3-20-2008

Ewing v. State, Dept. of Transp. Respondent's Brief 1 Dckt. 34541

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN E. EWING and NOREEN EWING, Plaintiffs-Appellants-Cross Respondents, v. STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION, Defendant-Respondent-Cross Appellant.	Supreme Court Docket No. 34541 Kootenai County Case No. CV 06-7599

RESPONDENT/CROSS-APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT FOR KOOTENAI COUNTY

HONORABLE CHARLES W. HOSACK, PRESIDING

Michael J. Verbillis, P.A.
601 E. Sherman Avenue, Suite 3
Post Office Box 519
Coeur d'Alene, ID 83816-0519
Attorneys for Appellants John E. Ewing and Noreen Ewing

Michael E. Kelly
Lopez & Kelly, PLLC
1100 Key Financial Center
702 W. Idaho Street
Post Office Box 856
Boise, ID 83701
Attorneys for Respondent/Cross-Appellant State of Idaho, Department of Transportation

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

I.
STATEMENT OF THE CASE

A. Nature of the Case.

This appeal is brought by Plaintiffs/Appellants John E. Ewing and Noreen Ewing against the State of Idaho, Department of Transportation (hereinafter "State") arising out of an action brought to recover damages purportedly sustained as a result of John E. Ewing's (hereinafter "Ewing") fall at the Mineral Mountain Rest Area located on U. S. Highway 95, near Potlatch, Idaho. In their Complaint, it is alleged that Ewing fell into an improperly backfilled area that was not compacted. It was later determined the area of the fall was compromised as a result of an undetected waterline leak following excavation work done by Department of Transportation employees at the rest area.

B. Course of the Proceedings.

Ewing's Complaint for negligence against the State was filed on October 12, 2006. R. pp. 9-10. On November 9, 2006, a Notice of Appearance was filed on behalf of the State, R. p. 11, and an Answer and Demand for Jury Trial was subsequently filed on November 20, 2006. R. pp. 14-17.

On April 10, 2007, Ewing filed a Partial Motion for Summary Judgment. Ewing's Motion sought an order from the court that the State, pursuant to the third affirmative defense in its Answer, was not Ewing's statutory employer precluding it from civil liability under the exclusive remedy provisions of Idaho Worker's Compensation laws. R. pp. 26-27.

On June 25, 2007, the State filed a Cross Motion for Summary Judgment seeking an order from the Court that the State was Ewing's statutory employer at the time of his accident and thus, immune from third party liability; in the alternative, that the State did not owe a duty to Ewing as

a licensee on the property; and in the alternative, that the State was otherwise protected from liability under the provisions of Idaho Code § 36-1604, commonly known as the recreational use statute. R. pp. 55-56.

Subsequent to oral argument, the District Court issued an Order denying Plaintiffs' Motion for Partial Summary Judgment, denying the State's Motion that it was Ewing's statutory employer and denying the State's Motion that Ewing was a licensee, but granting State's Motion for Summary Judgment under the recreational use statute. R. pp. 104-105.

C. Statement of Facts

The statement of facts set forth in Ewing's Brief (III. Statement of Case, (iii), Appellants' Brief, p. 1) is a fair summary of some of the undisputed facts in this action. Ewing's characterization of the location of the incident at issue and whether it was covered by the contracts at issue between the State and the Scarsella Brothers (Scarsella) and between Scarsella and Ewing's employer, North Star Enterprises, Inc. (North Star) is somewhat restrained however.

The following facts are likewise undisputed and are pertinent to the issues on appeal and cross-appeal:

1. On or about October 15, 2003, ITD awarded Contract No. 6674 to Scarsella "for the work of reconstruction & minor realignment of 6.434 miles of US-95, MP 366.593 to MP 373.027, including right turn lanes, a left turn lane, truck climbing lanes, snow plow turnarounds, crossdrains, livestock passes, pavement marking, & signing; Electrical Substation to Smith Creek, known as Idaho Federal Aid Project No. NH-STP-4110(110), in Latah and Benewah County, Key No. 6298"

(hereinafter "ITD Contract"). R. pp. 64-70.

2. On or about January 27, 2004, Scarsella subcontracted with North Star to perform certain portions of the ITD Contract including pilot car and flagging operations (hereinafter "the subcontract"). R. pp. 71-87.

3. On the date of his accident, June 20, 2006, Ewing was an employee of North Star, working on the ITD Contract as a pilot car operator and flagger. R. pp. 24-25.

4. The Mineral Mountain Rest Area is located at or about mile post 371 which is within the construction zone covered by the ITD Contract and is specifically referred to in the contract as follows:

> **Mineral Mountain Rest Area**
>
> Mineral Mountain Rest Area is a public roadside rest facility located within the project limits. The Contractor shall maintain public access to the rest area at all times. The rest area is intended for use by the traveling public only. The Contractor shall not use the rest area for equipment parking nor material storage during construction. The Contractor shall not allow any of his employee's [sic] nor Subcontractor's employee's [sic] to park private vehicles within the rest area limits. The Contractor shall furnish separate toilet facilities for constructions workers. Any material tracked into the rest area from the project shall be removed by the Contractor at no additional cost to the State.

R. p. 89.

5. On June 20, 2006, while on a break but during the course and scope of his employment with North Star on the ITD Contract, as the Plaintiff walked across the Mineral Mountain Rest Area, the ground gave way causing him to fall. R. p. 24.

6. Plaintiff fell while he was walking across the rest area to use a picnic table. R. p. 24.

7. As a result of his fall, the Plaintiff filed for and received worker's compensation benefits. R. pp. 93-94.

II.
ISSUES PRESENTED ON APPEAL/CROSS-APPEAL

A. Issue on appeal.

Whether the District Court erred in granting summary judgment to the State pursuant to the provisions of Idaho Code § 36-1604.

B. Issue on cross appeal.

Whether the District Court erred in denying the State's Motion for Summary Judgment that it was the statutory employer of Ewing at the time of his accident and thus, immune from third party liability.

III.
ARGUMENT

A. District Court properly ruled the State was entitled to summary judgment under the Idaho recreational use statute.

An appellate court's review of a lower court's ruling on a motion for summary judgment is under the same standard used by the trial court in originally ruling on the motion. Thereby, if the evidence reveals no disputed issues of material fact, what remains is a question of law, over which this Court exercises free review. *Fuhriman v. State, Department of Transportation*, 143 Idaho 800, at 803, 153 P.3d 480, at 483 (2007).

In granting summary judgment to the State, the lower court ruled:

Idaho Code § 36-1604, commonly referred to as the "recreational use statute," applies to the Mineral Mountain Rest Area where the accident at issue occurred and the State, as the landowner, is protected from liability by virtue of the recreational use statute. (Appellate Brief, p. 4, R. p. 105).

The pertinent provisions of Idaho Code § 36-1604 to this appeal are as follows:

> 36-1604. LIMITATION OF LIABILITY OF LANDOWNER.
>
> (a) Statement of Purpose.
>
> The purpose of this section is to encourage owners of land to make land, airstrips and water areas available to the public without charge for recreational purposes by limiting their liability toward persons entering thereon for such purposes.
>
> (b) Definitions. As used in this section:
>
> 2. "Land" means private or public land . . .
>
> 4. "Recreational purposes" includes, but is not limited to, any of the following activities or any combination thereof: hunting, fishing, swimming, boating, rafting, tubing, camping, picnicking, hiking, pleasure driving, the flying of aircraft, bicycling, running, playing on playground equipment, skateboarding, athletic competition, nature study, water skiing, animal riding, motorcycling, snowmobiling, recreational vehicles, winter sports, and viewing or enjoying historical, archeological, scenic, geological or scientific sites, when done without charge of the owner.
>
> (c) Owner Exempt from Warning. An owner of land owes no duty of care to keep the premises safe for entry by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes. Neither the installation of a sign or other form of warning of a dangerous condition, use, structure, or activity, nor any modification made for the purpose of improving the safety of others, nor the failure to maintain or keep in place any sign, other form of warning, or modification made to improve safety, shall create liability on the part of an owner of land where there is no other basis for such liability.
>
> (d) Owner Assumes No Liability. An owner of land or equipment who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:
>
> 1. Extend any assurance that the premises are safe for any purpose.

2. Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.

Under this statute, a person who enters land, public or private, for recreational purposes is neither an invitee or a licensee, and thus then is not owed a duty of care beyond that of the duty owed to a trespasser, as will be discussed below. The statute expressly states, "an owner of land owes no duty of care to keep the premises safe for entry by others for recreational purposes, or to give any warning of a dangerous condition . . . ." Idaho Code § 36-1604(c).

Undisputedly, the Mineral Mountain Rest Area where the Plaintiff fell is open to the public. In *Bauer v. Minidoka School District No. 331*, 116 Idaho 586, 778 P.2d 336 (1989), this Court acknowledged that the recreational use statute applies to injuries occurring on public land. *Id.* 116 Idaho at 588, 778 P.2d at 338. Further, there is no dispute of material fact that the Mineral Mountain Rest Area is land open to the public without charge by its owner, the State of Idaho.

It is also undisputed that the Plaintiff has affirmed that he was walking to use a picnic table at the Mineral Mountain Rest Area when he suffered his alleged injuries. R. p. 24. The recreational use statute lists many possible uses that would be considered recreational in purpose, including "picnicking," when done without charge of the owner." Idaho Code § 36-1604(b)(4).

Appellants argue that the favorable inference to Ewing regarding the use of the Mineral Mountain Rest Area was that he was taking a brief rest during his work day when he fell into ground that suddenly gave way on the property. (Appellants' Brief, p. 4). An inference the Appellants claim the lower court did not grant. It appears however that is exactly the inference the trial court granted in this matter. Ewing's counsel characterizes his activity at the rest area as "taking a brief rest." *Id.*,

p. 4. Ewing himself states he was attempting to walk to use a picnic table at the rest area. R. p. 24. Taking these undisputed statements in the light most favorable to the Plaintiffs, the trial court could not infer anything other than that Ewing was in the process of recreating at the time of the accident. No matter how characterized, Ewing's activity at the rest area unequivocally falls under the purview of Idaho Code § 36-1604(b)(4) as a "recreational purpose."

In an attempt to over-dissect the trial court's decision to grant summary judgment under the recreational use statute, the Appellants discuss the fact that the court apparently focused on the nature of the property rather than the character of the use of the property in its analysis. Appellants state that it appears the trial court reasoned that the owner of any type of public land where any of the activities listed in I. C. § 36-1604 could thereon be performed was entitled to this "mantel of invulnerability." (Appellants' Brief, pp. 4-5). This appears to be an apparent attempt to direct this Court toward a tortured analysis of the legislative intent of the statute. Nevertheless, Appellants never attempt to tie this analysis into why Mr. Ewing's incident at the Mineral Mountain Rest Area is not subject to the provisions of the Idaho recreational use statute.

The Appellants' second argument addresses whether Mr. Ewing's use of the property in question was indeed recreational, while more on point, likewise fails. It appears Ewing is making the same argument made in *Jacobsen v. City of Rathdrum*, 115 Idaho 266, 766 P.2d 736 (1988). In *Jacobsen*, specific to Ewing's argument in this case, the mother of the injured minor plaintiff argued that the recreational use statute requires an intent to use land for recreational purposes and thus, raised the question of whether the minor could have formed the requisite intent. This Court held that the recreational use statute requires only that the recreational user use the owner's property for

recreational purposes. The statute does not require that the recreational user formulate a specific intent to use the property for recreational purposes. Thus, if the person actually uses the property for recreational purposes, no showing of specific intent to do so is required. *Jacobsen*, 115 Idaho 266, at 273, 766 P.2d 736, at 743.

While not specifically addressed in their Brief, Appellants also appeared to imply that the activity Ewing was engaged in when he fell needs to be specifically itemized in the language of the statute for the recreational use statute to apply. Thereby, Ewing's use of the property, i.e. walking across the property to a picnic table while on break from his job, would need to be listed with particularity in the statute in order for it to apply. Whether Appellants are implying this argument or not, this Court in *Johnson v. Sunshine Mining Co., Inc.*, 106 Idaho 866, 684 P.2d 268 (1984), has addressed the scope of "recreational purposes" under Idaho Code § 36-1604.

This Court held that I. C. § 36-1604(b)(3) has been clearly addressed by the legislature. In *Johnson*, the Court stated that the statutory language employed by the legislature, i.e. "includes, but not limited to," makes it clears that the list is not intended to be exhaustive. *Id.*, 106 Idaho at 868, 684 P.2d at 270. As referenced above, by his own affidavit, Ewing states he was injured while "attempting to walk to use the picnic table." R. p. 24. Likewise their brief clearly stated that Ewing's use of the property at issue was while he was taking a brief rest during his work day. (Appellants' Brief, p. 4).

Appellants argue under *Jacobsen v. City of Rathdrum, supra*, a plaintiff may bring an action for willful and wanton misconduct under I. C. § 36-1604 against the owner of the land. In *Jacobsen*, this Court held "willful and wanton misconduct" is defined by the Idaho Jury Instructions as follows:

WILLFUL AND WANTON MISCONDUCT

> Willful and wanton misconduct is present if the defendant intentionally does or fails to do an act, knowing or having a reason to know facts which would lead a reasonable man to realize that his conduct not only creates unreasonable risk of harm to another, but involves a high degree of probability that such harm would result.

IDJI 225 (1985). *Jacobsen*, 115 Idaho 266, at 270, 766 P.2d 736, at 740.

In this matter, the record is devoid of any proof of willful and wanton misconduct on the part of the Department of Transportation employees in backfilling the area on which the Plaintiff fell or in knowing there was a water leak causing the area to become unstable. Further, Plaintiffs' Complaint lacks even a hint of an allegation of willful and wanton misconduct on the part of the State for this incident. R. pp. 9-10. Even if inferences were made in the light most favorable to the Appellants, those inferences do not lead to an issue of material fact that the State's acts or omissions in this matter may have been willful and wanton.

Ewing also argues that this Court has fashioned exemptions to the recreational use statute where a "special relationship" exists between the plaintiff and the landowner. In their Brief, Appellants cite to *Bauer v. Minidoka School District No. 331*, 116 Idaho 586, 778 P.2d 336 (1989), discussed *supra*, in which the Court found that the statute did not apply because there was a special relationship between the defendant school district and the plaintiff student. Ewing also pointed to *Tomich v. City of Pocatello*, 127 Idaho 394, 901 P.2d 501 (1995), in which the Court ruled that the recreational use statute did not apply because there was a special relationship between the City as the owner of the airport and the plaintiff as a pilot utilizing the services offered at the airport run by the City of Pocatello. Despite citing to the above-referenced cases and the "special relationship"

exemption under the recreational use statute, Ewing fails to present any argument that he had some type of "special relationship" with the State at the time of his fall which would exempt him from the application of I. C. § 36-1604.

Finally, Plaintiffs argue that the trial court's ruling under the recreational use statute should be reversed as it does not pass muster under the standards of statutory construction. It appears however the argument is merely a repetitive characterization of Ewing's activity at the time of this incident. This argument was addressed above in *Johnson v. Sunshine Mining Co., Inc.*, 106 Idaho 866, 684 P.2d 268. As the Court stated in *Johnson*, the definition of "recreational purposes" is not limited to the specific activities outlined in I. C. § 36-1604(b)(4). *Id.*, 106 Idaho at 868, 684 P.2d at 270.

Nevertheless, this Court has looked at the recreational use statute's legislative history in *Jacobsen v. City of Rathdrum, Bauer v. Minidoka School District No. 331* and *Tomich v. City of Pocatello*. It has deemed the statute unambiguous and it has likewise passed due process challenges. Appellants' statutory construction argument presents no new areas of inquiry which would cause this Court to question the lower court's ruling on a statutory construction basis.

Notwithstanding the fact that Ewing was engaged in his employment with North Star on the day of his fall, he was on a break from his duties and in his own words, walking to a nearby picnic table at the Mineral Mountain Rest Area when he was injured. He was on public land owned by the State of Idaho and utilizing that land free of charge at the time of his incident. In turn, he was clearly utilizing the rest area as contemplated by the legislature under the language of the recreational use statute.

Based on the foregoing, Ewing's activities at the time of his alleged injuries are subject to Idaho Code § 36-1604 and as such, the trial court properly granted the State's Motion for Summary Judgment.

B. Notwithstanding the trial court's ruling in regard to Idaho Code § 36-1604, the court erred in denying the State's Motion for Summary Judgment holding that the State was not Ewing's statutory employer at the time of the accident at issue.

While granting the State's Motion for Summary Judgment under the Idaho recreational use statute, the court also denied the State's Motion for Summary Judgment under its statutory employer argument. In its Order of August 14, 2007, the court opined:

> The State of Idaho, Department of Transportation could qualify, in different circumstances, as a category 1 statutory employer of Plaintiff John Ewing pursuant to Idaho Code § 72-223(1), but is not a statutory employer entitled to immunity due to the circumstances of the accident at issue and the nature of the employment relationship. R. p. 104.

Based on the undisputed facts in the record as set forth in Section II of this brief and pursuant to previous holdings of this Court, the lower court clearly erred in denying the State's motion that is a category 1 statutory employer of the Plaintiff and is thus, precluded from civil liability under the exclusive remedy rule of the Idaho worker's compensation law. The analysis the State has offered to the trial court that it is the statutory employer of Ewing is unequivocally accurate based on the applicable statutes, prevailing case law and the undisputed facts of this case.

The Idaho Workers Compensation Act (Act), provides employees with a definite remedy for injuries arising out of and in the course of employment while limiting the liability of employers,

resulting in the exclusive remedy rule. *See* I.C. §§72-201,[1] 72-209(1)[2] & 72-211.[3] There is a limited exception to the exclusive remedy rule which does not preclude an individual from bringing a civil action for damages against a third party; however, the Act specifically excludes certain employers, referred to as statutory employers, from third party liability. *See* I.C. §72-223.[4] Three relatively recent cases set forth the framework for determining whether a third party is a statutory employer: *Venters v. Sorrento Delaware, Inc.*, 141 Idaho 245, 180 P.3d 392 (2005); *Robison v. Bateman-Hall, Inc.*, 139 Idaho 207, 76 P.3d 951 (2003); and *Fuhriman v. State, Dept. of Transp.*, 143 Idaho 800, 153 P.3d 480 (2007).

---

[1]"[S]ure and certain relief for injured workmen 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 is otherwise provided in this act." I.C. §72-201.

[2]"Subject to the provisions of section 72-223, [Idaho Code] the liability of the employer under this law shall be exclusive and in place of all other liability of the employer to the employee, his spouse, dependents, heirs, legal representatives or assigns." I.C. §72-209(1).

[3]"Subject to the provisions of section 72-223, [Idaho Code,] the rights and remedies herein granted to an employee on account of an injury or occupational disease for which he is entitled to compensation under this law shall exclude all other rights and remedies of the employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or disease." I.C. §72-211.

[4]"The right to compensation under this law shall not be affected by the fact that the injury, occupational disease or death is caused under circumstances creating in some person other than the employer a legal liability to pay damages therefor, such person so liable being referred to as the third party. Such third party shall not include those employers described in section 72-216, Idaho Code, having under them contractors or subcontractors who have in fact complied with the provisions of section 72-301, Idaho Code; nor include the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workmen there employed." I.C. §72-223(1).

In *Venters*, the Court looked to the established statutory definition of "employer":

> 'Employer' means any person who has expressly or impliedly hired or contracted the services of another. It includes contractors and subcontractors. It includes the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workers there employed. If the employer is secured, it means his surety so far as applicable.

I.C. §72-2-102(13)(a). The *Venters* Court also relied upon its previous interpretation of this definition in *Robison*, and determined that an entity can only qualify as occupying the status of statutory employer in one of two categories if it **either**:

> A. by contracting **or subcontracting** out services, is liable to pay worker's compensation benefits if the direct employer does not, **or**
>
> B. was the owner/lessee of the premises, or other person who is virtually the proprietor or operator of the business there carried on, but who by reason of there being an independent contractor or for any other reason, is not the direct employer of the worker.

Venters, 141 Idaho at 249, 108 P.3d at 396; citing I.C. §§72-216, -102, -223; *Robison,* 139 Idaho at 210-211, 76 P.3d at 954-55 (emphasis added). Specifically with regard to the first category of statutory employer, the *Venters* court explained:

> Thus, the definition of a statutory employer encompasses a party deemed an employer for the purposes of being liable for worker's compensation benefits under I.C. §72-102, but who, by virtue of that liability, is also immune from third-party tort liability under I.C. §72-223.

Id.

The *Venters* case involved an injury and subsequent death of an employee of a trucking company that contracted with the defendant Sorrento of Delaware, Inc. ("Sorrento"). The plaintiff's

wife and child brought a wrongful death action against Sorrento and Sorrento sought summary judgment on the basis that it was the statutory employer of the trucking company employee and was thus, immune from tort liability. The trial court agreed and the plaintiffs appealed. The Idaho Supreme Court focused its analysis on the first category of statutory employer outlined above, specifically whether Sorrento qualified as a statutory employer because of its contractual relationship with the trucking company. The Court recognized that the trucking company provided worker's compensation for its injured worker but, "[a]s an employer of a contractor, Sorrento would not have been permitted to avoid liability to Mr. Venters under the Idaho worker's compensation statutes should [the trucking company] have failed to comply with the worker's compensation statutes." *Venters,* 141 Idaho at 250, 108 P.3d at 398. The contractual relationship between Sorrento and the trucking company controlled and the Court held that Sorrento was the statutory employer of the direct employees of the trucking company, and therefore, "enjoyed the immunities provided by the Act from third-party tort liability." *Id.* This same immunity is extended to employers who subcontract out services. I.C. §72-216(1), (2).[5] *See also Robison,* 139 Idaho at 211, 76 P.3d at 955.

A similar analysis was done by the Court in *Fuhriman, supra*, which involved the death and injury of several persons who were all employees of Multiple Concrete Enterprises, Inc. ("Multiple"), a contractor that was hired by ITD on a road construction project. *Fuhriman,* 143

---

[5]"An employer subject to the provisions of this law shall be liable for compensation to an employee of a contractor or subcontractor under him who has not complied with the provisions of section 72-301[,Idaho Code,] in any case where such employer would have been liable for compensation if such employee had been working directly for such employer." I. C. §72-216(1).

"The contractor or subcontractor shall also be liable for such compensation, but the employee shall not recover compensation for the same injury from more than one party." I. C. §72-216(2).

Idaho at 802, 153 P.3d at 482. In that case the injured road workers and families of road workers injured and killed in an accident at the road construction site brought personal injury and wrongful death actions against ITD. *Id.* ITD owned and maintained the interstate where the accident occurred. *Id.* The Court was asked to determine whether ITD qualified as a category one statutory employer.[6] Relying on the Act, *Venters* and *Robison*, the Court stated that it had "summarized the I.C. §72-223 category one protection for employers as including 'employers who make use of a contractor's **or subcontractor's** employees.'" *Fuhriman*, 153 P.3d at 485 (citations omitted) (emphasis added). In *Fuhriman* ITD had a contractual relationship with Multiple, the employer of the injured workers, therefore, the Court concluded "[s]ince [ITD] 'expressly ... contracted the services' of Multiple, it meets the definition of statutory employer. ... In short, [ITD] made use of a contractor's employees by using them to render the services Multiple contracted to provide. Therefore, the State as an employer is immune from third party liability." *Id.* (footnote omitted).

Another case that is instructive on the law regarding statutory employers is *Struhs v. Protection Technologies, Inc.,* 133 Idaho 715, 992 P.2d 164 (1999), in which the Court considered whether the Army was the statutory employer of the plaintiff, Struhs, who was working for a subcontractor hired through an entity contracting with the Department of Energy (DOE) for work at Idaho National Engineering Laboratory (INEL, now INEEL). The Court found that "[t]he DOE, which indirectly employed Struhs through its contracts with EG&G [the prime contractor], and the

---

[6]A "category one statutory employer" as that term is used in the *Fuhriman* case refers to the first category of employers as outlined above, i.e., an entity that, by contracting or subcontracting out services, is liable to pay worker's compensation benefits if the direct employer does not.

subcontract with APS [Struhs' direct employer], was Struhs' statutory employer." *Id.* at 720, 992 P.2d at 169. In other words, the Court focused on the department of the United States that contracted for the work, rather than an unrelated department or agency of the United States. *Id.*

Applying the Court's analyses and the framework in these cases to the facts of the instant matter leads to the conclusion that ITD is the statutory employer of the plaintiff and is therefore immune from liability. It is undisputed that a contractual relationship existed between ITD and Scarsella and further that Scarsella identified in its contract with ITD that it would subcontract with North Star. R. p. 66. Just as in *Venters* and *Fuhriman,* ITD was, in essence, making use of North Star's employees by using them to render services including flagging and pilot car operation, which Scarsella contracted to provide for the project. Just as in *Struhs*, ITD indirectly employed the plaintiff through its contract with Scarsella and the subcontract with North Star. It is also undisputed and evidenced by his worker's compensation claim, that Ewing was an employee of North Star at the time of his accident and that he was within the course and scope of his employment when the accident occurred. ITD was clearly a category one statutory employer of the plaintiff and is therefore immune from liability in tort. No genuine issue of material fact exists on this point.

At the District Court level, Ewing moved for partial summary judgment seeking to preclude ITD from asserting its immunity as a statutory employer of the plaintiff. The basis for the motion was that he was not performing flagging duties at the time of his fall and that ITD was merely the owner of the property where he fell. Ewing completely ignored the fact that he was within the course and scope of his employment at the time of his fall, his indirect employment relationship with ITD, and the fact that his fall occurred within the construction zone of the project.

Ewing was taking a break from his flagging duties on the ITD project on Highway 95 when he fell on the grounds of the Mineral Mountain Rest Area. While construction on the rest area itself was not part of the project, the rest area is located at mile post 371, clearly within the construction zone of the project which stretched from mile post 366.593 to mile post 373.027 and was clearly within the scope of the contract. R. p. 89. Ewing argued at the trial court level that because he was not engaged in his duties on the project at the time of his fall, ITD's status as his statutory employer changes into the mere owner of the premises.[7] To support this flawed premise, Plaintiff relies on *Robison, supra*, and contends without analysis that *Fuhriman, supra* is "very different" than the facts of the instant matter. A true measuring stick on this issue is whether the State would have been called upon to provide worker's compensation benefits to Ewing for this incident, had either North Star or Scarsella failed to do so. The answer is clearly yes.

An entity can qualify as a statutory employer if it meets one of the two criteria; it need not meet both. The relationships in this case are undisputed; ITD was an indirect employer of Ewing at the time of his fall, thus qualifying it as his statutory employer and limiting the Appellant to worker's compensation benefits as his exclusive remedy. Neither the circumstances of the accident, nor the nature of the employment relationship, the basis of the trial court's denial of the State's Motion on this issue, overcome the undisputed evidence that the State was Ewing's statutory employer at the time he fell at Mineral Mountain Rest Area.

---

[7]Ewing acknowledged ITD's status as his statutory employer in his brief, stating "any accident happening within the highway system in Idaho suffered by any person that is an employee of a contractor or subcontractor on the highway project involved is disqualified from bringing a lawsuit [pursuant to I.C. §72-223]. With this general contention Plaintiff concurs." R. p. 30.

V.
CONCLUSION

Based upon the above undisputed facts, the cited case law and applicable statutes, and the reasons set forth above, Respondent/Cross-Appellant State of Idaho, Department of Transportation respectfully submit that the District Court's order granting summary judgment pursuant to Idaho Code § 36-1604 be affirmed and that the District Court's order denying the State's motion for summary judgment that the State is a category 1 statutory employer of the Plaintiff and thus, immune from liability, be reversed.

DATED this 20 day of March, 2008.

LOPEZ & KELLY, PLLC

By: _____

Michael E. Kelly, Of the Firm
Attorneys for Respondent/Cross-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20 day of March, 2008, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Michael J. Verbillis, P.A.
601 E. Sherman Avenue, Suite 3
Post Office Box 519
Coeur d'Alene, ID 83816-0519
Telephone: (208) 667-9475
Facsimile: (208) 664-1161

- ☒ U.S. Mail
- ☐ Hand-Delivered
- ☐ Overnight mail
- ☐ Facsimile

Michael E. Kelly