

No. 48852-3

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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Judson D. Forks

Appellant,

vs.

Encon Washington LLC

Respondent,

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**APPELLANT'S REPLY BRIEF**

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Jesse Froehling, WSBA #47881  
122 East Stewart Ave.  
Tacoma, WA 98372  
Telephone: (253) 770-0116  
Facsimile: (253) 770-0144  
Attorney for Appellant

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## I. ARGUMENT

### A. Encon's position defies the clear public policy behind the Industrial Insurance Act

Encon does not argue that Mr. Forks was not an employee of Aerotek. Rather, it seeks to construe a policies and procedures agreement to which it is not a party to counteract the public policy supporting Washington's Industrial Insurance Act. Under Encon's interpretation of the policies and procedures agreement that Judson Forks signed as part of his employment with Aerotek, Encon would evade any liability under tort law or the Industrial Insurance Act and have no incentive to provide Aerotek employees with a safe workplace. In fact, if the Court sustains the trial court's grant of summary judgment, Mr. Forks respectfully submits that this case will become a roadmap for workplaces that wish to circumvent liability under both the Industrial Insurance Act as well as tort liability.

As detailed in Mr. Forks's opening brief, Mr. Forks was injured after a supervisor, employed by Encon, directed Mr. Forks to help a forklift driver – also employed by Encon – to direct a jig into place. (CP 206). As he did so, the replacement rebar pins in the jig snapped and trapped Mr. Forks against the wall. (CP 206). In an effort to free himself, he suffered a winged scapula.

Encon's interpretation – as well as the trial court's interpretation -- of relevant case law allows Encon to escape liability for Mr. Forks' injuries not because its employees were not negligent, but because, as a result of a contract to which Encon is not a party, it is responsible in neither tort law nor the workers' compensation system to compensate Mr. Forks for his injuries. This interpretation flies in the face of case law as well as the language of the Industrial Insurance Act.

The purpose of the Act is to “reduc[e] to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.” RCW 51.12.010. An interpretation of the Act that eliminates any incentive for an employer to provide a safe workplace certainly does not accomplish the policy supporting the Act. Even as early as 1939, courts seemed to recognize as much.

In *Lunday v. Department of Labor and Industries*, 200 Wash. 620, 94 P.2d 744, the Court noted the policy behind the Act as it existed at the time: “No employer or workman shall exempt himself from the burden or waive the benefits of this act by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be pro tanto void.” *Id.* at 623. Later, in *Fisher v. City of Seattle*, 62 Wn.2d 800, 384 P.2d 852 (1963) the Court noted that the Act “affords immunity

to the employer only; it is not a bar to an action against a negligent third party.” *Id.* at 852. The Court also noted that “[c]ompensation law . . . is a mutual agreement between the employer and the employee under which both give up and gain certain things.” *Id.* at 855 (*citing* 1 Larson, Workmen’s Compensation Law § 47.10 (1952)).

Finally, in *Novenson*, the Court noted that employers who choose to hire temporary workers must – like standard employers – give up and gain certain things: “For whatever reason, Spokane Culvert found it advantageous to contract with Kelly to provide it with temporary workers . . . Having chosen to garner the benefits of conducting business in this manner, it is not unreasonable to require Spokane Culvert to assume the burdens. A potential burden, in this instance, may well be the application of RCW 51.24.010, which permits a common law action for negligence.” *Novenson v. Spokane Culvert & Fabricating Co*, 91 Wn.2d 550, 555, 588 P.2d 1174 (1979).

Encon asserts that, because of the presence of Mr. Forks’ signature on a document to which it is not a party, Encon gains the advantages afforded to employers under the workers’ compensation system without bearing any of the burdens. Such an interpretation contradicts case law

stemming back more than 70 years and should not free Encon from liability today.

Mr. Forks submits that the Court should not allow Encon to have it both ways: it cannot reap the benefits of cheap labor provided by a staffing agency yet pay none of the workers' comp premiums – or, in the alternative, damages for its negligence – when those workers are injured.

B. Encon relies on an interpretation of a contract that differs from that attributed to it by the actual parties to the contract

To arrive at the interpretation described above, Encon applies a reading to a contract that is different than the reading that the actual parties to the contract agree upon.

Of all the cases cited by Encon, none of them provide a factual scenario similar to that at issue: a third party – not a party to a contract – urges the Court to apply a meaning to the contract that is different than the one upon which the parties agree. Here, both Aerotek and Mr. Forks agree about the meaning of the contract – namely, that it does not provide Encon with the benefits conferred upon employers by the Industrial Insurance Act without carrying any of the burdens. “The primary objective in contract interpretation is to ascertain the *mutual* intent of the parties at the time they executed the contract.” *Intl. Marine Underwriters v. ABCD*

*Marine, LLC*, 179 Wn.2d 282, 313 P.3d 395 (2013). And here, the parties' intent is clear. As Aerotek testified in its deposition, the purpose of the paragraph upon which Encon relies is to "require[] the employee to file a workers' comp claim with Aerotek rather than the client." (CP 291). "[I]t does not prohibit the employee from filing any other lawful claim against the client." (CP 291).

In other words, the only entity that disagrees that Encon may be sued for its negligence is Encon, not either of the two parties to the contract.

C. The Parties' Actions Altered the Terms of the Policies & Procedures Agreement

Assuming that Encon is correct – that it is essentially a third-party beneficiary to the Policies & Procedures Agreement signed by Mr. Forks as part of his employment with Aerotek, Encon seeks only to enforce the portion of the contract that benefits Encon. As the Court is aware, the paragraph at issue states, in relevant part, as follows: "I further understand and agree that, for Workers' Compensation purposes only, I will be considered an employee of Aerotek's client, and that workers' compensation benefits are my exclusive remedy to any injury I incur on assignment." (CP 71).

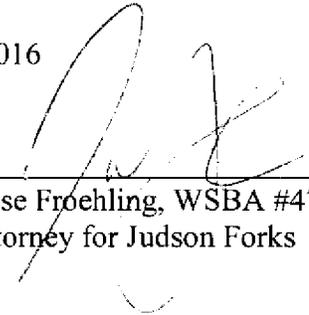
Even if that statement is enforceable on behalf of Encon, Encon was not fulfilling its end of the bargain. Aerotek, not Encon, paid Mr. Forks' workers' compensation premiums. (CP 278). Aerotek, not Encon, paid Mr. Forks (CP 278). Aerotek, not Encon, withheld Mr. Forks' taxes. (CP 278). In other words, it is plain that even if Mr. Forks agreed in the document that Encon was his employer for purposes of workers' compensation purposes, the parties to the contract were not actually acting as if Encon was Mr. Forks' employer.

Since Encon did not suffer an of the burdens of the bargain – it did not pay him, take care of his medical treatment or withhold his taxes – it cannot now reap the benefits by failing to take responsibility for its own negligence.

## II. CONCLUSION

For the foregoing reasons, Mr. Forks respectfully requests that the Court vacate the judgment entered below and allow Mr. Forks his day in court.

DATED this 1<sup>st</sup> day of November, 2016



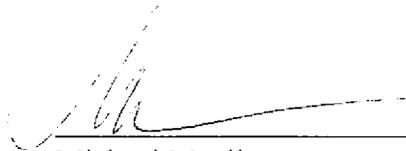
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Jesse Froehling, WSBA #47881  
Attorney for Judson Forks

**CERTIFICATE OF SERVICE**

I declare under penalty of perjury under the laws of the State of Washington that I served the foregoing document to the Court of Appeals, Division II, Greg Wallace and Sidney Tribe via first class mail and email.

Dated this 1<sup>st</sup> day of November, 2016

  
\_\_\_\_\_  
Michael Moeller

**FROEHLING LAW OFFICE**

**November 01, 2016 - 12:46 PM**

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[sidney@tal-fitzlaw.com](mailto:sidney@tal-fitzlaw.com)  
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