

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEBRUARY 5, 2019
STATE OF NORTH DAKOTA

Plains Trucking, LLC,

Petitioner,

vs.

Todd Cresap, Judge of the District Court, North
Central Judicial District, Lyle and Laurie Davis,
individually and as Personal Representatives of
the Estate of Trevor Davis, and on behalf of the
heirs-at-law and wrongful death beneficiaries of
Trevor Davis, Deceased; Missouri Basin Well
Service, Inc. d/b/a MBI Energy Services,

Respondents.

SUPREME COURT NO. 20190014

Civil No. 51-2015-CV-01030

APPEAL FROM THE DISTRICT COURT DATED MAY 19, 2016
WARD COUNTY, NORTH DAKOTA
NORTH CENTRAL JUDICIAL DISTRICT
HONORABLE TODD CRESAP

**RESPONDENTS' BRIEF IN OPPOSITION OF
PETITION FOR SUPERVISORY WRIT**

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I. STATEMENT OF THE ISSUES

[¶1] Whether the District Court erred in finding there were genuine issues of material fact which precluded summary judgment on Defendant Plains Trucking LLC's claim that Trevor Davis was an employee of Plains Trucking, LLC.

[¶2] Whether the District Court erred in finding there were genuine issues of material fact which precluded summary judgment on Defendants Plains Trucking LLC's claim it was an employer in compliance with N.D.C.C. Chapter 65.

II. STATEMENT OF THE CASE

[¶3] This case concerns an explosion on March 27, 2013, which killed Trevor Davis ("Trevor"). Trevor died while cleaning the interior of a crude oil tanker for Defendants Plains Trucking, LLC ("Plains Trucking") and Missouri Basin Well Service, Inc. ("MBI"). While Trevor was cleaning the inside of the crude oil tanker owned by MBI, the crude oil tanker exploded which caused Trevor to be ejected through the roof of the garage and onto adjacent land. Trevor was nineteen years old at the time of his death. This lawsuit is brought by Trevor's parents, Lyle and Laurie (the "Davises"), against Plains Trucking and MBI for Trevor's wrongful death.

[¶4] In May 2014, the Davises commenced this suit against Plains Trucking and MBI. (Doc. #2 – Complaint). In their Complaint, the Davises alleged Trevor was an independent contractor working for Plains Trucking and brought claims of negligence and strict and/or absolute liability against Plains Trucking and MBI. Id. The Davises also plead, in the alternative, a claim of liability under N.D.C.C. Chapter 65 against Plains Trucking if the Court determined Trevor was an employee of Plains Trucking. Id.

[¶5] On July 9, 2015, Plains Trucking moved for summary judgment arguing that Trevor was an employee and that Plains Trucking had immunity from suit as a complying employer

pursuant to N.D.C.C. Chapter 65. (Doc. #13 – Motion for Summary Judgment). Plains Trucking also moved for Rule 11 sanctions against the Davises, claiming the lawsuit was frivolous and brought to harass and needlessly increase the costs of litigation against Plains Trucking. (Doc. #39 – Motion for Sanctions). The Davises opposed summary judgment arguing that Trevor was an independent contractor, and in the alternative, if Trevor was an employee, Plains Trucking was a non-complying employer under N.D.C.C. Chapter 65. (Doc. #22). On May 19, 2016, the Court denied the motion for summary judgment on the basis there were multiple genuine issues of material fact which precluded summary judgment. (Doc. #60).

[¶6] The trial in this matter is set for March 26-29, 2019. On January 15, 2019, Plains Trucking brought its present Petition for Supervisory Writ. Plains Trucking provided no explanation as to why it waited approximately 32 months to bring its Petition following the Court’s denial of summary judgment.

III. STATEMENT OF FACTS

A. Introduction to Trevor Davis.

[¶7] Trevor was born in 1993 and is the son of Lyle and Laurie. (Respondents’ Appendix¹ at p. 1). The Davises and Trevor have predominately lived in Burlington, North Dakota. (Resp. App. at p. 1). In the summer of 2012, Trevor was working two jobs. (Resp. App. at pp. 1-2). Trevor was working at Ruby Tuesday in Minot and also working at the Tunnel of Suds Car Wash in Minot. (Resp. App. at pp. 1-2). Trevor worked with his boyhood friend Josh Lohtowe (“Josh”) at Tunnel of Suds Car Wash. (Resp. App. at p. 11). Trevor and Josh’s work at the Tunnel of Suds Car Wash involved washing the exterior of automobiles and pickup trucks. (Resp. App. at p. 11). Their work did not involve cleaning large petroleum trucks and tankers.

¹ Hereinafter “Resp. App.”

(Resp. App. at p. 11). Trevor had never worked in the oil field industry before Plains Trucking invited Trevor to clean the inside of tankers. (Resp. App. at p. 1).

B. Plains Trucking Approaches Trevor and Josh to Work as Independent Contractors.

[¶8] Plains Trucking was owned, in part, by Kirk St. Croix (“Kirk”). (Resp. App. at pp. 1-2). The Davises have known and been friends with Kirk and his wife for many years. Id. One of Kirk’s sons, Tucker St. Croix (“Tucker”), approached Trevor and Josh to gauge their interest in working with Plains Trucking. (Resp. App. at p. 11). Tucker informed Trevor and Josh that their job duties would include washing the exteriors of trucks/tankers and cleaning the inside of tankers. (Resp. App. at p. 11). Trevor and Josh determined to take the job. While Trevor informed his parents that he was cleaning the exterior of tankers and trucks, he never informed them that he was cleaning the inside of empty oil field tankers that were connected to a tractor for hauling oil. (Resp. App. at p. 2).

C. Plains Trucking Treats Trevor and Josh as Independent Contractors.

[¶9] Trevor and Josh began working with Plains Trucking in the fall of 2012. (Resp. App. at p. 12). Plains Trucking did not request Trevor and Josh fill out a W-4 tax form (“Employee’s Withholding Allowance Certificate”) when they began working with Plains. (Resp. App. at pp. 2, 11). Plains Trucking also failed to have Trevor and Josh fill out an I-9 (“Employment Eligibility Verification/Immigration and Naturalization Service”). (Resp. App. at p. 12). In fact, Plains Trucking did not have Trevor and Josh fill out any employment-related forms. (Resp. App. at p. 12).

[¶10] Trevor and Josh cleaned trucks and trailers MBI owned. (Resp. App. at p. 13). MBI typically paid Plains Trucking \$500.00 for exterior cleaning and \$1,000.00 for each interior cleaning of a truck/trailer. (Resp. App. at p. 12). Plains Trucking kept half of the payments from

MBI and the other half was split between whatever independent contractors performed the cleaning services. (Resp. App. at p. 12). Josh and Trevor made approximately \$800.00-\$1,000.00 per week working for Plains Trucking as independent contractors. (Resp. App. at p. 12). Almost all of the payments from Plains Trucking to Trevor and Josh were in cash. (Resp. App. at p. 12). Not surprisingly, Plains Trucking did not supply Trevor or Josh with a W-2 (“Wage and Tax Statement”) at the end of 2012. (Resp. App. at pp. 2, 12). Plains Trucking also never requested Trevor or Josh’s social security numbers. (Resp. App. at pp. 2, 12).

D. Trevor and Josh Work as Independent Contractors for Plains Trucking.

[¶11] Plains Trucking did not supply Trevor or Josh with any manuals or written procedures concerning the cleaning of a tanker which previously had hydrocarbons contained in it. (Resp. App. at p. 13). Plains Trucking did not supply any training to Trevor or Josh. (Resp. App. at p. 13). The only procedure that Plains Trucking requested Trevor and Josh follow concerning the interior cleaning of a tanker was to allow a tanker to sit for eight to ten hours with intake and outtake hoses in the tanker before they commenced cleaning the interior. (Resp. App. at p. 13).

[¶12] On the days they chose to work on behalf of Plains Trucking, Trevor and Josh would contact MBI to determine how many trucks MBI had that required interior and/or exterior washing. (Resp. App. at p. 14). Trevor and Josh had the discretion to take on as many of the MBI trucks as they wanted on any given day. (Resp. App. at p. 14). The MBI drivers would then drive the trucks to the Plains Trucking building in Ross, North Dakota. (Resp. App. at p. 14).

[¶13] In regard to the cleaning of the interior of trucks/trailers, Trevor and Josh would drain whatever oil was in the trailer first. (Resp. App. at p. 14). Thereafter, they would open hatches and begin the process of connecting hoses with fans to move fresh air into and out of the tank.

(Resp. App. at p. 14). Trevor and Josh would then take turns entering the inside of the tank to complete the necessary work. (Resp. App. at p. 14). Trevor and Josh could complete the tasks in whatever time frame they chose. (Resp. App. at p. 15). There was no supervision from anyone at Plains Trucking and Trevor and Josh never worked with any Plains Trucking employees. (Resp. App. at p. 15).

[¶14] Outside of cleaning the exterior and interior of MBI trucks at the Plains Trucking building in Ross, North Dakota, and splitting fifty percent of the fee with Plains Trucking concerning the cleaning of MBI trucks/trailers, Josh and Trevor provided no other services for compensation to Plains Trucking. (Resp. App. at p. 14). Trevor and Josh, both then living in Minot, were responsible for their own travel expenses to get to the Plains Trucking facility in Ross which is approximately 60 miles away. (Resp. App. at p. 14).

[¶15] In February 2013, Josh's father, Justin Lohtowe ("Justin"), visited Josh at the Plains Trucking site and informed Josh that the work was too dangerous. (Resp. App. at p. 15). Justin is employed by Strata Corporation and has experience working in the oil field industry and understands the danger of hydrocarbon fumes. (Resp. App. at p. 15). Based on his father's comments about the danger of cleaning the MBI trucks, Josh decided to stop working as an independent contractor for Plains Trucking in February 2013. (Resp. App. at p. 15).

E. Darian Songer Bail Begins Working as an Independent Contractor for Plains Trucking.

[¶16] Darian Songer Bail ("Darian") is another one of Trevor's friends that worked with Trevor at Tunnel of Suds Car Wash in Minot in 2012. (Resp. App. at p. 16). In February 2013, Trevor reached out to Darian to see if he would be interested in working alongside him for Plains Trucking. Id. Trevor informed Darian of the job duties and how payments worked, and Darian decided he was interested in cleaning the exterior and interior of trucks/trailer. (Resp. App. at p.

17). Darian had no experience in working in the oil and gas industry prior to this job. (Resp. App. at p. 17).

[¶17] Darian began working with Plains Trucking in March 2013. Just like Trevor and Josh, Plains Trucking did not ask Darian for his social security number and did not supply him with a W-4, I-9, or any other forms. (Resp. App. at p. 17). Plains Trucking told Darian that he would be paid in cash. Id. Darian did not receive a W-2 form for 2013, the only year he worked for Plains Trucking. (Resp. App. at p. 17).

[¶18] No one at Plains Trucking instructed Darian concerning any safety practices or procedures concerning his work in cleaning the trailers. (Resp. App. at p. 17). No one supplied Darian with any safety manuals or manuals on the procedure that Plains Trucking wished to have used in cleaning the trailers. Id. In short, Plains Trucking provided Darian no training. (Resp. App. at p. 17). Darian worked for Plains Trucking for about two weeks before the horrific incident on March 27, 2013.

F. Trevor Davis is Killed on March 27, 2013.

[¶19] At the time of the incident on March 27, 2013, the LED (light-emitting diode) light that Trevor and Darian used when cleaning the inside of trailers had been broken. (Resp. App. at p. 18). Plains Trucking did not replace the LED light. (Resp. App. at p. 18). Instead, Plains Trucking provided Trevor and Darian with a halogen light. (Resp. App. at p. 18). Plains Trucking was aware that Trevor and Darian were going to use the halogen light on March 27, 2013, to clean the MBI trailer. (Resp. App. at p. 18).

[¶20] On March 27, 2013, Trevor went into the MBI tanker to clean it. (Resp. App. at p. 19). Darian then saw a yellow flame which turned into a funnel. (Resp. App. at p. 19). There was then an explosion which resulted in Darian being blown into the air and through the Plains

Trucking roof before falling onto the trailer and then the ground. (Resp. App. at p. 19). Trevor was blown through the roof of Plains Trucking and landed in the Plains Trucking yard outside. (Resp. App. at p. 19). The explosion killed Trevor, while Darian suffered second and third degree burns and had to be hospitalized for four weeks in a Minot hospital. (Resp. App. at p. 19).

[¶21] Plains Trucking never paid Darian for any of his work until he was released from the hospital. (Resp. App. at p. 18). After being discharged from the hospital, Kirk brought Darian to the bank where he gave him \$800.00 cash. (Resp. App. at p. 18). Plains Trucking did not supply Darian with a W-2 for 2013. (Resp. App. at p. 17). Plains Trucking also did not provide Josh with a W-2 for 2013 despite Josh working for Plains Trucking in January and February 2013. (Resp. App. at p. 12).

G. WSI Contacts the Davises.

[¶22] After Trevor was killed in the March 27, 2013, explosion, the Davises did not contact WSI. (Resp. App. at p. 5). Despite Plains Trucking now claiming that Trevor was an employee, Plains Trucking did not notify WSI of Trevor's death, as is required by law. (Resp. App. at p. 5). Instead, WSI became aware of an article in the Williston Herald News which stated that Trevor had died in an explosion in the Plains Trucking yard. (Resp. App. at p. 5); (Doc. #29 – News Article). On April 3, 2013, WSI contacted the Mountrail County Sheriff's Office to request a copy of the sheriff's report concerning Trevor's death. (Resp. App. at p. 5); (Doc. #25 – WSI Request).

[¶23] On April 3, 2013, WSI contacted Lyle by telephone. (Resp. App. at p. 6). WSI requested Trevor's date of birth, social security number, and mailing address. (Resp. App. at p. 6). WSI explained that it had faxed a non-dependency claim form to the funeral home for Lyle to fill out for non-dependency benefits. (Resp. App. at p. 6). WSI asked Lyle for his understanding of

what happened in Trevor's death, and Lyle explained to WSI that all he knew was Trevor was cleaning the inside of an oil tanker at the Plains Trucking yard in Ross, North Dakota, when an explosion occurred resulting in Trevor's death. (Resp. App. at p. 6). WSI did not ask Lyle any questions concerning whether Trevor was an employee or independent contractor of Plains Trucking. (Resp. App. at p. 6).

[¶24] On April 4, 2013, WSI sent the Davises a letter which stated WSI needed the Davises' assistance with the application process for death benefits. (Resp. App. at pp. 5-6); (Doc. #27 – WSI letter). At the time, the Davises had no knowledge of whether Trevor was an independent contractor or employee of Plains Trucking. (Resp. App. at pp. 5-6). On April 5, 2013, still only approximately a week after the explosion killed Trevor, WSI sent a letter enclosing form C12 which is an application for non-dependency benefits. (Resp. App. at p. 6); (Doc. #28 – WSI letter). The WSI letter states “[t]o assist Workforce Safety & Insurance (WSI) in establishing a claim, please complete the attached form.” (Resp. App. at p. 6). At this point in time, the Davises did not have any knowledge concerning whether Trevor was an employee or independent contractor of Plains Trucking or the legal implications of such. (Resp. App. at p. 6).

[¶25] On April 4, 2013, after still not having heard anything from Plains Trucking, WSI sent a C9 Employer's report for Death Claim form to Plains Trucking. (Resp. App. at p. 5); (Doc. #26 – WSI letter). On April 19, 2013, despite Plains Trucking never treating Trevor as an employee while he worked for it, Plains Trucking submitted the C9 form claiming to be the employer of Trevor. (Resp. App. at p. 6). ; Doc. #29 – C9 Form).

[¶26] On or about April 17, 2013, Lyle Davis had a conversation with WSI concerning the C12 form. (Resp. App. at p. 7). WSI informed Lyle Davis that if he did not fill out the C12 form, the Davises would not receive any benefits from WSI. (Resp. App. at p. 6). As such, the

Davises filled out the C12 form and sent it to WSI on April 17, 2013. (Resp. App. at p. 6); Doc. #37 – C12 form). At this point in time, three weeks after the horrific death of their nineteen year old son and while Darian continued to recover in a hospital from his severe injuries, the Davises did not have any knowledge whether Trevor was an employee or independent contractor of Plains Trucking and did not understand the legal implications of the distinction. (Resp. App. at p. 6, 19).

[¶27] On or about June 5, 2013, the Davises received two checks for \$7,500.00 each for non-dependent death benefits from WSI. (Resp. App. at p. 7). At this time, the Davises still had no knowledge of whether Trevor was an employee or independent contractor for Plains Trucking. (Resp. App. at p. 7). In fact, the Davises only learned that Trevor, Josh, and Darian were all independent contractors working with Plains Trucking after the Davises hired the Serkland Law Firm and the Serkland Law Firm had its investigator look into the incident. (Resp. App. at p. 7).

H. Plains Trucking Files Payroll Report which Misrepresents and Omits “Employees”, Wages Paid to “Employees”, and Mischaracterizes Classification of “Employees.”

[¶28] On or about October 31, 2013, Plains Trucking submitted an “Employer Payroll Report” (“2013 Payroll Report”) to WSI for its payroll period of November 1, 2012, to September 30, 2013. (Resp. App. at pp. 8-9). In the 2013 Payroll Report, Plains Trucking identifies Trevor and Darian as employees of Plains Trucking for the payroll period. (Resp. App. at pp. 8-9). Despite claiming in the 2013 Payroll Report that Trevor was Plain’s Trucking’s employee, Plains Trucking did not supply a social security number for Trevor in the 2013 Payroll Report. (Resp. App. at pp. 8-9). Trevor was of course killed while working for Plains Trucking and Darian received severe injuries while working for Plains Trucking. (Resp. App. at pp. 19). Notably, Plains Trucking omits Josh from its 2013 Payroll Report, despite Josh having worked for Plains Trucking for at least three to four months (November 1, 2012, until February 2013) during the payroll period. (Resp.

App. at p. 12). Despite Trevor, Josh, and Darian doing identical work for Plains Trucking, no explanation is provided in the 2013 Payroll Report for why Plains Trucking treated only Trevor and Darian, the two contractors injured on the job, as employees.

[¶29] Not only does the 2013 Payroll Report omit Josh as an “employee,” it also misrepresents the gross payroll. (Resp. App. at pp. 8-9). The 2013 Payroll Report states that Plains Trucking paid Trevor a total of \$1,100.00 dollars between November 1, 2012, and October 31, 2013 (in effect, November 1, 2012, to the day he was killed, March 27, 2013). (Resp. App. at pp. 8-9). When working with Josh (November 1, 2012, until sometime in February 2013), Trevor made \$800.00-\$1,000.00 per week. (Resp. App. at p. 12). As such, even calculating on the low side, Trevor would have made thousands of dollars in excess to what Plains Trucking represented to WSI as the gross payroll for Trevor during this period.

[¶30] Furthermore, while it appears that Plains Trucking primarily paid Trevor in cash, the Davises have located two checks from Plains Trucking to Trevor which amount to \$1,075.00 in wages just for the month of March 2013. (Resp. App. at p. 4). This is despite the fact that Plains Trucking has turned over an “Earnings Register” in discovery which represents to that Trevor would have only netted \$954.30 from Plains Trucking in wages for the entire year of 2013. (Resp. App. at p. 10).

[¶31] The 2013 Payroll Report also misrepresents the classification code for the work performed by Trevor and Darian. (Resp. App. at pp. 8-9). The 2013 Payroll Report classifies Darian and Trevor as “Auto Repair Body – Body Shops – Mech.” (Resp. App. at pp. 8-9). This is the same designation the 2013 Payroll Report provides for employees who were actually mechanics. (Resp. App. at pp. 8-9). Darian and Trevor were not mechanics. Instead, Darian and Trevor engaged in the much more dangerous activity of cleaning hydrocarbons and other

combustible materials inside of oil tankers. By omitting Josh's payroll expenditures, misrepresenting Trevor and Darian's payroll expenditures, and by classifying Trevor and Darian into a less dangerous job category, Plains Trucking reduced the premium it owed to WSI.

I. Plains Trucking Files a W-2 for Trevor in 2013 Following his Death.

[¶32] Near the end of 2013, Plains Trucking contacted the Davises to get Trevor's social security number for the very first time. (Resp. App. at pp. 4). Plains Trucking, despite not filing a W-2 for Trevor in 2012, Josh in 2012 and 2013, or Darian in 2013, decided to file a W-2 for Trevor in 2013. (Doc. #33 – W2). As stated earlier, the W-2 Plains Trucking provided represents it only paid Trevor \$1,100.00 in gross salary in 2013, despite the presence of checks from Plains Trucking in the month of March 2013 that alone total more than what the net amount of \$1,100.00 would be. (Resp. App. at p. 4).

IV. JURISDICTION

[¶33] This Court's authority to issue supervisory writs is derived from N.D. Const. art. VI, § 2, and N.D.C.C. § 27-02-04. Dimond v. State Bd. of Higher Educ., 1999 ND 228, ¶ 19, 603 N.W.2d 66. The authority to issue a supervisory writ is discretionary; it cannot be invoked as a matter of right. Trinity Med. Ctr. v. Holum, 544 N.W.2d 148, 151 (N.D. 1996). "Courts generally will not exercise supervisory jurisdiction 'where the proper remedy is an appeal merely because the appeal may involve an increase of expenses or an inconvenient delay.'" Ziegler v. Meadowbrook Ins. Group, Inc., 2009 ND 192, ¶ 16, 774 N.W.2d 782 (citation omitted). This Court exercises its authority to issue supervisory writs "rarely and cautiously, and only to rectify errors and prevent injustice in extraordinary cases in which there is no adequate alternative remedy." Id. (citation omitted).

[¶34] Plains Trucking did not provide any explanation as to why it waited approximately

32 months, and until 10 weeks before trial to bring its present Petition for Supervisory Writ. Nevertheless, the Davises do not wish to have the Petition for Supervisory Writ denied on the lack of timeliness on the part of Plains Trucking. Rather, the Davises join Plains Trucking in requesting the Court determine whether the district court erred in denying Plains Trucking's motion for summary judgment. For the reasons set forth below, the Davises respectfully request the Court deny Plains Trucking's Petition on substantive grounds and hold that the district court did not err in denying the motion for summary judgment.

V. LAW AND ARGUMENT

[¶35] In support of its Petition, Plains Trucking makes two arguments as to why the district court erred in denying its motion for summary judgment. First, Plains Trucking argues administrative res judicata bars any claim by the Davises that Trevor was an independent contractor. Second, Plains Trucking argues that it is a complying employer with N.D.C.C. Ch. 65 and thereby is immune from suit. Plains Trucking's arguments are unsupported by the law and facts in the record.

[¶36] The district court correctly concluded there were genuine issues of material fact regarding whether Trevor was an independent contractor or employee. In addition, administrative res judicata does not apply in this matter, as there has never been a trial-like administrative proceeding on the issue, and the purposes of administrative res judicata are not served by applying the doctrine in this instance. Moreover, case law from other jurisdictions supports the Davises' position that administrative res judicata does not apply. Finally, there is no dispute, that absent administrative res judicata, there are genuine issues of material fact regarding whether Trevor was an independent contractor.

[¶37] The district court also correctly concluded there were, at a minimum, genuine issues

of material fact regarding whether Plains Trucking was a complying employer pursuant N.D.C.C. Ch. 65. In fact, if anything, this Court should rule, as a matter of law, that if Trevor is an employee, Plains Trucking was a non-complying employer. This is because there can be no genuine issue of material fact that Plains Trucking (1) omitted like-kind employees from its payroll report; (2) misrepresented the earned income for Trevor (and Darian); and (3) misrepresented the classification code for the type of work Trevor, Darian, and Josh engaged in.

A. The District Court Correctly Concluded There Are Genuine Issues of Material Fact regarding whether Trevor was an Independent Contractor or an Employee.

[¶38] Plains Trucking's argument that Trevor is an independent contractor solely relies on this Court determining administrative res judicata bars the Davises from claiming Trevor was an independent contractor because WSI awarded them \$15,000 in death benefits. Trevor died as a nineteen year-old cleaning the inside of a crude oil tanker used to haul hydrocarbons. The Davises understood that Trevor was working for Plains Trucking and understood he was cleaning the exterior of oil tankers. Like most parents, the Davises had no knowledge of whether Trevor was an "independent contractor" or "employee," never mind the legal significance of the distinction.

[¶39] On March 27, 2013, Trevor was killed in an explosion. The Davises did not have an opportunity to ask their dead son whether he was an independent contractor or employee. The Davises did not reach out to WSI claiming that Trevor was an employee. Rather, WSI contacted the Davises and asked them to fill out various forms. WSI, nor anyone else, explained to the Davises the distinction between an independent contractor or employee or the legal significance of the designation. While grieving their dead child, the Davises accepted \$15,000.00 in funeral benefits from WSI. Thereafter, the Davises contacted legal counsel and legal counsel conducted an investigation regarding the incident. As a result of the investigation, it became clear to Davises'

counsel that Trevor as an independent contractor.

1. Administrative Res Judicata Does Not Apply Because There Has Never Been a Trial-Like Administrative Proceeding on the Issue of Whether Trevor was an Independent Contractor or Employee of Plains Trucking.

[¶40] Res judicata is the doctrine that “prohibits relitigation of claims that were raised or could have been raised in a prior proceeding between the same parties or their privies, and which were resolved by a final judgment in a court of competent jurisdiction.” Cridland v. ND Workers Comp. Bureau, 1997 ND 223, ¶ 17, 571 N.W.2d 351. “Administrative res judicata is the judicial doctrine of res judicata applied to an administrative proceeding.” Id. at ¶ 18. Importantly, administrative res judicata “is applied more circumspectly than its judicial counterpart[.]” Ziesch v. WSI, 2006 ND 99, ¶ 17, 713 N.W.2d 525.

[¶41] Administrative res judicata does not apply in this matter because there has never been an adjudicative hearing or any other trial-like hearing on the merits of whether Trevor was an employee or independent contractor working for Plains Trucking. This Court has held administrative res judicata necessitates agency action taken in a judicial capacity. See Muscatell v. ND Real Estate Comm’n, 546 N.W.2d 374, 379 (N.D. 1996) (providing that “[t]he doctrine [of administrative res judicata] contemplates agency action taken in a judicial capacity that resolves disputed issues which the parties have had an adequate opportunity to litigate”); Hector v. City of Fargo, 2014 ND 53, ¶ 26, 844 N.W.2d 542 (providing the “doctrine [of administrative res judicata] precludes a subsequent administrative proceeding involving issues raised in a prior administrative proceeding after an adjudicative or trial-type proceeding”); State ex rel. WSI v. JFK Raingutters, 2007 ND 80, ¶ 22, 733 N.W.2d 248 (application of res judicata is appropriate to bar new proceedings when an agency has conducted a trial-type hearing, made findings, and applied the law); Cridland, 1997 ND 223, ¶ 19, 571 N.W.2d 351 (providing that “[r]espected authorities have

recognized administrative res judicata more readily applies when an administrative agency decides issues after according the parties the benefit of a trial-type procedure”).

[¶42] In the present matter, there has never been anything resembling a trial-like administrative hearing. Instead, after Trevor’s death, WSI sought out the Davises and sent them a death benefits form to fill out and continually followed up with them to have it completed. (Resp. App. at pp. 5-7). As explained above, the Davises did not have any knowledge regarding whether Trevor was an employee or independent contractor and/or the legal significance of the designation. There was never a trial-type proceeding in this matter which determined whether Trevor was an employee of Plains Trucking. There have been no factual findings made and no law applied. There is no basis for holding that administrative res judicata applies in this matter. As such, for this reason alone, the Court should reject Plains Trucking’s argument that the Davises are barred by administrative res judicata from claiming in this matter that Trevor was an independent contractor working for Plains Trucking.

[¶43] Furthermore, administrative res judicata takes into account “(1) the subject matter decided by the administrative agency, (2) the purpose of the administrative [proceeding], and (3) the reasons for the later proceeding.” Cridland, 1997 ND 223, ¶ 18, 571 N.W.2d 351. As such, administrative res judicata again contemplates an “administrative proceeding.” There has never been an administrative hearing in this matter. The present suit is the very first time the Davises have attempted to adjudicate Trevor’s status as an independent contractor with Plains Trucking.

[¶44] Furthermore, the purposes of administrative res judicata are not served by applying the doctrine in this instance. “The purpose of administrative res judicata is to preserve scarce administrative resources and avoid wasteful expense and delay.” Ziesch, 2006 ND 99, ¶ 17, 713 N.W.2d 525. Little to no administrative resources were used in awarding death benefits in the

amount of \$15,000.00 to the Davises. There has been no wasteful expense and delay in this matter. This is not an instance in which the Davises adjudicated Trevor's status as an independent contractor/employee in an administrative proceeding/hearing and then later tried to adjudicate the same claim in district court. This is the very first time the Davises have attempted to have the claim that Trevor is an independent contractor adjudicated. As WSI has never taken any action in a judicial capacity, there has never been a trial-like administrative proceeding, and because the purposes of administrative res judicata are not served by applying the doctrine in this instance, the Davises respectfully request the Court find that administrative res judicata does not apply in this matter.

2. Case Law from Other Jurisdictions Demonstrates the Davises are not Barred from Claiming Trevor was an Independent Contractor.

[¶45] Case law from other jurisdictions supports the district court's conclusion that the Davises were not barred by the doctrine of administrative res judicata. Other jurisdictions, facing similar factual scenarios to which the Court faces in the present matter, have allowed the injured worker to bring a claim against their employer after accepting workers' compensation benefits. See e.g. Minish v. Hanuman Fellowship, 214 Cal. App. 4th 437 (2013); Day v. Advanced M & D Sales, Inc., 336 Or. 511, 86 P.3d 678 (2004); Allen v. Garden Orchards, Inc., 437 Mich. 417, 471 N.W.2d 352 (1991).

[¶46] In Advanced M & D Sales, Inc., the Oregon Supreme Court stated that the question presented was whether "plaintiff's conduct in filing a workers' compensation claim with his employer and his acceptance of workers' compensation benefits from defendant's insurer estops him from alleging in the present action that he was not a worker subject to the Workers' Compensation Law at the time of his injury." Advanced M & D Sales, Inc., 86 P.3d at 682. The trial court and court of appeals found the worker was barred from alleging he was not an employee

in the subsequent action. Id. at 679. The Oregon Supreme Court reversed, stating that a worker filing a workers' compensation claim in good faith with the honest belief that he was an employee at the time of his injury would not bar/estop him from taking a contrary position in a later civil complaint. Id. at 684-85.

[¶47] In Minish, the issue was whether the trial court erred in granting summary judgment to the Defendant in reasoning that a victim's receipt of workers' compensation benefits barred her from denying she was an employee covered by the Workers' Compensation Act in a subsequent action. Minish, 214 Cal.App.4th at 443. The appeals court reversed the trial court, holding that despite plaintiff receiving "substantial" workers' compensation benefits from claiming to be an employee, the Plaintiff was not barred from claiming she was not an employee in a subsequent action. Id. at 443-44. The court explained the receipt of compensation funds is insufficient to bar a future claim where there is no evidence the worker ever asserted she was a covered employee in a any proceeding before the workers' compensation board. Id. at 450-54.

[¶48] Finally, in Garden Orchards, Inc., the plaintiff, a surviving spouse, brought an action to recover for the wrongful death of her husband/worker after entering into an agreement with the employer representing that her husband was an employee of the employer and accepting \$20,000.00 in full and final settlement of any and all liability the employer might have for weekly workmen's compensation benefits. Garden Orchards, Inc., 471 N.W.2d at 353. The trial court and appeals court found the Plaintiff was barred from bringing a wrongful death action when she had previously taken the position that her husband was an employee of the employer. Id. at 352-53. The Michigan Supreme Court reversed the lower courts, holding the plaintiff could bring the wrongful death action claiming her husband was an independent contractor, but that she would have to offset any verdict against the employer by \$20,000.00, the amount she received in

settlement with the employer for workers' compensation. Id. at 357-59.

[¶49] In the present matter, WSI contacted the Davises and asked them to fill out forms requesting funeral benefits. The Davises had no discussions with WSI or anyone else concerning whether Trevor was an employee or independent contractor or the legal significance of the designation. The Davises, in good faith, accepted the \$15,000.00 in funeral benefits. If a jury determines that Trevor is an independent contractor, the Davises will necessarily be obligated to return the \$15,000.00 to WSI, and are willing to do so. See Garden Orchards, Inc., 471 N.W.2d at 358-59. However, as the case law demonstrates, the Davises must be allowed to proceed with their claim that Trevor was an independent contractor. See Minish, 214 Cal. App. 4th 437, 443-54 (2013); Advanced M & D Sales, Inc., 336 Or. 511, 86 P.3d 678, 684-85 (2004); Garden Orchards, Inc., 437 Mich. 417, 471 N.W.2d 352, 357-59 (1991).

3. There are Genuine Issues of Material Fact Regarding Whether Trevor is an Independent Contractor of Plains Trucking under the Common Law Test.

[¶50] “Whether a worker is an independent contractor or an employee is a mixed question of fact and law.” State ex rel. WSI v. Larry’s On Site Welding, 2014 ND 81, ¶14, 845 N.W.2d 310. “[T]he labels the parties place on the relationship is not determinative” of whether a worker is an employee or independent contractor. Id. at ¶17. Instead, Courts look at a twenty factor common-law test which is now codified in N.D. Admin. Code § 92-01-02-49(1)(a). Id. at ¶18. Here, there is no dispute that if administrative res judicata does not apply, there is a genuine issue of material fact regarding whether Trevor was an independent contractor or an employee.

[¶51] Plains Trucking argues that if this Court allows the Davises to claim Trevor was an independent contractor, the result will lead to a myriad of persons accepting benefits and then suing their employer in tort. This is a red herring argument. First, if the Davises prevail on their claim that Trevor is an independent contractor, they will obviously need to repay all funds they

received from WSI (\$15,000.00 in funeral benefits). There is no incentive for persons to accept benefits and then bring a tort action (i.e., double recovery would not be possible). Second, in the overwhelming majority of situations, there will be no genuine issue of material fact regarding whether someone is an employee or independent contractor. Plains Trucking's position that anyone can create a question of fact regarding employment status under the common-law test is incorrect. Third, as stated above, this case concerns the parents of a deceased nineteen year old child who died instantly in an explosion while working away from home. Like most parents, the Davises did not have any knowledge regarding whether Trevor was an employee/independent contractor of the legal significance of the designation. The Davises are not trying to "game" the system. Instead, they are trying to pursue justice for their dead child.

B. If Trevor and Darian are Employees, Plains Trucking is a Non-Complying Employer and Does Not Have Immunity Under the Workers' Compensation Act.

[¶52] Plains Trucking's position in this matter is that Trevor was at all times an employee of Plains Trucking and Plains Trucking was a complying employer with the North Dakota Workers' Compensation Act. The Workers' Compensation Act generally provides the exclusive remedy for an employee who suffers a compensable injury. Richard v. Washburn Pub. Sch., 2011 ND 240, ¶ 13, 809 N.W.2d 288 (citations omitted). Further, N.D.C.C. § 65-04-28 generally provides immunity to employers who comply with the provisions of the workers' compensation statutes. However, N.D.C.C. § 65-09-01(1) provides in relevant part:

Any employer subject to this title who is in violation of subsection 1 or 2 of section 65-04-33...is not protected by the immunity from civil liability granted to employers under this title for injuries to that employer's employees for damages suffered by reason of injuries sustained in the course of employment and to the dependents and legal representatives of an employee whose death results from injuries sustained in the course of employment.

N.D.C.C. § 65-09-01(1) (emphasis added). Indeed, “the employer must be in compliance with the workers’ compensation statutes for the exclusive remedy provisions to apply.” Carlson v. GMR Transp., Inc., 2015 ND 121, ¶ 12, 863 N.W.2d 514.

[¶53] Section 65-04-33, N.D.C.C., addresses the consequences for the failure of an employer to secure workers’ compensation coverage and provides in relevant part:

1. An employer may not employ any person, or receive the fruits of the labor of any person, in a hazardous employment as defined in this title, without first applying for workforce safety and insurance coverage for the protection of employees by notifying the organization of the intended employment, the nature of the intended employment, and the estimated payroll expenditure for the coming twelve-month period.
2. An employer who willfully misrepresents to the organization or its representative the amount of payroll upon which a premium under this title is based, or who willfully fails to secure coverage for employees, is liable to the state in the amount of five thousand dollars plus three times the difference between the premium paid and the amount of premium the employer should have paid.

[¶54] Section 65-09-02, N.D.C.C. grants employees “dual remedies” for employer noncompliance with N.D.C.C. § 65-04-33, and provides in relevant part:

An employee whose employer is in violation of section 65-04-33, who has been injured in the course of employment, or the employee's dependents or legal representatives in case death has ensued, may file an application with the organization for an award of compensation under this title and in addition may maintain a civil action against the employer for damages resulting from the injury or death. In the action, the employer may not assert the common-law defenses of:

1. The fellow servant rule.
2. Assumption of risk.
3. Contributory negligence.

The organization is subrogated to the recovery made in the action against the uninsured employer.

[¶55] In a “tort action to recover damages for a work-related injury, the employer has the burden of establishing by a preponderance of the evidence the defense that the employer is immune from suit under the exclusive remedy provisions of the workers’ compensation act.” Carlson, 2015 ND 121, ¶ 15, 863 N.W.2d 514. Here, the evidence demonstrates Plains Trucking willfully misrepresented the amount of payroll upon which its premium is based. It did so through (1) omitting like-kind employees from the payroll report; (2) grossly misrepresenting the payroll of “employees;” and (3) misrepresenting the classification code for the job descriptions of its “employees.”

[¶56] This Court has previously determined an employer’s failure to include wages of like-kind employees in its payroll report, if willful, constitutes a violation of N.D.C.C. § 65-04-33(2). Vail v. S/L Services, Inc., 2017 ND 202, ¶ 27, 900 N.W.2d 271. Here, there is no dispute Plains Trucking omitted Josh from the 2013 Payroll Report despite Josh working for Plains Trucking for a minimum of four months during the payroll period. (Resp. App. at pp. 8-9, 11). Plains Trucking has provided no explanation or argument as to why it failed to include Josh and his wages in the 2013 Payroll Report. Josh performed the identical work to Trevor and Darian and worked hand-in-hand with Trevor. It is telling that Plains Trucking including Trevor and Darian, the two “employees” who were either killed or severely injured on the job, in their 2013 Payroll Report while omitting the other “employee” who was not injured. It is also notable that Trevor was not included as an “employee” on the 2012 Payroll report despite having started working for Plains Trucking in the fall of 2012. (Resp. App. at pp. 8-9, 12). It was only after Trevor was killed, that Plains Trucking decided to designate Trevor was an employee. For these reasons alone, Plains Trucking is in violation of N.D.C.C. § 65-04-33(2) and not immune from suit.

[¶57] Additionally, Plains Trucking is in violation of N.D.C.C. § 65-04-33(2) by willfully

misrepresenting the payroll of its “employees” on the 2013 Payroll Report which its premium is based on. In regards to Trevor, the 2013 Payroll Report represents to WSI that the gross payroll for Trevor during the reporting period (November 1, 2013 to March 27, 2013) was \$1,100.00. (Resp. App. at pp. 8-9). This is a gross misrepresentation. Trevor made \$800.00-\$1,000.00 per week during this five month period.² (Resp. App. at p. 12). As such, even calculating on the low side, Trevor would have made fifteen times the amount of earnings that Plains Trucking represented to WSI. For this reason alone, Plains Trucking is in violation of N.D.C.C. § 65-04-33(2) and not immune from suit.

[¶58] Furthermore, the 2013 Payroll Report also misrepresents the classification code for the work performed by Trevor and Darian. (Resp. App. at pp. 8-9). The 2013 Payroll Report classifies Darian and Trevor as “Auto Repair Body – Body Shops – Mech.” (Resp. App. at pp. 8-9). This is the same designation the 2013 Payroll report provides for employees who were actually auto mechanics. (Resp. App. at pp. 8-9). Darian and Trevor were not mechanics. Instead, Darian and Trevor engaged in the much more dangerous activity of cleaning hydrocarbons and other combustible materials inside of oil tankers. As such, a classification code such as “tank cleaning” or something similar would have been appropriate. However, an accurate classification would have designated a significantly more dangerous job and in turn, a higher premium. By misrepresenting the classification/job that Trevor and Darian performed, Plains Trucking misrepresented its payroll and effectively lowered the premium which would have been properly due to WSI. For this reason alone, Plains Trucking is in violation of N.D.C.C. § 65-04-33(2) and not immune from suit.

[¶59] Plains Trucking fails to address any of these issues in its Petition for Supervisory

² Additionally, while it appears that Plains Trucking primarily paid Trevor in cash, the Davises have located two checks from Plains Trucking to Trevor which amount to \$1,075 in wages just for the month of March 2013 alone. (Resp. App. at p. 4).

Writ.³ Instead, Plains Trucking relies on letters from WSI on March 15 and April 22, 2013, which state that Plains Trucking has workers compensation insurance coverage as somehow evidencing that its 2013 Payroll Report dated October 31, 2013 is accurate. (Docs. ##18, 19 – Letters from WSI). The Davises do not dispute that Plains Trucking paid a premium and had workers compensation insurance coverage on the date of March 27, 2013. Rather, the Davises argue that Plains Trucking violated N.D.C.C. § 65-04-33(2) by willfully misrepresenting to WSI the amount of payroll upon which Plains Trucking’s premium is based. WSI has never made any sort of finding that Plains Trucking’s 2013 Payroll Report dated October 31, 2013, was accurate. Rather, as explained above, the 2013 Payroll Report is indisputably inaccurate and full of misrepresentations.

[¶60] While Plains Trucking appears to, for the first time, acknowledge there are misrepresentations in its 2013 Payroll Report, it appears Plains Trucking is arguing the misrepresentations are mere convenient oversights. As such, it appears Plains Trucking’s apparent defense is now that it did not “willfully” misrepresent its payroll.

[¶61] “Whether conduct is willful is generally a question of fact for the trier of fact.” Vail, 2017 ND 202, ¶ 31, 900 N.W.2d 271. Respectfully, when considering the undisputed facts in this matter, it is the Davises’ position that a trier of fact cannot reach but one conclusion— that Plains Trucking willfully misrepresented its payroll.

³ Plains Trucking also cites and relies on case law concerning a previous statutory framework. For example, Plains Trucking relies on Westman v. Dessellier, 459 N.W.2d 545 (N.D. 1990). Westman concerned the pre-1995 WSI statutory framework under which an employee had the election of choosing between claiming worker’s compensation or bringing a tort action against its employer. This is an entirely different statutory scheme than today. Moreover, even overlooking the different statutory scheme, Westman only has bearing on this matter if (1) Trevor is an employee, and (2) Plains Trucking is a complying employer. Respectfully, there are, at a bare minimum, genuine issues of material fact concerning both these points, and if anything, Plains Trucking is a non-complying employer as a matter of law.

[¶62] Willful conduct for purposes of N.D.C.C. § 65-04-33(2) means “conduct engaged in intentionally and not inadvertently.” Muldoon v. WSI, 2012 ND 244, ¶13, 823 N.W.2d 761 (citation omitted). “A state of mind can rarely be proven directly and must usually be inferred from conduct and circumstantial evidence.” Id. This Court has stated that “willfully” under N.D.C.C. § 65-04-33 “does not require an intent to defraud by knowingly misrepresenting, misstating, or failing to disclose any material fact and merely requires proof a false statement was intentionally made[.]” Vail, 2017 ND 202, ¶ 32, 900 N.W.2d 271. In fact, this Court has previously explained what is required to show willfulness in a similar matter:

That interpretation does not require [the employee] to prove that [the employer] knew about its obligations under the worker’s compensation law, that [the employer] knew [the employee] or other similarly situated workers were employees, that [the employer] intended to deceive WSI or violate the law, or that [the employer] acted in reckless disregard of statutory requirements or the fact [the employee] or other similarly situated workers were employees. Moreover, under that definition of willfully, an employer’s ignorance of the law or good faith belief a worker is not an employee does not preclude a finding of a willful violation of N.D.C.C. § 65-04-33(2).

Id. at ¶ 34.

[¶63] In short, it is a very low bar for an employee to show that an employer acted “willfully.” Plains Trucking has provided no explanation as to why Josh was omitted from the 2013 Payroll Report, or as to why Darian and Trevor’s alleged payroll is incorrect, and in Trevor’s case, grossly misrepresented, or as to why Darian and Trevor were classified as auto-mechanics. While the Davises believe it is clear Plains Trucking acted willfully, at the bare minimum, there is a question of fact whether Plains Trucking willfully misrepresented its payroll to WSI for the relevant payroll period. Thus, the district court properly denied summary judgment in favor of Plains Trucking.

VI. CONCLUSION

[¶64] For the aforementioned reasons, the Davises respectfully request the Court DENY the Petition for Supervisory Writ and hold that the district court did not err in denying the motion for summary judgment.

Dated February 5, 2019

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**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Plains Trucking, LLC,

Petitioner,

vs.

Todd Cresap, Judge of the District Court, North
Central Judicial District, Lyle and Laurie Davis,
individually and as Personal Representatives of
the Estate of Trevor Davis, and on behalf of the
heirs-at-law and wrongful death beneficiaries of
Trevor Davis, Deceased; Missouri Basin Well
Service, Inc. d/b/a MBI Energy Services,

Respondents.

SUPREME COURT NO. 20190014

Civil No. 51-2015-CV-01030

APPEAL FROM THE DISTRICT COURT DATED MAY 19, 2016
WARD COUNTY, NORTH DAKOTA
NORTH CENTRAL JUDICIAL DISTRICT
HONORABLE TODD CRESAP

CERTIFICATE OF SERVICE

[¶1] I hereby certify that on February 5, 2019, the following:

- 1. Respondents' Brief in Opposition of Petition for Supervisory Writ**
- 2. Respondents' Appendix**

were filed electronically with the Clerk of Court via: supclerkcourt@ndcourts.gov and that an electronic copy was also served via email upon the following:

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Dated this 5th day of February, 2019.

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