

73148-3-I

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

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JOSE JAIMES,

Appellant,

v.

SUPERIOR FLOORS & COUNTERTOPS, LLC,  
a Washington Corporation,

Respondent.

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**BRIEF OF RESPONDENT**

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## INTRODUCTION

NDTS Construction, Inc. (“NDTS”), doing business as Pacific Huts & Castles, dissolved in 2011. In June 2012, Jose Jaimes was hired to perform manual labor for Superior Floors and Countertops, LLC (“Superior Floors”), doing business as Pacific Huts & Castles.<sup>1</sup> Both NDTS and Superior Floors were founded and operated by three brothers, including: Timofey Strizheus, Pavel Strizheus, and Visiliy Strizheus.<sup>2</sup>

On August 27, 2012, Mr. Jaimes was injured in the course and scope of his employment while on a Superior Floors job site. Mr. Jaimes applied for, and received, workers’ compensation benefits under the Industrial Insurance Act (“IIA”).

Workers’ compensation benefits are provided only to “workers.” In order to qualify as a “worker” under the IIA, a claimant must prove that he is injured while “engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his . . . employment.” RCW 51.08.180. Thus, a claimant must prove an employment relationship between him and the employer in order to satisfy

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<sup>1</sup> NDTS and Superior Floors operated under the same trade name, but not at the same time; there was no overlap of usage. “The purpose of transferring Pacific Huts & Castles was to take the trade name, take the work that was under that trade name from NDTS Construction and transfer it over to Superior Floors and Countertops and close NDTS Construction.” CP 1680. The transfer of the “Pacific Huts & Castles” trade name occurred in 2011. CP 1680.

<sup>2</sup> The dissolved NDTS corporation was governed by Timofey and Vasiliy Strizheus, while the active Superior Floors company is governed by all three Strizheus brothers.

IIA requirements. Here, Mr. Jaimes's application for benefits stated that Pacific Huts & Castles ("Pacific Huts") was his employer. At that time, Superior Floors – not NDTs – was using the Pacific Huts trade name.<sup>3</sup>

Mr. Jaimes later filed suit against Superior Floors, among a dozen other entities,<sup>4</sup> for his workplace injury. However, his claim is barred by the IIA's exclusive remedy provisions. The IIA provides sure and certain relief through workers' compensation benefits, and precludes workers from filing other lawsuits against their employers relating to their workplace injuries.

In February 2015, The Honorable Jean Rietschel of the King County Superior Court (the "trial court") dismissed Mr. Jaimes's case after correctly applying the IIA and Washington Supreme Court precedent.<sup>5</sup> Because Mr. Jaimes was a worker for Superior Floors, he is barred from bringing a negligence claim against Superior Floors.

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<sup>3</sup> Despite Superior Floors' 2012 use of the Pacific Huts trade name, Washington's Department of Labor & Industries ("L&I") still had NDTs as the registered owner of the Pacific Huts trade name and, ultimately, issued benefits payments to Mr. Jaimes attributable to NDTs.

<sup>4</sup> Seeking to avoid leaving any potentially liable parties out of his lawsuit, Mr. Jaimes also named the following entities in this action: (1) NDTs Construction, Inc.; (2) Pacific Huts & Castles, Inc; (3) Pacific Huts & Castles Construction; (4) Greg Quinn; (5) Dale Quinn; (6) Dixie Quinn; (7) Mary Quinn; (8) Pavel Strizheus; (9) Timofey Strizheus; (10) Vasily Strizheus; (11) Nikolay Dzyubak; (12) Vivek Gupta; (13) Bhawna Gupta; and (14) Employees, Companies, & Corporations A-D. CP 1, 10.

<sup>5</sup> In a December 2014 Order, the trial court previously dismissed on summary judgment all of the other named defendants in this action. CP 1761-62.

The entry of judgment in favor of Superior Floors, and against Mr. Jaimes, was proper in all respects. The available evidence establishes that there is no genuine issue of material fact to dispute that Mr. Jaimes worked for Superior Floors on August 27, 2012. This Court should affirm the trial court's dismissal.

#### **ASSIGNMENTS OF ERROR**

Superior Floors does not assign any error to the trial court's decision and, therefore, asks that it be affirmed in all respects.

#### **RESTATEMENT OF ISSUES**

1. Whether the trial court correctly ruled Superior Floors is immune from Mr. Jaimes' suit under RCW 51.04.010 and RCW 51.32.010, Washington's Industrial Insurance Act exclusive remedy provisions?

2. Whether Superior Floors is a "third party" from which Mr. Jaimes may seek damages under RCW 51.24.030(1), where he worked for Superior Floors' tradename Pacific Huts & Castles, and NDTS did not exist as an entity in August 2012?

3. Whether the debate regarding the Declaration of Kimberly Lampman is moot, given the fact that the trial court stated, on the record, that it could not consider the hearsay allegations relating to information from the Labor and Industries?

## RESTATEMENT OF THE CASE

Mr. Jaimes's appeal is founded on the notion that he worked for NDTS Construction, Inc. If, as the record establishes, NDTS did not exist in August 2012, then Mr. Jaimes's arguments on appeal must fail.

### A. NDTS Construction Did Not Exist in August 2012.

In 2004, Timofey Strizheus created NDTS Construction, Inc. and operated that corporation under the registered trade name Pacific Huts & Castles. CP 1290. In 2011, the Strizheus brothers closed NDTS and transferred the Pacific Huts trade name, as well as NDTS's work assignments to Superior Floors. CP 1301, 1680-81. At the time of transfer in 2011, NDTS did not have any employees. CP 1301.

Consistent with this testimony, records maintained by various Washington State Departments support the fact that NDTS stopped conducting business in 2011. For example, L&I records indicate that NDTS's license was suspended on August 9, 2011. CP 938. Washington State's Department of Revenue records show that NDTS's business tax account was closed on June 30, 2011. *See* App.<sup>6</sup> In a September 2012

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<sup>6</sup> This account summary information is publicly available at: [dor.wa.gov/contentdoingbusiness/registermybusiness/brd/default.aspx](http://dor.wa.gov/contentdoingbusiness/registermybusiness/brd/default.aspx). This Court may take judicial notice of information. *See* ER 201(b)(2) (authorizing courts to take judicial notice of a fact that is "not subject to reasonable dispute in that it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonable be questioned."); *see also Jackson v. Quality Loan Service Corp.*, 186 Wn. App. 838, 844, 347 P.3d 487 (2015) (discussing judicial notice) (citation omitted);

Domestic Corporation Reinstatement Report submitted to the Washington Secretary of State's Office, the date of NDTS's dissolution is listed as October 3, 2011. CP 1153.

Furthermore, the notion that the Strizheus brothers did not conduct, nor intended to conduct, any business with NDTS in 2012 is bolstered by the fact that they did not secure any commercial general liability insurance for NDTS between August 2012 and August 2013. CP 506. Specifically, the Starr Surplus Lines Insurance Company provided commercial general liability insurance coverage, between August 16, 2012 and August 16, 2013, for Superior Floors d/b/a Pacific Huts only; not NDTS. CP 506. NDTS was not listed a "Named Insured" or as an "Additional Insured" on the insurance policy declarations. CP 506.

**B. Superior Floors Began Using the Pacific Huts Trade Name in 2011 and was Using the Trade Name in 2012 and Beyond.**

After NDTS ceased operations in 2011, the Strizheus brothers began using the Pacific Huts trade name to conduct business on behalf of Superior Floors. CP 1680. Superior Floors was doing business as Pacific Huts in August 2012.<sup>7</sup> In fact, the August 27, 2012 workplace in which Mr. Jaimes was injured was governed by a residential homebuilding

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<sup>7</sup> Despite using the Pacific Huts trade name in 2012, it does not appear that Superior Floors actually registered the trade name or formally attached it to Superior Floors. In fact, in March 2014 L&I cited Superior Floors for an RCW 18.21.100(1) violation for using "a trade name that was not registered." CP 953.

contract between EVF, Inc. (owner) and “Superior Floors & Countertops LLC dba Pacific Huts & Castles, LLC” (contractor). CP 614-23 (Primary Contract); CP 624-27 (Contract Addendum, naming Superior Floors); CP 628-37 (Pacific Huts’ Proposal and Specifications).

Importantly, NDTS Construction is not identified anywhere within the construction contract that governed Superior Floors’ homebuilding work on August 27, 2012. CP 614-37.

**C. Tim Strizheus Hired Mr. Jaimes to Work for Superior Floors in June 2012 – when NDTS was Not Conducting Business.**

In June 2012, after a 10 minute telephone conversation, Timofey Strizheus hired Mr. Jaimes to “pick up work” for Superior Floors.<sup>8</sup> CP 34, 1294, 1702-03. Mr. Jaimes was not hired to work for NDTS – especially because NDTS was not conducting any business in June 2012. CP 1292.

During the course of his work with Superior Floors, Mr. Jaimes’s general work hours were from 7:00 am until 3:30 pm.<sup>9</sup> CP 879, 1285. From his first day of working for Superior Floors, until his last (his date of injury), Superior Floors supplied Mr. Jaimes with the tools and equipment necessary to complete his job tasks. CP 879, 903, 1295, 1298-99, 1703.

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<sup>8</sup> Although Mr. Jaimes was hired to work for Superior Floors, admittedly, Superior Floors did not require Mr. Jaimes to complete a job application or provide Mr. Jaimes with a W-2 because he was a temporary worker. CP 1691, 1696.

<sup>9</sup> To be clear, Mr. Jaimes testified in deposition that Timofey Strizheus told him to start work at 7:00 a.m. CP 879. This conflicts with Mr. Jaimes’s argument that he was free to come and go as he pleased.

Additionally, Timofey Strizheus gave Mr. Jaimes verbal instructions regarding specific job tasks to complete and then left Mr. Jaimes alone to complete those simple tasks. CP 1299-1301, 1708. On more complicated tasks, such as measuring and tying rebar, building bathtub desks, or transferring heaving equipment, Mr. Jaimes and Timofey Strizheus would complete those items together as a team. CP 1300-01.

Regarding remuneration for his work, Mr. Jaimes requested that Superior Floors pay him in cash and Superior Floors complied with his requests. CP 1298, 1688. During his time working for Superior Floors, Mr. Jaimes was paid in cash \$100/day, and averaged \$500/week. CP 875.

As support for these cash payments to Mr. Jaimes, Superior Floors produced copies of its JPMorgan Chase Bank account statements, establishing that, between June 1, 2012 and August 31, 2012, “Superior Floors & Countertops LLC dba Kitchen & bath Design Center or Pacific Huts and Castles,” withdrew significant amounts of cash (i.e., \$200 – \$500) on at least 11 occasions, at regular intervals, to pay Mr. Jaimes. CP 1101-06, 1108-13, 1115-20.

No such banking statements are available for NDTs during this same period – June to August 2012 – because, again, NDTs was not conducting any business. Additionally, Mr. Jaimes has not produced any documents or evidence showing that NDTs was active in 2012.

**D. After His 2012 Workplace Injury, Mr. Jaimes Reported to L&I that Pacific Huts was His Employer for Purposes of Workers' Compensation Benefits.**

Contemporaneous information is important and very telling. On his Report of Industrial Injury or Occupational Disease (completed on August 29, 2012), Mr. Jaimes stated that he was injured on August 27, 2012 at 3:00 pm, and that he had been working a day-shift. CP 187. He described how he had fallen and marked "Yes" to the question "Were you doing your regular job?" CP 187. Where it asked him to identify his employer, Mr. Jaimes wrote "Pacific Huts & Castles" and, later, answered that he had worked there for "3 months." CP 187.

Moreover, at a later date, Mr. Jaimes again informed L&I that he was employed by Pacific Huts and had been employed by that entity from June 2012 to August 27, 2012. CP 197. He identified Tim Strizheus as his supervisor and that he worked full-time, 40 hours per week, and that his wages were paid by the day. CP 197. He identified himself as a carpenter for Pacific Huts. CP 197.

Noticeably, Mr. Jaimes did not identify NDTS Construction Inc. as his employer. CP 187, 197. And, while he also did not list Superior Floors as his employer on the Industrial Injury Report, the record is clear that Superior Floors was doing business as Pacific Huts at that time.

**E. Confusion Initially Ensued Regarding the Payment of Workers Compensation Payments, But Superior Floors Ultimately Paid the L&I Premiums for Mr. Jaimes's Workplace Injuries.**

L&I initially sent employment verification notices, decisions, and payment orders to NDTs, doing business as Pacific Huts. CP 190-92, 195-206, 947-48, 950. Although NDTs was not operational in 2012, that entity was still the official registered owner of the Pacific Huts. Because Superior Floors was using the Pacific Huts trade name at the time of Mr. Jaimes's workplace injuries, it satisfied the amounts owing and due to L&I for premiums related to workers' compensation benefits. CP 31-32, 188, 1125-30.

**F. In His Original Complaint and First Amended Complaint, Mr. Jaimes Asserted that He was an Employee of Superior Floors.**

Mr. Jaimes filed his Original Complaint on March 3, 2014. CP 1. In pertinent part, Mr. Jaimes initially alleged that he "was an employee of Pacific Huts and Castles, Inc., . . . 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." CP 6.

Then, on March 27, 2014, Mr. Jaimes filed his First Amended Complaint in which he again plead: "At the time of the incident, plaintiff was an employee of Pacific Huts and Castles, Inc., . . . 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.” CP 14.

**G. In Initial and Supplemental Answers to Interrogatories, Mr. Jaimes Listed Superior Floors as an Employer.**

In his June 2014 answers to written discovery, Mr. Jaimes identified “Pacific Huts and Cabinets [sic] aka Superior Floors and Counter tops [sic], aka NTDS [sic] Construction aka Pavel Striheuas [sic]” as his employer in response to Interrogatory Nos. 2 & 6. CP 117, 119.

Then, in his July 2014 First Supplemental Responses to discovery, Mr. Jaimes did not attempt to correct any misunderstanding regarding his answers specifying that Superior Floors was one of his employers. CP 164-85.

**H. The Trial Court Dismissed Numerous Defendants on Summary Judgment in December 2014.**

On December 19, 2014, the trial court considered the Defendants’ motion for summary judgment to dismiss Mr. Jaimes’s claims under the IIA’s employer immunity provision. In its oral ruling, the trial court found that:

- “Plaintiff is held to his, uh, statements that he was an employee[.]” 12/19 RP 36.<sup>10</sup>

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<sup>10</sup> For consistency purposes, Respondent will use the same transcript reference citation as used in Appellant’s Opening Brief.

- “Looking at the facts that have been presented, if the Court ignores, uh, the statements in the Application for Benefits as an employee, it is clear that Plaintiff is still covered under the broad definition of worker.” 12/19 RP 37.
- “There is nothing in this statute that says a worker covered . . . is not also precluded from suing once they receive benefits.” 12/19 RP 37.
- “The claim here was filed for benefits as to Pacific Huts and NDTS . . . the Court clearly has to dismiss Pacific Huts and NDTS as payments were made under, uh, benefits for that number and those entities.” 12/19 RP 37.
- “I will not dismiss Superior Floors at this time. I invite further briefing on that issue.” 12/19 RP 40.

The trial court dismissed all parties except Superior Floors. CP 1761-62.

**I. On Reconsideration, the Trial Court Properly Granted Summary Judgment Dismissal of Superior Floors.**

On February 13, 2015, the trial court considered Superior Floors’ motion for reconsideration / continuation of oral argument, and additional briefing, seeking summary judgment dismissal. When pressed, Mr. Jaimes could not adequately respond to the trial court’s question: “How does that square with their evidence that their license with L&I of NDTS expired in August of 2011? 2/13 RP 20.

In summarizing the evidence before it regarding the dismissal of Superior Floors, the trial court stated:

- “Superior Floors clearly has a business license that has the registered trade name Pacific Huts.” 2/13 RP 42.

- “Plaintiff did apply for unemployment benefits under Pacific Huts and NDTs.” 2/13 RP 42.
- “Under the Defendant’s affidavits, they state that the Plaintiff was hired to work for Superior Floors. Under the Plaintiff’s affidavits, they state that he was hired to work for NDTs.” 2/13 RP 43.
- “The Court considers also that in the complaint, there is a statement that the Plaintiff’s employer was NDTs and/or Superior Floors.” 2/13 RP 43.
- “In the interrogatories on two occasions, the Plaintiff answered that his employer was Pacific Huts, aka Superior Floors.” 2/13 RP 43.
- “There is evidence that the NDTs license with Labor and Industries did expire on August 2011. There is further evidence that in September of 2012, there was a reinstatement from the State of Washington for NDTs for a period of business license from 7-2011 to June 2013.” 2/13 RP 42.
- “[T]here is evidence that Superior Floors were the ones who paid the outstanding premiums on the Labor and Industries claim for the Plaintiff.” 2/13 RP 42.
- “[T]he Plaintiff’s own statements and the complaints in the interrogatories are inconsistent with his own statements of belief of NTIS (sic) and that he has acknowledged his employer as Superior Floors, aka Pacific Huts.” 2/13 RP 44.

Based on all of this evidence, the trial court dismissed Superior Floors, explaining in its oral ruling that:

Given the trade name of Pacific Huts as the, uh, trade name owned by Superior Floors in their business license, uh, given the Plaintiff’s admissions of his employment by Superior Floors, uh, given Superior’s payments of the

Labor and Industries claims, given the filing of the complaint – the Labor and Industries claim as a Pacific Huts employee, uh, given the lapsed license of NDTs with Labor and Industries at the time, the Court does not find that there is, in fact, a material question of fact as to whether Superior Floors was the employer. And I do grant the Motion for Summary Judgment at this time.

2/13 RP 44-45; CP 410-11.

**J. The Court Did Not Consider Kim Lampman's Declaration.**

In support of its February 2015 motion, Superior Floors submitted the declaration of Kimberly Lampman. CP 346-52. Ms. Lampman's declaration, admittedly, contains hearsay statements regarding comments reportedly made by an L&I employee. Recognizing this fact, the trial court did not take into account Ms. Lampman's declaration as a part of her ruling, and stated on the record:

The Court cannot consider the hearsay allegations from the Labor and Industries employer that there wasn't ever in, uh, the heading of NDTs in the Labor and Industries documents. That's clearly hearsay, and the Court cannot consider it.

2/13 RP 43. Thus, the issue regarding Ms. Lampman's declaration is moot on appeal.

**STANDARD OF REVIEW**

Orders granting summary judgment are reviewed de novo. *Trimble v. Washington State Univ.*, 140 Wn.2d 88, 92, 993 P.2d 259 (2000). This Court engages in the same inquiry as the trial court, and

based on the record, considers all facts and any reasonable inferences in the light most favorable to the nonmoving party. *Id.* at 93 (citation omitted). Summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c).

“A material fact is one” upon which the “outcome of litigation” depends. *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997) (citation omitted). If the moving party shows that there is no genuine issue of material fact, the burden shifts to the nonmoving party to present specific facts showing that a genuine issue exists for trial. CR 56 “mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case.” *Celotex v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). “[A] complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Id.* at 323.

Argumentative assertions, unsupported speculation, suspicions, beliefs and conclusions that unresolved factual issues remain are insufficient to create a genuine issue of fact. *See Seven Gables Corp. v.*

*MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). “[W]hen reasonable minds could reach but one conclusion from the evidence presented, questions of fact may be determined as a matter of law.” *Cent. Wash. Bank v. Mendelson-Zeller*, 113 Wn.2d 346, 353, 779 P.2d 697 (1989).

Additionally, the Court “may affirm” the trial court’s summary judgment order “on any basis supported by the record.” *State v. Carter*, 74 Wn. App. 320, 324 n. 2, 876 P.2d 1 (1994); *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 796 (2004) (court can affirm summary judgment order on any grounds supported by the record).

#### **SUMMARY OF ARGUMENT**

The IIA provides the exclusive remedy for workers injured on the job, which Mr. Jaimes already received. The IIA bars Mr. Jaimes from additional recovery against Superior Floors because he was a worker for Superior Floors. There is an exception to this rule where the worker is injured by a third person who is not in the worker’s same employ. Since Superior Floors doing business as Pacific Huts employed Mr. Jaimes in August 2012, Mr. Jaimes is barred from suing Superior Floors for his industrial injury. As a matter of law, Mr. Jaimes failed to show he was injured by a third person not in his same employ.

Mr. Jaimes argues that he worked for NDTS Construction in August 2012, but that is not correct. Even considering all reasonable inferences in his favor, Mr. Jaimes's argument fails because the record establishes that NDTS was neither licensed to conduct business in August 2012 nor the entity that contracted with EVF, Inc. to build the home that Mr. Jaimes was working on in August 2012. In short, Mr. Jaimes could not work for NDTS in August 2012 because NDTS was not operational at that time. Thus, Superior Floors, doing business as Pacific Huts, was the only employer for whom Mr. Jaimes was able to work in August 2012.

Additionally, because Mr. Jaimes has, on multiple occasions prior to dispositive briefing in the trial court, acknowledged that he worked for Pacific Huts and/or Superior Floors doing business as Pacific Huts, he should be estopped from changing his position when that fact no longer benefits his interests.

Lastly, the argument regarding the declaration of Kimberly Lampman is moot on appeal. The trial court never factored Ms. Lampman's declaration and hearsay statements into its decision and order to dismiss Superior Floors. Because the trial court did not consider that declaration, this Court should do likewise on appeal.

For all of these reasons, this Court should affirm the trial court's dismissal of Mr. Jaimes' lawsuit.

## ARGUMENT

Mr. Jaimes was injured in the course and scope of his work for Superior Floors. He has received workers' compensation benefits for his injuries. The IIA's compensation structure has worked as originally intended. Mr. Jaimes should not now be able to sue his employer, Superior Floors, for additional compensation.

### A. **Washington's Industrial Insurance Act Grants Immunity from Suit to an Employer in Return for Statutory Compensation.**

"Washington's IIA was the product of a grand compromise in 1911. Injured workers were given a swift, no-fault compensation system for injuries on the job. Employers were given immunity from civil suits by workers." *Birklid v. Boeing Co.*, 127 Wn.2d 853, 859, 904 P.2d 278 (1995) (citation omitted). The IIA allows injured workers to receive speedy, no-fault compensation for injuries sustained on the job, while employers are given immunity from civil suits by employees. RCW 51.04.10 *et seq.*; *Birklid*, 127 Wn.2d at 859.<sup>11</sup>

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<sup>11</sup> Reaffirming this longstanding understanding, the Washington Supreme Court more recently explained:

Employers are liable for workplace injuries without regard to fault in exchange for limited liability, and employees forfeit common law remedies which may exceed that available under workers' compensation law, in exchange for swift and certain relief. Industrial injuries are viewed as a cost of production.

*Ball-Foster Glass Container Co. v. Giovanelli*, 163 Wn.2d 133, 140, 177 P.3d 692 (2008) (citation omitted).

The IIA abolishes “most civil action arising from on-the-job injuries and replaces them with an exclusive remedy of industrial insurance benefits.” *Meyer ex rel Meyer v. Burger King Corp.*, 101 Wn. App. 270, 273, 22 P.3d 1015 (2000); *see also Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 47 P.3d 556 (2002) (explaining that “[i]n addition, a parent company and its subsidiaries will be treated as one entity for the purposes of immunity under the Act.”) (citation omitted). Extrapolating this clarification in *Minton*, it logically follows that the IIA’s immunity provision applies equally to the relationship between a business and its trade name, like the connection between Superior Floors and Pacific Huts in this case.<sup>12</sup>

In exchange for certain relief, the IIA expressly provides that the employee forfeits certain rights to pursue alternative tort or other remedies. The IIA expressly states this intent:

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

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<sup>12</sup> However, there do not appear to be any reported Washington cases that address the IIA’s immunity provision when a worker identifies a trade name as his employer as opposed to stating his employer’s true name.

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 jurisdictions of the courts of the state over such causes are hereby abolished, except as in this title provided.**<sup>13</sup>

Consequently, employees may receive less than full tort damages in exchange for the expense and uncertainty of litigation. “Even when an employee is killed or seriously injured on the job, the employee is entitled only to workers’ compensation benefits, and these benefits are calculated as a lesser percentage of the employee’s salary.” *Flanigan v. Dep’t. of Labor & Indus.*, 123 Wn.2d 418, 423, 869 P.2d 14 (1994) (citing RCW 51.32.050 (concerning death benefits), 51.32.060 (concerning permanent total disability compensation), and 51.32.09 (concerning temporary total disability benefits)).

Further, RCW 51.32.010 explains who is entitled to workers’ compensation, stating that:

Each worker injured in the course of his or her employment . . . shall receive compensation in accordance with this chapter, and, except as in this title otherwise provided, such payments shall be in

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<sup>13</sup> RCW 51.04.010 (emphasis added).

lieu of any and all rights of action whatsoever against any person whomsoever.

The exclusive remedy provisions of Title 51 RCW are “sweeping, comprehensive, and of the broadest, most encompassing nature.” *Cena v. State*, 121 Wn. App. 352, 356, 88 P.3d 432 (2004). Therefore, a worker who receives workers’ compensation “benefits under the IIA has no separate remedy for his other injuries except where the IIA specifically authorizes a cause of action.” *Id.* at 356.

If, however, the worker is injured as the result of a third person, the IIA provides the injured worker with an opportunity to file a lawsuit against that third person, clarifying that:

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.<sup>14</sup>

Here, Mr. Jaimes is suing Superior Floors based on the argument that he worked for NDTS and that Superior Floors is a “third person,” subject to liability to him for his industrial injuries. Given the evidence on record showing that Superior Floors was the only entity (among the two) from whom he could work in August 2012, Mr. Jaimes’s argument that he was an NDTS employee fails.

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<sup>14</sup> RCW 51.24.030(1).

**B. NDTs was Not an “Employer” in August 2012.**

The IIA “is a self-contained system that provides specific procedures and remedies for injured workers.” *Malang v. Dep’t. of Labor & Indus.*, 139 Wn. App. 677, 687, 162 P.3d 450 (2007) (citation & quotations omitted). Title 51 RCW defines “employer” as follows:

“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.<sup>15</sup>

Title 51 defines an “employee” as:

“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.<sup>16</sup>

And defines “worker” as:

“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

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<sup>15</sup> RCW 51.08.070 (in relevant part).

<sup>16</sup> RCW 51.08.185.

way of manual labor or otherwise, in the course of his or her employment[.]<sup>17</sup>

Definitions of employer and employee or worker are sufficiently broad to extend its provisions even to those who hire independent contractors if the contract is to provide personal labor. See *Malang*, 139 Wn. App. at 687-88 (explaining the breadth and scope of the definition of “worker”).<sup>18</sup> The IIA applies equally to “involuntary service.”<sup>19</sup>

Here, the record establishes that NDTs stopped conducting business in 2011. CP 1301, 1680-81. L&I records establish that NDTs’s license was suspended in August 2011 – *nine months* before Mr. Jaimes was hired and a *full year* before he was injured. CP 938-39. NDTs’s business tax account was closed on June 30, 2011. Appx. And, there is evidence that NDTs effectively dissolved in October 2011.

The question then becomes: If NDTs stopped operating in 2011, how could it hire Mr. Jaimes in June 2012? The simple answer is: It can’t.

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<sup>17</sup> RCW 51.08.180 (in relevant part).

<sup>18</sup> “The legislature adopted a broad definition of ‘worker’ to eliminate the technical distinction between employees and independent contractors. By collapsing the distinction, the legislature intended to extend the IIA’s coverage to independent contractors “whose *personal efforts* constitute the main essential in accomplishing the objects of the employment.” *Malang*, 139 Wn. App. at 687-88 (citations omitted & emphasis in original).

<sup>19</sup> See, e.g., *Bolin v. Kitsap County*, 114 Wn.2d 70, 72, 76, 785 P.2d 805 (1990) (extending IIA coverage to jurors); *Rector v. Cherry Valley Timber Co.*, 115 Wn. 31, 35-36, 196 P. 653 (1921) (applying IIA to soldiers); RCW 51.12.045 (providing coverage for employers of offenders performing community service); *State v. Bartley*, 18 Wn.2d 477, 482-83, 139 P.2d 638 (1943) (a purported partnership was in fact master and servant relationship under the IIA).

**C. Mr. Jaimes Worked for Superior Floors, Doing Business as Pacific Huts, in August 2012.**

In late 2011, the Superior Floors began using and conducting business under the Pacific Huts trade name.<sup>20</sup> CP 1680. Superior Floors was doing business as Pacific Huts when Timofey Strizheus hired Mr. Jaimes to work for Superior Floors in June 2012. And, there is no dispute in the record that, as of August 27, 2012, the workplace in which Mr. Jaimes was injured was governed by a contract between EVF, Inc. and Superior Floors doing business as Pacific Huts. CP 614-37.

Accordingly, the available evidence on record supports the fact that only Superior Floors was in a position to employ Mr. Jaimes in August 2012.

**D. Mr. Jaimes's Course of Dealings Evidences Support for Superior Floors Being His Employer.**

While Mr. Jaimes did not complete an application or sign a contract to work for Superior Floors, that fact is not essential to determining the work relationship here. Employer-employee relationships may exist even though there is no express contract of employment where evidence shows prior employment relationship between the parties, a customary rate of pay and a result that the services be performed. *Wilkie*

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<sup>20</sup> The fact that Superior Floors, apparently, did not officially register the Pacific Huts trade name does not detract from the fact that Superior Floors was conducting business under Pacific Huts.

*v. Dep't. of Labor & Indus.*, 53 Wn.2d 371, 374-75, 334 P.2d 181 (1959) (reversing the trial court, holding that the trial court had erred, in deciding as a matter of law, that the facts did not establish an employer-employee relationship).<sup>21</sup>

Here, similar to *Wilkie*, there is evidence that on multiple prior occasions, Mr. Jaimes performed work at the instruction of Timofey Strizheus, between June 2012 and August 2012, on behalf of Pacific Huts, which, at that time, was being used by Superior Floors. CP 34, 879, 903, 1285, 1292, 1294, 1680, 1702-03. Again, like *Wilkie*, there is ample evidence that Superior Floors doing business as Pacific Huts was paying Mr. Jaimes \$100 cash for each day worked, averaging about \$500 per week. CP 875, 1106-20, 1298, 1688. And, similar to the *Wilkie* court, this Court should conclude that, based on the available evidence, an employment relationship existed between Superior Floors and Mr. Jaimes.

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<sup>21</sup> In *Wilkie*, “[t]he factual determination which the jury was called upon to make was whether or not a contract of employment, establishing the relationship of employer-employee, existed at the time of the injury.” 53 Wn.2d at 374-75. The *Wilkie* court clarified:

There was evidence that, upon a previous occasion, work had been performed for Ernst by the appellant, and that he was paid at the rate of two dollars an hour, although there had been no previous express agreement for payment between the parties. There is also evidence that Wilkie had formerly followed the mechanic’s trade and, since that time, had performed some mechanical work in the vicinity, and that the rate of pay for such work in that locality was two dollars an hour. The evidence further discloses that it was at the request of Ernst that Wilkie performed the services, and that he expected to be paid.

*Id.* at 375.

**E. As the Employer who Paid for Mr. Jaimes’s L&I Premiums, Superior Floors is Entitled to Immunity from Suit.**

Washington’s Supreme Court has “consistently held that when an employer . . . pays its industrial insurance premiums pursuant to the [IIA] the employer may no longer be looked to for recourse.” *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 456, 932 P.2d 628 (1997) (citation and quotation omitted), *overruled in part on other grounds by, Wash. Indep. Tel. Ass’n v. Wash. Util. & Transp. Comm’n*, 148 Wn.2d 887, 906, 64 P.3d 606 (2003). “Having fulfilled its obligation under the IIA to provide [the worker] ‘sure and certain relief,’ [the employer] is correspondingly entitled to immunity from ‘all civil actions and causes of action’ stemming from [the worker’s] injury.” *Id.* at 452 (citing RCW 51.04.010).

Here, the record clearly establishes that Superior Floors, doing business as Pacific Huts, paid Mr. Jaimes’s L&I premiums; not NDTs: “[T]here is evidence that Superior Floors were the ones who paid the outstanding premiums on the Labor and Industries claim for the Plaintiff.” 2/13 RP 42.

**F. Mr. Jaimes was Also an Employee of Superior Floors Pursuant to the Multi-Part Test Used by Washington Courts.**

Whether an employment relationship exists should be decided based on the specific facts of each case. *See Clausen v. Dep’t of Labor & Indus.*, 15 Wn.2d 62, 69, 129 P.2d 777 (1942). The existence of an

employment relationship must be demonstrated by objective evidence that would lead a reasonable person to determine such a relationship exists. See *Jackson v. Harvey*, 72 Wn. App. 507, 519, 864 P.2d 975 (1994) (discussing the reasonable person standard). A plaintiff's "bare assertion of belief that he or she worked for this or that employer does not establish an employment relationship." *Id.*

Under the IIA, an employment relationship exists when there is evidence of: (1) the employer's right to control; (2) a mutual agreement to establish an employment relationship; and (3) payment of wages. See *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d 550, 553, 588 P.2d 1174 (1979) (regarding control and consent); *Doty v. Town of South Prairie*, 155 Wn.2d 527, 540-42, 120 P.3d 941 (2005) (regarding wages).<sup>22</sup>

It is worth noting that the two-part *Novenson* test has generally been applied where the employment relationship at issue involves dual employment. See *Brown v. Labor Ready NW, Inc.*, 113 Wn. App. 643, 649, 54 P.3d 166 (2002), *rev. denied* 149 Wn.2d 1011, 69 P.3d 875 (2003). Thus, it is typically used in cases that concern application of the

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<sup>22</sup> Although the wage requirement is typically not discussed in cases where there is no question of the existence of remuneration, it remains a required element as employment "constitutes 'services performed by an individual for remuneration.'" *Doty*, 155 Wn.2d at 540 (quoting RCW 51.08.195).

loaned servant doctrine,<sup>23</sup> where there has been a change of employer without informing the worker,<sup>24</sup> or where the worker is employed by an independent contractor.<sup>25</sup> None of these situations apply here.

In contrast, here there is no entity other than Superior Floors doing business as Pacific Huts that employed Mr. Jaimes on the construction site on August 27, 2012. NDTs was not operational at that time, so there is no loaned servant, dual employer analysis to apply to this case. See *Ackley-Bell v. Seattle Sch. Dist. No. 1*, 87 Wn. App. 158, 166, 940 P.2d 685 (1997) (“Here, it is undisputed that Ackley-Bell was employed with the District in October 1991. She is thus a ‘worker.’ We therefore need not conduct the *Novenson* two-prong inquiry.”).

Again, Mr. Jaimes was clearly a Superior Floors worker on August 27, 2012. Nevertheless, applying the evidence on record to *Novenson* factors reveals a clear employment relationship between Superior Floors, doing business as Pacific Huts, and Mr. Jaimes as of August 2012.

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<sup>23</sup> *Novenson*, 91 Wn.2d at 553; *Rideau v. Cort Furniture Rental*, 110 Wn. App. 301, 303, 39 P.3d 1006 (2002) (loaned worker); *Brown*, 113 Wn. App. at 648 (borrowed servant from temporary employment agency); *Jones v. Halverson-Berg*, 69 Wn. App. 117, 121, 847 P.2d 945 (1993) (loaned servant).

<sup>24</sup> *Fisher v. City of Seattle*, 62 Wn.2d 800, 805, 384 P.2d 852 (1963) (employment relationship may not be thrust upon a worker without his consent); cf. *Sonnens, Inc. v. Dep’t. of Labor & Indus.*, 101 Wn. App. 350, 353, 3 P.3d 756 (2000) (joint employer agreement)

<sup>25</sup> *Marsland v. Bullitt Co.*, 71 Wn.2d 343, 346-47, 428 P.2d 586 (1967) (independent contractor is not in the same employ and not immunized from suit).

**1. Superior Floors Had the Right to Control Mr. Jaimes.**

Here, it is beyond dispute that Superior Floors, doing business as Pacific Huts, had the right to control Mr. Jaimes in the manner and the means by which he performed his work duties. Factors to consider in determining whether the right to control exists include:

(1) who controls the work to be done; (2) who determines the qualifications; (3) setting pay and hours of work and issuing paychecks; (4) day-to-day supervision responsibilities; (5) providing work equipment; (6) directing what work is to be done; and (7) conducting safety training.<sup>26</sup>

Application of the *Bennerstrom* factors to the evidence on record in this case demonstrates an employment relationship between Superior Floors and Mr. Jaimes:

- Timofey Strizheus (of Superior Floors / Pacific Huts) verbally instructed Mr. Jaimes on what job tasks to do. CP 1299-1301, 1708.
- Timofey Strizheus hired Mr. Jaimes after speaking with him on the telephone and accessing Mr. Jaimes's qualifications. CP 34, 1294, 1702-03.
- Superior Floors set Mr. Jaimes work hours, generally, from 7:00 am to 3:30 pm, and paid Mr. Jaimes \$100 per day. CP 875, 879, 1101-20, 1285.
- Superior Floors provided Mr. Jaimes with all of the work tools and equipment that he needed to complete the job tasks. CP 879, 903, 1295, 1298-99, 1703.

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<sup>26</sup> *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 863, 86 P.3d 826 (2004).

Now, applying these same factors to NDTS, it is clear that NDTS did not have the ability to control Mr. Jaimes's work performance. This is so because NDTS was not operational in August 2012.

**2. Mr. Jaimes Consented to Work for Superior Floors.**

Consent may be given expressly or impliedly and may be inferred from the attending circumstances. See *Fisher*, 62 Wn.2d at 806 (in discussing the consent by an employee the note observed: "Understanding may be inferred from circumstances, but understanding there must be.") (quoting *Murray v. Union Ry. Co. of New York City*, 229 N.Y. 110, 127 N.E. 907 (1920) (Justice Cardozo)). A worker's belief as to whether he or she consented to employment with a specific employer must be reasonable. See *Stelter v. Dep't. of Labor & Indus.*, 147 Wn.2d 702, 709, 57 P.3d 248 (2002).

Here, then, the question is: whether Mr. Jaimes expressly or impliedly consented to being a worker for Superior Floors doing business as Pacific Huts, and whether Mr. Jaimes alleged belief was reasonable. All of the facts on record, prior to this litigation and prior to the dispositive briefing in the trial court, show that Mr. Jaimes consented to an employment relationship with Superior Floors. Examples of Mr. Jaimes's consent are set forth below:

- In his application for workers' compensation benefits and employment verification forms, Mr. Jaimes indicated that Pacific Huts was his employer on August 27, 2012. CP 187, 197.
- Mr. Jaimes consented to the work instructions provided by Timofey Strizheus and identified Tim as his supervisor. CP 197, 875, 879, 903.
- Mr. Jaimes consented to working full time, 40 hours per week for Pacific Huts. CP 187, 197.
- Mr. Jaimes consented to being paid for his services in cash in the amount of \$100 per day from Pacific Huts. CP 187, 197, 875, 879.
- Mr. Jaimes consented to Pacific Huts providing him with tools and equipment. CP 879, 903.
- Additionally, in his Complaint and First Amended Complaint, Mr. Jaimes acknowledged that he worked for Pacific Huts and/or Superior Floors. CP 1, 10.
- In his written discovery responses, Mr. Jaimes again acknowledged that he worked for Pacific Huts and/or Superior Floors. CP 117, 119, 164-85.

Even construing all of these facts in the light most favorable to Mr. Jaimes, objectively reasonable persons would be find it incredibly difficult to say that Mr. Jaimes did not consent to working for Superior Floors.

Regarding the notion that Mr. Jaimes believed that he worked for NDTS, that is not a reasonable under the circumstances. If Mr. Jaimes was so certain that he was a NDTS employee, why in the world would he

ever plead (repeatedly) that he was an employee of Superior Floors? Why would he not identify NDTs on his workers' compensation materials submitted to L&I? And how does he account for NDTs's suspended license of 2011 and lack of business operations in 2012? He can't account for that.

Looking at Mr. Jaimes's argument for what it is, at some point, Mr. Jaimes realized that he needed to identify an entity other than Superior Floors as his employer, otherwise he would be precluded from maintaining this present action.

### **3. Superior Floors Paid Mr. Jaimes's Wages.**

Proof of receipt of wages is also used to establish that an employment relationship exists. See *Clausen*, 15 Wn.2d at 69; *Doty*, 155 Wn.2d at 537. Wages are "monetary remuneration for services performed." *Doty*, 155 Wn.2d at 542. "[T]he very basis of the employee-employer relationship is the performance of service in return for some kind of remuneration therefore[.]" *Id.* at 537. A person who receives no wages is a volunteer and, except in limited circumstances, is not entitled to industrial insurance benefits. *Id.* at 538.

Here, there is no dispute that Mr. Jaimes was paid by Superior Floors for the work he performed between June 2012 and August 2012. Nor is there any doubt that Superior Floors paid the L&I premiums related

to the workers' compensation benefits Mr. Jaimes received due to his workplace injury on August 27, 2012.

Weighing all of these factors together, it becomes abundantly clear that Mr. Jaimes consented to work for Superior Floors, Superior Floors had the right to control Mr. Jaimes's work, and Superior Floors paid Mr. Jaimes for his services. And, because Superior Floors was Mr. Jaimes's employer in August 2012, it is immune from this lawsuit.

The trial court properly dismissed Superior Floors on summary judgment. Accordingly, this Court should affirm.

**G. Mr. Jaimes Should be Estopped from Now Claiming that Superior Floors was Not His Employer in August 2012.**

The trial court aptly noted that Mr. Jaimes "is held to his [ ] statements that he was an employee[,]"<sup>27</sup> and, later, observed that Mr. Jaimes's "own statements and the complaints [and] the interrogatories are inconsistent with his own statements of belief of [NDTS] and that he has acknowledged his employer as Superior Floors, aka Pacific Huts." 2/13 RP 44. Mr. Jaimes first tells L&I that he was an employee of Pacific Huts (to obtain workers' compensation benefits), then asserts in his Complaint that he was employed by Pacific Huts and/or Superior Floors, and now argues that he was employed by NDTS only. The matter of Mr. Jaimes's

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<sup>27</sup> 12/19 RP 36.

August 2012 employment is not À La Carte menu from which he can pick and choose the employment hat that fits him best at the moment.

**1. Mr. Jaimes Cannot Create an Issue of Material Fact by Relying on Contradictory Testimony.**

Mr. Jaimes cannot create a genuine issue of material fact<sup>28</sup> sufficient to avoid summary judgment by submitting testimony that controverts his prior testimony. It is well-established that “[w]hen a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.” *Marshall v. A.C. & S. Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989) (citation omitted); *see also McCormick v. Lake Washington Sch. Dist.*, 99 Wn. App. 107, 111-12, 992 P.2d 511 (1999) (informing that “[s]elf-serving affidavits contradicting prior depositions cannot be used to create an issue of material fact” and holding that teacher’s declaration opposing summary judgment flatly contradicted her earlier deposition testimony such that it could not create an issue of fact); *Unigard Ins. Co. v. Leven*,

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<sup>28</sup> It is well-settled that the controverting facts required by CR 56(e) to defeat summary judgment must be evidentiary in nature. Statements of ultimate facts, conclusory statements of fact, and opinion are insufficient to create a genuine issue for trial. *See Grimwood, v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988).

97 Wn. App. 417, 430-31, 983 P.2d 1155 (1999) (party not allowed to retract earlier statements with contradictory self-serving affidavit).

This truism holds even when a party first makes a written statement, such as Mr. Jaimes in this case, and then attempts to contradict his or her prior statement in deposition testimony. *See AB ex rel. EF v. Rhinebeck Cent'l Sch. Dist.*, 361 F. Supp.2d 312, 316 (S.D.N.Y. 2005) (noting that “just as the court should not accept an affidavit that contradicts deposition testimony, I should not allow inconsistent allegations made in a complaint to defeat summary judgment in the face of contradictory testimony either.”).

In *Rhinebeck*, a student in a sexual harassment action argued that, “even if she did not mention the graduation [harassment] incident in her deposition testimony, it was included in [a previously filed] amended complaint[.]” *Id.* Rejecting this argument, the *Rhinebeck* court concluded: “Faced with deposition testimony that contradicts an affidavit and a complaint, this court must accept [the student’s] sworn testimony.”

*Id.*<sup>29</sup>

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<sup>29</sup> *See also Better Env't, Inc. v. ITT Hartford Ins. Group*, 96 F. Supp.2d 162, 168 (S.D.N.Y. 2000) (the court refused to grant summary judgment to plaintiff whose own prior testimony contradicted his complaint and supporting affidavit); *Pacific Ins. Co. v. Kent*, 120 F. Supp.2d 1205, 1213 (C.D. Cal. 2000) (recognizing that “courts have also precluded the use of a later deposition testimony to contradict prior sworn testimony”) (citation omitted).

Just as the courts in *Marshall*, *McCormick*, *Unigard* and *Rhinebeck* rejected a party's self-serving, contradictory testimony, this Court should reject Mr. Jaimes's multiple contradictions about the identity of his employer in August 2012.

**2. Mr. Jaimes is Judicially Estopped from Now Claiming that NDTS was His Employer in August 2012.**

“Judicial estoppel precludes a party from gaining an advantage by taking one position and then seeking a second advantage and taking an incompatible position in a subsequent action.” *Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 906, 28 P.3d 832 (2001). The doctrine applies when a prior inconsistent position benefited the litigant or was accepted by the court, but does not require privity of the parties, reliance, or prejudice.<sup>30</sup> *Id.* at 907-08.

Whether judicial estoppel should apply to a particular case requires the application of several nonexclusive factors to the particular facts of the case. *See Falkner v. Foshaug*, 108 Wn. App. 113, 124-25, 29 P.3d 771 (2001) (citation omitted). The primary factors of judicial estoppel are whether (1) the nonmoving party's “later position is clearly inconsistent

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<sup>30</sup> “The purpose of judicial estoppel is to bar as evidence statements and declarations by a party which would be contrary to sworn testimony the party has given in the same or prior judicial proceedings.” *King v. Clodfelter*, 10 Wn. App. 514, 519, 518 P.2d 206 (1974) (citations omitted). “The doctrine of judicial estoppel protects the integrity of the judicial process, not the interest of a defendant attempting to avoid liability.” *Miller v. Campbell*, 164 Wn.2d 529, 544, 192 P.3d 352 (2008).

with the [party's] earlier position"; (2) "judicial acceptance of the second position would create a perception that either the first or second court was misled by the party's position"; and (3) "the party asserting the inconsistent position would obtain an unfair advantage or imposes an unfair detriment on the opposing party if not estopped." *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951-52, 205 P.3d 111 (2009).

In this case, the record establishes that (1) Mr. Jaimes received workers compensation benefits by initially claiming Pacific Huts to be his employer; (2) he filed this lawsuit claiming that Pacific Huts and/or Superior Floors was his employer; and (3) now he is claiming that NDTs was his employer for the purposes of circumventing the IIA's exclusive remedy provision. Accordingly, Mr. Jaimes should be estopped from pleading inconsistently now.

Again, the trial court's summary judgment dismissal should be affirmed.

**H. Ms. Lampman's Declaration is Moot and, Even if the Trial Court had Considered Her Declaration, It Would be Harmless Error.**

Mr. Jaimes challenges the trial court's consideration of Kimberly Lampman's declaration that, admittedly, contains hearsay statements regarding her communications with an L&I employee. *See* ER 801(c), 802. This issue is moot.

Mootness can arise at any state of litigation, including appeal. *See Martin v. Municipality of Metro. Seattle*, 90 Wn.2d 39, 40-42, 578 P.2d 525 (1978). “Issues are moot when the court can no longer provide effective relief and only abstract questions remain.” *In re Detention of Williams*, 106 Wn. App. 85, 99, 22 P.2d 283 (2001) (citation omitted), *affirmed in part and reversed in part on other grounds by*, 147 Wn.2d 476, 55 P.3d 597 (2002).

In this case, the record clearly shows that the trial court did not even consider the hearsay in Ms. Lampman’s declaration in its decision to dismiss Superior Floors on summary judgment:

The Court *cannot consider the hearsay allegations* from the Labor and Industries employer that there wasn’t ever in [ ] the heading of NDTs in the Labor and Industries documents. *That’s clearly hearsay, and the Court cannot consider it.*<sup>31</sup>

Even assuming *arguendo* that the trial court factored Ms. Lampman’s declaration into its ruling – which the trial court did not – any error in accepting Ms. Lampman’s hearsay statements was harmless. “The test is whether the untainted evidence (untainted by the offending hearsay) is so overwhelming that any error is harmless.” *State v. Edwards*, 131 Wn. App. 611, 615, 128 P.3d 631 (2006) (citation omitted). Here, the

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<sup>31</sup> 2/13 RP 43 (emphasis added).

“overwhelming untainted evidence” shows that Mr. Jaimes worked for Superior Floors in August 2011.

### **CONCLUSION**

On August 27, 2012, NDTS Construction, Inc. did not exist. At that time, NDTS had a suspended license (with L&I), a closed tax account (with the Department of Revenue), was not conducting any business operations, and was no longer using the Pacific Huts trade name. Most importantly, at that time, NDTS did not have any employees. Thus, under the most favorable view of the facts, Mr. Jaimes could not have been an NDTS worker in August 2012. Reasonable minds cannot differ upon these facts.

Before commencing this lawsuit, and at certain points during the pendency of this litigation, Mr. Jaimes claimed and acknowledge that he worked for Superior Floors and/or Pacific Huts in August 2012. Mr. Jaimes is correct; he did work for Superior Floors at that time. This fact is undisputed. Superior Floors had the ability to control Mr. Jaimes’s work and paid Mr. Jaimes for his services. Importantly, at a minimum, Mr. Jaimes impliedly consented to this work relationship with Superior Floors.

Since Superior Floors was Mr. Jaimes’s employer on the date of his workplace injury, and because Superior Floors paid for Mr. Jaimes’s workers’ compensation benefits through L&I premiums, it is immune

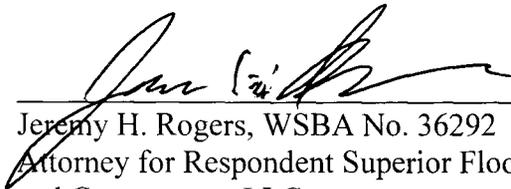
from this tort personal-injury action. The IIA structure has worked as originally intended in this case: Mr. Jaimes has received swift and certain relief for this industrial injuries. And, in exchange for this relief, he cannot now sue Superior Floors.

The trial court made the correct ruling below. Finding that there is no “material question of fact as to whether Superior Floors was [Mr. Jaimes’s] employer,”<sup>32</sup> the trial court properly granted the motion for summary judgment and dismissed all claims against Superior Floors.

For all of the above reasons, Superior Floors request that this Court affirm the summary judgment dismissal of Mr. Jaimes’s claims.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of October 2015.

**SMITH FREED & EBERHARD, P.C.**

  
\_\_\_\_\_  
Jeremy H. Rogers, WSBA No. 36292  
Attorney for Respondent Superior Floors  
and Countertops, LLC

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<sup>32</sup> 2/13 RP 45.

**CERTIFICATE OF SERVICE**

I declare that I served a true and correct copy of the foregoing

**BRIEF OF RESPONDENT** as follows:

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DATED this 19<sup>th</sup> day of October 2015.

*Angela Torcolini*  
Angela Torcolini

# **APPENDIX**



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TAX REGISTRATION NO : 602400789	ACCOUNT OPENED : 6/1/2004 12:00:00 AM
UBI : 602400789	ACCOUNT CLOSED : 6/30/2011 12:00:00 AM
ENTITY NAME : NDT5 CONSTRUCTION INC	
BUSINESS NAME :	
MAILING ADDRESS :	BUSINESS LOCATION :
13433 NE 20TH ST STE F	13433 NE 20TH ST STE F
BELLEVUE, WA 98005-2024	BELLEVUE, WA 98005-2024
ENTITY TYPE : CORPORATION	RESELLER PERMIT NO: A18 5063 12
	PERMIT EFFECTIVE: 1/4/2011
NAICS CODE : 236115	PERMIT EXPIRES: 6/30/2011
NAICS DEFINITION NEW SINGLE-FAMILY HOUSING CONSTRUCTION (EXCEPT FOR-SALE BUILDERS)	

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