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IN THE SUPREME COURT
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WASHINGTON STATE DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent,

v.

LYONS ENTERPRISES, INC. d/b/a JANPRO CLEANING SYSTEMS,

APPELLANT.

BRIEF OF AMICUS CURIAE
THE ASSOCIATION OF WASHINGTON BUSINESS

FILED
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STATE OF WASHINGTON

Robert A. Battles, WSBA No. 22163
ASSOCIATION OF
WASHINGTON BUSINESS
1414 Cherry Street SE
Olympia, WA 98507
Telephone: (360) 943-1600

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I. INTRODUCTION

The Association of Washington Business “AWB” supports the review of the Court of Appeals’ published opinion in this matter. AWB joins in the arguments raised by both the Appellant Lyons Enterprise Inc., d/b/a Jan-Pro Cleaning Systems (“Lyons”) and the Amicus Curiae International Franchise Association. In the current case the Court of Appeals has failed to follow Washington law and legal precedent.

Statutes and regulations are enacted to provide certainty for all parties subject to them. The legislative and rule making processes are designed to allow citizens to participate and comment on proposed laws. Once they are enacted, businesses rely on them to be applied and enforced in a consistent matter. In addition, businesses rely on how the law is interpreted by the courts.

It is a basic legal tenet that a lower court must follow the precedent of the higher court. In this case, the Court of Appeals failed to follow the legal precedent set by this Court. Allowing the Court of Appeals’ decision to stand could result in a chilling effect on all businesses in Washington State.

AWB seeks, pursuant to RAP 10.6(b), permission from the Court to file the Brief of Amicus Curiae. This brief is filed by operation of RAP 18.6 and RAP 10.2(f). AWB contends that the failure of the Court of Appeals to follow legal precedent and statutes are issues of substantial public interest.

I. IDENTITY AND INTEREST OF AMICI CURIAE

AWB is Washington State's chamber of commerce and principal representative of the state's business community. AWB is the state's oldest and largest general business membership federation, representing the interests of approximately 8,000 Washington companies who, in turn, employ over 700,000 employees, approximately one-quarter of the state's workforce. AWB members are located in all areas of Washington, represent a broad array of industries, and range from sole proprietors and very small employers to the large, recognizable, Washington-based corporations which do business in all parts of the state and world. AWB members include all types of employers including franchisors and franchisees. Our members rely on the consistent application of laws in every jurisdiction. AWB members have a vested interest in the outcome of this matter.

II. ISSUES OF CONCERN TO *AMICUS CURIAE*

Among the issues presented in the Appeal, this memorandum seeks to address the following issues raised by Lyons in the Petition for Review (PFR) and Supplemental Brief:

1. Lyons' franchisees and other similarly situated franchisees are not covered workers of the franchisor because the "essence" of the franchise agreement is not "personal labor." RCW 51.08.180.
2. In *White v. Dep 't of Labor & Indus.*, 48 Wn.2d 470, 294 P.2d 650 (1956), this Court held that RCW 51.08.180 does not apply to an independent contractor who "employs others to do all or part of the work" because, in any such case, the labor is not "personal" to the contractor. The *White* case exception should also apply franchisees when the franchise agreement permits the franchisees to hire their own employees and delegate the work to others.

III. STATEMENT OF THE CASE

AWB adopts and joins in the Statement of the Case in Lyons' Brief filed in this matter.

IV. ARGUMENT

A **The Essence of a Franchise Agreement is not Personal Labor**

The Court of Appeals ruled that when a franchisee does not use the labor of a subordinate, then the franchise is considered a covered "worker" of the franchisor under RCW 51.08.180(1). RCW 51.08.180(1) provides in part that a "worker" includes "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."

Prior to making any determination regarding an individual's status as a "worker," the Department must first determine whether the essence of a contract is personal labor. *Malang v. Department of Labor and Industries*, 139 Wash. App. 677, 688, 162 P.3d 450 (2007). If the essence of the contract is not personal labor, the inquiry is at an end, as the independent contractor is not a worker under RCW 51.08.180(1). *Malang*, 139 Wash. App. at 688.

In determining whether the essence of a contract is personal labor, courts look to the contract, the work to be done, the situation of the parties, and other attendant circumstances. *Lloyd 's of Yakima Floor Ctr. v. Department of Labor and Industries*, 33 Wn. App. 745, 749, 662 P.2d 391 (1982); *Cook v. Department of Labor and Industries*, 46 Wn.2d 475, 476, 282 P.2d 265 (1955). Indeed, when analyzing whether the essence of a contract is personal labor, courts are to look to the "realities of the situation" rather than technical requirements. *Department of Labor and Industries v. Tacoma Yellow Cab Co.*, 31 Wn. App. 117, 124, 639 P.2d 843, review denied, 97 Wn.2d 1015 (1982). In making this determination, courts should look to the "gist or substance, the vital sine qua non, the

very heart and soul" of the agreement. *Haller v. Department of Labor and Industries*, 13 Wn.2d 164, 168, 124 P.2d 559 (1942).

The essence of the agreement between Lyons and its franchisees -- the "Unit Franchise Agreement" -- is the sale of a franchise, not the establishment of an employment relationship.

The Unit Franchise Agreement is not a vehicle to avoid paying workers' compensation premiums for those toiling in employer's business. Rather, it is a binding contract between independent businesses whereby the franchisee buys a franchise and pays royalties in exchange for the franchisor's brand, training, support and customer base. The franchise benefits the franchisees by giving them all the tools they need to succeed in their own independent businesses.

The Court of Appeals' and Department's misunderstanding of the nature of the franchisor/franchisee relationship is not confined to its failure to recognize the distinct nature of the franchisee's business. Indeed, other well-established aspects—the "essence"—of most standard franchise agreements are ignored, including the promotion of brand uniformity through training and system standards, use of superior and consistent supplies, franchisee fees, territorial limitations and termination provisions. These features are common to all franchises, including those that have

little to do with the franchisees' "labor," and show that the essence of a franchise agreement is the franchise itself, not the goods or services the franchisee ultimately sells to the end-customer.

The "realities" of this case contrast with the circumstances presented in *Dana's Housekeeping, Inc. v. Department of Labor and Industries*, 76 Wn. App. 600, 886 P.2d 1147 (1995). In *Dana's Housekeeping*, the "realities of the situation" were the fact that (1) the company benefited by receiving 48 percent of the cleaning fee; (2) the company exercised intense control over the scope, manner, quality, and who could do the work; and the fact that Dana's -- not the cleaners who were alleged to be independent contractors -- accepted risk of non-payment. *Dana's Housekeeping*. 76 Wn App. At 608-609. Each of these "situational realities" convinced the court in *Dana's Housekeeping* that the essence of the contract was personal labor.

In *Dana's Housekeeping*, the cleaners' duties were rigorously spelled out in "priority lists" and the cleaners were prohibited from employing others. This is not case in this appeal. The facts as set forth by the parties show there is no prohibition on franchisees using additional assistance, and in fact most do. Similarly, there is no "priority list" or similar direction or control. Rather, the franchisees are expected to use

accepted industry standards in performing their tasks. Finally, as set out above in *Dana's Housekeeping* the employer (Dana's) accepted the risk of non-payment. That is not the situation in the current case. The risk of non-payment is borne by the franchisee.

The facts in the present case are in direct contrast to those outlined in *Dana's Housekeeping*. The Court of Appeals and the Department failed to understand the franchise agreements and the underlying law. AWB requests that this Court reverse the Court of Appeals for failure to look to the essence of the franchise agreement.

B. The Court of Appeals Failed to Properly Apply this Court's Three-Part Test Established in *White* that shows that Franchisees and their Employees Are Not "Covered Workers." Under the Industrial Insurance Act.

As discussed above, when determining whether the essence of the contract is personal labor for the employer, courts look to "the contract, the work to be done, the situation of the parties, and other attendant circumstances." *Lloyd's of Yakima Floor Ctr. v. Department of Labor and Industries*, 33 Wash. App. 749 662 P.2d 391 (1982); *Cook v. Department of Labor and Industries*, 46 Wn.2d 475, 282 P. 2d 265 (1955). Based upon its review of prior case law, this Court, in a seminal case, identified three situations negating an independent contract for "personal labor." *White v. Department of Labor and Industries*, 48 Wn.2d 470, 474, 294

P.2d 650 (1956). *White* excluded from the Industrial Insurance Act's coverage the independent contractor (1) who of necessity owned and supplied machinery or equipment to perform the contract (2) who obviously could not perform the contract without assistance, and (3) who of necessity or of choice employed others to do all or part of the work. *White*, at 474.

"Personal labor" means labor personal to the independent contractor. *Silliman v. Argus Services, Inc.* 105 Wn. App. 232, 238, 19 P.3d 428 (2001). A contract that contemplates a specific type of labor, not a specific laborer, is not a contract for "personal labor." *Silliman*, 105 Wn. App. at 237-238. Accordingly, an independent contractor who may, and does in fact, delegate part of his or her work to others is excluded from the Industrial Insurance Act's coverage. *Massachusetts Mutual Life Insurance Co. v. Department of Labor and Industries*, 51 Wn App. 159, 164, 752 P.2d 381 (1988).

The *White* court formulated the third criterion based upon two cases in which the independent contractor was found to be excluded from coverage. *White*, 48 Wn.2d at 474. Those cases were *Haller v. Department of Labor and Industries*, 13 Wn.2d 164, 124 P.2d 559 (1942) and *Crall v. Department of Labor and Industries*, 45 Wn.2d 497, 275 P.2d

903 (1954). In *Crall* the independent contractor, who owned several trucks and employed others to drive them, was hired to haul logs. The contract did not require that the independent contractor himself drive the trucks. *Crall*, at 499. While noting that the *Crall* decision could also be explained by the necessary logging trucks used, the *White* court cited *Crall* as standing for the proposition that the Industrial Insurance Act does not cover an independent contractor when the contracting parties contemplate that the labor will be done by others, *in whole or in part*. *White*, at 473 (emphasis added).

This determination was the basis of the decision in *Massachusetts Mutual Life Insurance Co. v. Department of Labor and Industries*, 51 Wn. App. 159, 164, 752 P.2d 381 (1988). In *Massachusetts Mutual*, the Department determined that insurance agents working under contract were covered workers. *Massachusetts Mutual*, 51 Wn. App. at 160. The contract in question authorized the "general agents" to hire sales agents. *Id.* at 161. The Department's determination was overturned by the trial court and the Court of Appeals because:

the contracting parties contemplated the delegation of duties by the independent contractor. Therefore, under both the third White guideline and the Crall case upon which the guideline was formulated, we must conclude that none of the insurance agents at issue here are "workers" for purposes of the Act.

Massachusetts Mutual, 51 Wn. App. at 165.

Here, just as in *Massachusetts Mutual*, the Department effectively sought to limit *White*. 51 Wn. App. At 164. Unfortunately, in this case the Court of Appeals has ratified the attempt to curtail the clear guidance offered by *White*. In *White* the Court focused on whether the contract contemplated the employment of others to do all or part of the work, “by necessity or choice.” 48 Wn.2d at 474. In the case at hand, the Court of Appeals ignored the essence of the contract between Lyons and its franchisees -- which plainly contemplated such employment of others -- and instead focused on a different factual question: whether the franchisee did in fact employ others. Simply put, this is not the test established by *White* which has been the law of Washington for almost sixty years. Moreover, for all the reasons identified above, the factual question identified by the Court of Appeals as controlling is the wrong focus. *White* correctly interpreted RCW 51.08.180(1), and the Court of Appeals erred.

Based on the facts in this case, the principles articulated in *White* should apply. The franchisees are solely responsible for all hiring decisions. Under the rule established in *White* and *Crall*, it must be concluded that the essence of the contract at issue is not "personal labor."

V. CONCLUSION

The Court of Appeals decision has created a system that results in making an entire model of business (franchises) inconsistent with established case law and the statutes. This decision is bad for business, which results in businesses leaving Washington for more consistent stable environments. Lost business means lost jobs.

Businesses need to be able to count on a consistent interpretation and application of the law. Franchises make up a large portion of business in the State of Washington. The Court of Appeals jeopardizes these businesses and ultimately the jobs they create.

For the reasons stated above, AWB urges this Court to affirm the tests established in the *White* decision and further find that all the franchisees of Lyons are not covered workers for purposes of the Industrial Insurance Act.

DATED this 7th day of December, 2015.

THE ASSOCIATION OF WASHINGTON
BUSINESS

By


Robert A. Battles WSBA No. 22163
General Counsel
The Association of Washington Business

OFFICE RECEPTIONIST, CLERK

To: Bob A. Battles
Cc: McBrideR@LanePowell.com; steve.vinyard@atg.wa.gov
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Dear Clerk:

Please find attached for filing in the above-referenced matter, electronic copies of the following documents:

- Motion for Leave to file Memorandum of Amicus Curiae of AWB
- Brief of Amicus Curiae of AWB
- Declaration of Service

By copy of this e-mail, electronic service to counsel of record is made. In addition, hard copies have been sent via US mail.

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ROBERT (BOB) A. BATTLES
ASSOCIATION OF WASHINGTON BUSINESS
General Counsel and Government Affairs Director

T 360.943.1600 / M 360.870.2914
T 800.521.9325 / F 360.943.5811
PO Box 658, Olympia, WA 98507-0658
www.awb.org

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