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7/9/2020 4:22 PM
Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

DALE KELLY and NANCY KELLY, Husband and Wife, Plaintiffs-Appellants, vs. TRC FABRICATION, LLC, an Idaho Limited Liability Company Defendant-Respondent,	Docket No. 47653-2019

APPELLANTS' REPLY BRIEF

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

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I. INTRODCUTION

This reply brief will demonstrate that TRC's efforts to frame the issue on appeal as one involving a "grand bargain" between Idaho workers and their employers or policies designed to prevent an injured worker from being overcompensated are without merit. It will then be shown that TRC's arguments concerning the meaning of I.C. § 72-102(13)(a) are not supported by the plain language of the statute and, in fact, conflict with this Court's decision in *Venters v. Sorrento Delaware, Inc,* 141 Idaho 245, 108 P3d 392 (2005). Instead, the statute, combined with its purpose and this Court's decisions construing the statute, show that the district court erred in concluding that TRC was Dale Kelly's statutory employer and thereby immune from the Kellys' negligence claims.

II. REPLY ARGUMENT

A. Idaho Court Do Not Characterize Statutory Employer Immunity As Being Part Of A "Grand Bargain" Between Idaho Workers And Their Employers.

At the outset it should be noted that TRC's efforts to frame the issue of this appeal are misleading and without merit. First, TRC would have this Court believe that reversal of the district court's summary judgment decision would unfairly deprive TRC of the benefits of the "grand bargain" that exists between Idaho workers and their employers.[1] TRC is mistaken in two respects.

[1] The phrase "grand bargain" appears in Respondent's Brief at pages 7, 24, and 29.

First, the phrase "grand bargain" has not appeared in any of this Court's decisions in the 103 years since the Idaho Legislature enacted the state's first worker's compensation laws in 1917.[2] The phrase did not appear in appellate decisions from other jurisdictions until 2009 when it was first used in a dissenting opinion in *Satterlee v. Lumberman's Mutual Casualty Co.*, 222 P.3d 566, 579 (Mont. 2009) ("The workers' compensation system in Montana constitutes a grand bargain in which injured workers forego the possibility of larger awards potentially available through the tort system (the quid) in exchange for a no fault system that provides more certainty of an award (the quo).").

Second, as *Satterlee* illustrates, the courts that have used the phrase do so when characterizing the basic trade-off inherent in all workers' compensation systems. Contrary to TRC's suggestion, grand bargain is not a phrase used by courts when discussing statutory employer liability or immunity.[3] As stated in the Appellants' opening brief at page 9, this Court has aptly described the dual policy considerations underlying the Idaho's Workers Compensation Act without using the phrase "grand bargain." *Gomez v. Crookham Co.*, 166 Idaho 249, 255, 457 P.3d 901, 907 (2020). Those policy considerations are "to provide employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinative." *Id.* This case presents no reason for the Court to incorporate the phrase "grand

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[2] *Roe v. Albertson's Inc.*, 141 Idaho 524, 527, 112 P.3d 812, 815 (2005) ("In 1917, our legislature enacted the state's first worker's compensation laws. 1917 Idaho Sess. Laws, ch. 81; *Gifford v. Nottingham*, 68 Idaho, 330, 340, 193 P.2d 831, 837 (1948) (Holden, J., dissenting)).

[3] Emily A. Spieler, *(Re)assessing The Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017*, 69 Rutgers University Law Review, Vol. 69, fn.4, pp.927-28.

bargain" into Idaho jurisprudence. TRC's suggestion that Kellys' points and authorities threaten the foundation of the grand bargain is without merit.

B. Statutory Employer Immunity Is Unrelated To Rules Preventing Injured Workers From Obtaining Double Recoveries.

The same flaws exist with TRC's assertion that the district court granted TRC summary judgment so as to prevent Dale Kelly from receiving a double recovery.[4] Statutory employer immunity has nothing to do with the Idaho Legislature wanting to prevent injured workers from being overcompensated for their injuries. Rather, the statutory employer laws are designed to increase the likelihood that an injured worker will receive his work comp benefits by not allowing unscrupulous employers to avoid responsibility for work comp benefits by using subcontractors who fail to have work comp insurance for their employees. *Adam v. Titan Equip. Supply Corp.,* 93 Idaho 6444, 646, 470 P.2d 409, 411 (1970); *Harpole v. State,* 131 Idaho 437, 440, 958 P.2d 594, 597 (1998). Also, since 1996, the immunity aspect of being a statutory employer has mirrored those instances where the statutory employer faces potential liability for work comp benefits when the direct employer fails to have workers compensation insurance. *Robison v Bateman-Hall, Inc.,* 139 Idaho 207, 211, 76 P.3d 951, 955 (2003).

Moreover, the Act has never prevented injured employees from collecting workers' compensation benefits and also pursuing tort liability claims against non-employer third-party tortfeasors. In *Schneider v. Farmers Merchant, Inc.*, 106 Idaho 241, 243, 678 P.2d 33, 35 (1984), this Court endorsed the following statement from its earlier decision in *Tucker v. Union Oil Co. of*

[4] Respondent's Brief, p.2.

California, 100 Idaho 590, 603, 603 P.2d 15, 1696 (1979), "[t]here appears no question but that an injured employee may receive workman's compensation benefits and thereafter bring a negligence action against a third-party tortfeasor who was a non-employer. I.C. § 7-223." As illustrated by the *Schneider* case, the Act and courts use other methods to ensure the injured worker is not overcompensated. Those include giving the employer, if not at fault, a subrogation right against the employee's tort recovery, or otherwise reducing the damage award by the amount of the employee's workers compensation benefits. The later method was used in *Schneider. Id.*, 106 Idaho at 245, 678 P.2d at 37. *Also see*, *Maravilla v. J.R. Simplot Co.,* 161 Idaho 455, 462-63, 387 P.3d 123, 130-31 (2016).

C. Statutory Employer Immunity Applies Only To Those Who Enter Into Service Contracts And Pay For The Services Rendered.

Moving to the central issue of this appeal, TRC mistakenly argues that the plain language of I.C. § 72-102(13)(a) justifies the district court's summary judgment decision. TRC asserts that statutory employer immunity is bestowed upon a party who enters into a contract of any kind which "envisions" or "results" in someone being "expressly or impliedly hired" to perform a "service." TRC also argues that immunity applies to all persons or entities in a chain of contracts whenever the injured worker was hired by an upstream contractor.[5]

TRC's arguments implicate the rules of statutory interpretation, which TRC did not address. In *Gomez v. Crookham Company*, 166 Idaho 249, 253, 457 P.3d 901, 905 (2020), this Court explained that the objective of statutory interpretation is to derive the legislative intent. Such

[5] Respondent's Brief, pp.2, 5, 8 and 14.

begins with the literal language of the statute. To determine the meaning of the statute, the Court applies the plain and ordinary meaning of the terms and, where possible, every word, clause and sentence should be given effect. In *State v. Olivas*, 158 Idaho 375, 379, 347 P.3d 1189, 1193 (2015), the Court elaborated that only where the language of the statute is ambiguous will the Court look to the rules of construction for guidance and consider the reasonableness of a proposed interpretation. A statute is ambiguous where language is capable of more than one reasonable construction. Ambiguous statutes must be construed to mean what the Legislature intended them to mean. The Court determines legislative intent by examining the literal words of the statute, along with the reasonableness of the proposed construction, public policy behind the statute and its legislative history.

I.C. § 72-102(13)(a), defines a category one statutory employer as follows:

> "Employer" means any person who has expressly or impliedly hired or contracted the services of another. It includes contractors and subcontractors.

Black's Law Dictionary defines "hire" as "to engage the labor or services of another **for wages or other payment**."[6] A person hires the services of another when they agree to pay wages or other compensation to the other person in exchange for performance of the specified services. Based on the definition of "contract," a person contracts for the services of another when they enter into an agreement that creates an enforceable obligation for the other person to perform specified services.[7] To be enforceable the contract for services must be supported by

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[6] BLACKS' LAW DICTIONARY, 735 (7th ed. 1999) (emphasis added).
[7] *Id.* at 318.

consideration, typically a promise of payment from the employer to the person performing the services. *Davidson v. Soelberg,* 154 Idaho 227, 232, 296 P.3d 433, 438 (Ct. App. 2013) (citing *Sirius LC. v. Erickson,* 144 Idaho 38, 42, 156 Idaho P.3d 539, 543 (2007); *General Motors Acceptance Corp. v. Turner Ins. Agency, Inc.,* 96 Idaho 691, 695, 535 P.2d 664, 668 (1975)).

To expressly hire the services of another or to expressly contract for services of another may be ambiguous. TRC argues it includes all types of contracts, which contain any service component, large or small, integral or incidental. Kellys interpret the statute as covering only those persons who enter into service contracts with an independent contractor for performance of specified services in consideration for payment from the "employer."

The plain wording of the statute does not support TRC's arguments. It does not say "employer" includes everyone who enters into a contract of any kind, provided the contract includes a component of service, large or small, integral or incidental. Likewise, the statute does not say "employer" includes everyone who enters into a contract that envisions or somehow results in another person being hired or contracted with to perform the services.

Instead, Appellants submit that a more reasonable interpretation of the statute limits an "employer" to one who hires or contracts and pays for the services of another. If the contract covers services and non-service matters, the service component must be paramount so that the contract can be fairly characterized as a service contract. The predominant factor test used by Judge Dale in *Schuler v. Battelle Energy All., LLC,* No. 4:18-CV-00234-CWD, 2019 WL 5295461 (D. Idaho Oct. 18, 2019), would be useful in that regard. The Legislature never intended statutory employer immunity to apply to the purchaser of goods, even with incidental and ancillary delivery.

Appellants' position is supported by this Court's decisions on statutory employer immunity addressed in their opening brief. Such includes *Venters* and *Spencer* discussed further below.

In *Venters v. Sorrento Delaware, Inc,* 141 Idaho 245, 249, 108 P3d 392, 396 (2005), this Court suggested that category one immunity is limited to those persons who hire or contract with another so as to create at least "an indirect contractual employment relationship" between the putative statutory employer and the injured worker. The Court held that Montierth Farms was not a category one statutory employer of Mr. Venters, the deceased truck driver, since there was not even an indirect employment relationship between the deceased truck driver and Montierth Farms. Instead, it was Sorrento that hired 3-C Trucking to transport its wastewater to its storage tanks on Montierth Farms' property so it could be used as irrigation water by Montierth Farms. 3-C Trucking in turn hired the drivers, including Mr. Venters. Instead of entering into a direct or indirect employment relationship with the driver, Montierth Farms had simply contracted with Sorrento for its wastewater. The fact that the Sorrento-Montierth Farms contract envisioned or resulted in a trucking company and its drivers being hired to deliver the wastewater to Montierth Farms' property was not enough to qualify Montierth Farms as the driver's statutory employer.

Not surprisingly, TRC argues that its status is more closely aligned to that of Sorrento than and Montierth Farms. TRC overlooks the key fact that Sorrento expressly contracted with 3-C Trucking for its transportation services and paid for those services. In contrast, TRC did not contract with a trucking company for delivery services. Instead, TRC simply entered into a contract for the purchase of goods, with incidental and ancillary delivery arranged and paid for separately by the seller.

TRC's discussion of *Spencer v. Allpress Logging, Inc.*, 134 Idaho 856, 11 P.3d 475 (2000), is also flawed. Procedurally, TRC mistakenly asserted on Page 16 of its brief that the Industrial Commission ultimately ruled that Weyerhaeuser was Spencer's statutory employer. As correctly stated on Page 19 of Appellants' opening brief, the Idaho Industrial Commission ultimately concluded that Weyerhaeuser was **not** Spencer's statutory employer. *Id.* 134 Idaho at 858-59, 11 P.3d at 477-78. More importantly, while this Court held that Weyerhaeuser was Spencer's statutory employer and therefore liable for Spencer's workman's compensation benefits, it was not because Weyerhaeuser had entered into a contract to purchase timber from Schilling, with incidental delivery of the timber to Weyerhaeuser's sawmill. Instead, this Court concluded that Weyerhaeuser was the statutory employer of Spencer because it had also entered into a contract with Schilling for harvesting the timber and agreed to pay Schilling additional sums for harvesting the timber when each load was delivered. This Court reasoned that since Weyerhaeuser was contracting with Schilling for logging, it had clearly entered into a contract for services, thereby making Weyerhaeuser a statutory employer under the Act and responsible for paying Spencer's work comp benefits. In reaching this decision, the Court emphasized that when each load of harvested timber was delivered to Weyerhaeuser, Weyerhaeuser issued its check to cover the cost of harvesting the timber. *Id.* Unlike the facts of *Spencer*, TRC did not hire the services of a transportation company and did not issue payment for the transportation services provided by Jay Transport and Dale Kelly. Also, Brown Strauss's invoice to TRC did not allocate any portion of the purchase price for the steel tubing to transportation costs. For these reasons, the district court

erred in applying *Spencer* to the facts of this case and using it to support its conclusion that TRC was Dale's statutory employer.

D. TRC Has Conceded The Point Of Appellants' Hypothetical.

TRC, at page 25 of its brief, conceded "it may be reasonable for a court to find that no statutory employer relationship exists in the Kellys' hypothetical scenario." Since the factual differences between the hypothetical and this case are only ones of scale, TRC is conceding the reasonableness of Appellants' position that there was no statutory employer relationship between TRC and Dale Kelly.

III. CONCLUSION

The Legislature never intended to extend statutory employer immunity to purchasers of goods. The contract between TRC and Brown Strauss was a contract for the purchase of goods only. Because TRC did not enter into a contact for services, the Idaho Worker's Compensation Act is inapplicable, and TRC is not entitled to statutory employer immunity under the Act. Alternatively, the Court should hold that purchasers of goods with ancillary delivery are not statutory employers of the delivery persons and are not entitled to statutory employer immunity under the Act.

For these reasons and all others discussed above and in their opening brief, the Appellants respectfully urge this Court to reverse the district court's Memorandum Decision granting summary judgment in favor of TRC and the Judgment of Dismissal, allowing for further proceedings on the negligence and loss of consortium claims set forth in their complaint.

DATED this 9th day of July 2020.

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By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of July 2020, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

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