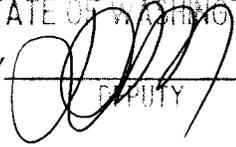


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

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

NO. 40802-3-II

RICHARD DAVIS,
Appellant.

v.

DARIN MILLIKAN and HIRE SOURCE, INC., a corporation;
and JOBS 4 U, INC., dba Hire Source Staffing,
Respondents.

RESPONDENTS' BRIEF

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I. INTRODUCTION

This matter arises out of the failure of a safety device on equipment owned and maintained by Cadet Manufacturing Company and operated jointly by Appellant Richard Davis and Respondent Darin Millikan. Mr. Davis was a permanent employee of Cadet, while Mr. Millikan was a temporary employee of the same employer. As a result of the subject accident, Appellant filed suit against both Respondent Millikan and against Respondent Hire Source, the temporary labor provider that had sent Respondent Millikan to the Cadet facility at Cadet's request.

On summary judgment, the Superior Court dismissed the *respondeat superior* claims against Respondent Hire Source on the basis of the Loaned Servant Doctrine. The Superior Court subsequently dismissed the remaining claims against Respondent Millikan pursuant to the statutory immunity granted by the Industrial Insurance Act.

II. COUNTERSTATEMENT OF ISSUES ON APPEAL

Appellant's statement of the issues on appeal is unnecessarily argumentative and repetitive. A concise statement of the issues pertaining to Appellant's assignments of error is as follows:

1. Did the lower court err in dismissing Appellant's *respondeat superior* claims against Hire Source, based on the Loaned Servant Doctrine?

2. Did the lower court err in dismissing Appellant's negligence claim against Darin Millikan, based on the statutory immunity of "co-workers" under the Industrial Insurance Act?

III. COUNTERSTATEMENT OF THE CASE

Respondents Hire Source, Inc., Jobs 4 U, Inc., and Hire Source Staffing (collectively "Hire Source") are a single entity. (CP 73-77.) Hire Source is a provider of temporary contract workers for manual labor jobs, and is in the sole business of placing temporary employees in short-term and long-term job assignments based on the temporary worker's qualifications and the needs of Hire Source's business clients. (CP 73-77.)

As of May 2007, Cadet Manufacturing Company ("Cadet") was one of Hire Source's clients. (CP 73-77.) Hire Source had provided numerous work-release employees to Cadet's fabrication department since 1994. (CP 73-77.) Plaintiff Richard Davis was one such employee; Mr. Davis had originally worked for Cadet as a temporary employee under the work-release program, but had been hired by Cadet on a permanent basis shortly prior to the subject incident. (CP 73-77.)

In May 2007, Cadet requested a temporary worker from Hire Source to operate machinery in its fabricating department. (CP 73-77.) No particular experience or skill was required for this position. (CP 73-77.) Cadet's only requirements were that the worker have a minimum level of

physical fitness that would permit him to stand and operate machinery in a noisy environment for eight to ten hours per day. (CP 73-77; CP 35; CP 56-57.)

A work-release supervisor contacted Hire Source on or about May 22, 2009, requesting a job placement for Darin Millikan. (CP 73-77.) Hire Source's president Laura Hayes matched Mr. Millikan to the position in Cadet's fabricating department. (CP 73-77.)

Mr. Millikan met Ms. Hayes at the Cadet facility on May 23, 2007. (CP 73-77; CP 68.) Ms. Hayes gave Mr. Millikan an introductory tour of the facility, and introduced Mr. Millikan to Cadet supervisor Jerry Neff. (CP 73-77; CP 68.) Hire Source had no further contact with Mr. Millikan for purposes of the specific work to be performed for Cadet. (CP 73-77; CP 69.) Hire Source had no involvement in Cadet's assignment of Mr. Millikan to the job of "press operator", as opposed to any other job in Cadet's fabricating department. (CP 73-77; CP 58; CP 61-63.)

Cadet was responsible for providing the necessary protective equipment for the fabricating job. (CP 73-77; CP 68-69; CP 47-49.) A representative of Cadet showed Mr. Millikan the heavy-duty press that Mr. Millikan was assigned by Cadet to operate. (CP 70-71; CP 33-34; CP 45-46.) A representative of Cadet demonstrated the operation of the press to Mr. Millikan and instructed Mr. Millikan on how to operate the press. (CP

70-71.)

Once in the fabricating department, Mr. Millikan reported to Cadet, which exercised control over Mr. Millikan's work. (CP 73-77.) If Mr. Millikan failed to obey Cadet's instructions, Cadet had the right to terminate Mr. Millikan's assignment with Cadet. (CP 73-77.) Although it could not "fire" a temporary worker, Cadet had the ultimate authority to end a temporary worker's assignment to Cadet. (CP 52-54.)

Hire Source charged Cadet an hourly rate for the services of its temporary employees, and Hire Source would then compensate the temporary worker. (CP 73-77.) Each Cadet employee was issued a badge by Cadet, with which he or she was to clock in and out of the Cadet facility. (CP 73-77; CP 36; CP 59-60.) Cadet then input the employee's time into its time management software and generated time sheets for each employee. (CP 73-77; CP 60-61.) Hire Source picked up those time sheets from Cadet, issued paychecks to its temporary workers, and generated an invoice to Cadet for the temporary worker's time. (CP 73-77; CP 60.) The hourly rate charged to Cadet covered the worker's hourly wages, as well as his worker's compensation premiums, social security taxes, and similar costs. (CP 73-77; CP 37-38.)

Ms. Hayes was sometimes present at the Cadet facility in order to meet new temporary workers and introduce them to Cadet supervisor Jerry

Neff. (CP 73-77.) However, neither Ms. Hayes nor any other Hire Source representative had the authority to supervise the temporary employee's work on Cadet's fabricating floor. (CP 73-77.)

Hire Source did not provide any training or instruction regarding Cadet's fabricating equipment. (CP 73-77; CP 62; CP 69.) Any and all such training was provided by Cadet. (CP 73-77.) Once assigned, the temporary employee's specific job duties and the performance thereof were wholly within the control of Cadet. (CP 73-77; CP 36; CP 63.) Moreover, Cadet did not differentiate between permanent and temporary employees in its fabricating department. (CP 39-40; CP 50.)

Subsequent to the accident of May 23, 2007, Cadet and the Washington State Department of Labor & Industries conducted an investigation. (CP 41-42.) The only possible explanation for the incident, and the one for which Cadet was fined by the Department, was that the equipment's safety device known as the "light curtain" had failed. (CP 43-44.) According to Cadet's CR 30(b)(6) deposition, the specific sequence of events that resulted in Mr. Davis' injury could not have occurred but for a failure of the light curtain. (CP 55.) Based on the investigation and the facts known to Cadet and the Department of Labor and Industries, Cadet does not believe that Mr. Millikan could have done anything to prevent the subject incident. (CP 51-52.)

Cadet did not terminate Mr. Millikan's assignment as a result of the subject incident. (CP 73-77; CP 51.) Instead, Cadet kept Mr. Millikan on as a temporary worker for more than four months after the date of the subject incident, until September 26, 2009. (CP 73-77.) Mr. Millikan left Cadet and Hire Source when he obtained permanent employment elsewhere. (CP 73-77.)

On or about March 31, 2009, Appellant Richard Davis filed suit against Respondents Darin Millikan and Hire Source. (CP 1-2.) His Amended Complaint, filed on or about August 8, 2009, asserts a direct negligence claim against Respondent Darin Millikan, and a vicarious liability claim against Respondent Hire Source. (CP 3-5.)

On or about December 24, 2009, Respondents filed a motion for summary judgment, arguing among other things that Appellant's *respondeat superior* claims against Respondent Hire Source were barred by the application of the Loaned Servant Doctrine. (CP 11-77; CP 143-156.) On or about January 29, 2010, the lower court granted the motion in part, dismissing Appellant's claims against Respondent Hire Source on the basis of the Loaned Servant Doctrine. (CP 157-158.) On or about March 4, 2010, Respondent Millikan filed a motion for summary judgment, arguing that, as Appellant's "co-worker", he was immune from suit under the Industrial Insurance Act, Title 51 RCW. (CP 159-218; CP 255-259.) On or about

April 30, 2010, the lower court granted Respondent Millikan's motion for summary judgment and dismissed Appellant's remaining claims, holding that Respondent Millikan was entitled to statutory immunity. (CP 260-261.)

This appeal followed.

IV. ARGUMENT

A. The lower court did not err in dismissing Appellant's *respondeat superior* claim against Hire Source. Appellant's claim is barred by the operation of the Loaned Servant Doctrine.

As a preliminary matter, Appellant appears to continue to misunderstand the argument made by Respondent Hire Source in the proceedings below. Respondent Hire Source has at no time asserted that it is immune from liability under the Industrial Insurance Act, nor has it asserted that it is "vicariously immune" from liability as a beneficiary of Respondent Millikan's immunity.¹ Instead, Respondent Hire Source asserted, and continues to assert, that pursuant to the Loaned Servant Doctrine, Respondent Millikan must be deemed the employee not of Hire Source but of Cadet for purposes of any and all relevant acts or omissions, such that *respondeat superior* liability is not triggered in the first instance.

For purposes of the instant appeal, Respondent Hire Source

¹ While this is an argument that may have been raised had the Clark County Superior Court denied Respondent Hire Source's motion while dismissing the claims against Respondent Millikan, it was unnecessary to raise this argument in the proceedings below, because both Respondents were dismissed on summary judgment.

concedes that it is not entitled to the benefit of Respondent Millikan's immunity, because this argument was not briefed on summary judgment below. As such, this issue is moot on appeal, and Respondent Hire Source will provide no further response to Appellant's argument on this issue.

The Loaned Servant Doctrine² holds that one who is in the general employ and pay of one person may be loaned by his employer to another, and when he undertakes to do the work of the other he becomes the servant of such other, to perform the particular transaction. *Olsen v. Veness*, 105 Wn. 599, 601 (1919). The Washington Courts of Appeals, the Washington State Supreme Court and the Ninth Circuit Court of Appeals all speak to the application of the doctrine in cases such as the one at bar.

Under the rule of respondeat superior, an employer is vicariously liable to third parties for his servant's torts committed within the scope of employment. Restatement (Second) of Agency 219, at 481 (1958). An employer, however, may loan his servant to another employer. When a servant's general employer loans his servant to the borrowing, or "special" employer, the servant then becomes the "borrowed servant" of the special employer to perform a particular transaction. If it can be established that the servant had borrowed servant status at the time of performance of such transaction, the servant's general employer can escape

² The "loaned servant" doctrine is also referred to as the "borrowed servant" defense and the "loaned employee" doctrine.

liability for damage or injuries flowing from the transaction.

Stocker v. Shell Oil Co., 105 Wn. 2d 546, 548 (1986) (internal citations omitted).

20 years prior to *Stocker*, the Washington Supreme Court analyzed the factors to be considered in applying the Loaned Servant Doctrine. In *Nyman v. MacRae Brothers Construction*, 69 Wn.2d 285 (1966), Seaborn leased from MacRae a large crane with an operator and an oiler. The crane was to provide the power for operating a pile-driving machine. While on the job, the crane operator pulled the wrong lever in the cab of the crane causing a cable that was attached to a large piling to become taut. The piling swung down and struck Nyman, causing a leg injury. *Nyman v. MacRae Brothers Construction*, 69 Wn.2d 285, 286. Nyman sued MacRae, which argued that it had no liability under the borrowed employee doctrine. The Washington Supreme Court agreed, noting that the question was whether Bickler, the crane operator, was:

(1) the servant of his general master, the Mobile Crane Company; or (2) the servant of the 'borrowing' master, the Seaborn Pile Driving Company; or (3) the servant of both companies. 1 Restatement (Second), Agency §§ 226, 227 (1958). Obviously, he remained the servant of the Mobile Crane Company in the sense that he was still in their employ. But the question remains as to whether Bickler, in performing certain

functions with the crane for Seaborn Pile Driving Company, became the servant of that company to that limited extent. There can be no question that '(h)e may become the other's servant as to some acts and not as to others.' 1 RESTATEMENT, AGENCY (SECOND) § 227 (1958).

Id. at 288.

Similarly, in *Brown v. Labor Ready Northwest, Inc.*, 113 Wn.App. 643 (2002), the lower court granted defendant Labor Ready's motion for summary judgment on the basis that plaintiff was a "borrowed servant." There, the relationship between the temporary labor provider, Labor Ready, and the special employer, CMI, was practically identical to that of Hire Source and Cadet herein: CMI contacted Labor Ready for temporary employees, Labor Ready provided a worker, the worker kept track of his time on a time card verified by CMI and the worker then submitted the timecard for payment by Labor Ready. Similar to the Cadet job site herein, at the CMI jobsite CMI issued equipment, supervised Henson, provided Henson instructions on how to perform his work, and had the ability to terminate the temporary employee from his assignment with CMI.

After an incident in which plaintiff Brown alleged that Henson had negligently operated a forklift, thereby causing injury to Brown, Brown filed suit against Labor Ready on a theory of vicarious liability for

Henson's negligence. Labor Ready prevailed at summary judgment, on the basis that the borrowed servant doctrine constituted a complete defense to the vicarious liability claim.

In upholding the dismissal of Labor Ready, Division I of the Court of Appeals held that

[E]xclusive control for all purposes is not required, as the facts of *Nyman* clearly demonstrate. Rather, the question is the control of the borrowed servant by the borrowing employer for the transaction causing injury.

* * *

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

Brown at 650-52.

As in *Nyman* and *Brown, supra*, Mr. Millikan was expected to work under the direction of his temporary employer, Cadet Manufacturing Co.; Hire Source had relinquished all right to control Mr. Millikan in his day-to-day work for Cadet; and Cadet exercised that right of control over

Mr. Millikan's daily work instead. Mr. Millikan was performing his work at Cadet under the direction of Cadet's workers and supervisors; he was to have his timecards verified and processed by Cadet; and he was operating a heavy-duty press provided by Cadet, and in the operation of which he had been trained by Cadet, at the time of the alleged incident. Moreover, no Hire Source employee was on site at any time to supervise Mr. Millikan's work once Mr. Millikan had been turned over to Cadet.

Like the Washington state courts, the Ninth Circuit Court of Appeals has recognized the Loaned Servant Doctrine, focusing on the analysis of who has the "power to control the servant":

'When one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as the servant of the latter and not of the former.'

...

... it is not essential, in order to constitute an employee a loaned servant, that the general employer relinquish full control over his employee, or that the special employee be completely subservient to the borrower. While the latter must possess the power of 'authoritative direction and control' over the employee (*Standard Oil v. Anderson*, supra 212 U.S. at 222, 29 S.Ct. at 252) so that his directions will have 'the force of a command' (*Denton v. Yazoo*, supra, 284 U.S. at 310, 52 S.Ct. at 142), this authority need not extend over every incident of an employer-employee relationship, but only

over the servant's performance of the particular work in which he is engaged at the time of his negligent act or omission.

McCollum v. Smith, 339 F.2d 348, 351 (9th Cir. 1964).

The crucial question is which employer had the right to control the particular act giving rise to the injury. In this connection *Restatement, Agency*, § 227, Comment a(2), states: '... Since the question of liability is always raised because of some specific act done, the important question is not whether or not he remains the servant of the general employer as to matters generally, but whether or not, as to the act in question, he is acting in the business of and under the direction of one or the other.'

McCollum v. Smith, 339 F.2d at 352.

In the case at bar, Cadet had complete control over the Hire Source temporary employee, Respondent Darin Millikan, for purposes of the transaction causing injury to the plaintiff. Mr. Millikan was trained in the operation of the machine by Cadet's supervisor and/or employees, and was subject to the supervision of Cadet while on Cadet's fabricating floor. Mr. Millikan was acting in the business of Cadet, by operating Cadet's equipment in order to manufacture parts for Cadet. Cadet expected Mr. Millikan to follow Cadet's instructions while working in Cadet's facility. If he failed to obey instruction, Mr. Millikan's assignment to Cadet could be terminated by Cadet.

Similarly, Cadet had complete control over the machinery operated by Appellant and Respondent Millikan at the time of the accident. Respondent Hire Source had neither the ability nor the authority to interfere in the operation of the equipment. Rather, Cadet had complete control over Mr. Millikan and his performance of the duties assigned to him by Cadet while under Cadet's charge. The specific transaction causing injury to the plaintiff, *i.e.*, the operation of the heavy-duty press, was therefore wholly outside Hire Source's control and instead within the control of Cadet.

The significant and material parallels between *Nyman, Brown* and the case at bar, combined with Cadet's "right to control" – pursuant to the standard set forth in *McCollum* and the Restatement of Agency – Respondent Millikan and the machinery he was operating at the time of the subject accident, establish that the Loaned Servant Doctrine was properly applied to bar Appellant's claims against Respondent Hire Source in the instant matter.

Significantly, Appellant presents no argument whatsoever that the Loaned Servant Doctrine, as recognized under Washington law, does not apply to the facts of this case. He does not attempt to distinguish the instant case from those cited by Respondent Hire Source, nor does he cite other Washington cases that could potentially lead to a different result. He

cites no Washington authorities that would mandate an outcome other than that reached by the Clark County Superior Court.

Instead, Appellant limits his argument to a demand that this Court should wholly disregard long-standing precedent, asserting that the Loaned Servant Doctrine is outdated and should be abandoned in favor of the concept of “enterprise liability”.³ He relies on Kansas, Louisiana and Alaska case law directly contrary to Washington precedent in support of his argument. However, Appellant fails to acknowledge the fact that the Loaned Servant Doctrine is one that has been applied in this jurisdiction since at least 1908, and has been applied to bar claims against a general employer as recently as 2003.⁴ *See Stewart v. Balfour*, 51 Wn. 127 (1908); *Brown v. Labor Ready Northwest, Inc.*, 149 Wn.2d 1011 (2003). Moreover, Appellant fails to acknowledge that the cases upon which he relies predate Washington’s more recent applications of the Loaned Servant Doctrine by up to 23 years.

The 1992 case of *Bright v. Cargill, Inc., and Labor Source, Inc.*, 837 P.2d 348 (Ka., 1992), decided by the Kansas Supreme Court almost two decades ago, held that a Loaned Servant Doctrine relationship exists

³ In his conclusion, Appellant expressly concedes that, unless the Loaned Servant Doctrine is abandoned as the law of this jurisdiction, it applies to bar Appellant’s claims against Respondent Hire Source.

⁴ The doctrine has been applied in an unpublished decision as recently as 2006. *Styren v. Labor Ready*, 135 Wn.App. 1017 (Div. 3, 2006).

in that state only where the employee has abandoned service to the general employer. The Kansas court went on to apply what it termed a “modern” cost-shifting concept of “enterprise justification” to loaned servants, while rejecting the control rationale in its entirety. *I.e.*, it placed the losses caused by an employee’s conduct on the employer benefiting from the “enterprise”, while expressly rejecting the rationale that the employer with the right and ability to control the specific action causing the injury should be the liable entity.

When presented with a similar inquiry, the Washington Supreme Court refused to employ the approach adopted by the Kansas Supreme Court. As stated above, the Washington courts have expressly held that a worker may be a “loaned servant” within the meaning of the doctrine even where he has not abandoned service to his general employer. *See Nyman*, 69 Wn.2d at 288. Similarly, unlike Kansas, Washington has specifically adopted the “control” inquiry, and has set forth a cogent analysis of the type and amount of control required to render an employee a loaned servant: Exclusive control for all purposes is unnecessary; if the borrowing employer controlled the loaned servant for purposes of the transaction causing injury, vicarious liability shifts from the general to the borrowing employer. *See Brown*, 113 Wn.App. at 650-52; *McCollum v. Smith*, 339 F.2d at 352.

In the case at bar, established Washington law holds that Cadet, which controlled the equipment and Respondent Millikan's use thereof, is the borrowing employer within the definition of the Loaned Servant Doctrine. By contrast, Respondent Hire Source had neither the right nor the ability to interfere in the maintenance or operation of that equipment. It would not only violate the law of this jurisdiction to hold Hire Source liable under these circumstances, but it would also be patently unjust to do so, as Hire Source had no right of control and the incident has been found to have occurred as a result of the failure of Cadet's equipment.

Similarly, Washington has rejected an approach such as that employed by the Louisiana court in *Morgan v. ABC Manufacturer, et al.*, 710 So.2d 1077 (La., 1998), which deemed it "unreasonable" to choose between two employers for purposes of liability, where each had the right to control the employee's actions. *Morgan v. ABC Manufacturer, et al.*, 710 So.2d 1077, 1081. By contrast, Washington has expressly adopted the concept that "a servant [can] have only one master at a time" because "the finding that a loaned employee [is] a borrowed servant mean[s] that his relationship with the general employer [is] temporarily suspended, thus precluding liability." *Id.* Interestingly, *Morgan* specifically acknowledges that this "remains the prevailing view in many of our sister states", citing *Stocker v. Shell Oil Co., supra*, as well as examples of case law from New

York, Georgia, Missouri, Arizona, Michigan, Ohio, New Mexico, Rhode Island and Illinois. *Morgan*, 710 So.2d at fn 7.

The rationale for this “right to control” approach is that the employer who has “the right to control the specific acts of the employee at the time of the accident ... is in the best position to prevent the injury.” *Morgan*, 710 So.2d at 1080; *see also McCollum v. Smith, supra* (holding that, because “the question of liability is always raised because of some specific act done”, control is relevant only with respect to “the particular work in which [the loaned servant] is engaged at the time of his negligent act or omission”.)

It is undisputed that Respondent Hire Source had no right of control whatsoever with respect to the maintenance or operation of Cadet’s fabricating equipment, or with respect to Respondent Millikan’s use of that equipment. Unlike a situation in which both employers have the right to control the employee’s actions, only Cadet had the right to control Respondent Millikan’s actions at any time relevant to this inquiry.

For the same reasons, Appellant’s reliance on the 1980 Alaska Supreme Court case of *Kastner v. Toombs*, 611 P.2d 62 (Ak., 1980), is misplaced. Alaska, like Kansas, appears to have decided that the borrowed servant exception to *respondeat superior* liability is too confusing to apply consistently, such that a general employer always

remains liable for the acts of its employee. This is directly contrary to Washington law, which refuses to abdicate the responsibility of engaging in a detailed inquiry, and instead evaluates who controlled the specific event that resulted in the plaintiff's injury.

On the record before this court, it is undisputed that Mr. Millikan was a Hire Source employee, who was under the supervision and control of Cadet for purposes of the specific transaction that caused injury to Mr. Davis, *i.e.*, the operation of the press. It is undisputed that Hire Source had no involvement and no authority with respect to Mr. Millikan's specific assignment to the press while on the Cadet fabricating floor, to the perhaps cursory press-specific training provided to Mr. Millikan by Cadet, to Mr. Millikan's operation of the press, or to the press itself. Cadet exercised complete control over every aspect of the specific act or transaction in question, thereby rendering Mr. Millikan a loaned servant for purposes of the operation of the instrumentality causing the injury, *i.e.*, the press.

The Loaned Servant Doctrine is well-established in Washington law, as well as in the common law of many other states. Appellant's preference for the laws of Kansas, Louisiana and Alaska, while understandable in the context of the case at bar, is insufficient to overturn established precedent. Moreover, policy questions such as those set forth

by Appellant should be directed to the legislature, rather than to the courts, which are charged with the duty to apply existing law. Existing law, in turn, mandates application of the Loaned Servant Doctrine and the affirmation of the lower court's summary judgment ruling, especially in the absence of any controlling legal authority to the contrary.

B. The lower court did not err in dismissing Appellant's negligence claim against Darin Millikan. Appellant's claim is barred by the Industrial Insurance Act, Title 51 RCW.

RCW 51.04.010 abolishes all civil actions for workplace injuries by an injured worker as against his employer and co-workers working for the same employer. *See* RCW 51.04.010. Statutory immunity therefore protects companies and individuals from litigation by employees and co-workers, respectively, in favor of compensation provided by the State to any and all injured workers.

It is undisputed that Appellant Richard Davis cannot file suit against his employer Cadet, because Cadet is entitled to workers' compensation immunity pursuant to RCW 51.04.010. It is equally undisputed that, if Respondent Darin Millikan is deemed to have been an "employee" of Cadet within the meaning of RCW 51.04.010, then Mr. Millikan is entitled to statutory immunity as Mr. Davis' co-worker.

An employment relationship that triggers the statutory bar to suit

by an injured worker against his employer is deemed to exist 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 v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d 550 (1979) (citing *Marsland v. Bullitt Co.*, 71 Wn.2d 343 (1967); *Fisher v. Seattle*, 62 Wn.2d 800 (1963))). Appellant did not and does not oppose the argument that Cadet exercised control over Respondent Millikan for purposes of the workers' compensation analysis, instead focusing solely on the consent prong of the inquiry. As such, the issue of control, which was addressed in detail in the context of the Loaned Servant analysis above, will not be addressed further.⁵

Washington case law bears out Respondent's position that the consent of a non-injured borrowed employee is not required in order to bring that borrowed employee within the definition of a "co-worker" for purposes of RCW 51.04.010. Unlike an injured employee, who is deemed to have given up his rights to file a civil claim only if he expressly did so by consenting to the employment relationship, the non-injured borrowed employee gives up no rights as against his employer. As such, he must only have been subject to the control of the employer in order for the

⁵ Notably, if Respondent Millikan is found not to have been required to consent to an employment relationship in order to gain the benefit of statutory immunity, there is nothing in the record before this Court that would warrant reversal of the lower court's ruling on the issue of control.

borrowing employer to become his “employer” for vicarious liability purposes, and in order for the borrowed servant to gain the attendant benefit of statutory immunity.

The reason for the difference between the two concepts is readily explained by the difference between the nature of the two liabilities involved. The end product of a vicarious liability case is not an adjustment of rights between employer and employee on the strength of their mutual arrangement, but a unilateral liability of the master to a [third party]. The sole concern of the vicarious liability rule, then, is with the master: did he accept and control the service that led to the [third party]’s injury? If he did, it is of no particular importance between him and the [third party] whether the servant enjoyed any reciprocal or contractual rights vis-a-vis the master. Accordingly, the Restatement of Agency says plainly that the master must consent to the service, but nowhere requires that the servant consent to serve the master or even know who he is.

Novenson v. Spokane Culvert & Fabricating Co., 91 Wn.2d 550, 554.

A finding that Respondent Millikan is Cadet’s employee for vicarious liability purposes does not require the adjudication of any rights between Mr. Millikan and Cadet “on the strength of their mutual arrangement”; instead, it is an adjudication only of Cadet’s potential vicarious liability to a third party. As such, the inquiry of whether Cadet was Mr. Millikan’s employer focuses not on Mr. Millikan, but on Cadet as

the “master”, who accepted and controlled the service that that led to Mr. Davis’ injury. Cadet is Mr. Millikan’s “employer” for vicarious liability purposes because it consented to Mr. Millikan’s service, but does not require that Mr. Millikan consented to serve Cadet.

Appellant references *Fisher v. City of Seattle*, 62 Wn.2d 800 (1963) in support of his proposition that consent is a necessary element of immunity. However, *Fisher* is wholly inapposite because, as conceded by Appellant himself, it addresses only an injured employee’s right to sue his employer, rather than his right to sue a non-injured co-worker who happens to be a loaned servant. The only published decision that squarely addresses the relationship between an employer and a borrowed employee who is not the injured claimant is *Brown v. Labor Ready*. It, in turn, specifically holds that “[c]onsent of the borrowed employee is [...] irrelevant in cases where the borrowed employee is not the claimant.” *Brown v. Labor Ready*, 113 Wn.App. 643, 649 (2002) (emphasis added).

Appellant fails to cite any authority whatsoever in support of his position that a borrowed employee’s consent is required before he can avail himself of co-worker immunity. Instead, Appellant relies solely on emotional arguments and the assertion that the *Brown* court failed to fully explain its decision. This, however, is insufficient for a reversal of the lower court’s decision on summary judgment. Moreover, the argument

that Mr. Millikan should be required to consent to the benefits, as opposed to the burden, of the employment relationship, is not borne out by any legal authority.

Unless this Court abandons Washington's Loaned Servant Doctrine and holds Respondent Hire Source vicariously liable for acts over which it had neither actual control nor any right of control, Respondent Millikan's statutory immunity is a logical corollary of the Doctrine. If Respondent Hire Source was not Mr. Millikan's "employer" for purposes of the injury-causing operation of Cadet's machinery, then Cadet must have been his employer for that purpose. In turn, because Cadet is immune from liability as Mr. Davis' employer, Mr. Millikan must be immune as Cadet's employee and Mr. Davis' co-worker.

Finally, Appellant would have this Court believe that the issue of consent is one to be determined by the finder of fact, rather than as a matter of law, and that this factual issue should have sufficed to defeat Respondents' motion below. However, the existence of consent by Respondent Millikan would be relevant only if the consent of a borrowed servant were necessary to worker's compensation immunity in the first instance. Because it is not, even if there is conflicting evidence on the issue of whether Respondent Millikan consented to the employment relationship, this Court need not reach that issue, because it is not a

necessary element of the statutory immunity analysis at issue here.

If this Court applies the Loaned Servant Doctrine as it has been established in this jurisdiction, Cadet rather than Hire Source must be deemed to have been Respondent Darin Millikan's employer for purposes of his actions and/or omissions at the time of the subject incident. This, in turn, leads to the inescapable conclusion that Respondent Millikan, as an employee of Cadet, was a co-worker of Appellant Richard Davis, and is therefore immune from suit under RCW 51.04.010.

V. CONCLUSION

Respondent respectfully requests that this Court affirm the Clark County Superior Court decisions dismissing Appellants' claims against Hire Source and Darin Millikan in their entirety, based on the operation of the Loaned Servant Doctrine and the Industrial Insurance Act, respectively.

Respectfully submitted this 14th day of September, 2010.

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

NO. 40802-3-II

RICHARD DAVIS,
Appellant.

v.

DARIN MILLIKAN and HIRE SOURCE, INC., a corporation;
and JOBS 4 U, INC., dba Hire Source Staffing,
Respondents.

CERTIFICATE OF SERVICE

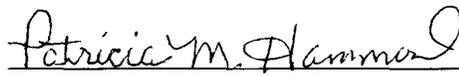
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I hereby certify that I have arranged to have copies of Respondents' Brief sent for service upon the following in the manner noted:

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SIGNED THIS 14 day of September, 2010, at Seattle, Washington.



PATRICIA HAMMOND

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