

Uldaho Law

Digital Commons @ Uldaho Law

Idaho Supreme Court Records & Briefs, All

Idaho Supreme Court Records & Briefs

6-11-2019

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

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation

"Richardson v. Z & H Construction LLC Appellant's Reply Brief Dckt. 46587" (2019). *Idaho Supreme Court Records & Briefs, All*. 7825.

https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/7825

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ Uldaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs, All by an authorized administrator of Digital Commons @ Uldaho Law. For more information, please contact annablaine@uidaho.edu.

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 REPLY BRIEF

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

Honorable Davis F. VanderVelde, presiding.

Matthew C. Andrew
SKAUG LAW, P.C.
1226 E. Karcher Road
Nampa, Idaho 83687
matt@skauglaw.com
Attorneys for Plaintiff/Appellant

Hans Mitchell
PERKINS, MITCHELL, POPE &
MCALLISTER, LLP
PO Box 519
Boise, ID 83701
service@perkinsmitchell.com
hamitchell@perkinsmitchell.com

Melina S. Kollross (*pro hac vice*)
CLAUSEN MILLER P.C.
10 S. LaSalle St
Chicago, IL 60603-1098
mkollross@clausen.com
*Attorney for Defendant/Respondent
Hernandez Framing, LLC*

J. Nick Crawford
BRASSEY CRAWFORD, PLLC
345 Bobwhite Court, Suite 215
PO Box 1009
Boise, Idaho 83701
jnc@brassey.net
icourt@brassey.net
*Attorney for Defendant/Respondent
Plumbing Unlimited, LLC*

Kylie L. Madsen
MADSEN BECK, PLLC
847 E. Fairview Avenue
Meridian, ID 83642
kylie@madsenbeck.com
*Attorney for Defendant/Respondent,
Z&H Construction, LLC.*

TABLE OF CONTENTS

TABLE OF CONTENTS iii

TABLE OF CASES AND AUTHORITIES..... iv

I. ARGUMENT..... 1

A. *Blake v. Starr* and *White v. Ponozzo* undermine Respondents’ contention that they are statutory co-employees of Mr. Richardson...... 1

B. Respondents’ contention they are co-employees of Mr. Richardson undermines the public policy behind the Idaho Worker’s Compensation law...... 5

1. Respondents’ expansion of immunity would create chaos for Idaho’s industry and workmen...... 5

2. Granting immunity to the Respondents would not humanely construe the worker’s compensation law in favor of the injured employee, Mr. Richardson...... 9

C. The district court’s reliance on the Virginia case of *Pfeiffer v. Krauss* was incorrect as Idaho’s worker’s compensation law is not ambiguous...... 10

D. The legislature did not intend for the term “employee” to include business entities...... 11

II. CONCLUSION 12

CERTIFICATE OF SERVICE..... 14

TABLE OF CASES AND AUTHORITIES

Cases

Blake v. Starr, 146 Idaho 847, 203 P.3d 1246 (2009) 1, 2, 3, 4, 5, 6, 10

Meisner v. Potlatch Corporation, 131 Idaho 258, 262, 954 P.2d 676, 680 (1998) 11

Page v. McCain Foods, Inc., 141 Idaho 341, 109 P.3d 1084, (2005)..... 9

Pfeifer v. Krauss, 546 S.E.2d 717 (Va. 2001)..... 1, 10, 11, 13

Robison v. Bateman-Hall, Inc., 139 Idaho 207, 210-211, 76 P.3d 951, 954-955 (2003). 4

Sorrento Delaware, Inc., 141 Idaho 245, 251, 108 P.3d 392, 398 (2005)..... 8

Spencer v. Allpress Logging, Inc., 134 Idaho 856, 860, 11 P.3d 475, 479 (2000) 8

White v. Ponozzo, 77 Idaho 276, 291 P.2d 843 (1955)..... 1, 2, 3, 5, 6

Statutes

Idaho Code §72-102(12)..... 11

Idaho Code §72-102(24)..... 11

Idaho Code §72-209..... 4

Idaho Code §72-209(3)..... 1, 2, 4, 6

Idaho Code §72-216..... 6, 10

Idaho Code §72-223..... 6, 10

I. ARGUMENT

The district court erred when it found that the Respondents were statutory co-employees. In Idaho, statutory co-employees have always been actual employees of statutory employers.

Additionally, the expansion of immunity the Respondents argue for, undermines the public policy behind the worker's compensation law. The policy behind the act is to provide immunity to those employers responsible to provide worker's compensation benefits to injured workers they employ. That immunity flows to actual employees of those employers under Idaho Code §72-209(3). The immunity does not flow from employees to the benefit of non-employer actors such as the Respondents.

The district court's reliance on the Virginia case of *Pfeifer v. Krauss*, 546 S.E.2d 717 (Va. 2001) was error as the worker's compensation statutes are not ambiguous requiring a look to outside persuasive authority. Respondents contention that the term "employee" includes business entities is also inconsistent with the context of the entire act.

The district court's order should be reversed and remanded because the Respondents do not qualify for immunity under Idaho's exclusive remedy rule.

A. **Blake v. Starr and White v. Ponozzo undermine Respondents' contention that they are statutory co-employees of Mr. Richardson.**

The crux of Respondents argument is that "[t]he statutory employer's immunity extends to its direct and statutory employees under I.C. §72-209(3) and this Court's holdings in *Blake* [citation omitted], and *White v. Ponozzo* [citation omitted]..." Joint Respondents' Brief, p. 13 (emphasis added). They contend that all statutory employees of a common statutory employer

are statutory co-employees and immune from tort liability under the exclusive remedy rule. They argue that all contractors, subcontractors, employees, and agents, who work for or have contracts with a common general contractor are immune from tort liability between each other without limitation. Respondents argue for an impermissible expansion of the exclusive remedy rule without any justified policy reason to do so.

Respondent's contend that "by statute, Richardson, Z&H, Hernandez, and Unlimited are all Hayden's statutory employees and statutory co-employees of one another, and who share immunity from tort liability under the Worker's Compensation Law." Joint Respondent's Brief, p. 22. They further contend that this Court has already expressly held this statement to be true when it stated the following language in *Blake v. Starr*:

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).

146 Idaho 847, 851, 203 P.3d 1247, 1250 (2009). Respondents misconstrue this language. The purpose to which this Court referred was providing immunity to a category one statutory employer by preventing an end run around the exclusive remedy rule by allowing a tort claim against the statutory employer's direct employee. This was also the holding of *White v. Ponozzo*, 77 Idaho 276, 291 P.2d 843 (1955), and Respondents reliance upon those cases is misplaced.

Additionally, it must be kept in mind when reading the above quoted language that it was written from the viewpoint of the statutory employer's employee. To put this in context, we can insert the parties in this case into the language. The statutory employer in this case is Hayden. The "employee of a statutory employer" refers to an employee of Hayden. The "employee of his

employer's subcontractor" refers to the employee of Hayden's subcontractor. In this case, Richardson is an employee of Hayden's subcontractor, Alignment. Thus, the language simply means that Richardson and Hayden's employees are statutory co-employees. It also means that any of the Respondent's employees and Hayden's employees are also statutory co-employees. What *Blake* does not support is the contention that Richardson and the Respondent LLC's or the Respondents' employees are statutory co-employees. The purpose behind establishing co-employee status in *White* and *Blake* does not exist in that scenario.

In *White*, the plaintiff and defendant Dykes were both employees of defendant Ponozzo Brothers. White and Dykes both drove trucks for Ponozzo. White was injured in a collision with Dykes and sued both Ponozzo and Dykes. 77 Idaho 276, 277, 291 P.2d 843, 843-844 (1955). White claimed he was not an employee of Ponozzo at the time of the crash. This Court disagreed, finding he was an employee, and as such, Ponozzo was immune from suit under the exclusive remedy rule. 77 Idaho at 279-280, 291 P.2d at 844-845. This Court then held that Dykes, as White's actual co-employee, was also immune from liability because the exemption from liability is extended to co-employees through whom the employer acts. *Id.*, at 280, 845.

White was a rather straight forward application of the worker's compensation laws as it affects actual co-employees, or employees of the same employer. In *Blake*, this Court was asked to determine whether an injured worker could seek recovery from the employee of a statutory employer, rather than an actual co-employee of the same employer. The Court noted that while an injured worker has the right to bring a civil action for damages against third parties, the

worker's compensation laws specifically exclude certain employers from third party liability. *Blake* at 850.

Those employers included direct employers and statutory employers. A "statutory employer" is "anyone who, by contracting or subcontracting out services, is liable to pay worker's compensation benefits if the direct employer does not pay those benefits." *Robison v. Bateman-Hall, Inc.*, 139 Idaho 207, 210-211, 76 P.3d 951, 954-955 (2003). Lastly, the *Blake* Court discussed I.C. § 72-209 and basic principles of agency law to conclude that a statutory employer's immunity extends to its own direct employees through whom it acts.

The plain language of the statute encompasses every relationship in which the employer could be held liable through *respondeat superior*. I.C. § 72-209(3). Allowing a suit against an employee of a statutory employer would create vicarious liability for the employer who is otherwise statutorily immune from liability.

Blake at 851, 1250 (emphasis added). That is the purpose to which this Court referred when it concluded that an employee of a statutory employer and the employee of its subcontractor are statutory co-employees. It was to prevent an end run around the exclusive remedy rule. To hold otherwise would have meant a statutory employer could be responsible to pay worker's compensation benefits without the benefit of immunity from civil suit. That situation does not exist with the case at bar. There is no reason to extend immunity to the Respondents because they were never going to be responsible to pay for Richardson's worker's compensation benefits.

The Respondents know this. To get around this, the Respondents try to bootstrap immunity to themselves with an unsupported agency theory via the Respondent LLCs'

employees. “Because any such liability is *derivative* of its employee’s liability, if the employee is immune from suit, so is the employer.” Respondents’ brief at page 17 emphasis added. The fatal flaw with Respondents’ argument, is that under the facts of this case, the employees cannot claim immune without their employers Z&H, Hernandez, and Unlimited being immune first. That cannot be the case as Alignment was not contracted by or under any of the Respondents and none of the Respondents are responsible for Mr. Richardson’s worker’s compensation benefits.

The Respondents ask this Court to transpose the conclusions of *Blake* and *White* and paste it onto starkly different facts in this case. They do this ignoring the principle that exclusive remedy immunity flows from an actual employer first. The mismatch of facts was even acknowledged by the district court when it indicated that no Idaho case match the facts in this case. R. p. 468.

The Respondents’ arguments fail. None of the Respondent LLCs are actual employees of Hayden Homes (the statutory employer of Mr. Richardson). Because of this, the Respondent LLCs, nor their employees, could be characterized as statutory co-employees of Mr. Richardson. *Blake* and *White* do not support the defense position that the Respondent LLCs (or their employees) are statutory co-employees of Mr. Richardson. The Respondents’ arguments fail to harmonize with the Idaho statutes and cases that grant immunity to employers and their actual employees.

B. Respondents’ contention they are co-employees of Mr. Richardson undermines the public policy behind the Idaho Worker’s Compensation law.

1. Respondents’ expansion of immunity would create chaos for Idaho’s industry and workmen.

The Respondents' incorrect reading of *Blake* and *White*, as well as their arguments for umbrella immunity, undermine the public policy behind Idaho's worker's compensation law. Respondents argue for a dramatic expansion of immunity. This would create chaos rather than harmony in Idaho industry and with Idaho wagedworkers. This would be especially so in the construction industry that relies heavily upon the worker's compensation law, its underlying policy, and the statutory employer structure.

As explained in *Blake*, "...a statutory employer's immunity from suit under Idaho Code §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." *Blake* at 851. Immunity flows from employers to employees. Respondents want this Court to reverse the flow creating a new vicarious liability analysis/test to assign immunity to contractors, rather than follow the statutory procedure outlined in Idaho Code §§72-223 and Idaho Code §72-216. Vicarious acts of an employee may merge with the employer for purposes of determining third party liability or to determine whether exclusive remedy immunity is granted to the employee. However, that is a separate analysis from whether a business entity/employer/contractor like the Respondents can claim to be statutory co-employees of Mr. Richardson by virtue of their own employees.

When reading I.C. §72-223 and §72-216, it is clear that the purpose of the exclusive remedy rule is to provide immunity to employers and statutory employers first. The actual employees of those specific employers are then granted immunity via I.C. §72-209(3). There is

no authority in Idaho that an employee can act as an instrument through which this immunity is provided to a non-employer actor under Idaho's worker's compensation law.

Idaho's worker's compensation law is a compromise between employers and employees. Employers provide benefits up front in exchange for immunity from damages claims by their employees. Employees gave up their right to sue for damages to receive these benefits up front. The rights to immunity and to benefits only exist within the special relationship between an employer and their employees. They sit on opposite sides of the bargain that was struck when the worker's compensation law codified the compromise.

Unlike employers, non-employer third parties do not enter into this agreement with an injured worker. Non-employers are not responsible to provide worker's compensation benefits to injured workers. If a party is not liable under the worker's compensation law then that party is not immune from a third party claim for damages.

In this case, the Court should note that Respondents are not arguing that they are somehow liable for Mr. Richardson's worker's compensation benefits in an attempt to claim immunity. They want this Court to find that they are not liable both for damages and under the worker's compensation law.

Adopting the Respondents' position creates a disturbing result. Respondents' proposed rule creates a class of contractor that is not responsible to provide worker's compensation benefits to injured non-employees and at the same time allow that contractor to claim immunity from third party suit from a worker they injure. Responsible employers do not even enjoy this level of immunity. This Court has noted that "...the Idaho Code sections dealing with the concept

of statutory employer ‘are designed to prevent an employer from avoiding liability under the workmen’s compensation statutes by sub-contracting the work to others.’” *Venters v. Sorrento Delaware, Inc.*, 141 Idaho 245, 251, 108 P.3d 392, 398 (2005) citing *Spencer v. Allpress Logging, Inc.*, 134 Idaho 856, 860, 11 P.3d 475, 479 (2000). If Idaho’s worker’s compensation law prevents an employer from avoiding providing benefits, then interpreting the same law in a manner that completely immunized the Respondents would not be consistent with the underlying policy principle to deter avoiding liability either. Respondents would enjoy the benefits of both worlds without having to pay any price to receive it.

The practical effect of adopting the district court’s ruling would be far reaching and disruptive to an industry that employs thousands of businesses and wageworkers within Idaho. This expansion of immunity would allow contractors under a general contractor to act with impunity as against other contractors working on a job site. It would shift the cost of the negligent acts of these contractors to others, namely the contractors/employers of the injured workers who provide worker’s compensation benefits regardless of fault.

This does not foster certainty nor protect industry as it allows certain contractors to avoid all liability in both systems. Contractors would operate knowing they would not have to pay for the harm they cause other sub-contractors on the same job for a common general contractor. These super-immune contractors would not have to pay for the costs of their negligence. This is a dangerous expansion of immunity that would create chaos rather than foster harmony in Idaho’s industry. This undermines the public policy behind the worker’s compensation system

by harming workers and their employers who responsibly provide worker's compensation benefits.

2. Granting immunity to the Respondents would not humanely construe the worker's compensation law in favor of the injured employee, Mr. Richardson.

This Court “[m]ust liberally construe the provisions of the workers’ compensation law in favor of the employee, in order to serve the humane purpose for which the law was promulgated.” *Page v. McCain Foods, Inc.*, 141 Idaho 341, 345, 109 P.3d 1084, 1087 (2005). Adopting the Respondents’ position greatly expands the immunity and undercuts an injured worker’s ability to obtain relief against non-employer actors. The humane purpose of the act is thwarted when a grant of immunity this broad is bestowed upon otherwise undeserving parties.

Granting broad immunity does not make Mr. Richardson whole, yet it would grant the Respondents the power to avoid responsibility. Respondents would receive immunity without having participated in the worker’s compensation compromise with Mr. Richardson. Were that to be the case, the system would no longer be a fair compromise. Rather, Respondents’ requested rule renegotiates this compromise in favor of non-employer actors at Mr. Richardson’s expense and that of his employer paying the bills. This is not interpreting the statute in favor of Mr. Richardson and the humane purpose for which the system exists as a whole. The system was not designed to allow negligent actors to escape responsibility.

There is no justification to permit the Respondents to receive this grant of immunity when they are not responsible to provide worker’s compensation benefits for Mr. Richardson. Respondents have no relationship with Mr. Richardson. Alignment and Hayden deserve

immunity because they are employers of Mr. Richardson. They bore the risk and cost of providing worker's compensation benefits to Mr. Richardson. They participated in the system and honored the compromise in providing Mr. Richardson benefits when he was injured.

There is nothing unique or special about the Respondents that justify this immunity to be granted them in this case. To adopt Respondents' arguments on this issue dramatically expands immunity and undermines Idaho public policy of providing that immunity to employers and statutory employers alone.

C. The district court's reliance on the Virginia case of *Pfeiffer v. Krauss* was incorrect as Idaho's worker's compensation law is not ambiguous.

This Court has addressed the application of I.C. §72-223 and §72-216 in prior cases. In *Blake* the Court held “[t]here is nothing ambiguous or contradictory in these provision of the Act.” *Blake* at 850. If these statutes are not ambiguous, then the district court should have applied them to the case at bar. Rather than do so, the district court sought persuasive authority from Virginia when it found that “...there is no Idaho case law with identical facts...” R. p. 468. The district court then applied the Virginia case of *Pfeifer v. Krauss*, 546 S.E.2d 717 (Va. 2001) and concluded that the intent of the act was to provide a more umbrella-like coverage. R. p. 469.

What is absent from the district court's decision and order, was any analysis concerning whether the exclusive remedy rule applies to the case at bar. The district court did not do any analysis regarding the status of the Respondents based on I.C. § 72-223 and §72-216. The district court wrote generally about the exclusive remedy rule and how statutory employers are immune under the Act. It went as far as to acknowledge that Hayden Homes was a statutory

employer. But the district court did not analyze or apply the statute to the Respondents in this case. Instead of completing the statutory analysis as against the Respondents, it applied *Pfeifer*. Doing so was not necessary as the statute is not ambiguous.

The district court should have applied Idaho's unambiguous workers' compensation statutes to the case at bar. There was no need to resort to persuasive authority from Virginia in this case as the statute itself provides the answer the Legislature intended. Had the district court applied the statute, it would have determined that none of the Respondents could be statutory co-employees of Mr. Richardson.

D. The legislature did not intend for the term "employee" to include business entities.

"Worker's compensation statutes must be considered in the context of the entire act." *Meisner v. Potlatch Corporation*, 131 Idaho 258, 262, 954 P.2d 676, 680 (1998). The defense is correct that the term "employee" includes the term "person." The term person is defined by Idaho Code §72-102(24) which states that the term includes "any political subdivision thereof, or any individual, partnership, firm, association, trust, corporation, including the state insurance fund, or any representative thereof." The Respondents use this statute as the foundation of their argument that as a business entity, they can be an "employee."

However, when reading the definition of "employee" under Idaho Code §72-102(12) in the context of the entire act, it is clear the Legislature was describing a natural person. "Workman" by its very words show the Legislature meant a human being. To interpret otherwise would create absurd results. See Appellant's brief at IV.A.2 for examples of some of these absurdities illustrating the context of the entire act in interpreting "employee."

As such, Respondents' contention that the Legislature intended for the term "employee" to mean also political subdivision, partnership, firm, association, trust, corporation, the State Insurance Fund, or LLC is a stretch of the plain language, intent, and context of the entire act. When the Legislature talks about employees under the act, the Legislature intended it to mean natural people.

II. CONCLUSION

The Respondents cannot be statutory co-employees of Mr. Richardson and cannot qualify for immunity under the exclusive remedy rule. Immunity flows from employers to employees. None of the Respondents are employers of Mr. Richardson. As such the district court's finding that the Respondents are statutory co-employees fails under Idaho law and should be reversed. Only employers received immunity.

Finding that the Respondents are statutory co-employees also undermines the public policy that supports the worker's compensation law. It is employers that can claim the benefits of exclusive remedy rule immunity, not non-employer actors like the Respondents. Respondents do not qualify for immunity under Idaho's exclusive remedy rule because they did not pay the price to obtain this immunity by providing benefits to Mr. Richardson. Adopting the district court's ruling on this matter ignores the humane purpose behind the worker's compensation law to the detriment of the injured worker and his/her employer. This ruling would create chaos in Idaho industry by shifting who pays for the consequences of an actor's negligence to employers alone. The purpose of the law is to provide immunity to those employers that are responsible to provide benefits to injured workers. The purpose behind the law is not to allow negligent

contractors with no relation to Mr. Richardson to escape liability in every aspect. Respondents do not qualify for this immunity.

The district court's reliance on the *Pfeifer* case was not necessary as the statute was not ambiguous. Lastly, the Respondents' contention that employee also can mean a business entity like the Respondents, is inconsistent with the context of the entire act.

The district court's finding on summary judgment should be reversed as there is no basis in Idaho law to find Respondents qualify for immunity in this case. Mr. Richardson respectfully requests that this Court reverse and remand the district court's decision granting the Respondents' motions for summary judgment.

Dated this 11th day of June, 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 11th day of June, 2019, I served a true and correct electronic copy of the above document by i-Court electronic filing upon:

Hans Mitchell
PERKINS, MITCHELL, POPE & MCALLISTER, LLP
PO Box 519
Boise, ID 83701
service@perkinsmitchell.com
hamitchell@perkinsmitchell.com
Attorney for Defendant/Respondent Hernandez Framing, LLC

Kylie L. Madsen
MADSEN BECK, PLLC
847 E. Fairview Avenue
Meridian, ID 83642
kylie@madsenbeck.com
Attorney for Defendant/Respondent, Z&H Construction, LLC.

J. Nick Crawford
BRASSEY CRAWFORD, PLLC
345 Bobwhite Court, Suite 215
PO Box 1009
Boise, Idaho 83701
jnc@brassey.net
icourt@brassey.net
Attorney for Defendant/Respondent Plumbing Unlimited, LLC

/s/ Becky Harvey _____
Becky Harvey