

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

Richard Price and KS Industries LLC,  Petitioners,  vs.  The Honorable Douglas L. Mattson, Judge of the District Court, North Central Judicial District and Huey Brock,  Respondents.	<b>SUPREME COURT NO.</b> _____  Civil No. 31-2015-CV-00106
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**PETITION FOR SUPERVISORY WRIT**

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## TABLE OF CONTENTS

	<u>Paragraph</u>
TABLE OF CASES .....	III
TABLE OF AUTHORITIES .....	V
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW .....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS .....	11
1.    The KS Entities.....	11
2.    KSI, LLC’s activities in North Dakota. ....	13
3.    The accident and WSI’s subsequent award of benefits to Brock under KSI, LLC’s WSI account. ....	16
4.    Brock applies for workers’ compensation benefits in California. ....	18
LAW AND ARGUMENT .....	23
I.    STANDARD OF REVIEW .....	23
II.   NORTH DAKOTA LAW BARS BROCK FROM SUING KSI, LLC AND RICHARD PRICE IN TORT. ....	29
1.    Brock’s suit is barred because KSI, LLC is a contributing employer. ....	29
a.    KSI, LLC identified Plaintiff Huey Brock and Defendant Richard Price as employees under its WSI employee reporting obligations and paid premiums on their behalf. ....	38
b.    KSI, LLC paid Huey Brock and Defendant Richard Price remuneration in exchange for hazardous work.....	43
c.    WSI concurs that KSI, LLC is a contributing employer. ....	52
2.    Brock’s suit is barred because he accepted benefits under KSI, LLC’s WSI account.....	58

**TABLE OF CONTENTS (cont'd)**

a. Brock stipulated he was a KSI, LLC employee. .... 64

III. ALLOWING BROCK TO SUE KSI, LLC AND PRICE IN TORT  
IS OBNOXIOUS TO NORTH DAKOTA LAW. .... 73

1. Collateral estoppel does not apply. .... 75

2. Even if collateral estoppel applied, it cannot overcome the  
exclusive remedy rule. .... 78

3. The exclusive remedy rule has been zealously safeguarded  
by this Court and the Legislature and cannot be cast aside by  
the subsequent California finding. .... 82

4. KSI, LLC only seeks the benefit of the bargain it struck with  
Brock. .... 87

CONCLUSION ..... 91

## TABLE OF CASES

<u>Am. Standard Life &amp; Acc. Ins. Co. v. Speros</u> 494 N.W.2d 599 (N.D. 1993) .....	79
<u>Barry v. Baker Elec. Co-op., Inc.</u> 354 N.W.2d 666 (N.D. 1984) .....	26, 81, 83, 84
<u>Bartholomay v. Plains Grain &amp; Agronomy, LLC</u> 2016 ND 138, 881 N.W.2d 249 .....	30, 82
<u>Bradford Electric Light Co. v. Clapper</u> 286 U.S. 145 (1932).....	81
<u>Cervantes v. Drayton Foods, L.L.C.</u> 1998 ND 138, 582 N.W.2d 2 .....	29, 33, 49
<u>Cormier v. Nat’l Farmers Union Prop. &amp; Cas. Co.</u> 445 N.W.2d 644 (N.D. 1989) .....	82
<u>Gernand v. Ost Services, Inc.</u> 298 N.W.2d 500 (N.D. 1980) .....	30
<u>Heringer v. Haskell</u> 536 N.W.2d 362 (N.D. 1995) .....	23
<u>Hulne v. Int’l Harvester Co.</u> 496 F. Supp. 849 (D.N.D. 1980).....	58
<u>In re Estate of Harms</u> 2012 ND 62, 814 N.W.2d 783 .....	72
<u>Lovelette v. Braun</u> 293 F.Supp. 41 (D.N.D. 1968).....	50
<u>Meide v. Stenehjem ex rel. State of N.D.</u> 2002 ND 128, 649 N.W.2d 532 .....	72
<u>Mitchell v. Sanborn</u> 536 N.W.2d 678 (N.D. 1995) .....	24, 25
<u>Pac. Employers Ins. Co. v. Indus. Accident Comm’n</u> 306 U.S. 493 (1939).....	80
<u>Richard v. Washburn Pub. Sch.</u> 2011 ND 240, 809 N.W.2d 288 .....	32

<u>Riverwood Commercial Park, L.L.C. v. Standard Oil Co.</u> 2007 ND 36, 729 N.W.2d 101 .....	75, 78
<u>Smith v. Vestal</u> 494 N.W.2d 370 (N.D. 1992) .....	31, 82
<u>Stine v. Weiner</u> 238 N.W.2d 918 (N.D. 1976) .....	79, 81, 92
<u>Trinity Med. Ctr. v. Holum</u> 544 N.W.2d 148 (N.D. 1996) .....	23
<u>Trinity Hosps. v. Mattson</u> 2006 ND 231, 723 N.W.2d 684 .....	24, 29, 32, 33, 49, 51, 52, 53, 59
<u>Westman v. Dessellier</u> 459 N.W.2d 545 (N.D. 1990) .....	58
<u>Zimmerman v. N. Dakota Workforce Safety &amp; Ins. Fund</u> 2010 ND 42, 779 N.W.2d 372 .....	52

## TABLE OF AUTHORITIES

### Paragraph

#### North Dakota Century Code

N.D.C.C. § 65-01-01 .....	31, 58, 90
N.D.C.C. § 65-01-01.1 .....	30
N.D.C.C. § 65-01-02(16) .....	34
N.D.C.C. § 65-01-02(17) .....	34, 35, 49, 68
N.D.C.C. § 65-01-02(22) .....	52
N.D.C.C. § 65-01-03 .....	34
N.D.C.C. § 65-01-08 .....	31, 32, 35, 51, 58, 85, 92
N.D.C.C. § 65-01-08 (1) .....	50
N.D.C.C. § 65-04 .....	85
N.D.C.C. § 65-04-28 .....	31, 32, 42, 85, 89
N.D.C.C. § 65-04-33 .....	36, 38
N.D.C.C. § 65-05-03 .....	62
N.D.C.C. § 65-05-05 .....	62
N.D.C.C. § 65-05-05(2) .....	65, 66
N.D.C.C. § 65-05-06 .....	31, 59, 85
N.D.C.C. § 65-10-01 .....	62

#### Other Authorities

Black's Law Dictionary (10th ed. 2014) .....	34
U.S. Const. Art. IV, § 1 .....	79

**¶1 STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

North Dakota’s Workforce Safety and Insurance (“WSI”) Act bars Plaintiffs from suing contributing employers and co-workers in tort for non-intentional injuries. In 2011, Plaintiff Huey Brock suffered a workplace injury while working for Petitioner KSI, LLC, for which he received WSI disability and medical benefits under KSI, LLC’s WSI account.

In 2012, Brock applied for workers’ compensation benefits in his home state of California, which North Dakota law allows. In 2013, the California system determined that KSI, LP (an entity related to KSI, LLC) was Brock’s employer and awarded him benefits. Brock then sued KSI, LLC and its former employee, Richard Price, in tort. The District Court granted Brock’s summary judgment motion, collaterally estopping KSI, LLC from arguing it was Brock’s employer. The Court denied KSI, LLC’s cross-motion for summary judgment, which sought dismissal as a matter of law because the undisputed evidence showed, among other things, that KSI, LLC paid the WSI premiums to provide Brock with WSI coverage.

Can Brock use the subsequent 2013 California finding that he was employed by KSI, LP to overcome the exclusive remedy rule when KSI, LLC undisputedly: (1) identified Brock to WSI as a covered employee; (2) paid WSI premiums on Brock’s behalf; (3) paid Brock wages for his work; (4) secured WSI medical and disability coverage for Brock’s workplace injuries; and (5) Brock accepted and received benefits under KSI, LLC’s WSI account?

## STATEMENT OF THE CASE

[¶2] Petitioners KSI, LLC and Richard Price respectfully request this Court take original jurisdiction over the above-referenced matter pursuant to its general superintending control over district courts.

[¶3] Petitioners seek a supervisory writ vacating the District Court's August 18, 2016, Order Granting Plaintiff's Motion for Summary Adjudication and Denying Defendants' Motion for Summary Judgment ("District Court Order"). The District Court Order is contrary to long-standing North Dakota law and creates an injustice for which Petitioners have no adequate remedy.

[¶4] The issue presented by this Petition is the applicability of the exclusive remedy provisions of the Workforce Safety and Insurance Act. Specifically, whether a Plaintiff who has accepted WSI medical and disability benefits under a contributing employer's account can sue that contributing employer and its employee in tort if an out-of-state court subsequently finds the Plaintiff was actually hired by an entity related to the contributing employer.

[¶5] Plaintiff Huey Brock was employed by and worked as a Welder's Helper for KSI, LLC, a Colorado entity. Brock was and remains a California resident. In March of 2011, Brock was injured in a pre-dawn motor vehicle accident on Highway 2 near Ross, North Dakota. Defendant Richard Price, Brock, and another KSI, LLC employee were traveling in a KSI, LLC pickup in fog on the way to a jobsite in Tioga. Price (a KSI, LLC employee) was driving.

[¶6] The accident occurred when the driver of a semi-tractor trailer missed his turn off of Highway 2 into an equipment storage yard. Rather than continue to the next interchange to turn around, the truck driver stopped and backed up to turn into the yard.



The back-up and brake lights on the truck trailer were covered in mud. Another pickup truck traveling ahead of the KSI, LLC vehicle drove into the back of the mud-covered truck trailer. The KSI, LLC pickup truck then drove into the back of the first pickup truck. Brock suffered severe injuries resulting in quadriplegia.

[¶7] WSI immediately accepted Brock's claim and awarded benefits under KSI, LLC's WSI account. Brock later sought workers' compensation benefits in California based on its extraterritorial jurisdiction over out-of-state injuries incurred by California residents who entered into a contract for hire in California. Brock was awarded benefits based upon the California agency's finding that he was hired in California by KSI, LP, a California entity related to KSI, LLC.

[¶8] Brock subsequently filed this tort action against his former employer, KSI, LLC, and former co-worker, Richard Price, for the March 2011 workplace injuries while working in North Dakota. Brock moved for summary judgment, arguing the California decision collaterally estopped KSI, LLC from arguing that it was Brock's employer. KSI, LLC opposed the motion and cross-moved for summary judgment, arguing KSI, LLC was undisputedly a "contributing employer," immunizing it and its employee (and Brock's former co-worker), Price, from suit. KSI, LLC also argued, among other things, Brock's acceptance of WSI benefits foreclosed his tort suit.

[¶9] The District Court granted Brock's motion and denied KSI, LLC's motion, concluding: "It is clear to this Court that collateral estoppel is appropriate in this matter." App. 340, ¶ 39.

[¶10] Petitioners respectfully request this Court exercise its jurisdiction to vacate the District Court Order and direct the District Court to dismiss Brock’s action. Petitioners further request this Court invite WSI to file an amicus brief. See N.D.R.App.P. 21 (b)(3).

### **STATEMENT OF THE FACTS**

#### **1. The KS Entities.**

[¶11] KS Industries, LLC (“KSI, LLC”) is a Colorado limited liability company established in 2007. App. 183, ¶ 3 (Matlock Aff.). KSI, LLC provides oilfield construction services in Wyoming, Colorado, Texas, and North Dakota. Id. KSI, LLC was registered as a foreign limited liability company with the North Dakota Secretary of State on March 10, 2010 and has been operated continuously from its Tioga, North Dakota office since 2010.

[¶12] KSI, LLC is one of six companies closely affiliated with KS Industries, LP (“KSI, LP”), a California limited partnership.<sup>1</sup> Id., ¶ 2. The KSI Affiliates, including KSI, LLC, all have principal offices at the same address in Bakersfield, California. Id. KSI, LLC is the only KSI Affiliate authorized to operate in North Dakota. Id., ¶ 3.

#### **2. KSI, LLC’s activities in North Dakota.**

[¶13] Before commencing operations and hiring employees for its North Dakota operations, KSI, LLC applied for workers’ compensation coverage with WSI. App. 181, ¶ 2 (Schumacher Aff.); App. 183, ¶ 3 (Matlock Aff.); App. 187 (App. for Ins.). Coverage was effective on March 16, 2010 and has been in effect continuously since that time.

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<sup>1</sup> In 1960, Ken Small started Ken Small Construction, Inc. in Bakersfield, California. Since then, the company has grown and expanded into several affiliated businesses, including: KSI, LP, the corporate center; KSI Engineering, Inc.; KS Fabrication & Machine; KS Industries of Wyoming; and KSI, LLC (collectively “KSI Affiliates”).

App. 181, ¶ 2 (Schumacher Aff.); App. 183, ¶ 5 (Matlock Aff.); App. 187 (App. for Ins.). WSI established and determined the structure of the premiums and coverage for the employees working in North Dakota, based initially upon estimated payroll amounts. App. 181, ¶¶ 3-4 (Schumacher Aff.); App. 183, ¶ 5 (Matlock Aff.).

[¶14] Defendant Richard Price submitted an application to work for KSI, LLC's North Dakota operations on October 28, 2010. The application was submitted online through the website <http://www.ksilp.com>, shared by all KSI Affiliates. Following pre-employment screening and an interview, Price was hired for KSI, LLC's North Dakota operations. App. 236, 10:3-11 (Price Depo.). He began working on November 15, 2010. Id. In addition to his regular job duties, Price transported coworkers in a company vehicle to and from KSI, LLC's home base in Tioga. Id., 29:25; 30:1-6.

[¶15] Plaintiff Huey Brock is a California resident. App. 65, 8:24-25 (Cal. Workers' Comp. Hearing Minutes and Evid. Sum.). Like Price, he submitted an online application for work at the website <http://www.ksilp.com>. See id., 8:19-21. Brock was initially hired for a pipefitter position with KS Industries of Wyoming and worked in Wyoming from April to August, 2010. App. 66-67, 9:21-25; 10:1-2. After returning to California, Brock was called and offered a job with KSI's operations in North Dakota. He accepted the position and began working for KSI, LLC in Tioga on December 6, 2010. App. 68, 11:1-3. Brock often traveled to and from worksites in a KSI, LLC vehicle driven by Price. App. 237, 30:21-25; 31:1-6 (Brock Depo).

**3. The accident and WSI's subsequent award of benefits to Brock under KSI, LLC's WSI account.**

[¶16] In the pre-dawn hours of March 31, 2011, Huey Brock, Richard Price, and a third KSI, LLC employee were traveling in a KSI, LLC pickup on Highway 2 to Tioga. App.

7, ¶ VII (Complaint). The KSI vehicle was involved in a four-vehicle collision, caused by a semi-tractor trailer backing up on the highway. App. 47 (Traffic Collision Rpt.). Brock and Price were both injured. Brock sustained significant injuries; he was transported to Trinity Hospital in Minot and later moved to Craig Rehabilitation Hospital in Denver. Brock is now a quadriplegic.

[¶17] Brock signed and filed a WSI injury report form on April 4, 2011. App. 184, ¶ 10 (Matlock Aff.); App. 227 (Employee Rpt. of Injury). KSI, LLC submitted a claim for injury to WSI on April 5, 2011. App. 181, ¶ 4 (Schumacher Aff.); App. 184, ¶ 10 (Matlock Aff.); App. 225-226 (Employer Rpt. of Injury). WSI accepted Brock's claim on April 6, 2011, and WSI medical and disability benefits were paid to Brock under KSI, LLC's account. App. 181, ¶¶ 4-6 (Schumacher Aff.); App. 184, ¶ 10 (Matlock Aff.); App. 228 (Notice of Decision Accepting Claim and Awarding Benefits).

**4. Brock applies for workers' compensation benefits in California.**

[¶18] After one year of receiving WSI disability and medical benefits for the compensable injury, Brock's attorney, Michael Ainbinder, notified WSI that he would be filing an application for workers' compensation benefits in Brock's home state, California. App. 229 (Stipulation). WSI negotiated a stipulation with Brock and attorney Ainbinder to delay the application of N.D.C.C. § 65-05-05(2) (which suspends WSI benefits once a claimant applies for benefits in another state), pending the outcome of the California proceeding. App. 185, ¶ 3 (Oliver Aff.); App. 230, ¶ 1 (Stipulation). The stipulation was signed by KSI, LLC, Brock's employer; WSI; Stephanie Brock, on behalf of Huey Brock; and Michael Ainbinder, as Attorney for Claimant Huey Brock and acting in trust for WSI. App. 231-232 (Stipulation).

[¶19] Under the terms of the stipulation, Brock and his counsel agreed that Brock’s workplace injury occurred while he was employed by KSI, LLC. App. 229 (“Claimant sustained a compensable injury by accident arising out of and in the course of his employment with KS Industries, L.L.C., as a Welder’s Helper.”).

[¶20] Notwithstanding the stipulation terms, Brock applied for workers compensation benefits in California, claiming he was employed by KSI, LP. App. 85 (Cal. App. for Claim Adjudication). KSI, LP opposed the application, arguing that Brock was employed by KSI, LLC at the time of injury and covered by WSI. App. 91-98 (KSI, LP Answer). Prior to the hearing on the disputed claim, the parties stipulated that the six KS Affiliates operated “under the KS Industries, LP umbrella and have the same corporate address in Bakersfield, California.” App. 63, 6:17-19 (Cal. Workers’ Comp. Hearing Minutes and Evid. Sum.).

[¶21] The disputed claim was heard in a California workers’ compensation proceeding in February, 2013. In May 2013, jurisdiction over Brock’s claim was accepted by the California Workers Compensation Appeals Board, and Brock was awarded benefits as an employee of KSI, LP. App. 101 (Cal. Findings and Award). KSI, LP requested reconsideration and was denied on August 13, 2013. App. 123. A Petition for Writ of Review (App. 126), submitted to the Second District Court of Appeal, was also denied. App. 157.

[¶22] Brock subsequently brought this negligence case against KSI, LLC and Price for the same injuries deemed compensable and for which disability and medical benefits were paid through KSI, LLC’s WSI coverage. App. 6-10 (Complaint). Brock alleged his status as an employee of KSI, LP as determined by final order issued by the California

Workers Compensation Appeals Board, Division of Workers Compensation, is “issue preclusive on the identity of his employer” at the time of his March 31, 2011 workplace injury and cannot be challenged. App. 7, ¶ V (Complaint). The District Court erroneously agreed. App. 331-341 (District Court Order). The District Court denied Petitioners’ cross-motion for summary judgment. Id., ¶¶ 40-43.

## LAW AND ARGUMENT

### **I. Standard of Review**

[¶23] This Court has jurisdiction to review this case and issue a supervisory writ pursuant to Article VI, Section 2 of the North Dakota Constitution. Trinity Med. Ctr. v. Holum, 544 N.W.2d 148, 150 (N.D. 1996); Heringer v. Haskell, 536 N.W.2d 362, 364 (N.D. 1995). This Court may exercise its authority to issue a supervisory writ to control the district courts in instances where it must rectify errors. Holum, at 150. This Court further may issue supervisory writs to “prevent injustice in extraordinary cases where no adequate remedy exists.” Id.

[¶24] This Court has previously recognized the important public interest in the workers’ compensation immunity provisions. See, e.g., Trinity Hosps. v. Mattson, 2006 ND 231, ¶ 8, 723 N.W.2d 684; Mitchell v. Sanborn, 536 N.W.2d 678, 683 (N.D. 1995). The Trinity Hospitals and Mitchell cases recognized that a district court’s denial of a contributing employer’s motion for summary judgment impermissibly forces a contributing employer to defend a tort suit from which it has immunity. As a result, dismissal as a matter of law is necessary. Trinity Hosps., at ¶ 1 (“We conclude Trinity Hospitals is immune from suit under the exclusive remedy provisions of workers’ compensation law, and we direct the district court to dismiss Phillips’ action.”).

[¶25] In Mitchell, the Court noted there was “a reasonable suggestion that expensive and extensive medical discovery would be necessary before a trial on damages.” Mitchell, 536 N.W.2d at 683. The same is true here. Supplemental Oliver Aff. (filed with this Petition). As a result of the workplace accident, Brock suffered catastrophic injuries and is now a quadriplegic. Id., ¶ 4. Brock received care at Trinity Hospital in Minot, Craig Rehabilitation Hospital in Denver, and his rehabilitation continues in California. Id., ¶ 4(b) & (c). Depositions of Brock’s many healthcare providers have not been taken. Id., ¶ 4. Attempts to schedule Brock’s deposition have not yet been successful. Id., ¶ 5(a). And, depositions of the drivers of the three other vehicles involved in the March 2011 accident have not been taken. Id., ¶ 5(b)-(f). Unless this Court vacates the District Court Order, extensive and expensive medical and fact discovery will be necessary.

[¶26] This Court has also recognized the extraordinary injustice in requiring an employer to pay WSI premiums under the threat of criminal sanction while simultaneously denying the employer immunity by applying out-of-state workers’ compensation law. Barry v. Baker Elec. Co-op., Inc., 354 N.W.2d 666, 673 (N.D. 1984) (“To exact such premium but not provide the concomitant immunity to the employer would constitute fraud.”).

[¶27] A supervisory writ is appropriate and necessary in this case. Without a supervisory writ, an extraordinary injustice and error of law will occur: Both KSI, LLC, undisputedly a contributing employer, and its former employee, Richard Price, who is also immune from suit, will be forced to defend Brock’s tort suit.

[¶28] Petitioners respectfully request this Court exercise its jurisdiction to vacate the District Court Order and direct the District Court to dismiss Brock’s action.

**II. North Dakota law bars Brock from suing KSI, LLC and Richard Price in tort.**

**1. Brock’s suit is barred because KSI, LLC is a contributing employer.**

[¶29] “The workers’ compensation act, N.D.C.C. tit. 65, is a legislatively created compromise for claims between injured workers and their employers.” Trinity Hosps., 2006 ND 231, ¶ 11, 723 N.W.2d 684 (citing Cervantes v. Drayton Foods, L.L.C., 1998 ND 138, ¶ 6, 582 N.W.2d 2). “Under the workers’ compensation act, an employee generally gives up the right to sue the employer in exchange for sure and certain benefits for all workplace injuries, regardless of fault.” Trinity Hosps., at ¶ 11.

[¶30] “Generally, when an employer complies with the workers compensation statutes, the employee’s exclusive remedy against the employer is limited to recovery under the workers compensation statutes.” Bartholomay v. Plains Grain & Agronomy, LLC, 2016 ND 138, ¶ 6, 881 N.W.2d 249; Gernand v. Ost Services, Inc., 298 N.W.2d 500, 504 (N.D.1980). “The **sole exception** to an employer’s immunity from civil liability under this title . . . is an action for an injury to an employee caused by an employer’s intentional act done with the conscious purpose of inflicting the injury.” N.D.C.C. § 65–01–01.1 (emphasis added); Bartholomay, at ¶ 6. Brock does not claim section 65–01–01.1 applies.

[¶31] “The public policy encompassing workers’ compensation statutes dictates a broad interpretation of the exclusive remedy rule.” Smith v. Vestal, 494 N.W.2d 370, 375 (N.D. 1992). Four separate statutes establish that employers receive immunity from suit



in exchange for securing WSI coverage for employees. Section 65-01-01, N.D.C.C., states:

The state of North Dakota, exercising its police and sovereign powers, declares that the prosperity of the state depends in a large measure upon the well-being of its wageworkers, and, hence, for workers injured in hazardous employments, and for their families and dependents, sure and certain relief is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding, or compensation, except as otherwise provided in this title, and to that end, all civil actions and civil claims for relief for those personal injuries and all jurisdiction of the courts of the state over those causes are abolished except as is otherwise provided in this title. A civil action or civil claim arising under this title, which is subject to judicial review, must be reviewed solely on the merits of the action or claim. This title may not be construed liberally on behalf of any party to the action or claim.

Section 65-01-08, N.D.C.C., states:

If a local or out-of-state employer secured the payment of compensation to that employer's employees by contributing premiums to the fund, the employee, and the parents in the case of a minor employee, or the representatives or beneficiaries of either, do not have a claim for relief against the contributing employer or against any agent, servant, or other employee of the employer for damages for personal injuries, but shall look solely to the fund for compensation.

Section 65-04-28, N.D.C.C., states:

Employers who comply with the provisions of this chapter shall not be liable to respond in damages at common law or by statute for injury to or death of any employee, wherever occurring, during the period covered by the premiums paid into the fund.

Section 65-05-06, N.D.C.C., states:

The payment of compensation or other benefits by the organization to an injured employee, or to the injured employee's dependents in case death has ensued, are in lieu of any and all claims for relief whatsoever against the employer of the injured or deceased employee.

[¶32] North Dakota law is clear that an injured employee does not have a claim for relief against the “contributing employer or against any agent, servant or other employee of the employer for damages for personal injuries.” Trinity Hosps., 2006 ND 231, ¶ 11,

723 N.W.2d 684; N.D.C.C. § 65-01-08. A contributing employer’s immunity is from suit—not just liability. Trinity Hosps., at ¶ 1; N.D.C.C. § 65-04-28. “The district court in which a tort action is filed has the authority to determine whether the action is barred by the exclusive remedy provisions of the workers compensation act.” Richard v. Washburn Pub. Sch., 2011 ND 240, ¶ 12, 809 N.W.2d 288.

[¶33] “A ‘contributing employer’ is the entity who pays the WSI premium to secure workers’ compensation coverage for the employee and, in turn, receives immunity from legal liability for injuries to the employee.” Trinity Hosps., 2006 ND 231, ¶ 12, 723 N.W.2d 684 (citing Cervantes, 1998 ND 138, ¶ 9, 582 N.W.2d 2).

[¶34] The Workforce Safety and Insurance Act (“Act”) defines an “employee” as: “a person who performs hazardous employment for another for remuneration.” N.D.C.C. § 65-01-02(16). “Employer,” under the Act, is defined as “a person who **engages or receives** the services of another for remuneration.” N.D.C.C. § 65-01-02(17) (emphasis added). “Engage” is defined as “[t]o employ.” ENGAGE, Black’s Law Dictionary (10th ed. 2014). “Engage” is synonymous with “hire.” To “receive” is “[t]o take (something offered, given, sent, etc.); to come into possession of or get from some outside source <to receive presents>.” RECEIVE, Black’s Law Dictionary (10th ed. 2014). Moreover, any individual who performs services for another for remuneration is presumed to be an employee, unless he is an independent contractor under the “common law” test. N.D.C.C. § 65-01-03. Brock does not allege he worked as an independent contractor.

[¶35] Thus, “contributing employer” under the Act is broadly defined; indeed, the contributing employer need not hire the employee, but rather only engage **or receive the**

**services of another** to be immunized under the Act under the exclusive remedy provisions of N.D.C.C. § 65-01-08. N.D.C.C. § 65-01-02(17).

[¶36] This major underpinning to WSI statutory and case law is baked into the Act in numerous places. For example, to receive the benefits of the exclusive remedy rule, a contributing employer must properly identify individuals it employs or from whom it receives services. Section 65-04-33, N.D.C.C., addresses the consequences of an employer's failure to secure WSI coverage and further illustrates a contributing employer is an employer that **engages or receives** the benefits of another, noting:

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.

N.D.C.C. § 65-04-33 (emphasis added).

[¶37] It is undisputed KSI, LLC is a contributing employer.

- a. **KSI, LLC identified Plaintiff Huey Brock and Defendant Richard Price as employees under its WSI employee reporting obligations and paid premiums on their behalf.**

[¶38] Every local or out-of-state employer conducting business in North Dakota must obtain workers compensation coverage before hiring employees. N.D.C.C. § 65-04-33. KSI, LLC undisputedly obtained workers compensation coverage through WSI in March 2010, before commencing operations in this State. App. 181, ¶ 2 (Schumacher Aff.); App. 183, ¶ 4-5; (Matlock Aff.); App. 187-190 (App. for Ins.). KSI, LLC's WSI coverage became effective March 16, 2010. App. 181, ¶ 2 (Schumacher Aff.); App. 183, ¶¶ 4-5 (Matlock Aff.). KSI, LLC subsequently commenced operations in North Dakota.

[¶39] After applying for WSI coverage, KSI, LLC paid WSI premiums on the employees' behalf as required by North Dakota law. App. 181, ¶¶ 2-4 (Schumacher Aff.); App. 183-184, ¶¶ 4-9 (Matlock Aff.); App. 191 (Cert. of Premium Payment); App. 192-199 (3/16/10 to 3/31/11 Payroll Report); App. 200-220 (4/1/11 to 3/31/12 Payroll Report). On April 12, 2010, WSI's Chief of Employer Services, Barry Schumacher, issued KSI, LLC a "Certificate of Premium Payment," which stated:

This is to certify that North Dakota Workers Compensation Coverage is effective for the employer named on this certificate. Employees of the named employer are entitled to apply for the rights and benefits of Workforce Safety and Insurance (WSI).

App. 191.

[¶40] On April 11, 2011, KSI, LLC submitted its first annual "Employer Payroll Report" reflecting the actual payroll for the initial premium period, March 16, 2010 to March 31, 2011. App. 181, ¶ 4 (Schumacher Aff.); App. 184, ¶ 6 (Matlock Aff.); App. 192-199 (3/16/10 to 3/31/11 Payroll Report). The payroll report included the names of all individuals working for and paid by KSI, LLC, including Brock and Price. App. 195 (asterisk denotes Brock); App. 196 (asterisk denotes Price).

[¶41] KSI, LLC's second annual Employer Payroll Report (App. 200-220), for the premium period April 1, 2011 to March 31, 2012 was submitted on April 6, 2012 and also included Brock and Price. App. 181, ¶ 4 (Schumacher Aff.); App. 184, ¶ 8 (Matlock Aff.); App. 207 (asterisk denotes Brock); App. 212 (asterisk denotes Price).

[¶42] Brock has not and cannot dispute the fact that KSI, LLC—the only KSI entity authorized to operate in North Dakota—identified Brock and Price as employees covered by KSI, LLC's WSI account. KSI, LLC paid the WSI premiums on the employees' behalf. See N.D.C.C. § 65-04-28 ("Employers who comply with the provisions of this

chapter shall not be liable to respond in damages at common law or by statute for injury to or death of any employee, wherever occurring, during the period covered by the premiums paid into the fund.”).

**b. KSI, LLC paid Huey Brock and Defendant Richard Price remuneration in exchange for hazardous work.**

[¶43] In addition to KSI, LLC securing WSI coverage for Brock and Price and identifying them as employees in its Employer Payroll Reports, it is undisputed KSI, LLC paid Brock and Price remuneration (wages) for their work.

[¶44] Petitioners provided the District Court with the 2010 and 2011 IRS W-2s for Brock and Price. App. 221-222 (Brock W-2s); App. 223-224 (Price W-2s). These W-2s undisputedly identified KSI, LLC as Brock and Price’s employer. App. 184, ¶ 9 (Matlock Aff.). There is no evidence that KSI, LP operated in North Dakota or paid wages to either Brock or Price. App. 183, ¶ 3 (Matlock Aff.).

[¶45] It is also undisputed that the remuneration Brock received from KSI, LLC was in exchange for hazardous employment. Brock worked in North Dakota as a “Welder’s Helper.” App. 229 (stipulation signed by WSI; KSI, LLC; Brock’s attorney, Michael Ainbinder; and Brock’s wife, on his behalf, stating “Claimant sustained a compensable injury by accident out of and in the course of his employment with KS Industries, L.L.C. as a Welder’s Helper.”).

[¶46] Brock admits that on the day of the accident, March 31, 2011, he was traveling in a KSI, LLC vehicle with two KSI, LLC employees. App. 34 (Brock Statement of Uncontroverted Facts). The accident occurred shortly after Price—a KSI, LLC employee—picked up Brock on the way to KSI, LLC’s Tioga jobsite for their day’s work. App. 237, 30:21-25; 31:1-25; 32:1-22 (Price Depo.).

[¶47] In sum, it is undisputed that KSI, LLC: (1) secured WSI coverage for all of its employees; (2) paid WSI premiums on behalf of the KSI, LLC employees—including Brock and Price; (3) included Brock and Price in the payroll reports submitted to WSI in April 2011 and 2012; and (4) paid Brock and Price remuneration in exchange for hazardous work, as evidenced by IRS W-2s issued to Brock and Price.

[¶48] The fact that the California workers' compensation system determined Brock was hired by KSI, LP does not overcome these undisputed facts for multiple reasons.

[¶49] First, "Employer," under the Act, is defined as "a person who **engages or receives** the services of another for remuneration." N.D.C.C. § 65-01-02(17) (emphasis added). Even if Brock was hired and employed by KSI, LP, it is undisputed KSI, LLC received the services of Brock for remuneration. Second, "[a] 'contributing employer' is the entity who pays the WSI premium to secure workers' compensation coverage for the employee and, in turn, receives immunity from legal liability for injuries to the employee." Trinity Hosps., 2006 ND 231, ¶ 12, 723 N.W.2d 684 (citing Cervantes, 1998 ND 138, ¶ 9, 582 N.W.2d 2). It is undisputed KSI, LLC paid the WSI premium to secure workers' compensation coverage for Brock.

[¶50] Similarly, Brock's claim against Price fails because he is protected from suit as "an agent, servant, or other employee of the employer for damages for personal injuries." N.D.C.C. § 65-01-08 (1). Brock's exclusive remedy is workers compensation benefits—which he received. See, e.g., Lovelette v. Braun, 293 F.Supp. 41, 44 (D.N.D. 1968).

[¶51] By virtue of paying WSI premiums to secure coverage on behalf of Brock and all other employees, KSI, LLC is a "contributing employer" immune from suit under the Act. N.D.C.C. § 65-01-08; Trinity Hosps., 2006 ND 231, ¶ 12, 723 N.W.2d 684.

**c. WSI concurs that KSI, LLC is a contributing employer.**

[¶52] “Under North Dakota law, WSI is the entity charged with administering the policies, powers, and duties of N.D.C.C. tit. 65.” Trinity Hosps., 2006 ND 231, ¶ 19, 723 N.W.2d 684; N.D.C.C. § 65–01–02(22). The North Dakota Supreme Court “give[s] deference to an administrative agency’s construction of a statute in administering a law when that interpretation does not contradict clear and unambiguous statutory language.” Zimmerman v. N. Dakota Workforce Safety & Ins. Fund, 2010 ND 42, ¶ 5, 779 N.W.2d 372. There is nothing ambiguous about whether KSI, LLC was a contributing employer.

[¶53] Petitioners filed the Affidavit of Barry Schumacher, Chief of Employer Services at WSI, in support of their motion for summary judgment. App. 181-182 (Schumacher Aff.). Neither Brock nor the District Court addressed or even acknowledged Barry Schumacher’s Affidavit. See Trinity Hosps., 2006 ND 231, ¶ 19, 723 N.W.2d 684 (considering the unrefuted affidavit of WSI’s Barry Schumacher a “prominent factor in this case.”).

[¶54] Mr. Schumacher’s Affidavit is in accord with Petitioners’ assertion KSI, LLC and Richard Price are immune from Brock’s tort suit. Mr. Schumacher affirms that KSI, LLC: (1) applied for and maintained WSI coverage for its employees; (2) submitted annual employer payroll reports identifying both Brock, Price, and others as employees working for KSI, LLC in North Dakota; and (3) that Brock was awarded WSI benefits under KSI, LLC’s account for his workplace injury sustained on March 31, 2011. App. 181, ¶¶ 1-4 (Schumacher Aff.).

[¶55] Mr. Schumacher’s affidavit further states California’s finding that Brock was employed by KSI, LP is irrelevant to WSI:

5. WSI has been notified that the California Workers Compensation system accepted Huey Brock's Claim for benefits for his March 31, 2011 workplace injuries, finding that Mr. Brock was an employee of the California-based entity, KS Industries, LP at the time of injury.
6. California apparently has determined Huey Brock was employed by KS Industries, LP at the time of his March 31, 2011 workplace injuries. Irrespective, because Huey Brock provided services to KS Industries, LLC and his wages were claimed, coverage existed in North Dakota, and as a result his claim for benefits was properly deemed compensable by WSI.

App. 182, ¶¶ 5-6 (Schumacher Aff.).

[¶56] In short, via an unrefuted affidavit, WSI affirmed that WSI coverage for Huey Brock under KSI, LLC's account existed because Brock provided services (*i.e.*, "performed hazardous employment") for KSI, LLC and his wages were claimed (*i.e.*, the employment was in exchange for remuneration).

[¶57] Brock has produced absolutely no evidence to rebut the fact KSI, LLC was a contributing employer on behalf of Brock and Price.

**2. Brock's suit is barred because he accepted benefits under KSI, LLC's WSI account.**

[¶58] It is black letter law that once a claimant accepts benefits under North Dakota's workers compensation system—which Brock did—he or she gives up the right to sue the contributing employer or co-employees for the work related injury. N.D.C.C. §§ 65-01-01 & 65-01-08; Westman v. Dessellier, 459 N.W.2d 545, 548 (N.D. 1990) ("Under our law, once a claimant is allowed to participate in the fund, he or she may no longer elect to bring a lawsuit against the employer . . . or a coworker."). "Once the employee or his beneficiaries have received workmen's compensation benefits, they are precluded from pursuing a common law action, even for intentionally inflicted injuries." Hulne v. Int'l Harvester Co., 496 F. Supp. 849, 853 (D.N.D. 1980).



[¶59] Under section 65-05-06 “[t]he payment of compensation or other benefits by the organization to an injured employee . . . are in lieu of any and all claims for relief whatsoever against the employer of the injured or deceased employee.” Trinity Hosps., 2006 ND 231, ¶ 11, 723 N.W.2d 684.

[¶60] It is undisputed WSI accepted Brock’s claim and paid benefits on his behalf. App. 181, ¶¶ 2-4 (Schumacher Aff.); App. 184, ¶ 10 (Matlock Aff.); App. 228 (Notice of Decision Accepting Claim and Awarding Benefits).

[¶61] On April 4, 2011, Brock signed a “First Report of Injury” form. App. 227. On April 6, 2011, WSI issued its Notice of Decision Accepting Claim and Awarding Benefits, with a claim acceptance date of April 5, 2011. App. 228. The Notice of Decision identified KSI, LLC as the employer. Id.

[¶62] The award was not appealed and Brock made no attempt to challenge his eligibility for WSI benefits. N.D.C.C. § 65-10-01 (Claimant entitled to appeal final decision of WSI upon any ground going to basis of the claim). The April 6, 2011 award of benefits to Brock became final upon the expiration of the appeal period. N.D.C.C. § 65-05-03 (Subject to the right to appeal, decisions by WSI are final and entitled to full faith and credit). In addition to not challenging his WSI eligibility, Brock asked and WSI and KSI, LLC stipulated that to ensure seamless coverage for his injuries, WSI would not apply N.D.C.C. § 65-05-05 to suspend Brock’s WSI benefit payments while he sought California coverage. App. 229-232 (Stipulation).

[¶63] Brock’s acceptance of WSI benefits under KSI, LLC’s account precludes him from suing KSI, LLC and Price in tort.

**a. Brock stipulated he was a KSI, LLC employee.**

[¶64] Though it does not matter if Brock was employed by KSI, LLC or KSI, LP, this Court should be aware that both Brock and his attorney stipulated that Brock was employed by KSI, LLC.

[¶65] After accepting WSI medical and disability benefits under KSI, LLC's account for over a year, Brock's attorney informed WSI that Brock was considering filing a claim in California for the workplace injuries he sustained on March 31, 2011. App. 229 (Stipulation). Under N.D.C.C. § 65-05-05(2), when an injured worker applies for benefits from a second state for the same injury, WSI suspends all future benefits pending resolution of the application.

[¶66] To avoid the loss of WSI benefits, Brock and his counsel requested—and WSI agreed—to stay the suspension of future benefits required under section 65-05-05(2) pending resolution of the California application. App. 229-232. The stipulation, signed by Brock's wife; his counsel; WSI; and KSI, LLC was “beneficial to all of the parties' interests,” and afforded Brock the opportunity to apply for workers' compensation benefits in California without a lapse in coverage, otherwise required by statute. *Id.*

[¶67] The stipulation identifies, among other things: (1) Huey Brock as the claimant; (2) Welder's Helper as Brock's occupation; (3); KSI, LLC as Brock's employer; and (4) the “Employer Account No.” as the Employer Account assigned to KSI, LLC. Compare App. 191 (Cert. of Premium Payment Assigning KSI, LLC Employer Acct. # 1293424), with App. 229 (Stipulation, identifying Employer Acct. # 1293424). The Employer Account was first identified on the Certificate of Premium Payment signed by WSI's Barry Schumacher, as well as KSI, LLC's 2010 and 2011 Payroll Reports, which identified Brock and Price as Employees.

[¶68] The stipulation’s “Factual Background” identifies KSI, LLC as Brock’s employer in multiple places, including:

**March 31, 2011:** Claimant sustained a compensable injury arising out of and in the course of his employment with KS Industries, L.L.C. as a Welder’s Helper.

...

**April 19, 2012:** In a letter to WSI, claimant’s attorney, Michael Ainbinder indicated that claimant is considering filing a claim in California for the work related injuries sustained on March 31, 2011. Mr. Ainbinder indicated that claimant has always maintained residence in California; that KS Industries, L.L.C. is based in California, and that **claimant was hired in California to perform services for the employer in North Dakota.** Mr. Ainbinder believes there are sufficient ties to California, enabling claimant to file a claim in California for the March 31, 2011 work injury.

App. 229 (emphasis added). The emphasized stipulation text highlights why it does not matter if Brock was initially hired by KSI, LP: It is undisputed that Brock was performing services for KSI, LLC in North Dakota for remuneration. See N.D.C.C. § 65-01-02(17).

[¶69] The “Resolution of Dispute and Terms of Stipulation,” further identifies KSI, LLC as Brock’s employer:

If Claimant is found eligible to receive workers’ compensation benefits by the California Workers’ Compensation Appeals Board and/or the California workers’ compensation carrier for KS Industries, L.L.C., attorney Michael Ainbinder will represent WSI’s interest in seeking recovery of funds expended by WSI in claimant’s claim.

App. 230.

[¶70] Underscoring the importance of the stipulation, the following clause appeared before the signature block:

The parties by their signatures certify that they have read and received a copy of this stipulation and waive any right to rehearing or right to appeal this stipulation. The terms of this stipulated settlement contemplate prior

application of section 65-05-09.1 and application of section 65-05-09.2 to all benefit computations.

Id., 231.

[¶71] The stipulation was signed by WSI; KSI, LLC; Brock’s attorney, Michael Ainbinder; and Brock’s wife, on his behalf. Id., 231-232.

[¶72] This Court should not condone Brock’s attempt to return to North Dakota to claim KSI, LLC was not his employer—after **stipulating** KSI, LLC was his employer. Such inconsistent positions are precluded by judicial estoppel. In re Estate of Harms, 2012 ND 62, ¶ 10, 814 N.W.2d 783 (“Judicial estoppel is a doctrine designed to protect the integrity of the judicial process by prohibit[ing] a party from assuming inconsistent or contradictory positions during the course of litigation.”). Judicial estoppel applies where a party’s subsequent position is totally inconsistent with its original position, as Brock’s new position is. Meide v. Stenehjem ex rel. State of N.D., 2002 ND 128, ¶ 15, 649 N.W.2d 532.

### **III. Allowing Brock to sue KSI, LLC and Price in tort is obnoxious to North Dakota law.**

[¶73] The District Court agreed with Brock’s attempt to cast aside the Act’s exclusive remedy rule by applying collateral estoppel, stating:

It is clear to this Court that collateral estoppel is appropriate in this matter. The two parties have adjudicated this very issue at a previous time, in another court, and that court issued a final decision. To allow KSI, LLC another bite at the apple would defeat the ends of justice or work an injustice that this Court will not be a part of.

App. 340, ¶ 39.

[¶74] Brock’s attempt to collaterally estop KSI, LLC from arguing it was Brock’s employer ignores the temporal deficiencies in his argument. Indeed, neither the District

Court nor Brock explain why the California finding—made some two years **after** Brock accepted and received WSI benefits—retroactively overcomes the exclusive remedy rule.

**1. Collateral estoppel does not apply.**

[¶75] The fact that KSI, LLC is undisputedly a contributing employer is dispositive of Brock’s suit. Regardless, collateral estoppel does not apply here. “Collateral estoppel . . . applies only if the determination of the issue in the prior action was **necessary and essential** to support the judgment.” Riverwood Commercial Park, L.L.C. v. Standard Oil Co., 2007 ND 36, ¶ 20, 729 N.W.2d 101 (citation omitted and emphasis added). “A determination ranks as necessary or essential only when the final outcome hinges on it.” Id. (citation omitted). The doctrine “does not apply to matters which are incidental or collateral to the determination of the main controversy.” Id.

[¶76] The finding Brock was employed by KSI, LP (as opposed to KSI, LLC) was neither necessary nor essential to determining whether Brock qualified for California benefits. As noted by the workers’ compensation judge:

Having found that the applicant accepted employment with KS Industries LP in California[,] Jurisdiction is found for this matter to proceed . . . .

This Jurisdiction would still apply even if the Court were to accept defendant’s argument that the applicant was not offered employment or became an employee until he arrived in North Dakota and undergo a drug screening and passing before an offer of employment would be made.

App. 104 (Initial Cal. Opinion) (paragraph break added).

[¶77] The California Appeals Board and Appellate Court also agreed that whether KSI, LP or KSI, LLC hired Brock was incidental and collateral to determining whether Brock was eligible for benefits. App. 306 (Appeals Bd. Rpt. and Rec.; Denial at 2013 WL 6231154); App. 310 (Appellate Court Summary; Opinion at 2013 WL 6730781). In fact, KSI, LLC and the other KS Affiliates were found to be “merely alter egos of KSI, LP” in

the California proceedings. App. 103. For Petitioners' arguments to the District Court why collateral estoppel was inapplicable, see App. 38-48.

**2. Even if collateral estoppel applied, it cannot overcome the exclusive remedy rule.**

[¶78] Collateral estoppel is not to be applied rigidly. Riverwood Commercial Park, 2007 ND 14, ¶ 21, 729 N.W.2d 101. Rather, it “should apply as fairness and justice require, and should not be applied so rigidly as to defeat the ends of justice or to work an injustice.” Id. The District Court Order applying collateral estoppel works an injustice because allowing Brock to sue KSI, LLC and Price in tort is obnoxious to North Dakota law and policy.

[¶79] The Full Faith and Credit Clause of the United States Constitution requires states to recognize judgments of courts of other states. Am. Standard Life & Acc. Ins. Co. v. Speros, 494 N.W.2d 599, 602 (N.D. 1993); U.S. Const. Art. IV, § 1. A forum state must recognize the workers' compensation statutes of another state under the Full Faith and Credit Clause. Stine v. Weiner, 238 N.W.2d 918, 923 (N.D. 1976).

[¶80] However, the United States Supreme Court has long made clear that “[f]ull faith and credit does not . . . enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it.” Pac. Employers Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 504-05 (1939). “The Full Faith and Credit Clause does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.” Id., 501.

[¶81] Thus, North Dakota courts are not required to follow other states workers' compensation awards that are “obnoxious to the policy of our [workers' compensation]

act.” Stine, 238 N.W.2d at 923; Barry, 354 N.W.2d at 671 (citing Bradford Electric Light Co. v. Clapper, 286 U.S. 145 (1932) (a sister state must give recognition to the workmen’s compensation statutes of another state unless the provisions of the other state’s workmen’s compensation statutes are obnoxious to the public policy of the forum state)).

**3. The exclusive remedy rule has been zealously safeguarded by this Court and the Legislature and cannot be cast aside by the subsequent California finding.**

[¶82] North Dakota’s exclusive remedy rule has been zealously safeguarded by the Legislature and this Court. See, e.g., Cormier v. Nat’l Farmers Union Prop. & Cas. Co., 445 N.W.2d 644, 648 (N.D. 1989) (citing cases) (“[W]e have been zealous in protecting the integrity of our workers compensation statutory scheme of exclusivity in the face of numerous challenges to that exclusivity.”); see also Bartholomay, 2016 ND 138, ¶ 15, 881 N.W.2d 249 (rejecting a request to expand contributing employer liability because “The Legislature has spoken and set the public policy on the limits of a covered employer’s liability.”). “The public policy encompassing workers’ compensation statutes dictates a broad interpretation of the exclusive remedy rule.” Smith v. Vestal, 494 N.W.2d 370, 375 (N.D. 1992).

[¶83] This Court has said that to exact WSI premiums from a contributing employer but deny it immunity by applying out-of-state workers’ compensation law was tantamount to fraud. Barry, 354 N.W.2d at 673. In Barry, the issue was whether North Dakota law, which precluded a negligent employer from being liable for contribution, applied rather than Minnesota law, which permitted limited contribution liability, even though the injured employee received benefits under the Minnesota worker’s compensation act. In holding North Dakota law applied, this Court said:

We do not believe that the State of North Dakota, under the threat of criminal sanction, intended to exact a premium for coverage, may, and at the same time, deny the immunity to the complying employer.

**To exact such premium but not provide the concomitant immunity to the employer would constitute fraud.**

[¶84] Barry, 354 N.W.2d at 673 (emphasis and paragraph break added). The Court further noted that if it applied Minnesota law in this instance “the North Dakota workmens’ compensation statutes would . . . be nullified . . .” Id. Thus, this Court held, “[a]n employee’s choice of benefits is insufficient justification to alter North Dakota’s guaranty of protection to employers contributing to North Dakota workmen’s fund.” Id. Brock’s choice to seek California benefits after applying for and receiving WSI benefits is insufficient to retroactively overcome the exclusive remedy rule.

[¶85] The District Court Order allowing Brock’s tort suit against a contributing employer and its employee to proceed is obnoxious to and irreconcilable with North Dakota law. It is undisputed KSI, LLC is a contributing employer, immune from suit. N.D.C.C. § 65-01-08 (contributing employers are immune from suit). It is undisputed Brock received medical and disability benefits from WSI under KSI, LLC’s account. N.D.C.C. § 65-05-06 (“The payment of compensation or other benefits by the organization to an injured employee . . . are in lieu of any and all claims for relief whatsoever against the employer of the injured or deceased employee.”). It is undisputed KSI, LLC complied with the provisions of Chapter 65-04. N.D.C.C. § 65-04-28 (“Employers who comply with the provisions of this chapter shall not be liable to respond in damages at common law or by statute for injury to or death of any employee, wherever occurring, during the period covered by the premiums paid into the fund.”).



[¶86] These statutes, along with significant case law, will be nullified unless this Court vacates the District Court Order and awards summary judgment in favor of KSI, LLC and Richard Price.

**4. KSI, LLC only seeks the benefit of the bargain it struck with Brock.**

[¶87] The District Court’s statement that “[t]o allow KSI, LLC another bite at the apple would defeat the ends of justice or work an injustice that this Court will not be a part of” misses the crux of Petitioner’s argument. App. 340, ¶ 39.

[¶88] KSI, LLC has never sought “another bite at the apple.” Rather, KSI, LLC simply seeks the benefit (*i.e.*, immunity from suit) of the bargain it entered into by paying Brock wages in exchange for his work and WSI premiums on his behalf.

[¶89] On a more basic level, what should KSI, LLC have done differently in this matter? As the only KSI Affiliate authorized to operate in North Dakota, KSI, LLC complied with North Dakota law by identifying Brock as an employee, paying premiums on his behalf, and working diligently to secure and maintain WSI coverage for him after the accident. It is undisputed that KSI, LLC complied with the Act. N.D.C.C. § 65-04-28.

[¶90] The Act was created to provide sure and certain relief to employees without regard to questions of fault and to the exclusion of every other remedy. N.D.C.C. § 65-01-01. Unless this Court vacates the District Court Order, KSI, LLC loses the benefit of the very bargain it struck by complying with North Dakota law. KSI, LLC will be forced to defend a claim from which it and Price have immunity. And, they will be subjected to significant liability at trial.


## CONCLUSION

[¶91] This case may appear complicated. It is not. The undisputed facts are that KSI, LLC is a contributing employer. The subsequent California finding does not change the fact that KSI, LLC is a contributing employer or that Brock received benefits from KSI, LLC's WSI account. The California finding is not relevant in this case. Unless this Court exercises its jurisdiction to vacate the District Court Order and directs the District Court to dismiss Brock's action, an undisputed contributing employer and its former employee will be forced to defend a tort suit from which they have immunity, nullifying significant statutory and case law in North Dakota.

[¶92] This Court has zealously safeguarded the exclusive remedy rule because it is part of a carefully crafted legislative compromise between employers and employees. Brock's dispute is with the Legislature—not his former employer and co-worker. See Stine v. Weiner, 238 N.W.2d 918, 927 (N.D. 1976) ("Stine's objections to the immunity provisions in section 65-01-08, N.D.C.C., are more appropriately topics of consideration for the Legislature. If there is to be a policy change in the remedies available to an injured co-employee, such topic can be more fully explored by the Legislature fulfilling its policy-making role.").

Respectfully submitted November 4, 2016.

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ATTORNEYS FOR RICHARD PRICE AND KS  
INDUSTRIES LLC

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

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Richard Price and KS Industries LLC,

Petitioners,

vs.

The Honorable Douglas L. Mattson, Judge of  
the District Court, North Central Judicial  
District and Huey Brock,

Respondents.

**SUPREME COURT NO.** \_\_\_\_\_

Civil No. 31-2015-CV-00106

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**SUPPLEMENTAL AFFIDAVIT OF LESLIE BAKKEN OLIVER**

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Leslie Bakken Oliver, being first duly sworn, states and alleges as follows:

1. I submit this Affidavit based upon my personal knowledge.
2. I am an attorney for Defendant KS Industries, LLC and Defendant Richard Price.
3. This Affidavit is being submitted in accordance with N.D. R. App. P. 21(a)(3)(A).
4. Mr. Brock suffered catastrophic injuries in a workplace accident giving rise to this lawsuit and is now a quadriplegic. Because no medical discovery has been conducted in this case, extensive and expensive medical discovery will be necessary before trial. For example, the following medical discovery will be necessary before trial:
  - a. Discovery regarding Mr. Brock's care and treatment at Trinity Hospital in Minot;
  - b. Discovery regarding Mr. Brock's care and treatment at Craig Rehabilitation Hospital in Denver; and
  - c. Discovery regarding Mr. Brock's continued rehabilitation in California.
5. Additional fact discovery needs to be conducted on the following people and entities, at minimum:
  - a. Mr. Brock and his wife, Stephanie Brock. The Brocks reside in California.
  - b. Jim Hipner, LLC, the entity that owned the mud-covered semi that was backing up on Highway 2 on the morning of the accident. Jim Hipner, LLC, is located in Labarge, Wyoming.
  - c. Robert Lopez, the driver of the Jim Hipner, LLC, truck. The last known address for Mr. Lopez is Heyburn, Idaho.
  - d. Flint Energy, the owner of the first pickup truck that drove into the back of the mud-covered Jim Hipner, LLC semi on the morning of the accident. Flint Energy is located in Minot, North Dakota.
  - e. Jose Chavez, the driver of the Flint Energy truck. The last known address for Mr. Chavez is Dallas, Texas.
  - f. Shane Masterson, the driver of a car also involved in the accident. The last known address for Mr. Masterson is Elk Grove, California.

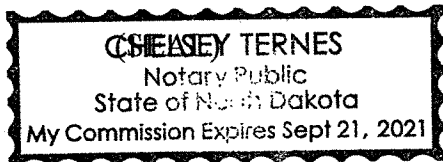
g. Various law enforcement officers and first responders on accident scene.

Dated this 4 day of November, 2016.



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Subscribed and sworn to before me this 4 day of November, 2016.

  
Notary Public

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

---

Richard Price and KS Industries LLC,

Petitioners,

vs.

The Honorable Douglas L. Mattson, Judge of  
the District Court, North Central Judicial  
District and Huey Brock,

Respondents.

**SUPREME COURT NO.** \_\_\_\_\_

Civil No. 31-2015-CV-00106

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**AFFIDAVIT OF ELECTRONIC SERVICE**

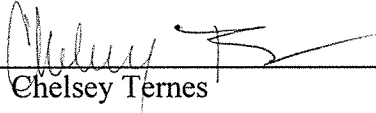
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STATE OF NORTH DAKOTA )  
  ) ss.  
COUNTY OF BURLEIGH )

[¶1] Chelsey Ternes, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter. Affiant states that on November 4, 2016, the Petition for Supervisory Writ, Appendix of Petitioners Richard Price and KS Industries LLC and Supplemental Affidavit of Leslie Bakken Oliver were filed electronically with the Clerk of Court of the North Dakota Supreme Court through email, and that the same documents were electronically served through email upon:

Duane Lillehaug - [dlillehaug@maringlaw.com](mailto:dlillehaug@maringlaw.com)  
Michael Ainbinder – [michaelainbinder@me.com](mailto:michaelainbinder@me.com)  
Honorable Douglas L. Mattson -- [dmattson@ndcourts.gov](mailto:dmattson@ndcourts.gov)

  
Chelsey Ternes

Subscribed and sworn to before me this 4 day of November, 2016.

  
Notary Public

(SEAL)

