleadings included the declaration of Lampman and the supplemental declaration of Pavel, the court did not address Jaimes’ argument that both were impermissibly based on hearsay. CP 362-68; 2/13 RP 12-13.

The court granted the motion for reconsideration, dismissing Superior Floors as a matter of law. CP 410-11; 2/13 RP 44-45. The court subsequently denied the Defendants’ motion for attorney fees. CP 412, 1736, 1767. Jaimes timely appealed. CP 1755.

ARGUMENT

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

This Court applies the usual standard of review for summary judgment, where, as here, the trial court determines as a matter of law whether the injured party is a “worker” as defined by RCW 51.08.180, and whether he is in an employment relationship with the entity asserting immunity under the Act. *Rideau v. Cort Furniture Rental*, 110 Wn. App. 301, 303 n.3, 39 P.3d 1006 (2002). This Court reviews *de novo* a motion for summary judgment, engaging in the same inquiry as the trial court. *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 525-26, 243 P.3d 1283 (2010). The court views all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000). Summary judgment is not appropriate unless the evidence shows that no genuine issue exists as to any material fact, that the moving party is entitled to judgment as a matter of law, and that a reasonable person could reach only one conclusion on the facts. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 349-50, 588 P.2d 1346 (1979); CR 56(c).

This Court typically reviews a ruling on a motion for reconsideration for an abuse of discretion. *Drake v. Smersh*, 122

Wn. App. 147, 151, 89 P.3d 726 (2004). But here, the Court should review *de novo* because the reconsideration order simply grants summary judgment. CP 410-11; *cf.*, *e.g.*, ***Folsom v. Burger King***, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (“The *de novo* standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion”).

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

1. The Industrial Insurance Act permits actions against third parties like Superior Floors.

To provide swift compensation for injured workers, the Washington Legislature abolished common law causes of action for workplace injuries, replacing them with the Industrial Insurance Act, Title 51 RCW. ***Hildahl v. Bringolf***, 101 Wn. App. 634, 640, 5 P.3d 38 (2000), *rev. denied*, 142 Wn.2d 1020 (2001); RCW 51.04.010. The Act provides the exclusive remedy for workers injured during the course of their employment, establishing “‘a system of compulsory state industrial insurance,’ under which ‘all awards are paid from the accident fund.’” ***Hildahl***, 101 Wn. App. at 640 (quoting ***Greenleaf v. Puget Sound Bridge & Dredging Co.***, 58 Wn.2d 647, 658, 364 P.2d 796 (1961)). The point of the Act is a “quid pro quo compromise”: the “employer pays some claims for which there would be no liability

under common law, and the employee gives up common law actions and remedies in exchange for sure and certain relief.” *Hildahl*, 101 Wn. App. at 640 (quoting *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 57, 821 P.2d 18 (1991)).

The Act does not, however, prevent an injured worker from seeking common law redress against a third party on the worksite. *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d 550, 552, 588 P.2d 1174 (1979); RCW 51.24.030(1). Instead, the Act permits a worker “injured by the negligence of one ‘not in the same employ’ to elect to seek a remedy against the tort-feasor.” *Novenson*, 91 Wn.2d at 552; RCW 51.24.030(1). The Act permits causes of action against third parties because “the compensation system was not designed to extend immunity to strangers.” *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 450, 932 P.2d 628, 945 P.2d 1119 (1997) (quoting 2A ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 71.00, at 14-1 (1993)).

2. “Worker” status cannot be thrust upon an individual without his consent.

The IIA defines “[w]orker” as “every person in this state who is engaged in the employment of an employer . . . [and] every person in this state who is engaged in the employment of or who is working

under an independent contract, the essence of which is his or her personal labor for an employer under this title” ***Doty v. Town of South Prairie***, 155 Wn.2d 527, 535, 120 P.3d 941 (2005) (quoting RCW 51.08.180). The IIA also instructs that “[e]mployee’ shall have the same meaning as ‘worker’ when the context would so indicate” 155 Wn.2d at 535 (quoting RCW 51.08.185). “For an injured person to fall within the statute’s protection, he or she must in fact be a worker.” 155 Wn.2d at 535. Whether injured persons are workers, and for whom they work, are crucial and threshold questions, where “[o]nly employers are immune under the Act from suit for workplace injuries; third persons are not:”

Although an injured worker may not sue his or her employer for a workplace injury, RCW 51.24.030(1) authorizes suit against a third person at fault for the worker’s injury, provided the third person is not in the worker’s same employ.

Hildahl, 101 Wn. App. at 642-43 (footnotes omitted) (quoting ***Manor***, 131 Wn.2d at 444).

The IIA “broadly” defines “employer” to include those entities who employ someone in the traditional sense and “those who hire independent contractors.” ***Malang v. Dep’t of Labor & Indus.***, 139 Wn. App. 677, 687, 162 P.3d 450 (2007); RCW 51.08.070. An employment relationship between employer and worker “exists only

when: (1) the employer has the right to control the servant's physical conduct in the performance of his duties, and (2) there is consent by the employee to this relationship." **Novenson**, 91 Wn.2d at 553 (citing **Marsland v. Bullitt Co.**, 71 Wn.2d 343, 428 P.2d 586 (1967) and **Fisher v. City of Seattle**, 62 Wn.2d 800, 384 P.2d 852 (1963)).

"Whether a situation satisfies both prongs is a question of fact." **Rideau**, 110 Wn. App. at 302. "It is only if the evidence is undisputed that the nature of the relationship existing presents a question of law." **Pichler v. Pac. Mech. Constructors**, 1 Wn. App. 447, 450, 462 P.2d 960 (1969).

This two-part inquiry focuses on the second factor, the crucial question being whether the worker consents to the employer/employee relationship. **Novenson**, 91 Wn.2d at 553-54. Our Supreme Court emphasized the "necessity of a mutual agreement" in **Fisher**, explaining:

[T]he spotlight focuses on the employee, *i.e.*, the servant, rather than on the employer, *i.e.*, the master. The important question, here, is: Did the workman consent with the "employer" to the status of "employee"? Unlike the common law, compensation law demands that, in order to find an employer-employee relation, a *mutual* agreement must exist between the employer and employee.

Novenson, 91 Wn.2d at 553-54 (quoting **Fisher** at 804).

The consent factor is determinative because the existence of an employment relationship affects an employee's valuable right to bring a claim for a workplace injury:

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. To thrust upon a worker an employee status to which he has never consented would not ordinarily harm him in a vicarious liability suit by a stranger against his employer, but it might well deprive him of valuable rights under the compensation act, notably the right to sue his own employer for common law damages.

Fisher, 62 Wn.2d at 804-05 (quoting 1 ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 47.10 (1952)). Indeed, the Court repeatedly emphasized this point, adding: "Common-law rights and remedies are not lost by stumbling unawares into a new contractual relation."

Fisher, 62 Wn.2d at 806 (quoting **Murray v. Union Ry. Co. of New York City**, 229 N.Y. 110, 127 N.E. 907 (1920)).

"[D]ifferent social values are at stake," depending on who asserts the employment relationship. **Novenson**, 91 Wn. 2d at 554. An injured worker who establishes an employment relationship is entitled to "moderate statutory benefits." 91 Wn. 2d at 555. But a defendant who establishes an employment relationship causes "the destruction of valuable common-law rights to the injured workman." *Id.* at 554-55. This distinction is crucial as it relates to temporary

laborers like Jaimes, where inferring that a temporary worker has consented to an employment relationship gives the employer “the best of two worlds—minimum wage laborers not on its payroll, and also protection under the workmen’s compensation act as though such laborers were its own employees.” *Id.*

Thus, the consent prong requires “clear evidence” of an agreement between the employee and the employer. *Rideau*, 110 Wn. App. at 302. It is not sufficient to show that such an arrangement was thrust upon the employee. *Novenson*, 91 Wn.2d at 554.

3. Superior Floors did not control Jaimes’ physical conduct.

As to the first inquiry, Superior Floors did not have the right to control Jaimes’ physical conduct in the performance of his duties. *Novenson*, 91 Wn.2d at 553. Jaimes came to the jobsite if he chose to. CP 74, 85, 932. He brought most of his own tools, aside from the ladder he fell from. CP 272. Timofey gave Jaimes tasks, but Jaimes decided how to complete them. CP 272, 933. Indeed, Jaimes and Hernandez agree that they worked without supervision or oversight. *Id.* Jaimes was a day laborer – he did his job until it was done, and then he left. CP 85.

The injury-causing incident amply demonstrates Superior Floors' lack of control. Timofey told Jaimes to make a frame and install the window, showing him where to place it. CP 59-60. That was it. *Id.* Timofey provided no information or instruction regarding how to install a 250-to-300 pound window. CP 59-60, 934-55. He did not provide training on how to secure or set up ladders. CP 85, 934. He did not provide safety equipment. *Id.* Rather, Timofey gave Jaimes a task, leaving it to Jaimes (and Hernandez) to determine how to accomplish it. CP 59-60, 272, 933.

Jaimes' relationship with Superior Floors also lacks any other typical indicia of employment:

- ◆ Jaimes did not have an employment agreement, and Timofey never mentioned his employment status – Jaimes simply showed up on site when he heard that Timofey needed work, and Timofey gave him some small tasks the contractors had left unfinished. CP 56-58.
- ◆ Jaimes had no commitment to work and no set hours – he came to a job site if there was work, and left when it was finished. CP 57-58.
- ◆ Jaimes was not paid a salary, or by the hour – he was paid a flat per diem, regardless of whether he worked three, six, or twelve hours. CP 57-58, 74.
- ◆ Jaimes was paid in cash – there was no W-2 and nothing was withheld. CP 56-57.
- ◆ Superior Floors did not report Jaimes' wages. CP 741.

Not a single document in the record supports the brothers' claim that Jaimes was a Superior Floors' employee: no W-2, other tax records, L&I records, or the like. CP 27, 733, 735, 741, 743, 772, 785. And Jaimes' Employment History from the State Employment Security Department, complete through September 30, 2013, does not mention Superior Floors (or NDTs), but stops in 2012, when Jaimes left ELIM Construction and began working for NDTs. CP 54-55, 943-45. He has no employment history after August 2012 because he can no longer work. CP 44, 75-76, 943-45.

4. Jaimes did not consent to employment with Superior Floors.

As to the second inquiry, Jaimes did not consent to an employment relationship with Superior Floors. *Novenson*, 91 Wn.2d at 553. Jaimes plainly stated that he worked for NDTs. CP 54, 55, 57, 271. He was hired by Timofey, NDTs's "owner," "principal," and "president," and his brother Pavel, and communicated primarily with Timofey. 55, 57-58, 938. He emphatically denied working for Superior Floors, and did not have any understanding of the business relationship between Superior Floors and NDTs. CP 55. Jaimes filed his industrial insurance claim with NDTs, not Superior Floors. CP 187-88, 938.

Like Jaimes, Hernandez, who witnessed Jaimes' fall, said that he worked for NDTS, not Superior Floors. CP 54, 932. Timofey told Hernandez that NDTS, needed "pick up" work and that Hernandez would be retained in the same manner as Jaimes. CP 932.

Jaimes' subjective belief is sufficient to raise a question of material fact as to whether he consented to an employment relationship with Superior Floors. *Rideau*, 110 Wn. App. at 307-08. In *Rideau*, the injured worker was hired by Occupational Resource Management, Inc. (ORM), which provides temporary workers to various businesses. 110 Wn. App. at 302. ORM had a contract to provide temporary employees to Cort Furniture Rental, and offered Rideau a temporary job with Cort. *Id.* Rideau accepted. *Id.*

Rideau reported to work at ORM before going to the Cort, and received paychecks from ORM, which withheld taxes and paid Industrial Insurance Premiums. *Id.* at 302-03. Cort supervised Rideau's work, and Rideau followed Cort's directions without questioning Cort's supervision. *Id.* at 303. Rideau considered ORM to be his employer. *Id.*

About six weeks after ORM hired Rideau, he sustained injuries in a rear-end collision involving a permanent Cort employee. *Id.* Rideau received L&I benefits, and filed a negligence action

against Cort when his L&I claim closed. *Id.* Cort moved for summary judgment, arguing that Rideau was a loaned servant; that is: (1) that Cort had exclusive control over Rideau, and (2) that Rideau consented to the relationship. *Id.* The trial court granted summary judgment, dismissing Cort as a matter of law. *Id.*

This Court reversed, holding that Rideau's belief that only ORM employed him was sufficient to raise a material question on whether Rideau consented to an employment relationship with Cort:

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 ORM, Rideau also stated that he considered ORM to be his sole employer. **This fact alone raises the question of whether Rideau consented to the role of "employee" to Cort and whether a mutual agreement existed.**

Id. at 307-08 (footnote omitted, emphasis added). Taking all facts and reasonable inferences in Rideau's favor, his subjective belief made summary judgment in Cort's favor inappropriate. *Id.*³

The same is true here. Again, Jaimes repeatedly stated his belief that he worked for NDTs, not Superior Floors. CP 54, 55, 57, 271. Summary judgment was inappropriate.

³ Jaimes was not a loaned servant for the same reason that he was not in an employment relationship with Superior Floors – he did not consent to the arrangement. *Id.*

5. Jaimes is not otherwise a “worker” providing personal labor for Superior Floors.

The trial court concluded that even if Jaimes is not an “employee,” he is a “worker” under RCW 51.08.180. 12/19 RP 37. This distinction is immaterial here.

The IIA defines “worker” broadly to eliminate the technical distinction between employees and independent contractors. ***Malang***, 139 Wn. App. at 687-88 (citing ***Lloyd’s of Yakima Floor Ctr. v. Dep’t of Labor & Indus.***, 33 Wn. App. 745, 748-49, 662 P.2d 391 (1982) (discussing ***White v. Dep’t of Labor & Indus.***, 48 Wn.2d 470, 294 P.2d 650 (1956))). Collapsing this distinction extends IIA coverage to independent contractors “whose *personal efforts* constitute the main essential in accomplishing the objects of the employment.” ***Malang***, 139 Wn. App. at 688 (citing ***Lloyd’s***, 33 Wn. App. at 749 (quoting ***Norman v. Dep’t of Labor & Indus.***, 10 Wn.2d 180, 184, 116 P.2d 360 (1941))). While this broad definition of “worker” increases the number of persons entitled to IIA compensation, it says nothing about who they work for.

Classifying Jaimes as a “worker” does not address the relevant issue on appeal – *who* Jaimes worked for. Jaimes did not work for Superior Floors for the same reasons discussed above – he

worked for NDTTS, and did not consent to an employment relationship with Superior Floors. *Supra* Argument § B.3.

In short, Superior Floors utterly failed to establish an employment relationship. There is no indication that Superior Floors controlled Jaimes' physical conduct. And Jaimes' subjective belief that he worked for NDTTS, not Superior Floors, is sufficient to defeat summary judgment on the consent prong of the employment relationship test. Summary judgment was improper. This Court should reverse.

C. At best, Superior Floors created fact questions, rendering summary judgment inappropriate.

The brothers claim, as a matter of law, that Jaimes worked for Superior Floors doing business as Pacific Huts, not NDTTS, which also did business as Pacific Huts. CP 26, 27, 34, 501. They allege: (1) that Superior Floors acquired the Pacific Huts tradename sometime in 2011, at which time NDTTS ceased doing business; (2) that Jaimes was Superior Floors' *only* employee; and (3) that Jaimes' occasional statements that he worked for Pacific Huts are admissions that he worked for Superior Floors, who was doing business as Pacific Huts when Jaimes was injured. CP 22-23, 27, 725-26, 733, 735-36, 739, 743, 772, 785. At best, this convoluted

misuse of various corporate forms raises fact questions, making summary judgment inappropriate.

In short, Superior Floors did not prove, as a matter of law, that it acquired the Pacific Huts tradename or that NDTTS dissolved before Jaimes was injured. Thus, it is irrelevant that Jaimes identified Pacific Huts, an NDTTS tradename. This Court should reverse.

1. Superior Floors did not prove – as a matter of law – that it acquired the Pacific Huts tradename and dissolved NDTTS before Jaimes was injured.

The brothers readily acknowledge that NDTTS, formed in 2004, did business as Pacific Huts and Castles. CP 725, 779, 790, 956. They claim that NDTTS coexisted with Superior Floors, formed in 2006, until Superior Floors acquired the Pacific Huts tradename in 2011, when NDTTS supposedly ceased doing business. CP 725, 731. Pavel claimed that Superior Floors registered the Pacific Huts tradename in 2011. CP 725. He denied that NDTTS and Superior Floors both used the Pacific Huts tradename at the same time. *Id.*

But aside from Pavel's self-serving testimony, there is no indication that Superior Floors acquired the Pacific Huts tradename or dissolved NDTTS before Jaimes was injured in August 2012. CP 725. Indeed, documentary evidence shows NDTTS doing business as Pacific Huts until at least January 2013. CP 938-39; 956, 1122-

23. The trial court even acknowledged that L&I plainly linked Pacific Huts to NDTs *after Jaimes' injury*. 12/19 RP 37.

NDTS's L&I contract registration shows two crucial things: (1) NDTs was in business until January 2013, more than a year after Jaimes was injured; and (2) NDTs did business as Pacific Huts. CP 938-39; 1122-23. An NDTs document from the Secretary of State also shows that NDTs did not become inactive until October 1, 2013, more than a year after Jaimes' injury. CP 956.

L&I assessed Industrial Insurance premiums and interest against Pacific Huts, under NDTs's UBI number. CP 32, 613, 956. L&I filed a warrant against NDTs doing business as Pacific Huts for the failure to pay workers compensation taxes. CP 947. And L&I payments for Jaimes were made under NDTs's UBI number. CP 188, 938.

By contrast, Superior Floor's L&I contract registration shows that Superior Floors was doing business as Superior Floors from 2006 to 2016. CP 952-54. The contract registration does not mention Pacific Huts. *Id.* There are no L&I documents linking Pacific Huts to Superior Floors.

The only State document linking the Pacific Huts tradename to Superior Floors is a business license expiring June 2014. CP 30.

This proves nothing. Since business licenses are only good for a year, this license proves only that Superior Floors registered the Pacific Huts tradename in June 2013, nearly one year after Jaimes' injury. <http://bls.dor.wa.gov/renewcorp.aspx>.

Superior Floors' claim that it owned the Pacific Huts tradename – and thereby employed Jaimes – is supported only by the self-serving statements of the corporate owners attempting to avoid liability. Documentary evidence, including L&I records, plainly and directing links Pacific Huts to NDTS, not Superior Floors. The brothers attempted to explain away these documents with different theories of corporate disregard, and they will surely do the same on appeal. But these theories only raise fact questions making summary judgment inappropriate.

2. The trial court was improperly persuaded by self-serving explanations that at most created fact questions.

The trial court was improperly persuaded by Superior Floor's business license issued in June 2013. 2/13 RP 44; CP 30. Registering the Pacific Huts tradename a year after Jaimes' injury has no bearing on which of the brothers' many corporate entities used the tradename when Jaimes was injured.

The trial court also focused on Jaimes' supposed "admissions" that he was employed by Superior Floors. 2/13 RP 43, 44-45. Jaimes' Complaint states that he was employed by Pacific Huts, "which, upon information and belief, is a subsidiary of NDTs Construction, Inc., and/or Superior Floors and Countertops, LLC, and/or Pacific Huts and Castles Construction." *Id.* at 43; CP 6. But the Complaint lists many defendants because, although they knew Jaimes worked for NDTs, they were not sure whether NDTs, or one of the brothers' many other entities, owned the Pacific Huts tradename. 2/13 RP 36. The Complaint is intentionally broad to avoid an empty chair. *Id.*

The court also noted that on two occasions, Jaimes "answered [interrogatories] that his employer was Pacific Huts aka Superior Floors." 2/13 RP 43. This is inaccurate and ignores supplemental interrogatories amending this response. Jaimes answered on June 16, 2014, that he was employed by and was a "worker" for "Pacific Huts and Cabinets [sic] aka Superior Floors and Counter tops [sic], aka NTDS Construction aka Pavel Striheuas [sic]." CP 117, 119, 136. Jaimes also stated that he filed a worker's

compensation claim with his “employer” “Pacific Huts and Castles aka NDTs Construction Inc.” CP 122.⁴

In his deposition four months later, Jaimes’ unequivocally stated that he worked for NDTs. CP 54. He explained that counsel’s office must have misunderstood him when filling out the interrogatories and that he did not know the business relationship between NDTs and Pacific Huts, or between NDTs and Superior Floors. CP 55. When asked whether he signed the interrogatories attesting to their accuracy, counsel asked whether they were translated into Spanish, but there is no answer. *Id.* But as addressed in more detail below, Jaimes plainly did not know enough English to read and understand responses to interrogatories. CP 43, 44, 52, 68, 70, 79, 80, 81, 83.

In December 2014, Jaimes updated his interrogatory responses, saying that he was a day laborer working for NDTs d/b/a Pacific Huts. CP 1070-72. He plainly stated that did not work for Superior Floors, and only knew about them through counsel. *Id.*

In short, Jaimes said he worked for NDTs because Timofey, NDTs’s owner, and Pavel told him that he worked for NDTs. CP 54.

⁴ Jaimes’ first supplemental set of interrogatories do not address employment status. CP 164-86.

But confusion is certainly understandable, where the brothers acknowledge that NDTs did business as Pacific Huts. CP 26, 725, 734, 738, 740, 790, 801. Not to mention that the brothers put up Pacific Huts signs when their houses were being sold. CP 84.

The trial court also noted that NDTs's license was suspended in 2011. 2/13 RP 45; CP 938. A suspended license has little or no bearing on whether the brothers continued to do business as NDTs. The brothers never reported Jaimes' wages to L&I. CP 741. They also insist that Superior Floors acquired the Pacific Huts tradename in 2011, but did not register it until 2013, a year after Jaimes' injury. CP 30, 725. In light of rampant disregard for corporate formalities, a suspended business license should have no bearing on whether the business was still active.

In any event, Timofey formally reinstated NDTs for a period covering Jaimes' injury. CP 1153-55. In September 2012, he filed a Domestic Corporation Reinstatement Report with the Secretary of State reinstating NDTs Construction, Inc. for a period from July 1, 2011 through June 30, 2013. *Id.* Timofey certified that grounds for dissolving NDTs "did not exist or have been eliminated." CP 1155.

The trial court was also persuaded by the fact that Superior Floors paid the L&I claims issued to NDTs doing business as Pacific

Huts. 2/13 RP 45. The L&I documents speak for themselves – Jaimes made an Industrial Insurance claim regarding NDTs, L&I issued warrants to NDTs, and the claims were paid. CP 31, 187, 188, 193, 938, 941, 947. The brother's assertions that Superior Floors paid these premiums – after L&I assessed premiums and interest against Pacific Huts and filed a warrant against NDTs – does not prove that it owned Pacific Huts; it proves only that the brothers disregarded corporate forms at will.

Finally, the court noted that Jaimes applied for benefits under NDTs *and* Pacific Huts. 2/13 RP 42. That is irrelevant, where NDTs plainly used the Pacific Huts tradename. CP 725, 790, 938-39, 947. Indeed, the trial court even noted that L&I linked the Pacific Huts tradename to NDTs, not to Superior Floors. 12/19 RP 38.

But in any event, Jaimes did not fill-in the L&I application, completed two days after his injury, because his hand was broken and he was “pumped full of medicine.” CP 81. Jaimes did not recall whether the doctor or Hernandez, who took Jaimes to the doctor, filled it in. CP 81, 84. Jaimes did not deny signing the document, but rather did not recall signing it or recognize his signature. CP 81.

Jaimes also does not speak or read enough English to understand forms like this one, written in English. See CP 44, 79,

80, 81, 83. Jaimes' English is very basic. CP 44. As he explained through an interpreter, he can order a hamburger, or buy groceries if he does not have to talk. *Id.* Jaimes watches television in Spanish, not English, and reads his daughters stories in Spanish. CP 44, 70.

After someone helped him fill out the L&I form, Jaimes had an interpreter with him regarding all L&I communications – all in English. CP 80, 83. Jaimes always had an interpreter when examined by doctors. CP 68. He uses friends to help him fill out applications. CP 79. And Jaimes testified through an interpreter. CP 43, 52.

A document filled out by someone else, written in a language Jaimes does not understand, does not establish as a matter of law the inference that Jaimes consented to an employment relationship with Superior Floors doing business as Pacific Huts. Rather, “[t]he trier of fact at trial is the one to draw any inferences as to [the plaintiff’s] understanding and consent vis-à-vis an employment relationship.” *Novenson*, 91 Wn.2d at 555.

3. Corporate forms cannot be used to commit fraud.

Material issues of fact regarding Super Floors’ use of the Pacific Huts tradename make summary judgment inappropriate. Again, Superior Floors’ principal defense is that it acquired the Pacific Huts tradename, at which time NDTs stopped doing business

entirely, including as Pacific Huts. The brothers made varying statements about whether Superior Floors purchased NDTs to acquire Pacific Huts, purchased only the Pacific Huts tradename and a few assets, or just took the tradename. 2/13 RP 18, 20, 27; CP 725, 801.

At best, Superior Floors has proven only that NDTs and Superior Floors both used the Pacific Huts tradename. But the brothers cannot bend their different corporate structures at will to commit a fraud.

Our courts will disregard the corporate form and impose personal liability upon finding that the corporate form “was used to violate or evade a duty and that the [corporate] form must be disregarded to prevent loss to an innocent party.” ***Landstar Inway, Inc. v. Samrow***, 181 Wn. App. 109, 123, 325 P.3d 327 (2014) (quoting ***Chadwick Farms Owners Ass’n v. FHC, LLC***, 166 Wn.2d 178, 200, 207 P.3d 1251 (2009)). The first element is satisfied when there is an abuse of the corporate form, typically involving fraud, misrepresentation, or manipulation of the corporation. ***Landstar***, 181 Wn. App. at 123 (citing ***Meisel v. M&N Modern Hydraulic Press Co.***, 97 Wn.2d 403, 410, 645 P.2d 689 (1982)). The second element is satisfied when “disregarding the corporate form is

necessary to avoid the consequences of intentional misconduct harmful to the plaintiff.” **Landstar**, 181 Wn. App. at 123 (citing **Meisel**, 97 Wn.2d at 410). In corporate disregard cases, fraud is broader than common law fraud, and means “inequitable or unconscionable conduct.” **Landstar**, 181 Wn. App. at 123 n.2.

The brothers’ own self-serving testimony is the only evidence supporting Superior Floors’ claim that it alone owned and used the Pacific Huts tradename when Jaimes was injured. *Supra*, Argument § C. 2. There is considerable evidence that NDTs continued doing business as Pacific Huts up until and after Jaimes’ injury. *Id.* There is also no hard evidence documenting that Superior Floors really acquired Pacific Huts before 2013. *Id.*

In short, it appears that NDTs and Superior Floors both used the Pacific Huts trade name concurrently. And in 2014, L&I fined Superior Floors for improperly using an unregistered trade name. CP 953. Superior Floors, not Jaimes, should face the consequences for the confusion this created.

In sum, Superior Floors at most creates questions of fact regarding its convoluted relationship with Pacific Huts and NDTs. Superior Floors cannot escape, however, that it did not control Jaimes’ labor or that Jaimes did not consent to an employment

relationship with Superior Floors. Summary judgment was inappropriate. This Court should reverse.

D. Superior Floors, a third party subject to suit under the IIA, does not gain statutory immunity vis-à-vis its relationship with NDTs.

As discussed above, the IIA permits injured workers like Jaimes to seek common law redress against negligent parties on the worksite who are not in their “same employ.” *Novenson*, 91 Wn.2d at 552; RCW 51.24.030(1). Thus, Jaimes is permitted to seek redress from Superior Floors, since he worked for NDTs, not Superior Floors, and there is no argument that he and Superior Floors were in the same employ.

There are situations in which an employee has two employers for purposes of the IIA. *Hildahl*, 101 Wn. App. at 642 n.8. But a “dual employment” relationship exists only when “both employers must have the right to control the worker’s physical conduct and the worker must consent to the employer/employee relationship.” 101 Wn. App. at 642 n.8 (citing *Sonnens, Inc. v Dep’t of Labor & Indus.*, 101 Wn. App. 350, 356, 3 P.3d 756 (2000)). Thus, Superior Floors is not a dual employer for the same reasons it is not an employer at all – it did not have the right to control Jaimes’ physical conduct, and

Jaimes did not consent to the relationship. *Supra*, Statement of the Case § B. 3.

In the same vein, Jaimes was not a “loaned servant” to Superior Floors. See **Rideau**, 110 Wn. App. at 303-04. An employer may “loan” an employee to another, but the borrowing entity becomes an employer under Title 51 RCW only if there is a “*mutual agreement* . . . between the loaned servant or ‘borrowed employee’ and the borrowing employer.” 110 Wn. App. at 304. The burden of proving this relationship rests on the borrowing employer who is attempting to gain immunity under the IIA. *Id.*

Again, Jaimes did not consent to work for Superior Floors. *Supra*, Argument § B.3. Thus, Superior Floors cannot gain immunity under the loaned servant doctrine. **Rideau**, 110 Wn. App. at 303-04.

Whatever the relationship between NDTs and Superior Floors, Jaimes is not *ipso facto* Superior Floors’ employee. **Meads v. Ray C. Roberts Post 969, Inc.**, 54 Wn. App. 486, 488-89, 774 P.2d 49 (1989) (rejecting that argument that “employee of a parent corporation’s wholly owned subsidiary ipso facto is an employee of the parent, by virtue of the parent’s right to control the subsidiary”). Instead, the same two-part test governs whether an employment relationship exists. **Mead**, 54 Wn. App. at 488-89.

And Superior Floors is not immune just because it paid L&I warrants issued to NDTS. CP 941; *Hildahl*, 101 Wn. App. at 644. Rather, “no[] case or statute mandates that immunity automatically flows from payment of an industrial insurance premium.” 101 Wn. App. at 644. Indeed, it would “defeat the purpose of the Act to allow a nonemployer to minimize financial exposure by paying an industrial insurance premium *after* a worker is injured on the job and *after* the state fund has compensated a worker for his or her injury.” 101 Wn. App. at 646.

By way of example, an entity who owns property where an injury occurs, or lets the contract to the injured worker, will be directly responsible for all L&I premiums if the employer fails to pay into L&I before the injury occurs. *Id.* at 644-45 (discussing RCW 51.12.070). But paying the premiums does not endow immunity. *Id.* Rather, if the person who lets a contract pays premiums after an injury, his redress is a right of reimbursement from the employer who should have paid the premium before work began. *Id.* at 645-46.

In other words, if Superior Floors paid L&I premiums for NDTS, then it can seek reimbursement from NDTS. *Id.* It is not, however, immune just because it made payments. *Id.*

In short, Jaimes worked for NDTs and did not work for Superior Floors just because it has some relationship with NDTs. Jaimes should be permitted to move forward against Superior Floors.

E. The trial court erroneously considered the declaration of Kimberly Lampman, a litigation paralegal at the law firm representing Superior Floors.

Days before the hearing in which the trial court dismissed Superior Floors as a matter of law, Superior Floors submitted a "Second Rebuttal Brief in Support of its Motion for Summary Judgment," along with supporting declarations from Pavel Strizheus and Kimberly Lampman, a paralegal at the law firm representing Superior Floors. CP 340, 346-47, 1092. Over Jaimes' objection, the court allowed these pleadings on reconsideration, noting that the underlying summary judgment was "very complicated." 2/13 RP 12-13. The trial court did not address Jaimes' argument that these declarations were based on hearsay. CP 362-68; 2/13 RP 12-13. On appeal, Jaimes challenges only the trial court's consideration of Lampman's declaration.

Lampman's declaration is plainly based on hearsay and should have been stricken. CP 347-51, 367. Lampman's declaration begins by referencing a voicemail she left for the L&I claims manager assigned to Jaimes' claim. CP 347. She then states that after doing

“research” though L&I and the Secretary of State, she learned that NDTs was not in business when Jaimes was injured and that the L&I Department had made an error when it issued a warrant to NDTs for unpaid premiums related to Jaimes’ compensation. *Id.* She continues that after contacting the Department and “our client,” she learned that the Department had erroneously assigned NDTs, not Superior Floors, as Jaimes’ employer when he was injured. *Id.*

Lampman then details a phone call from L&I, claiming that the claims manager admitted that that they had erred in listing Pacific Huts on NDTs’ UBI number, but refused to correct the error to reflect that Superior Floors was the “correct employer.” *Id.* Lampman then details a second phone call regarding her efforts to correct this supposed error. CP 438.

This declaration is based entirely on hearsay. CP 347-48. Lampman not only repeats the content of telephone conversations, she also discloses the results of “research” which appears to be another series of phone calls or other communications. *Id.* Her point is plainly to prove the truth of the matter asserted – that L&I mistakenly linked Pacific Huts to NDTs, when it was really linked to Superior Floors. *Id.* This goes to the heart of Superior Floors’

summary judgment motion. CP 21-23, 316-18. It was prejudicial error to consider Lampman's declaration. This Court should reverse.

CONCLUSION

The trial court improperly resolved fact questions that render summary judgment inappropriate. Jaimes did not consent to work for Superior Floors, who did not control his physical conduct in any event. Lacking an employment relationship, Superior Floors is a third party subject to suit under the IIA. This Court should reverse and remand for trial.

RESPECTFULLY SUBMITTED this 11th day of August,
2015.

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CERTIFICATE OF SERVICE BY MAIL AND/OR EMAIL

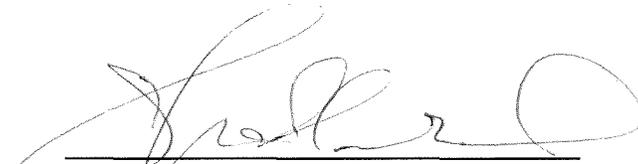
I certify that I caused to be mailed postage prepaid, via U.S. mail, and/or emailed, a copy of the foregoing **BRIEF OF APPELLANT** on the 11th day of August 2015, to the following counsel of record at the following addresses:

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RCW 51.04.010

Declaration of police power — Jurisdiction of courts abolished.

The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

[1977 ex.s. c 350 § 1; 1972 ex.s. c 43 § 1; 1961 c 23 § 51.04.010. Prior: 1911 c 74 § 1; RRS § 7673.]

RCW 51.08.070

"Employer" — Exception.

"Employer" means any person, body of persons, corporate or otherwise, and the legal representatives of a deceased employer, all while engaged in this state in any work covered by the provisions of this title, by way of trade or business, or who contracts with one or more workers, the essence of which is the personal labor of such worker or workers. Or as an exception to the definition of employer, persons or entities are not employers when they contract or agree to remunerate the services performed by an individual who meets the tests set forth in subsections (1) through (6) of RCW 51.08.195 or the separate tests set forth in RCW 51.08.181 for work performed that requires registration under chapter 18.27 RCW or licensing under chapter 19.28 RCW.

[2008 c 102 § 2; 1991 c 246 § 2; 1981 c 128 § 1; 1977 ex.s. c 350 § 12; 1971 ex.s. c 289 § 1; 1961 c 23 § 51.08.070. Prior: 1957 c 70 § 9; prior: (i) 1939 c 41 § 2, part; 1929 c 132 § 1, part; 1927 c 310 § 2, part; 1921 c 182 § 2, part; 1919 c 131 § 2, part; 1917 c 120 § 1, part; 1911 c 74 § 3, part; RRS § 7675, part. (ii) 1949 c 219 § 1, part; 1947 c 246 § 1, part; 1929 c 132 § 2, part; 1927 c 310 § 4, part; 1923 c 136 § 2, part; 1919 c 131 § 4, part; 1917 c 28 § 1, part; 1913 c 148 § 1, part; 1911 c 74 § 5, part; Rem. Supp. 1949 § 7679, part.]

RCW 51.08.180

"Worker" — Exceptions.

"Worker" means every person in this state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment; also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title, whether by way of manual labor or otherwise, in the course of his or her employment, or as an exception to the definition of worker, a person is not a worker if he or she meets the tests set forth in subsections (1) through (6) of RCW 51.08.195 or the separate tests set forth in RCW 51.08.181 for work performed that requires registration under chapter 18.27 RCW or licensing under chapter 19.28 RCW: PROVIDED, That a person is not a worker for the purpose of this title, with respect to his or her activities attendant to operating a truck which he or she owns, and which is leased to a common or contract carrier.

[2008 c 102 § 3; 1991 c 246 § 3; 1987 c 175 § 3; 1983 c 97 § 1; 1982 c 80 § 1; 1981 c 128 § 2; 1977 ex.s. c 350 § 15; 1961 c 23 § 51.08.180. Prior: 1957 c 70 § 20; prior: (i) 1939 c 41 § 2, part; 1929 c 132 § 1, part; 1927 c 310 § 2, part; 1921 c 182 § 2, part; 1919 c 131 § 2, part; 1917 c 120 § 1, part; 1911 c 74 § 3, part; RRS § 7675, part. (ii) 1937 c 211 § 2; RRS § 7674-1.]

RCW 51.08.185

"Employee."

"Employee" shall have the same meaning as "worker" when the context would so indicate, and shall include all officers of the state, state agencies, counties, municipal corporations, or other public corporations, or political subdivisions.

[1977 ex.s. c 350 § 16; 1972 ex.s. c 43 § 4.]

RCW 51.12.070

Work done by contract — Subcontractors — Nonemergency transportation brokers.

The provisions of this title apply to all work done by contract; the person, firm, or corporation who lets a contract for such work is responsible primarily and directly for all premiums upon the work, except as provided in subsection (2) of this section. The contractor and any subcontractor are subject to the provisions of this title and the person, firm, or corporation letting the contract is entitled to collect from the contractor the full amount payable in premiums and the contractor in turn is entitled to collect from the subcontractor his or her proportionate amount of the payment.

(1) For the purposes of this section, a contractor registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW is not responsible for any premiums upon the work of any subcontractor if:

(a) The subcontractor is currently engaging in a business which is registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW;

(b) The subcontractor has a principal place of business which would be eligible for a business deduction for internal revenue service tax purposes other than that furnished by the contractor for which the business has contracted to furnish services;

(c) The subcontractor maintains a separate set of books or records that reflect all items of income and expenses of the business;

(d) The subcontractor has contracted to perform:

(i) The work of a contractor as defined in RCW 18.27.010; or

(ii) The work of installing wires or equipment to convey electric current or installing apparatus to be operated by such current as it pertains to the electrical industry as described in chapter 19.28 RCW; and

(e) The subcontractor has an industrial insurance account in good standing with the department or is a self-insurer. For the purposes of this subsection (1)(e), a contractor may consider a subcontractor's account to be in good standing if, within a year prior to letting the contract or master service agreement, and at least once a year thereafter, the contractor has verified with the department that the account is in good standing and the contractor has not received written notice from the department that the subcontractor's account status has changed. Acceptable documentation of verification includes a department document which includes an issued date or a dated printout of information from the department's internet web site showing a subcontractor's good standing. The department shall develop an approach to provide contractors with verification of the

date of inquiries validating that the subcontractor's account is in good standing.

It is unlawful for any county, city, or town to issue a construction building permit to any person who has not submitted to the department an estimate of payroll and paid premium thereon as provided by chapter 51.16 RCW of this title or proof of qualification as a self-insurer.

(2) Nonemergency transportation brokers that operate as not-for-profit businesses are not liable for any premiums of a subcontractor if the provisions of subsection (1)(c) and (e) of this section are met throughout the term of the contract. For purposes of this section, nonemergency transportation brokers are those organizations or entities that contract with the state health care authority, or its successor, to arrange nonemergency transportation for qualified clients.

[2014 c 193 § 1; 2004 c 243 § 2; 1981 c 128 § 4; 1971 ex.s. c 289 § 81; 1965 ex.s. c 20 § 1; 1961 c 23 § 51.12.070. Prior: 1955 c 74 § 7; prior: 1923 c 136 § 5, part; 1921 c 182 § 8, part; 1915 c 188 § 6, part; 1911 c 74 § 17, part; RRS § 7692, part.]

RCW 51.24.030

Action against third person — Election by injured person or beneficiary — Underinsured motorist insurance coverage.

(1) 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.

(2) In every action brought under this section, the plaintiff shall give notice to the department or self-insurer when the action is filed. The department or self-insurer may file a notice of statutory interest in recovery. When such notice has been filed by the department or self-insurer, the parties shall thereafter serve copies of all notices, motions, pleadings, and other process on the department or self-insurer. The department or self-insurer may then intervene as a party in the action to protect its statutory interest in recovery.

(3) For the purposes of this chapter, "injury" shall include any physical or mental condition, disease, ailment or loss, including death, for which compensation and benefits are paid or payable under this title.

(4) Damages recoverable by a worker or beneficiary pursuant to the underinsured motorist coverage of an insurance policy shall be subject to this chapter only if the owner of the policy is the employer of the injured worker.

(5) For the purposes of this chapter, "recovery" includes all damages except loss of consortium.