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Richardson v. Z & H Construction LLC Appellant's Brief Dckt. 46587

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL RICHARDSON, individually, Plaintiff/Appellant, vs. Z&H CONSTRUCTION, LLC., HERNANDEZ FRAMING, LLC., and PLUMBING UNLIMITED, LLC., Defendants/Respondents.	Supreme Court No. 46587-2018 Canyon County Case No. CV17-05863

APPELLANT'S BRIEF

Appeal from the District Court of the Third Judicial District for Canyon County.

Honorable Davis F. VanderVelde, presiding.

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A. Nature of the Case

This is a personal injury case. The dispute arises from an accident that occurred during the construction of a house. On September 29, 2015, Mr. Michael Richardson, a finish carpenter working for Alignment Construction, LLC (Alignment), fell through a defectively constructed crawlspace cover. The cover was built by Z&H Construction, LLC (Z&H), Hernandez Framing, LLC (Hernandez), and/or Plumbing Unlimited, LLC (Unlimited). In addition to his claim for worker's compensation benefits, Mr. Richardson made a third-party claim against Z&H, Hernandez, and Unlimited.

B. Course of Proceedings

Mr. Richardson filed his initial complaint against Z&H on May 26, 2017. R. p. 13. Mr. Richardson filed several amended complaints between June 16, 2017, and February 7, 2018, as additional information was discovered concerning who constructed the crawlspace cover. R. p. 18-62. The amended complaints named defendants Hernandez and Unlimited. R. p. 18-62.

On June 20, 2018, Respondents Hernandez and Z&H filed motions for summary judgment arguing that they were statutory co-employees of Mr. Richardson and therefore qualified for immunity pursuant to Idaho's exclusive remedy rule. R. p. 79, 122. On August 23, 2018, Mr. Richardson responded to Respondents' motions arguing that Respondents did not qualify for immunity because they were not Mr. Richardson's statutory employers and were not employees of any of his statutory employers. R. p. 140. Hernandez and Z&H filed reply briefs

on August 30, 2018. R. p. 455, 461. Respondent Unlimited did not join the motions filed by Hernandez and Z&H. Tr. p. 5 L. 15 – p.3 L. 3.

The district court heard oral argument on the motion on September 6, 2018. R. p. 465; Tr. p. 5, L 1-3. On October 15, 2018, the district court issued an Order granting the motions for summary judgment finding that Z&H and Hernandez were statutory co-employees of Mr. Richardson and immune from third-party suit. R. p. 465.

After entry of the order on the motion for summary judgment, Mr. Richardson and Unlimited stipulated that the district court's Order applied equally to Unlimited. R. p. 471. Based upon this stipulation, the district court entered an Order dismissing the claims against Unlimited. R. p. 474.

The district court entered a final judgment dismissing all Respondents on November 20, 2018. R. p. 477. On November 29, 2018, Mr. Richardson timely filed his appeal of the district court's decision to dismiss the case against the defendants on summary judgment. R. p. 479.

C. Statement of Facts

Hayden Homes (Hayden), a general contractor, was constructing residential homes in the Sands Point Subdivision in Nampa, Idaho. R. p. 169 L. 17:15-20, p. 170 L. 18:1-16. Hayden hired Alignment to perform finish carpentry work in the subdivision. R. p. 169 L. 17:15-20. On September 29, 2015, Mr. Richardson was working for Alignment as a finish carpenter at a house located at Lot 8, Block 9 of the Sands Point Subdivision. R. p. 160. While working in the house, he stepped on a crawlspace cover that failed, causing him to fall through to the ground below. R.

p. 160, p. 180 L. 59:6-19. The crawlspace cover failure caused a significant injury to Mr. Richardson requiring the fusion of five vertebrae in his neck. R. p. 176 L. 42:4-14.

Hayden contracted separately with framing company Z&H to frame the house. R. p. 208 L. 7-12. Z&H sub-contracted with Hernandez to actually perform the work of framing the house. R. p. 208 L. 12-18, p. 251 L. 14-17, p. 351 L. 13-15. Unlimited claims Z&H contracted with it to perform plumbing work on the house. R. p. 447-448. Hayden also contracted with Unlimited to complete plumbing work on the house. R. p. 428-443, p. 447-448. Both Z&H and Unlimited were independent contractors to Hayden. R. p.383, p. 430. Z&H and Hernandez framed the house which included constructing the crawlspace cover through which Mr. Richardson fell. R. p. 358 L. 4-24. Z&H contends that Unlimited contributed to the crawlspace cover failure. R. p. 244 L. 10-25.

There is no contract between Alignment and Z&H. R. p. 164. There is no contract between Alignment and Hernandez. R. p. 164. There is no contract between Alignment and Unlimited. R. p. 164. Mr. Richardson is not an employee of Z&H, Hernandez, or Unlimited. R. p. 164. At the time of the fall, Mr. Richardson was an employee of Alignment. R. p. 169 L. 16:25-17:2, R. p. 164. Mr. Richardson received worker's compensation benefits through Alignment. R. p. 160, p. 184 L. 77:25 – p. 185 L. 78:17. None of the worker's compensation insurance policies of Z&H, Hernandez, or Unlimited covered Alignment or Mr. Richardson for this accident. R. p. 399-422; p. 423-425.

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II. ISSUES PRESENTED ON APPEAL

The district court found that Idaho's excusive remedy rule, pursuant to the worker's compensation statutes in Idaho Code §72-101 *et seq*., applied to Z&H, Hernandez, and Unlimited. The district court did so by finding that the intent of the act was to provide "umbrella-like coverage, with immunity extending to all subcontractors and their employees hired by a general contract to work on a specific project." R. p. 469. The district court therefore concluded that the Respondents were "statutory co-employees" and "immune from third party liability" in this case. R. p. 469.

The issue on appeal is whether the district court erred in granting summary judgment for the Respondents when it concluded that Idaho's exclusive remedy rule pursuant to Idaho Code §72-201 *et seq*. applied to Respondents.

III. STANDARD OF REVIEW

When reviewing an order for summary judgment, the standard of review used by the Idaho Supreme Court is the same as that used by the district court in ruling on the motion. *Van v. Portneuf Medical Center*, 147 Idaho 552, 556, 212 P.3d 982, 986 (2009). The party moving for summary judgment carries the initial burden to establish that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Eliopulos v. Knox*, 123 Idaho 400, 404, 848 P.2d 984, 988 (Ct.App.1992). Only after the moving party has met this initial burden of proof on a motion for summary judgment does the burden then shift to the non-moving party to come forward with sufficient evidence to create a genuine issue of material fact. *Indian Springs LLC v. Indian Springs Land Investment LLC*, 147 Idaho 737, 746, 215 P.3d 457, 466

(2009). The court is required to liberally construe all disputed facts in favor of the non-moving party, and to draw all reasonable inferences and conclusions that are supported by the record in favor of the non-moving party. *Kelso v. Lance*, 134 Idaho, 373, 375, 3 P.3d 51, 53 (2000).

IV. ARGUMENT

A. The district court erred in granting summary judgment when it found Idaho's exclusive remedy rule applied to immunize the Respondents from third party liability.

The ultimate issue in this case is whether the Respondents qualify for immunity under the exclusive remedy rule. There are only a few situations where that is possible. The first is if the Respondents are Mr. Richardson's statutory employers. The second is if they are Mr. Richardson's statutory co-employees by virtue of being an employee of a statutory employer. If the Respondents are neither, Mr. Richardson may maintain a third-party action against them for injuries sustained due to their negligence.

The first step when determining who can claim immunity under the exclusive remedy rule, is to identify who qualifies as a statutory employer under Idaho Code §72-223. The next step is to determine what employees qualify for the immunity. Exclusive remedy rule immunity extends from employers to employees pursuant to I.C. §72-209(3). When an employee works for a statutory employer of an injured worker, they are called statutory co-employees. See *Blake v. Starr*, 146 Idaho 847, 851, 203 P.3d 1246, 1250 (2009). Importantly, only employees of those employers that qualify for immunity can claim the immunity themselves.

In this case, the district court erred when it found that Respondents were Mr. Richardson's statutory co-employees as none of the Respondents were employees of his statutory employer.

1. Under Idaho's worker's compensation law, the only statutory employer in this case is Hayden Homes.

Under Idaho Code §72-209, an employer's liability to an employee for an industrial injury is limited to those obligations under the worker's compensation law. In other words, an employee's exclusive remedy for his injuries, as against his employer, are those benefits, compensation, and obligations under the worker's compensation law alone. This means an employee cannot sue his employer in tort if the employee is injured on the job even if his employer was negligent. This is commonly referred to as the exclusive remedy rule. *See Robison v. Bateman-Hall, Inc.*, 139 Idaho 207, 209, 76 P.3d 951, 954 (2003).

Even though the exclusive remedy for an injured worker prohibits suit against the worker's employer, an injured worker may bring a third party claim for damages against a negligent third party. I.C. §72-223(2). Certain third parties are exempted from suit as identified in I.C. §72-223(1). Both of these excluded third-parties are categorized as "employers" for purposes of application of the exclusive remedy rule.

The first are those employers described in I.C. §72-216 (i.e. contractors) having "under them" contractors or subcontractors who have secured worker's compensation insurance or are self-insured pursuant to I.C. §72-301. I.C. §72-223(1). These are referred to as category one statutory employers. *Fuhriman v. State, Dept. of Transp.*, 143 Idaho 800, 804, 153 P.3d 480, 484

(2007). The second category excludes "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). These are considered category two statutory employers. *Fuhriman* at 804.

"In order to qualify as a category one statutory employer, the employer by contracting or subcontracting out services, must be liable to pay worker's compensation benefits if the direct employer does not." *Fuhriman* at 805 citing *Venters v. Sorrento Delaware, Inc.*, 141 Idaho 245, 249, 108 P.3d 392, 396 (2005), See also §72-216(1).

In *Fuhriman,* the Supreme Court was asked to determine if the State of Idaho was a statutory employer when it hired a company named Multiple to do road construction. An accident occurred injuring and killing several employees of Multiple and a third-party suit was brought against the State of Idaho for damages. The Court explained that because the State had directly contracted with Multiple for the work, it was a statutory employer. Further, the court outlined the fundamental principle to determining whether the State could claim immunity from these suits.

> Multiple, the contractor, was liable to its employees. Since the State is a statutory employer, the State would have to pay worker's compensation benefits to the employees of Multiple, its contractor, if Multiple did not because Multiple was liable to its own employees. *Fuhriman* at 805.

The *Fuhriman* court explained further that "[w]hen the I.C. §72-102(13)(a) definition of 'employer' is read with I.C. §72-216(1), a 'statutory employer [is] liable for payment of worker's

compensation to an employee of its contractor whenever a contractor is liable to its employee under the Worker's Compensation Laws.'" *Id.*

Fuhriman outlines the principle that Idaho's Worker's Compensation system designates statutory employers as those who share the risk of potentially being liable to pay worker's compensation benefits for subordinate contractors' employees. If they take that risk, then they can claim the immunity of the exclusive remedy rule.

Put more simply, if a party has the potential to be responsible to provide worker's compensation benefits to an employee, that party can also claim immunity in a third-party claim for damages by that injured employee.

In this case, Mr. Richardson's actual employer is Alignment. Hayden hired Alignment to perform finish carpentry work on homes Hayden was constructing. Alignment was a contractor "under" Hayden. Hayden qualifies as Mr. Richardson's category one statutory employer because if Alignment had not provided worker's compensation benefits to Mr. Richardson, Hayden would be responsible to do so under I.C. §72-216(1).

Importantly, Alignment was not contracted by Z&H, Hernandez, or Unlimited. None of the Respondents can claim that Alignment was "under" them as a contractor or subcontractor in this case. Since there was no contractor/sub-contractor relationship between Alignment and the Respondents Z&H, Hernandez, and Unlimited cannot qualify as Mr. Richardson's statutory employers. In this case, the only statutory employer is Hayden Homes.

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2. Respondents cannot be statutory co-employees because they are not natural people as described in the Act nor are they employees of Hayden Homes or Alignment Construction.

The exclusive remedy rule grants immunity to employees of statutory employers. I.C. §72-209(3). A plain reading of the statutes reveal that the Legislature intended that only natural people be considered employees for purpose of Idaho's Worker's Compensation Act.

Additionally, Idaho's worker's compensation law grants a person the status of a statutory co-employee only if that person is the actual employee of a statutory employer. In other words, the immunity runs with the employer and the employee can claim the immunity based on an employee's status as an actual employee of a statutory employer. The immunity does not run with the employee and bootstrap in the employer after the fact.

a. Employees are only natural people under Idaho's workers' compensation law.

Respondents contend that all contractors and sub-contractors under Hayden are de facto employees of Hayden, and as Hayden is a statutory employer of Mr. Richardson, they too can claim the protections of the exclusive remedy rule. R. p. 83, p. 125. These arguments push the definition of "employee" beyond the language and intent of Idaho's statute.

The plain language of Idaho's worker's compensation law shows that the Legislature intended for employees under the Act to be natural people. Contractors and subcontractors are not employees for purposes of I.C. §72-209(3) or for purposes of the worker's compensation law as a whole. Contractors and subcontractors are listed in the worker's compensation law, but under the definition of "Employer." *See* I.C. §72-102(13)(a).

Idaho Code §72-102(12) defines employees within the worker's compensation law. It states that the term "Employee" is synonymous with "workman." It describes a person who works under a contract of service or apprenticeship with an employer. The statute references types of employment that are excepted from the law in I.C. §72-212. These include household domestic service, casual employment, employment of outworkers, employment of members of the employer's family and more. All of these types of work require the employment of natural people, not business entities like the Respondent LLCs. "To determine the meaning of a statute, the court applies the plain and ordinary meaning of the terms and, where possible, every word, clause and sentence should be given effect." *Robison* at 210 citing *Rife v. Long*, 127 Idaho 841, 848, 908 P.2d 143, 153 (1995). "The objective of statutory interpretation is to derive legislative intent." *Robison* at 210 citing *Albee v. Judy*, 136 Idaho 226, 230, 31 P.3d 248, 252 (2001). The language used by the Legislature demonstrate that the drafters intended employees to be natural people who do the jobs employers hire them to do.

Idaho Code §72-201 supports this definition. It outlines the intent of the Legislature when it passed the Act and explains the purpose behind Idaho's worker's compensation law:

> The common law system governing the remedy of workmen against employers for injuries received and occupational diseases contracted in industrial and public work is inconsistent with modern industrial conditions. The welfare of the state depends upon its industries and even more upon the welfare of its wageworkers. The state of Idaho, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for 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, and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as is in this law provided.

I.C. §72-201 emphasis added.

Personal injury is further defined in Idaho's worker's compensation law:

> "Injury" and "personal injury" shall be construed to include only an injury caused by an accident, which results in violence to the physical structure of the body.

I.C. §72-102(18)(c).

None of the Respondent LLCs have physical bodies upon which to cause violence. The Respondent LLCs are unable to be personally or physically injured.

To be considered a "wageworker" the Respondent LLCs would need to earn wages and would need to be susceptible to disablement. Idaho Code §72-102(33) and (34) defines these terms describing things that only natural people can experience.

> (33) "Wages" and "wage-earning capacity" prior to the injury or disablement from occupational disease mean the employee's money payments for services as calculated under section 72-419, Idaho Code, and shall additionally include the reasonable market value of board, rent, housing, lodging, fuel, and other advantages which can be estimated in money which the employee receives from the employer as part of his remuneration, and gratuities received in the course of employment from others than the employer. "Wages" shall not include sums which the employer has paid to the employee to cover any special expenses entailed on him by the nature of his employment.
>
> (34) "Wages" and "wage-earning capacity" after the injury or disablement from occupational disease shall be presumed to be the actual earnings after the injury or disablement, which presumption may be overcome by showing that those earnings do not fairly and reasonably represent wage earning capacity; in such a case, wage-earning capacity shall be determined in the light of all factors and circumstances which may affect the worker's capacity to earn wages.

I.C. §72-102(33) and (34) emphasis added.

A business entity like an LLC does not earn wages. A business entity does not suffer disability. A business entity does not experience a loss in wage-earning capacity. A business

entity cannot be compensated for a work-related injury. These are things that only natural people working as employees experience.

The Respondent LLCs also cannot qualify for income benefits based on a physical or vocational disability pursuant to the worker's compensation law.

> Income benefits for total and partial disability during the period of recovery, and thereafter in cases of total and permanent disability, shall be paid to the disabled employee…

I.C. §72-408.

The plain language of Idaho's worker's compensation statutes shows that employees under this law must be natural people. It does so because the purpose of the law is to provide "…sure and certain relief to the workmen and their families and dependents..." I.C. §72-201. Importantly, Mr. Richardson has found no controlling authority in Idaho that a business entity could be considered an employee for purposes of Idaho worker's compensation law.

The Respondent LLCs in this case are not natural people. The Respondent LLCs have no families or dependents. The Respondent LLCs do not have physical bodies. The Respondent LLCs cannot suffer a physical injury. To describe the Respondent LLCs as "co-employees" of Mr. Richardson, stretches the definition well beyond the Legislatures intent. The Respondent LLCs cannot be employees under Idaho's worker's compensation system because the plain language and reading of the Act does not contemplate business entities as employees.

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b. Employees can only receive the protections of the exclusive remedy rule if they work for statutory employers.

A person can only qualify as a statutory co-employee of an injured plaintiff, if they actually work as an employee for a statutory employer. Idaho Code §72-209(3) extends the exclusive remedy rule to employees of the injured worker's employer as well as the actual employees of a statutory employer.

> The purpose behind the various provisions of the worker's compensation law leads to the conclusion that the employee of a statutory employer and the employee of his employer's subcontractor are statutory co-employees under §72-209(3).

Blake, 146 Idaho at 851.

For example, if employee A and employee B both work for the same employer and A negligently causes an injury to B, then B cannot sue A individually for damages because I.C. §72-209(3) extends immunity from employers to its actual employees.

This also applies to employees of statutory employers. For example, employer A hires employee B. A then contracts for services with employer C. C hires employee D. While working on the job employee B negligently injures employee D. In this example, D cannot bring a third-party claim against employer C because the exclusive remedy applies to an actual employer under I.C. §72-209(1). D also cannot bring a third-party claim against employer A, because A is a category one statutory employer under I.C. §72-223 having "under" him, both C and D. Lastly, D cannot bring a third party claim for negligence against employee B, because "…the exemption from liability given an employer…also extends to the employer's… employees." I.C. 72-209(3). Since employer A is a statutory employer and employee B is an

employee of A, B is granted the protection of the exclusive remedy rule the same as statutory employer A by operation of I.C. §72-209(3).

Idaho Code §72-209(3) establishes that the only way an employee can enjoy the protections of the exclusive remedy rule is if the employee is employed for the actual employer or a statutory employer of the injured worker.

Indeed, this last example are the facts in *Blake v. Starr*. Blake was injured while working for Traffic Products & Services (TPS), a sub-contractor for Idaho Sand and Gravel (ISG). Starr was an employee of ISG. Blake brought suit personally against Starr for damages due to Starr's negligence. Starr claimed he was immune from a third party claim from Blake under I.C. §72-209(3). *Blake*, 146 Idaho at 848.

The Supreme Court began its analysis first by determining whether ISG was a statutory employer of Blake. *Id.* at 849-851. Only after determining that Starr's employer was a statutory employer, did the Supreme Court determine that "a statutory employer's immunity from suit under I.C. §72-223 must logically and necessarily be extended to its employees through I.C. §72-209(3) to fulfill the purpose of the Idaho Worker's Compensation Act." *Id.* at 851.

In this case, none of the Respondents can be classified as co-employees of Mr. Richardson. First, they are not natural people as described above. Second, the Respondents were not employees of Alignment or Hayden Homes. In fact, the contracts between Z&H and Unlimited with Hayden expressly state that Z&H and Unlimited are independent contractors and not the employees of Hayden. Since Hernandez was a subcontractor of Z&H, it also cannot be an employee of Hayden. The Respondents were considered at all times contractors or

subcontractors and not employees. Contractors and sub-contractors only fall under the definition contained in I.C. §72-102(13)(a) for employer. Therefore, Respondents cannot be Mr. Richardson's statutory co-employees as they are not Hayden's employees.

3. The district court's reliance on *Pfeifer v. Krauss Const. Co. of Virginia*, incorrectly broadened the application of the exclusive remedy rule in Idaho to include the Respondents.

In concluding that the Respondent LLCs were co-employees of Mr. Richardson, the district court relied on the Virginia case of *Pfeifer v. Krauss Construction Company of Virginia, Inc.,* 546 S.E.2d 717 (Va. 2001). In *Pfeifer*, Linkhorn Bay was the owner of a building project. Linkhorn Bay had no employees and contracted all work out to other contractors. Linkhorn Bay contracted with Virginia Natural Gas (VNG) in which VNG agreed to install a gas line in exchange for Linkhorn Bay's agreement to install natural gas appliances in the project buildings. VNG subcontracted work to be done on the project to Krauss Construction Company (Krauss). Linkhorn Bay then separately contracted with Tidewater to complete "exterior 'Finish System for construction' of the project." Pfeifer was an employee of Tidewater. Krauss employees were testing a gas line when a cap blew off the line injuring Pfeifer as he worked on the Linkhorn Bay project. Pfeifer brought a third-party suit against Krauss for damages and Krauss argued that it was a statutory employer/employee and Virginia's exclusive remedy rule applied to immunize Krauss. *Id.* at 718.

The relevant statute the *Pfeifer* Court applied was Va. Code §65.2-302. This statute identifies statutory employers based on a test involving the substance of the work that a party is contracted to perform.

> When any person (referred to in this section as 'owner') undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (referred to in this section as 'subcontractor') for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any worker employed in the work any compensation under this title which he would have been liable to pay if the worker had been immediately employed by him.

Va. Code §65.2-302(A) emphasis added.

The Court also explained the purpose of this statute is "to bring within the operation of the Act all persons engaged in work that is a part of the trade, business, or occupation of the party who undertakes as owner or who contracts as contractor to perform the work, and to make liable to every employee engaged in the work every such owner contractor, or subcontractor above such employee." *Pfeifer*, 546 S.E.2d at 719 emphasis added.

The *Pfeifer* Court explained further what determines whether a party can claim the protections of Virginia's exclusivity provision.

> If a particular subcontractor and an injured employee's common law or statutory employer are both working on the same project and are also engaged in the owner's or general contractor's work, that particular subcontractor, as a statutory co-employee of the injured worker, is also entitled to the common law immunity provided by the exclusivity provision.

Id. at 719 citing *Evans v. Hook*, 239 Va. 127, 131, 387 S.E.2d 777, 779 (1990). (emphasis added).

In Virginia, the third-party exception to the exclusive remedy rule is based on whether a subcontractor would be considered an "other party" or a "stranger to the employment."

> On the other hand, … a common-law action may be brought against an "other party" under the provisions of Code § 65.1-41. 232 Va. at 306, 351 S.E.2d at 16. Code § 65.1-41 provides in pertinent part: The making of a lawful claim against an employer for compensation under this Act for the injury ... of his employee shall operate as an

> assignment to the employer of any right to recover damages which the injured employee ... may have against any other party for such injury...
>
> We described that "other party" as "one who is a stranger to the employment and the work and who is thus not within the scope of the exclusion of § 65.1-40."

Evans v. Hook, 239 Va. 127, 387 S.E.2d 777, (1990) citing *Smith v. Horn*, 232 Va. 302, 351 S.E.2d 14 (1986) (emphasis added).

In Virginia, the test to determine whether an injured worker can make a third-party claim is whether a subcontractor is in the same "trade, business or occupation" as the actual employer of the injured party or of the injured party's statutory employer. If not, then that sub-contractor is an "other party" or "stranger to the employment" who cannot claim immunity.

Pfeifer argued that Krauss was not in the same trade, business or occupation of Linkhorn Bay and could not claim immunity. He argued that Krauss was a supplier of materials and not in the business of construction. As a supplier of materials, Krauss would be a "stranger to the employment" of constructing the building that was Linkhorn Bay's business. However, the Virginia Supreme Court disagreed and determined that Krauss was engaged in a part of the construction process which was the business of Linkhorn Bay. Since Krauss was in the same business as Linkhorn Bay, under Virginia's scheme it classified Krauss as a statutory co-employee of Pfeifer. As a statutory co-employee, Krauss could claim immunity from a third party claim for damages by Pfeifer.

The Virginia test for statutory employer status found in Va. Code §65.2-302 is different from Idaho's procedure contained in I.C. §72-223. Virginia's statute is based on the nature of the work contracted to be performed. The "trade, business, or occupation" of the contractor in

relation to the owner and common law employer of the injured party, controls whether that subcontractor can claim immunity as a statutory co-employee. This is consistent with the policy behind the statute described by the Virginia Court to bring all persons engaged in the work into the Virginia worker's compensation act.

Idaho's statute is functionally different. It is based on contractual relationships and whether a subcontractor falls "under" another. This makes Idaho's statutory employer analysis more hierarchical in its function and application than Virginia. In Idaho, if a contractor has "under him" a subcontractor who potentially has not provided worker's compensation benefits to that subcontractor's employees, the contractor is potentially obligated to provide those benefits as a backup for the subcontractor's failure. Because that contractor takes on that risk, he receives the immunity of the exclusive remedy rule according to I.C. §72-223(1). The function of the Idaho rule creates a linear hierarchy that determines those contractors/employers who can claim application of the immunity rule.

In Idaho, to obtain immunity from third-party claims, a contractor becomes a statutory employer by taking on the risk to provide worker's compensation benefits for a subordinate contractor's employees. However, in Virginia, one simply need to be working on the same project as the owner (or common law employer of the injured worker) and engaged in the owner's work that is "part of the trade, business, or occupation" to obtain that immunity. There is no requirement in Virginia for a negligent contractor to be potentially responsible to pay worker's compensation benefits to gain immunity as is the case in Idaho.

Indeed, Virginia's Supreme Court has explained that "…the issue turns on the defendant's relation to the project on which the plaintiff was injured." *Evans v. Hook*, 239 Va. at 132. As the district court observed, Virginia's scheme is more umbrella like in application. In contrast, Idaho's statutory scheme is hierarchal and linear providing immunity up the contractual chain of contractors/employers to those statutory employers potentially responsible to provide benefits to the injured worker. Idaho Code §§72-223(1) and 72-216(1) both use the term "under" to describe which employers are required to be the backup providers of worker's compensation benefits. Accordingly, Idaho's immunity goes up the chain of contractors and does not turn on the defendant's relation to the project.

The district court's application of the Virginia *Pfeifer* decision ignored Idaho's statutory employer analysis, statutory co-employee analysis, and improperly broadened the scope of immunity granted by I.C. §72-223(1) and §72-216(1). Under Idaho's statutory employer framework, the Respondents are not employees of the statutory employer Hayden Homes in this case and cannot be statutory co-employees of Mr. Richardson. Therefore, the Respondents cannot claim the exclusive remedy rule immunity from Mr. Richardson's third-party claims.

V. CONCLUSION

For the reasons discussed above, the Respondents are not statutory co-employees of Mr. Richardson. The Respondents do not qualify for immunity under Idaho's exclusive remedy rule. The district court erred in finding the Respondents to be statutory co-employees. The district court's finding on summary judgment should be reversed as there is no basis in Idaho law to find Respondents are immune from a third-party suit in this case. Mr. Richardson respectfully

requests that this Court reverse and remand the district court's decision granting the Respondent's motions for summary judgment.

Dated this 5th day of April, 2019.

SKAUG LAW, P.C.

/s/ Matthew Andrew
Matthew C. Andrew, of the firm
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of April, 2019, I served a true and correct electronic copy of the above document by i-Court electronic filing upon:

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