6-18-2020

Kelly v. TRC Fabrication LLC Respondent's Brief Dckt. 47653

IN THE SUPREME COURT OF THE STATE OF IDAHO

DALE KELLY and NANCY KELLY,
Husband and Wife,

Plaintiffs/Appellants

v.

TRC FABRICATION, LLC, an Idaho Limited Liability Co.

Defendant/Respondent.

Docket No. 47653-2019
Bonneville Co. Case No. CV10-18-7400

RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District for Bonneville County
The Honorable Dane H. Watkins, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal involving category one statutory employer immunity pursuant to the exclusive remedy rule of the Idaho Worker's Compensation Law. Idaho Code § 72-101 *et seq.* The appeal involves a contract under which Appellant Dale Kelly was "hired" to deliver steel tubing to Respondent TRC Fabrication, LLC's ("TRC's") facility in Idaho Falls, Idaho. The prime contract for the purchase of the steel tubing was between TRC and Brown Strauss Steel Co. ("Brown Strauss") in California. R., p. 10. The prime contract between TRC and Brown Strauss contained a provision indicating that the shipment of the steel tubing was "F.O.B. Delivered[.]" R., p. 118. In other words, *delivery* of the metal tubing by the seller, Brown Strauss, was a material aspect of the bargain struck between TRC and Brown Strauss, and as the district court correctly found, was "a service for which TRC contracted." R., p. 207.

To comply with the "F.O.B. Delivered" term of the prime contract between TRC and Brown Strauss, Brown Strauss elected to subcontract out its delivery obligation to Jay Transport. R., p. 56. In turn, Jay Transport engaged Dale Kelly to transport and deliver the shipment to TRC in Idaho Falls. R., p. 10, pp. 79-80. While assisting in the unloading of the steel tubing at TRC's facility in Idaho Falls, Dale Kelly was struck by steel tubing and sustained personal injuries. R., p. 11.

As a result of those injuries, Dale Kelly sought and received worker's compensation benefits under a policy in the name of Dale Kelly's assumed business name, "Dale Kelly Trucking." R., at p. 49, p. 199. Kelly and his wife, Nancy Kelly, (collectively, the "Kellys") also

filed a complaint against TRC for damages resulting from TRC's alleged negligence. R., pp. 9-15. Kelly sought recovery of damages under a negligence theory. R., pp. 12-13. Nancy Kelly sought recovery under a derivative claim for loss of consortium arising out of Dale Kelly's injuries. R., pp. 13-14. To avoid double recovery by Dale Kelly of both workers' compensation benefits and civil money damages, Judge Watkins granted TRC summary judgment, finding that because Kelly was "hired" to transport and deliver the steel tubes TRC purchased from Brown Strauss, TRC was entitled to category one statutory employer immunity under the Idaho Worker's Compensation Law. R., p. 208. The district court also granted TRC summary judgment as to Nancy Kelly's wholly-derivative loss of consortium claim. R., p. 209-10.

In this appeal, just as the Kellys did at the district court level, the Kellys seeks to inject concepts from the UCC Article 2 sale of goods context into an analysis of statutes in the Idaho Worker's Compensation Law. Aside from a recent decision from Judge Candy Dale (a case in which appellant's counsel's firm was the architect of such decision), the Kellys come forward with no authority from any jurisdiction employing a UCC Article 2 analysis in the context of interpreting a state's workers' compensation act. As the district court correctly held, the relevant question under the Idaho Worker's Compensation Law is not whether a particular contract in the applicable chain is for "goods" or "services" (or has as its predominant purpose "goods" or "services") under UCC Article 2. Instead, the appropriate statutory inquiry is whether under Idaho Code § 72-102(13)(a), the services of a worker have been "hired" by an upstream contractor. R., p. 204. The district court correctly ruled here that Kelly had been "hired" to

transport and deliver the steel tubes, and therefore, that TRC was entitled to category one statutory employer immunity. R., pp. 207-08. The district court should therefore be affirmed.

B. Course of Proceedings

The relevant proceedings for purposes of this appeal are those related to the category one statutory employer argument raised in the summary judgment motion filed by TRC, as it was on that ground that the district court granted summary judgment. On October 16, 2019, TRC filed its motion for summary judgment seeking dismissal of all claims asserted by the Kellys on the grounds that TRC was a statutory employer of Dale Kelly, and therefore, that TRC was entitled to immunity under the exclusive remedy rule of the Idaho Worker's Compensation Law. R., pp. 30-43. The Kellys responded -- arguing as they do here -- that the district court should import the goods/services concepts from Article 2 of the UCC to the worker's compensation context and find that the prime contract between TRC and Brown Strauss was for goods and not services, and that therefore, the Idaho Worker's Compensation Law should not be deemed to apply. R., pp 88-103.

The district court rejected the Kellys' invitation to apply UCC Article 2 concepts in interpreting and applying the Idaho Workers' Compensation Act. R., p. 204. Instead, in its Memorandum Decision and Order dated December 3, 2019, the district court interpreted the plain language of Idaho Code § 72-102(13)(a) and found that because Kelly had been "hired" by TRC to transport and deliver the steel tubes from Brown Strauss in Fontana, California to TRC in Idaho Falls, Idaho, and that TRC was Dale Kelly's statutory employer and entitled to category one statutory employer immunity. R., pp. 207-08. The district court subsequently entered

judgment in TRC's favor as to all claims raised by the Kellys on December 12, 2019 (the "Judgment"). R., p. 212-13. The Kellys timely appealed the Judgment on December 17, 2019. R., p. 214-216.

C. Statement of Facts

In January 2018, TRC purchased more than 43,000 pounds of metal tubing from Brown Strauss in Fontana, California. R., pp. 82-83. The contract between TRC and Brown Strauss contained the term "F.O.B. Delivered." R., p. 118. To comply with the "F.O.B. Delivered" term of the contract, Brown Strauss contracted with Jay Transport to haul the metal tubing from Fontana, California to TRC's facility in Idaho Falls. R., p. 56. In January 2018, Dale Kelly was operating under the d/b/a of "Dale Kelly Trucking." R., pp. 48-49. Dale Kelly Trucking was an exclusive contractor for Jay Transport, which provided him with all of his work assignments. R., pp. 48-49. Pursuant to the exclusive contract with Jay Transport, Dale Kelly Trucking was required to and did obtain various types of insurance coverage, including workers compensation coverage. R., pp. 48-49. Worker's compensation coverage for Dale Kelly Trucking was paid by Dale Kelly Trucking company funds. R., pp. 48-49.

Jay Transport assigned Dale Kelly Trucking to transport the shipment of metal tubing from Brown Strauss to TRC's facility in Idaho Falls, Idaho. R., p. 10, pp. 79-80. While the tubing was being unloaded at TRC's facility in Idaho Falls, Idaho, the load fell, hit the ground, and rolled into Dale Kelly's leg. R., p. 11. Through the workers compensation coverage obtained by his d/b/a Dale Kelly Trucking, Dale Kelly applied for and received workers compensation benefits (wage, medical, and disability) for the injuries he sustained. R., at p. 49, p. 199.

II. ISSUES PRESENTED ON APPEAL

TRC agrees that Kelly has adequately described the issues before the Court on appeal. That said, the Kellys misstate the applicable law in their phrasing of the first issue on appeal. The applicable question under the Worker's Compensation Law is not whether a contract is characterized as one predominantly for "goods" or for "services," but instead, whether a worker's services were "hired" as a result of said contract.

III. ARGUMENT

A. Statutory Employer Immunity under the Idaho Worker's Compensation Law.

As is well-known to this Court, the Legislature removed—with few exceptions—all workplace injuries from "private controversy." I.C. § 72–201. To that end, the Legislature crafted a system whereby "sure and certain relief" would be provided to injured workers regardless of fault. *Id.* This "sure and certain relief" is provided "to the exclusion of every other remedy, proceeding, or compensation, except as is otherwise provided in the worker's compensation scheme." *Id.*; *see also* I.C. § 72–209(1); I.C. § 72–211.

The exception is found at I.C. § 72–223, which allows an injured worker to sue a so-called "third party" who may be liable for damages stemming from the injury. I.C. § 72–223(1), (2). However, individuals or entities that meet the statutory definition of employer (so-called "statutory employers") are not "third parties" within the meaning of I.C. § 72–223, and, therefore, are immune from suit just like a claimant's direct employer. Idaho Code § 72-102(13)(a) describes two categories of statutory employers – category one statutory employers

(contractors and subcontractors of a claimant's direct employer) and category two statutory employers (the virtual proprietor of the premises):

> "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.*** It also includes, for purposes of section 72-438(12) and (14), Idaho Code, a municipality, village, county or fire district that utilizes the services of volunteer firefighters. If the employer is secured, it means his surety so far as applicable.

Idaho Code § 72-102(13)(a) (emphasis added).

At issue on this appeal is category one statutory employer immunity. The relevant portion of § 72-102(13)(a) defines a category one "employer" as "any person who **has expressly or impliedly hired or contracted the services of another. It includes contractors and subcontractors.**" (Emphasis added). Idaho law is clear that, in the event that a direct employer does not provide worker's compensation benefits to an injured employee, all of the direct employer's upstream contractors may be liable for the payment of those benefits. *See* Idaho Code § 72-216(1); *Blake v. Starr,* 146 Idaho 847, 203 P.3d 1246 (2009) (contractor that expressly contracts the services of a subcontractor is liable for workers' compensation benefits if the subcontractor does not provide them).

In exchange for the imposition of this potential liability, all of the upstream contractors are also entitled to "stand in the shoes" of the direct employer and claim complete immunity from any legal claim brought by the injured employee in the event workers' compensation benefits are actually paid by the direct employer and/or another contractor

higher up in the contractual chain. Idaho Code § 72-216(2), 72-223; *Blake,* 146 Idaho at 847 (holding that upstream contractor that is liable for workers' compensation benefits is a statutory employer entitled to employer immunity). This is known as the "Grand Bargain."

With this framework in mind, the Court now considers whether the district court properly concluded that TRC is entitled to category one statutory employer immunity. For the reasons more fully set forth below, TRC respectfully requests that this Court affirm the Judgment of the district court.

B. The district court properly concluded that TRC "hired" the services of Dale Kelly, and therefore, properly concluded that the Idaho Worker's Compensation Law is applicable to this case.

The Kellys first contend, as they did below, that the Idaho Worker's Compensation Law is inapplicable to this case, because the prime contract between Brown Strauss and TRC was predominantly for "goods" as opposed to "services." However, the Kellys modify their arguments on appeal to emphasize the "F.O.B. Delivered" term of the contract between Brown Strauss and TRC, arguing that because the contract between Brown Strauss and TRC was "F.O.B. Delivered," "TRC did not itself contract directly for shipping...[and] [u]nder the terms of the Purchase Agreement and Invoice No. 803034, TRC was only purchasing goods – not transport or delivery services." App. Br. at 14. First, this Court generally does not consider arguments raised for the first time on appeal, and therefore, should refuse to consider this argument now. *Watkins Co., LLC v. Estate of Storms*, 161 Idaho 683, 685, 390 P.3d 409, 411 (2017).

Second, and more importantly, even if the Court does reach this argument, the "F.O.B. Delivered" term of the prime contract between Brown Strauss and TRC actually illustrates just how *integral* transportation and delivery was to the deal reached between Brown Strauss and TRC. The "F.O.B." language in an agreement such as the prime contract between TRC and Brown Strauss defines whether a contract is a "shipment" contract or "destination" contract. Notably, both "shipment" and "destination" contracts envision a delivery component, with the difference being the specified location for said delivery. Indeed, "F.O.B." itself is a "delivery term," and both "shipment" and "destination" contracts are contracts that require or authorize the seller to "ship the goods by carrier." Idaho Code § 28-2-319(1) ("Unless otherwise agreed the term F.O.B. (which means 'free on board') at a named place, even though used only in connection with the stated price, is a *delivery term*...") (emphasis added); Idaho Code § 28-2-509(1).

Under a "shipment" contract -- which is the default rule -- risk of loss transfers when the seller delivers the goods to a carrier for delivery to a buyer. *See* Idaho Code § 28-2-319(1)(a); Idaho Code § 28-2-509(1)(a). By contrast, under a "destination" contract, risk of loss transfers when the seller delivers the goods to the buyer's place of business, and the seller agrees to transport the goods to buyer "at [seller's] own expense and risk." Idaho Code § 28-2-319(1)(b) (noting that "when the term is F.O.B. the place of destination, *the seller must at his own expense and risk transport the goods to that place* and there tender delivery of them in the manner provided in this chapter (section 28-2-503)") (emphasis added); Idaho Code Ann. § 28-2-509(1)(b). A "destination" contract is created by use of language designating the buyer's place of

business as the location for delivery. Idaho Code § 28-2-319(1)(b); Idaho Code § 28-2-509(1)(b); *Deiter v. Coons*, 162 Idaho 44, 49, 394 P.3d 87, 92 (2017) (discussing "shipment" and "destination" contracts); 77A C.J.S. SALES § 274 (same); *Delivery under shipment and destination contracts, generally*, 18 WILLISTON ON CONTRACTS § 52:10 (4th ed.) (same, also noting that "whether the shipment is at the buyer's or the seller's expense, *it is the seller's responsibility to make all necessary arrangements...*") (emphasis added).

Here, as the Kellys point out, the "F.O.B. delivered" language in the prime contract between TRC and Brown Strauss is a classic example of a "destination" contract, because it designated delivery to the buyer's place of business. However, contrary to the Kellys' argument, the presence of the "F.O.B. Delivered" term actually cuts against the Kellys' position and *establishes* that the delivery service Mr. Kelly was "hired" to perform *was* expressly contracted for between Brown Strauss and TRC. This would be true even if the contract were deemed to be a "shipment" contract, as all contracts using the term "F.O.B.," by definition, contain a delivery services component. Stated another way, the very inclusion of an "F.O.B." term of any type, in any contract, confirms that transportation and delivery services are a critical part of the bargained for exchange between the contracting parties.[1]

Thus, the presence of an "F.O.B." delivery term in the contract between Brown Strauss

[1] The fact that Brown Strauss subcontracted its shipping obligation to Jay Transport is of no import, and has no bearing on whether, in the first instance, Brown Strauss contracted with TRC for shipping, resulting in someone (here, Dale Kelly) being "hired" to perform the service of delivery. This is evident in the *Spencer v. Allpress Logging, Inc.*, 134 Idaho 856, 11 P.3d 475 (2000) case discussed below, which involved services that had been subcontracted out by Schilling to Allpress Logging.

and TRC actually confirms the correctness of the district court's ruling that the transportation/delivery "services" of Dale Kelly were "hired" by TRC within the meaning of Idaho Code § 72-102(13)(a), and therefore, that Dale Kelly was a category one statutory employee of TRC under the Idaho Worker's Compensation Law. It is perplexing for the Kellys to suggest that TRC did not expressly contract for delivery, when the contract between Brown Strauss and TRC *contained an "F.O.B." delivery term.* It is the Kellys, not the district court, that have misunderstood the meaning of an "F.O.B." term in a contract.

The Kellys also argue that the "goods" versus "services" distinction they assert is supported by this Court's decisions in the cases of *Venters v. Sorrento Delaware, Inc.*, 141 Idaho 245, 108 P.3d 392 (2004) and *Gonzalez v. Lamb Weston, Inc.*, 142 Idaho 120, 124 P.3d 996 (2005). Specifically, the Kellys argue that "*Venters* and *Gonzalez* establish that in cases brought by truck drivers, category one statutory employer immunity is limited to those parties who expressly enter into a contract for trucking services." App. Br. at 17.[2] First, even if the Kellys' characterization of the holding in these cases were correct, TRC *did* expressly enter into a contract with Brown Strauss that expressly called for delivery of the purchased tubes. Second, the Kellys have exaggerated the holdings in both *Venters* and *Gonzalez,* as there is no language

[2] The Kellys characterize the contract between TRC and Brown Strauss as being "indirectly related" to another contract for trucking services (i.e. the subcontract between Brown Strauss and Jay Transport for shipping). *Id.* This, again, is confusing, because TRC *expressly contracted for shipping* by the inclusion of an "F.O.B." delivery term in its contract with Brown Strauss. The fact that Brown Strauss elected to subcontract out its delivery obligation to Jay Transport does not change the fact that Brown Strauss had a contractual obligation to TRC to deliver the steel tubes. The delivery was therefore not only *directly* related to the prime contract between TRC and Brown Strauss, but was a *critical component* of that prime contract.

in either case that would support the sweeping assertion that only those who enter into an express contract for trucking services are entitled to category one statutory employer immunity. Notably, both the *Venters* and *Gonzalez* decisions are similar to this case, because they involved truck drivers who were injured while delivering loads while acting as independent contractors for a principal. In both cases, similarly to this case, the claimant was employed by a trucking company who contracted with the statutory employer to deliver products for the benefit of the statutory employer.

In *Venters*, Sorrento operated a cheese factory in Nampa, Idaho, which produced excess wastewater. *Venters*, 141 Idaho at 247, 108 P.3d at 394. To offload this excess wastewater, Sorrento paid local farmers an annual fee for the right to come unto the local farmers' property to pump wastewater into large storage tanks owned and maintained on the farmers' land by Sorrento. *Id.* As a collateral benefit to permitting Sorrento to deposit excess wastewater on their respective properties, the local farmers were permitted to use the wastewater as an irrigation source. Sorrento contracted with 3-C Trucking to haul the wastewater to Sorrento's storage tanks maintained on the local farmers' properties. *Id.* Montierth Farms was one of the local farms that contracted to "permit [Sorrento] to build a wastewater facility and to truck wastewater onto the farm site for dispersal." *Id.* at 247-48, 394-95. Stanley Venters, while waiting in the staging area at Montierth Farms to dump his load of wastewater, was struck, and eventually killed, by another truck driver who had just dumped his wastewater load. *Id.* at 248, 395. After receiving workers' compensation benefits, Mr. Venters' heirs filed a purported third-party claim against Montierth Farms and Sorrento. *Id.* Both Montierth Farms and Sorrento filed motions for summary

judgment arguing (among other things in the case of Montierth Farms) the same statutory employer immunity at issue here. *Id.* Both motions were granted by the district court. *Id.* Venters' heirs appealed. *Id.*

Though this Court affirmed on appeal the grant of summary judgment in favor of Montierth Farms, it did not do so on grounds of statutory employer immunity. Relevant here, the Court found that Montierth Farms was not a category one statutory employer of Mr. Venters, because "Montierth lacked even an indirect contractual employment relationship with Mr. Venters." *Id.* at 249, 396. After noting this, the Kellys argue that there are parallels between *Venters* and the instant matter, and in an effort to create parallels between the instant case and *Venters*, take liberties with the facts of *Venters*, such as by suggesting the existence of transfer of title terms that are simply not addressed at all in *Venters* -- and that would have been out of place in *Venters* -- because *Venters* did not deal at all with a contract for the sale of goods with a delivery component.

Contrary to the Kellys' argument that the instant matter exactly parallels *Venters*, this case is actually distinguishable from *Venters*, at least to the extent the Kellys argue that TRC stands in the same shoes as Montierth Farms from *Venters*. First, *Venters* clearly did not involve a traditional contract for the purchase and delivery of goods to Montierth. Indeed, the clear purpose of the Sorrento wastewater contracts was not about the sale of the wastewater as a good to Montierth, but was instead, about finding a place for Sorrento to dispose of its excess wastewater. This is reflected by the fact that local farmers like Montierth Farms did not pay Sorrento to purchase wastewater, but that instead, Sorrento paid local farmers for the right to

construct wastewater tanks and dispose of wastewater on the local farmers' property. Thus, the wastewater in *Venters* was delivered pursuant to a contract for the primary benefit of *Sorrento*, and the metal tubes in this case were delivered pursuant to a contract for the primary benefit of *TRC*. If an analogy of this case even can be made to the specific facts of *Venters*, TRC stands in similar shoes to Sorrento (who was deemed to be entitled to statutory employer immunity on appeal), not Montierth Farms.

Second, and more importantly, the undisputed evidence demonstrates that an "indirect contractual employment relationship" *did* exist here between TRC and Dale Kelly, because the prime contract between TRC and Brown Strauss expressly included a delivery component as one of its terms. An analogous "destination" contract delivery term such as the one at issue here (e.g., F.O.B. delivered) was not discussed by the Court in *Venters*. Frankly, it is inconceivable that an analogous provision would have been present in the contract at issue in *Venters*, because the contract between Montierth Farms and Sorrento was <u>*not*</u> for the purchase and delivery to Montierth Farms of Sorrento's wastewater.

Similarly, the *Gonzalez v. Lamb Weston, Inc.*, 142 Idaho 120, 124 P.3d 996 (2005) case does not stand for the expansive proposition it was cited for by the Kellys. In *Gonzalez*, Lamb Weston contracted with P.S.I. Waste Systems to haul non-recyclable waste from its food packaging plant to a transfer station. *Id.* at 121, 997. Cecilio Gonzalez, a P.S.I. employee, was injured while attempting to unload the Lamb Weston waste at a transfer station. *Id.* Mr. Gonzalez filed suit against Lamb Weston. *Id.* Lamb Weston moved for partial summary judgment on the grounds that is was Mr. Gonzalez statutory employer. *Id.* The district court

granted the motion. *Id.* This Court affirmed, following the non-controversial precedent that as an upstream contractor of a subcontractor's employee, Lamb Weston was Mr. Gonzalez's statutory employer. *Id.* at 122, 998. The Kellys argue that *Gonzalez* stands for the proposition that an express contract for "hauling services" is necessary for statutory employer immunity to apply. However, though *Gonzalez* involved a contract that required P.S.I. to haul food waste, there is no limiting language in *Gonzalez* that suggests such a contract of that nature is *required* for statutory immunity to apply, or that a different type of contract also resulting in a worker being "hired" to perform a service would somehow be outside the scope of the Idaho Worker's Compensation Law. Instead, because the prime contract in the instant matter included a term for delivery, and because Kelly, like Mr. Gonzalez, was an employee of a downstream subcontractor, *Gonzalez* actually illustrates the correctness of the district court's ruling.

Under the plain language of Idaho Code § 72-102(13)(a), the question for Worker's Compensation purposes is not whether a contract is predominantly "for goods" or predominantly "for services" as it is under the UCC's predominant factor test (discussed more fully below), but instead, whether the contract (however characterized) resulted in someone being "expressly or impliedly hired" to perform a "service." Stated differently, there is no exemption in the text of the Idaho Workers' Compensation Act for "services" provided pursuant to a contract that may have been primarily motivated by the purchase of goods, but that also contained a services component. As was well-put by the district court, "[t]he Act does not confine its definition of employer to those who hired or contracted *predominantly* (or exclusively) for services." R., p. 204.

Applied here, and as the district court correctly found, Dale Kelly was unquestionably "hired" to perform the contracted-for "service" of delivery pursuant to the prime contract between Brown Strauss and TRC. That would be true even if the prime contract were deemed to be primarily motivated by the purchase of goods. The district court therefore correctly concluded that the Idaho Worker's Compensation Law applies, that TRC was Dale Kelly's statutory employer, and that TRC was entitled to category one statutory employer immunity under the Idaho Worker's Compensation Law.

C. The district court properly relied on *Spencer v. Allpress Logging, Inc.* in reaching its decision.

The Kellys next argue that the district court erred in relying on this Court's opinion in the *Spencer v. Allpress Logging, Inc.*, 134 Idaho 856, 11 P.3d 475 (2000). Specifically, the Kellys argue that *Spencer* is "readily distinguishable and inapplicable to the facts of the instant appeal." App. Br. at 18. Contrary to the Kellys' argument, *Spencer* serves as perhaps the best example of the Idaho Worker's Compensation Law's application to a contract with both a "goods" and "services" component, and is significant authority supporting the correctness of the district court's decision in this case.

In *Spencer*, the contract between Schilling and Weyerhaeuser provided that Weyerhaeuser would advance Schilling $100,000 in purchase money, and in return Weyerhaeuser would have the right to cut and remove timber from Schilling's property. *Spencer,* 134 Idaho at 857, 11 P.3d at 476. The contract provided that when Schilling delivered timber to Weyerhaeuser, a portion of the contract price would be used to reduce the balance of

the advance and a portion would be allocated to cover the cost of harvesting the timber. *Id.* In other words, the contract was a hybrid contract with both a "goods" and "services" component. Weyerhaeuser purchased both a good (the timber) and a service (the cutting of the timber).

To satisfy the services component of the contract with Weyerhaeuser, Schilling subcontracted with Allpress Logging to cut and deliver the timber to Weyerhaeuser. *Id.* at 477. There is no indication in *Spencer* that there was any direct contract between Weyerhaeuser and Allpress Logging. Instead, "Allpress hired, instructed and paid his own employees without any involvement" from Schilling or Weyerhaeuser. *Id.* On all but two occasions, checks were issued from Weyerhaeuser directly to Schilling who deposited them into his personal account. Schilling would then pay Allpress out of this account. *Id.* While cutting timber, an Allpress employee, Justin Spencer, was severely injured when the line machine he was operating tipped over on top of him. *Id.* At the time of the accident, neither Allpress nor Schilling had worker's compensation coverage for Spencer. *Id.*

Spencer filed a worker's compensation complaint, and the Industrial Commission found, among other things, that Weyerhaeuser was Spencer's statutory employer – notwithstanding that the contract at issue involved a sale of goods (timber). In fact, a dissenting Commissioner unsuccessfully argued, as the Kellys do here, "that the Idaho Code should not be interpreted as being so broad as to include Weyerhaeuser simply because it purchased raw materials from Schilling." *Id.* at 478. Though the *Spencer* Court determined that "the contract under which Schilling and Weyerhaeuser were operating was a timber sale contract[,]" the Court still found

that the Idaho Worker's Compensation Law applied, and affirmed that Weyerhaeuser was Spencer's statutory employer. *Id.* The Court noted:

> Weyerhaeuser contracted with Schilling for the purchase of the timber, and Weyerhaeuser contracted to pay Schilling for the price of harvesting. In their agreement, part of the value of each load delivered was paid against Schilling's $100,000 advance, but part of the price was also included as part of the cost for delivery. While Weyerhaeuser did not care who did the harvesting, it paid the costs of logging the pine. *Thus, Weyerhaeuser was contracting with Schilling for logging the pine on the property.*

Spencer, 134 Idaho at 861, 11 P.3d at 480 (emphasis added). The same is true here. Just as Weyerhaeuser contracted for the service of logging in connection with its purchase of timber, TRC contracted for the service of delivery of the steel tubes in connection with its purchase of steel tubes. Just as Weyerhaeuser did not care who actually cut the timber, TRC did not care who delivered the steel tubes it purchased from Brown Strauss. However, both Weyerhaeuser and TRC contracted for a service connected with the goods they purchased, which was subcontracted out in each case -- in *Spencer* to Allpress (Spencer's employers) and here, to Dale Kelly Trucking (Dale Kelly's employer). On those facts, the Court correctly found in *Spencer* that Weyerhaeuser was Spencer's statutory employer, and comparatively, the district court correctly found here that TRC was Dale Kelly's statutory employer.

The Kellys rely on insignificant distinctions in attempting to distinguish *Spencer* from the present case, such as the fact that Weyerhaeuser bore the risk of loss, and that a portion of the price paid in *Spencer* was expressly allocated to logging services. For purposes of evaluating the

application of the Idaho Worker's Compensation Law, these distinctions are of no moment.[3] The question, instead, is whether a worker was "expressly or impliedly hired" to perform a service. *Spencer* is a clear example of a case where the Idaho Worker's Compensation Law was deemed to apply to a hybrid contract with both a goods and services component, and that is exactly what is present here. Therefore, contrary to the Kellys' arguments, the district court properly relied on the case of *Spencer v. Allpress Logging, Inc.*, 134 Idaho 856, 11 P.3d 475 (2000), among other cases, in concluding that TRC was Dale Kelly's statutory employer.

D. The Court should decline the Kellys' invitation to carve out an exception to the Act; namely, that a purchaser of goods cannot, as a matter of law, be a statutory employer of a delivery driver.

Next, the Kellys argue that this Court should determine, presumably as a matter of law, that a "purchaser of goods" cannot be a statutory employer of a "delivery person." Specifically, the Kellys argue that even if the Court were to conclude (as it should) that the contract between TRC and Brown Strauss was subject to the Idaho Worker's Compensation Law, the Court should carve out a special exception and hold that the Idaho Worker's Compensation Law does not apply to purchasers of goods and the delivery drivers delivering those goods. App. Br. at 21.[4] In

[3] TRC, through the F.O.B. term in the prime contract with Brown Strauss, plainly contracted for delivery whether or not any portion of the purchase price was expressly allocated to delivery. Delivery was therefore part of the bargained for exchange. Because delivery was contracted for, the consideration paid by TRC was, logically, for both the tubes and delivery. To say that TRC did not pay for delivery in the purchase price because there was no express price allocation to delivery also ignores the business reality that Brown Strauss was not, out of the goodness of its heart, bearing the cost of delivery of the tubes to Idaho Falls, Idaho.

[4] As a threshold matter, the *Spencer* case discussed above rebuts the notion that a purchaser of goods can never be a statutory employer, because, again, *Spencer* held that the Idaho Worker's

making this argument, the Kellys rely – as they did below – entirely on authority from outside of Idaho. The out-of-jurisdiction cases relied on by the Kellys in support of their goods/services argument are not only not binding, but also deal with distinct worker's compensation laws in other states and are also factually distinguishable and unpersuasive. As the district court correctly found, "[b]ecause pertinent Idaho case law exists which allows this Court to resolve the issue before it, this Court does not look to other jurisdictions to interpret the meaning of statutory employer under Idaho law."

If this Court does consider the out-of-state authority cited by the Kellys, as a threshold matter, the definition of a statutory employer in Idaho appears to be much broader than it is in the states cited by the Kellys. *Compare, Blake v. Starr*, 146 Idaho 847, 849, 203 P.3d 1246, 1248 (2009) ("[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.") *with McCracken v. Wal-Mart Stores E., LP*, 298 S.W.3d 473, 480 (Mo. 2009) (noting that "[o]ne is a statutory employee if (1) the work is performed pursuant to a contract, (2) the injury occurs on or about the premises of the alleged statutory employer and (3) *the work is in the usual course of the alleged statutory employer's business*.") (emphasis added).

In any event, these out-of-state cases are distinguishable – if not entirely inapposite to this case – because they do not focus on the definition of "employer" under the respective

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Compensation Law *did apply* in a case that involved a contract for the sale of goods (timber) with a separate services component. Under *Spencer*, and as held by the district court, the law in Idaho appears to be that a contract for the sale of goods *can* be covered under the Idaho Worker's Compensation Law so long as it has a services component.

workers' compensation statutes at issue in these cases. Instead, the cases cited by the Kellys deal with the definition of "contractor," appear to be applying a category two statutory employer analysis, or both. *See e.g., Davis v. Ford Motor Co.*, 244 F. Supp. 2d 784, 789 (W.D. Ky. 2003) (discussing Kentucky law defining "contractor" as a "person who contracts with another ... [t]o have work performed of a kind which is *a regular or recurrent part of the work of the trade, business, occupation, or profession of such person*" and determining that Ford was not a contractor under that definition); *Meyer v. Piggly Wiggly No. 24, Inc.*, 338 S.C. 471, 474, 527 S.E.2d 761, 763 (2000) (ostensibly applying a category two analysis and determining that a vendor-vendee relationship does not render one a "contractor" and that "a vendor's employee is not the purchaser's statutory employee *because the vendor does not perform part of the purchaser's business.*"); *Yancey v. JTE Constructors, Inc.*, 252 Va. 42, 44, 471 S.E.2d 473, 474–75 (1996) (ostensibly applying a category two analysis and determining that "an employee of a company supplying materials is not *engaged in the trade, business, or occupation of the general contractor* when the employee is injured while delivering the materials to the job site."); *Mobley v. Flowers*, 211 Ga. App. 761, 761, 440 S.E.2d 473, 474–75 (1994) (noting that "[i]n order to make a party to the contract for the sale of goods such a 'contractor,' the contract to sell must be accompanied by an undertaking ... to render substantial service in connection with the goods sold."); *Gray Bldg. Sys. v. Trine*, 260 Ga. 252, 252, 391 S.E.2d 764, 765 (1990) (same); *Shipley v. Gipson*, 773 S.W.2d 505 (Mo. App. 1989), *overruled by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003) (citation omitted) (emphasis added) (noting that "*only a contract which delegates to another the performance of the usual operations of the employer's business*

comes within the meaning of the statute."); *Wilson v. Daniel Int'l Corp.*, 260 S.C. 548, 554, 197 S.E.2d 686, 689 (1973) (noting category two "trade, business or occupation" requirement); *Hacker v. Brookover Feed Yard, Inc.*, 202 Kan. 582, 586, 451 P.2d 506, 511 (1969) (performing category two analysis and concluding that "[a] sale and delivery of merchandise is not such a contractual relationship as is anticipated by K.S.A. 44-503 creating statutory employers and employees for the purpose of workmen's compensation.'"); *Doyle v. Missouri Val. Constructors, Inc.*, 288 F. Supp. 121, 123, fn. 1 (D. Colo. 1968) (noting that statutory employer immunity in Colorado applied only where the claimant was "performing work which would ordinarily be accomplished through the defendant's employees, as required by Colorado decisional law[,]" (e.g. Category Two)); *Garrett v. Tubular Prod., Inc.*, 176 F. Supp. 101, 103 (E.D. Va. 1959) (while not entirely clear from the opinion whether the Eastern District of Virginia is applying something akin to a category one or category two analysis, it is clear that the opinion turned on a vendor/supplier vs. subcontractor distinction).

The Kellys also argue that *Ferguson v. Air-Hydraulics Co.*, 492 S.W.2d 130 (Mo. App. 1973) is "very similar to this case." App. Br., p. 24. The Kellys also cite *McCracken v. Wal-Mart Stores E., LP*, 298 S.W.3d 473 (Mo. 2009) in support of their position. *Id.* at p. 25. However, both the *Ferguson* and *McCracken* Courts also employed something akin to Idaho's category two statutory employer analysis, and therefore, are inapposite to the category one statutory employer question now before the Court on appeal. *See McCracken v. Wal-Mart Stores E., LP*, 298 S.W.3d 473, 480 (Mo. 2009) (noting that "[o]ne is a statutory employee if (1) the work is performed pursuant to a contract, (2) the injury occurs on or about the premises of the

alleged statutory employer and (3) *the work is in the usual course of the alleged statutory employer's business.*") (emphasis added); *Ferguson v. Air-Hydraulics Co.*, 492 S.W.2d 130, 135 (Mo. App. 1973), *abrogated by McGuire v. Tenneco, Inc.*, 756 S.W.2d 532 (Mo. 1988) (noting that "[u]nder the above statute our courts have held that there are three essential elements which must be present before an employee can be held to be a statutory employee. The evidence must show that: (1) the work was performed under a contract; (2) the injury must have occurred on or about the premises of the employer; and (3*) the injury must have occurred while the employee was doing work in the usual course of the business of the employer.*") (emphasis added). TRC is unclear how two out-of-state cases decided under Missouri's equivalent of Idaho's category two statutory employer framework have any bearing whatsoever on the present case.

At most, the out-of-state case law that finds a goods/services distinction meaningful in the statutory employer context looks to whether the purchase of goods was accompanied by "substantial services." *See e.g., Bros. v. Dierks Lumber & Coal Co.*, 217 Ark. 632, 638, 232 S.W.2d 646, 650 (1950) ("We do not hold that a mere contract for the sale of goods makes either the buyer or seller, or both, a 'contractor' within the meaning of section 6, *but we are committed to the view that when the contract to sell is accompanied by an undertaking by either party to render substantial services in connection with the goods sold, that party is a 'contractor' within the meaning of the section.*") (emphasis added); *Davis v. Ford Motor Co.*, 244 F. Supp. 2d 784, 788 (W.D. Ky. 2003) ("There appears to be two notable exceptions to this general rule: (1) when the contract to sell is accompanied by an undertaking by either party to render substantial

services in connection with goods sold; or (2) when the transaction is a mere devise or subterfuge to avoid liability.").

In *Hall v. 84 Lumber Co.*, No. CV409-057, 2011 WL 13279174, at *3 (S.D. Ga. Mar. 4, 2011), the Southern District of Georgia noted:

> The Georgia Supreme Court has held that "[a] mere contract for the sale of goods does not make either the buyer or seller or both a 'contractor' as used in [O.C.G.A.] § 34-9-8." *Gray Bldg. Sys. v. Trine*, 260 Ga. 252, 253, 391 S.E.2d 764, 765 (1990). *However, a party can be a statutory employer if the contract is "accompanied by an undertaking by either party to render substantial services in connection with the goods sold." Id.* (emphasis added). Therefore, Defendant 84 Lumber qualifies as a statutory employer if the delivery of the materials to its customers is a substantial service.
>
> After reviewing the applicable case law in Georgia, *the Court concludes that the delivery of the goods was a substantial service, making Defendant 84 Lumber a statutory employer with tort immunity.*

Hall v. 84 Lumber Co., No. CV409-057, 2011 WL 13279174, at *3 (S.D. Ga. Mar. 4, 2011) (emphasis added). While the *Hall* Court dealt with a different set of facts, it's finding that delivery was "a substantial service" in connection with the purchase of goods is equally applicable to TRC here. In sum, even if the goods/services distinction mattered at every level of the contractual chain (which under existing Idaho law, it does not), the delivery of the steel tubes was a "substantial service" performed in connection with the purchase of the steel tubes. Therefore, even if the case law cited by the Kellys were applicable here, the principal contract at issue – even if deemed to be predominantly for the purchase of goods – was accompanied by the "substantial service" of delivery, the cost of which amounted to about 7% of the total invoice amount. R., at p. 87.

Finally, the Kellys return again to the same "house of horrors" argument that they made unsuccessfully to the district court. The Kellys attempt to turn the "grand bargain" on its head by resorting to an example of a purchaser of small consumer goods being held liable for worker's compensation benefits for UPS delivery drivers. However, the Kellys' projected sea change in the way people do business, is, as a practical matter, very unlikely to occur. The reality is that most companies (especially large companies like UPS used in the Kellys' example) provide workers' compensation insurance for their employees. This reality is in all likelihood the result of the very purpose of the statutory employer doctrine, and the pressure contractors have placed on the parties they do business with to purchase worker's compensation coverage. However, in the rare circumstance where that is not the case, the Idaho legislature has already made the policy choice that ABC, Inc., might -- in Plaintiffs' far-fetched and unlikely example -- be liable as a statutory employer if all upstream contractors failed to secure worker's compensation coverage for the injured driver making the delivery to ABC, Inc. Indeed, this is one of the lynchpin principles of the statutory employer doctrine. *Adam v. Titan Equip. Supply Corp.*, 93 Idaho 644, 647, 470 P.2d 409, 412 (1970) ("Undoubtedly one objective of the statute in making the operator of the business liable for workmen's compensation, was to afford full protection to workmen by preventing the operator or contractor avoiding liability under the workmen's compensation act by subcontracting work to others who might be irresponsible.").

Alternatively, the district court wisely pointed out that the facts of the instant case are readily distinguishable from the Kellys' hypothetical. R., p. 207. Specifically, the district court noted that the present case involves a specially-arranged delivery of 43,000 pounds of steel

tubing rather than the delivery of a small consumer good in the Kellys' hypothetical that can be easily assimilated into stream-of-commerce delivery systems (such as UPS and other like providers). *Id.* Given the stark factual differences between this case and the Kellys' hypothetical, it may well be reasonable for a court to find that no statutory employer relationship exists in the Kellys' hypothetical scenario, even though such a relationship clearly exists here under existing Idaho law.

E. The Court should reject the Kellys' invitation to import UCC Article 2's Predominant Factor Test to the Workers' Compensation context.

Lastly, the Kellys argue that this Court should adopt, as a matter of first impression, UCC Article 2's predominant factor test in evaluating whether a contract is one in which "services" are provided within the meaning of the Idaho Worker's Compensation Law. TRC agrees with the Kellys that the predominant factor test is used by Idaho courts in resolving whether a hybrid contract (those contracts that involve both a goods component and a services component) is a "contract for the sale of goods" governed by Article 2 of the UCC, or a "contract for services" not governed by the UCC. "The test for whether a hybrid contract is subject to the UCC is whether the predominant factor, the thrust, the purpose of the agreement is a transaction of sale, with labor incidentally involved." *Silicon Int'l Ore, LLC v. Monsanto Co.*, 155 Idaho 538, 546, 314 P.3d 593, 601 (2013) (citations omitted). But that does not mean there is good reason to extend that test to the unrelated context of the Idaho Worker's Compensation Law.

Notably, none of the reported Idaho cases discussing statutory employer immunity adopt the predominant factor test. Moreover, TRC is unaware of any reported case in *any* jurisdiction

(aside from the *Schuler* case discussed below) adopting or extending the "predominant factor" test to the worker's compensation context, let alone a case that adopts any sort of extra-statutory requirement that every contract in the contractual chain be predominantly for services for statutory employer to apply. Again, there is nothing in the text of the Idaho Worker's Compensation Law that would preclude statutory employer immunity from applying to a hybrid contract, there is no defined exemption from the application of the Idaho Worker's Compensation Law if a contract is a hybrid contract, and no language in the Law's text from which such an intent could be inferred.

The Kellys do not dispute that the lone example of a case in *any* jurisdiction that has adopted the predominant factor test in the context of a workers' compensation claim is the decision of Judge Candy W. Dale in the case of *Schuler v. Battelle Energy All., LLC*, No. 4:18-CV-00234-CWD, 2019 WL 2477609 (D. Idaho June 12, 2019). It is noteworthy that the Plaintiff in the *Schuler* case is represented by the same firm representing the Kellys in this matter, and also that then-defense counsel for Battle Energy Alliance in *Schuler* did not argue against or oppose the application of the UCC's predominant factor test to the Idaho Worker's Compensation Law.[5] However, the *Schuler* matter is still very much pending, and in any event, in *Schule*r, Judge Dale found that even under the UCC's predominant factor test, the contract under which the truck driver made delivery of in-pile tubes to the Department of Energy's

[5] Counsel of record for TRC in this matter have since substituted in as counsel of record for Battelle Energy Alliance in the Schuler case. This information is provided solely to inform this Court that this is a familiar, hotly-litigated issue for both sets of counsel of record in this appeal.

Advanced Test Reactor (ATR) Complex was predominantly for services. *Id.* at *8 ("Considering the contract as a whole, although the predominant factor of Purchase Order No. 3015656 is the provision of ten IPTs, the predominant factor of the Requirements Document, which the purchase order expressly incorporates, is the provision of GE Hitachi's services during the IPT manufacturing process."). It was on other grounds – namely, a finding that Battelle was not Schuler's statutory employer -- that Judge Dale denied Battelle's motion for summary judgment.[6]

In addition to the adoption of the predominant factor test being virtually unprecedented nationwide in the worker's compensation context, it is a poor fit in the worker's compensation context. Indeed, imagine the same facts of this case with one minor wrinkle – that neither Dale Kelly Trucking nor any of the upstream contractors of Dale Kelly save TRC had secured worker's compensation coverage for their employees. Would it be good public policy, particularly given that Dale Kelly was unquestionably "impliedly hired" by TRC to perform the service of transportation/delivery of the tubes, to allow TRC to avoid payment of worker's compensation benefits to Dale Kelly on the technical grounds that the "predominant factor" in TRC's upstream contract with Brown Strauss was primarily the purchase of steel tubes, not the transportation and delivery services expressly required by that contract and that Dale Kelly was "impliedly hired" to perform? It does not take much imagination to realize that if Dale Kelly had *not* obtained worker's compensation coverage through Dale Kelly Trucking or any other

[6] It is also noteworthy that Judge Dale's opinion in that case was reached prior to this Court's decision in *Richardson v. Z&H Construction et.al,*. Docket Number 46587, March 20,2020.

upstream contractor, that at least Dale Kelly's answer to this question would be "no," and that he would have -- just as the injured worker successfully did in the *Spencer* case discussed above -- sought recovery of worker's compensation benefits from TRC under the statutory employer doctrine.

However, in such a scenario, under the Kellys' proposed "predominant factor" test approach, Mr. Kelly's right to what otherwise would have been "sure and certain" relief under the Idaho Worker's Compensation Law would be clouded and would require the injured worker to incur significant legal fees and costs to obtain a determination of his or her rights, which would ultimately come down to the Idaho Industrial Commission's or a court's determination of the predominant factors/motivations of upstream contractors in entering into contracts. If the Commission or court determined that *any* contract in the chain of contractors and subcontractors was predominantly for the purchase of goods, the injured worker would be completely deprived of any relief under the Idaho Worker's Compensation Law.

Idaho worker's rights to "sure and certain" relief under the Idaho Worker's Compensation Law should not be compromised and overcomplicated – e.g. made *un*sure and *un*certain – by the adoption of the UCC's "predominant factor" test in the worker's compensation context. In resolving this issue, it cannot be overlooked that adopting the "predominant factor" test and applying it to every contract in the chain would not only undermine and cloud upstream contractors' rights to immunity, but would, as a corollary, also cloud and undermine the important "sure and certain" relief that the statutory employer doctrine was intended to provide to Idaho's workers.

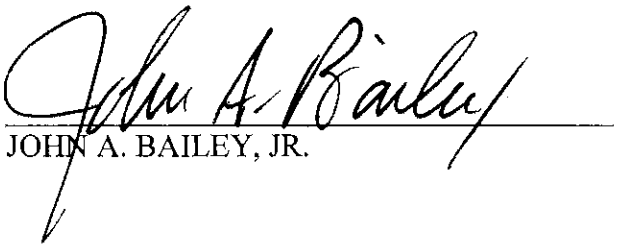
There is nothing in the text of the Idaho Worker's Compensation Law that suggests that an injured worker's "sure and certain" relief – or, as a corollary, an employer's immunity – should be dependent on whether any contract in the contractual chain could be characterized as being predominantly for the purchase of goods. Had the Legislature believed such qualification was necessary, it would have written that condition into the Worker's Compensation Law. The stakes are too high on all sides to inject such uncertainty into the well-settled "grand bargain" that exists between Idaho's workers and their employers. TRC therefore respectfully requests that this Court decline – as the district court did – the Kellys' invitation to adopt the UCC predominant factor test in the workers' compensation context.

IV. CONCLUSION

Based on the foregoing argument, TRC respectfully requests that the Court affirm the district court's Judgment.

DATED this 18th day of June, 2020.

HAWLEY TROXELL ENNIS & HAWLEY, LLP



JOHN A. BAILEY, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of June, 2020, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

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