

COMMUNITY LEGAL SERVICES
FARMWORKER OFFICE
P.O. Box 21538 • 305 South Second Avenue
Phoenix, Arizona 85036-1538
(602) 258-3434, Ext. 6 • FAX (602) 258-4628

Cheryl A. Koch Martinez, Bar No. 0 19 162
George H. McKay, Bar No. 0 159 10
COMMUNITY LEGAL SERVICES
305 S. Second Avenue, P.O. Box 21538
Phoenix, Arizona 85036-1538
(602) 258-3434 est. 286

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Benjamin Cornejo-Ramirez, et al.,
Plaintiffs,
VS.
James G. Garcia, Inc.,
Defendant.

CIV 99-020 1 PHX RCB

PLAINTIFFS' RESPONSE TO
DEFENDANT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT

Plaintiffs Benjamin Cornejo-Ramirez, Luis Ferrales, and Manuel Garia-Ruiz, by and through their undersigned counsel, respectfully submit this Memorandum in response to the Defendant's Motion for Partial Summary Judgment. This Memorandum is supported by Plaintiffs' Separate Statement of Facts and Statement of Disputed Facts, and exhibits attached thereto, and the other papers and pleadings previously filed in this action, all of which are incorporated herein by reference. Plaintiffs respectfully move the Court to deny Defendant's motion because genuine issues of material fact exist which do not entitle Defendant to judgment as a matter of law.

I. INTRODUCTION

This action was brought by six farmworkers who seek to recover damages against Defendant for violations of the Agricultural Worker Protection Act (hereinafter "AWPA"), 29 U.S.C. § 1801 q, and pendent state law claims of wage, negligence, and contract. Plaintiffs' Separate Statement of Facts (hereinafter "Pl. SOF") ¶1. The three Plaintiffs who are the subject of Defendant's motion have claims under the AWPA and the common

1 law of negligence. *Id.* ¶2. These Plaintiffs filed workers’ compensation claims for an auto
2 accident in which they were involved while on their way to the fields to work for Defendant
3 on July 4, 1998. *Id.* ¶¶ 3, 1 S. Their claims were denied by the insurance carrier. *Id.* ¶¶ 1 S-1 9.
4 They requested a hearing, which was held on May 28, 1999. *Id.* ¶ 20 In the Decision upon
5 Hearing, the Industrial Commission of Arizona (hereinafter “ICA”) found that their claims
6 were non-compensable because they were not in the course of employment when they
5 sustained their injuries. *Id.* Plaintiffs then requested a review of the decision. *Id.* ¶ 21. In its
8 Decision upon Review, the ICA affirmed its findings and made an additional finding that
9 Benjamin Comejo-Ramirez was not an employee of James G. Garcia, Inc. *Id.* As a result of
10 the ICA’s finding that Plaintiffs were not in the course of employment, Plaintiffs did not
11 receive workers’ compensation benefits. *Id.* ¶ 22.

12 The papers and pleadings previously filed, affidavits, depositions, and other
13 documents establish that there are genuine issues of material fact as to the claims for which
14 Defendant moves for judgment as a matter of law. Therefore, this Court should deny
15 Defendant’s motion.

16 **II. STANDARD FOR SUMMARY JUDGMENT**

17 This Court should grant summary judgment only if there is no genuine issue as to
18 any material fact and if the moving party is entitled to judgment as a matter of law.
19 Fed.R.Civ.P., 56(c); Anderson v. Liberty Lobbv. Inc., 477 U.S. 242, 247 (1986). The facts
20 should be viewed in the light most favorable to the non-moving party. *Id.* Viewing the facts
21 in the light most favorable to Plaintiffs, Defendant has failed to meet its burden as to each of
22 the causes of action’it has presented. Therefore, this Court should deny Defendant’s motion.

23 **[II. ARGUMENT**

24 A. Defendant Misstates and Misapplies the Applicable Law with Regard to the
25 Negligence Claim.

26 Defendant is not entitled to summary judgment as a matter of law on the negligence
27 claim because the ICA’s finding that Plaintiffs were not in the course of employment 1) paves
28 the way for their tort action, 2) does not collaterally estop the negligence claim , and 3) does
not bar the negligence claim under res judicata.

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1. The ICA’s Finding Grants Plaintiffs the Right to Sue Defendant in Tort.

In Arizona, a workers’ compensation scheme is in place which provides compensation to employees injured in the course of employment regardless of fault, yet also precludes them (with several exceptions) from bringing a tort action against their employer. Ariz. Const. art. XVIII, § 8. This system is designed to give injured workers and their employers a forum in which they can litigate work-related injuries in a less burdensome and less costly manner. See Id. It also safeguards the rights of both workers and employers by maintaining access to lawsuits in tort for the workers under the proper circumstances, and by disallowing tort lawsuits when the injury is work-related. See Id. Thus, workers who opt out of workers’ compensation, or those who were not within the course of employment at the time of the injury retain the right to sue their employer in tort. See Id.

Here, the ICA found that Plaintiffs’ injuries did not arise out of and in the course of employment. Pl. SOF ¶¶ 20-21. Defendant claims that this finding essentially bars Plaintiffs from litigating their claims in tort. Defendant’s Memorandum of Points and Authorities in Support of Its Motion for Partial Summary Judgment (hereinafter “Def. Memo.”) at 4. However, under Defendant’s analysis, Plaintiffs would be left with no forum in which they could recover for their non-work-related injuries. That certainly is not the law. See Ariz. Const. art. XVIII, § 8. In fact, according to the applicable state law, Plaintiffs have the right to litigate this matter in tort because their injuries were not work-related.

2. The doctrine of collateral estoppel has no bearing on the negligence claim because the applicable standard is respondeat superior.

Defendant contends that collateral estoppel bars Plaintiffs’ negligence claim. Def. Memo at 4. Defendant bases its contention on the incorrect assumption that there is only one theory of liability in tort: that Defendant owed Plaintiffs a duty of care only if they were its employees acting within the course or scope of employment. Id. at 4-5. However, Plaintiffs do not advance their claim on this theory. Their negligence claim is based on the alternate theory of respondeat superior. Defendant’s assertion that the main issue in the negligence

1 claim, whether Plaintiffs were acting within the course of their employment when the accident
2 occurred, is irrelevant.

3 a. The applicable standard for the negligence claim is
4 respondeat superior.

5 Plaintiffs' negligence claim is based on the doctrine of respondeat superior. See
6 Anderson v. Gobeau, 501 P.2d 453, 456 (Ariz. Ct. App. 1972). Despite Defendant's
7 unsupported claims to the contrary (See Def. Memo. at 6), Plaintiffs are the third party
8 claiming injuries as a result of Defendant's employee's conduct. Pl. SOF ¶¶ 14, 16-17.
9 Encarnacion Salgado, the vehicle's driver, was an employee and agent of Defendant. Id. ¶ 14.
10 Salgado was driving the van at the time of the accident, and it was his conduct which led to
11 Plaintiffs' injuries. Id. ¶¶ 16-17.

12 Thus, whether or not Plaintiffs were within the scope or course of employment
13 when the accident occurred is irrelevant to the analysis. Under respondeat superior, the issue
14 of scope or course of employment may arise, but only in relation to Salgado. See Anderson,
15 501 P.2d at 456. However, the issue of whether Salgado was in the course of employment
16 when the accident occurred was not litigated in the workers' compensation action. Pl. SOF
17 ¶ 20. Moreover, Defendant does not deny that Salgado was in the course of employment. See
18 Def. Memo at 4-6. Therefore, Plaintiffs are not precluded from litigating this issue.

19 Defendant's reliance on Robarge v. Bechtel Power Corp. to support its conclusion
20 that collateral estoppel precludes Plaintiffs' claim is misplaced. See Def. Memo. at 6. In fact,
21 this case actually supports Plaintiffs' position. In Robarge, two victims of a two-vehicle
22 automobile accident brought tort claims against the employer of the other vehicle's driver.
23 640 P.2d 2 11,213 (1982). The court analyzed which standard should be used in determining
24 whether the tortfeasor was in the course of employment when the accident occurred. The
25 court unequivocally held that the proper standard to use in a tort case is the doctrine of
26 respondeat superior, and that "other concepts borrowed from the area of work[ers]'
27 compensation law can be considered but will not be controlling." Id. at 214 (emphasis added).

28 Defendant attempts to use this case as support for its contention that Plaintiffs'
29 negligence suit is barred by collateral estoppel because "application of workman's

1 compensation principles and cases [as opposed to the doctrine of respondeat superior] are
2 appropriate” in this matter. Def. Memo. at 6. This conclusion is a misinterpretation of the
3 court’s analysis and its findings. The court merely stated that in some tort cases, principles
4 of law from the area of workers’ compensation may be applicable, but not controlling.
5 Robarge, 640 P.2d at 2 14. Moreover, the court held that respondeat superior was the correct
6 standard to use in the case. Id. Thus, respondeat superior is the correct standard to use here,
7 so Plaintiffs are not precluded from litigating their negligence claim.

8 b. Plaintiff Cornjeo-Ramirez’ negligence claim is not precluded by
9 collateral estoppel because the determination of his employment
relationship was not essential to the ICA’s decision.

10 In addition, if the Court finds that an employment relationship is necessary to bring
11 a negligence claim, Plaintiff Cornejo-Ramirez is not precluded from bringing the claim,
12 despite the ICA’s determination that Plaintiff was not the Defendant’s employee. Preclusion
13 does not apply because the determination was not essential to the ICA’s judgment. See infra
14 §III(B)(2)(b). Thus, collateral estoppel is also inapplicable to the issue of employment
15 relationship.

16 Therefore, the application of collateral estoppel to Plaintiffs’ negligence cause of
17 action is irrelevant. This Court should deny Defendant’s motion on this claim.

18 3. The doctrine of res judicata has no bearing on the negligence cause
19 of action because it is different from the cause of action adjudicated
in the workers’ compensation proceeding.

20 Defendant contends that res judicata bars Plaintiffs from bringing their negligence
21 claim. Def. Memo. at 7. However, this conclusion is incorrect. To bar an issue from
22 litigation, res judicata requires the presence of 1) the same cause of action, 2) an identity of
23 parties or their privies, and 3) a final judgment on the merits. Hawkins v. State Dept. of
24 Economic Security, 183 Ariz. 100, 103,900 P.2d 1236, 1239 (Ariz. Ct. App. 1995). Here, the
25 application of the doctrine fails because the negligence claim is a different cause of action than
26 the workers’ compensation claim, which does not delve into the issues of fault. Defendant’s
27 contention arguably could apply if Plaintiffs were proceeding under a theory that Defendant
28 was liable because Plaintiffs were performing job-related activities when they were injured.

1 However, Plaintiffs are proceeding under the theory that Defendant is liable for the acts of
2 Salgado. That issue was never litigated by the ICA, and thus, is not precluded here. Pl. SOF
3 ¶ 20.

4 Surprisingly, to support its claim, Defendant cites to the finding in Connors v.
5 Parsons regarding the scope of employment issue. Def. Memo. at 7. In Connors, the plaintiff
6 was injured in an automobile accident in a vehicle driven by her co-employee. 818 P.2d 232,
7 233 (Ariz. Ct. App. 1991). The plaintiff received workers' compensation benefits and then
8 sued her co-employee in tort. Id. at 233-34. The court held that the plaintiff could sue the co-
9 employee in tort because the ICA had not adjudicated whether the co-employee was acting in
10 the course of employment at the time of the accident. Id. at 235.

11 Here, Plaintiffs, unlike the plaintiff in Connors, did not receive workers
12 compensation benefits. Pl. SOF ¶ 22. In addition, Plaintiffs' theory of liability here is under
13 respondeat superior. See supra § 1831(e) (2)(a). Case dealt with an issue that is
14 not relevant here, the issue of choice of remedy as a waiver of alternate remedy under A.R.S.
15 §23-1024. 818 P.2d at 233-234. Thus, this case does not support Defendant's position and res
16 judicata does not bar Plaintiffs' tort action against Defendant.

17 Thus, neither collateral estoppel nor res judicata preclude Plaintiffs from bringing
18 the negligence claim against Defendant. In fact, the ICA's finding that Plaintiffs were not in
19 the course of employment when the accident occurred, gives them the right to sue Defendant
20 in this tort action.

21 B. The Defendant is Not Entitled to Summary Judgment As A Matter of Law
22 on the Agricultural Worker Protection Act (AWPA) Claims.

- 23 1. The Plaintiffs have properly alleged a violation of § 1831 (e) of the
24 AWPA.

25 Defendant contends, without introducing facts or matters outside of the pleadings,
26 that Plaintiffs have not properly alleged a violation of § 1831(e). Def. Memo at 8.
27 Defendant's motion with respect to § 1831 (e) is more properly brought as a motion to dismiss,
28 rather than a motion for partial summary judgment. This 12(b)(6) motion is untimely and

...

1 should be barred. Nevertheless, Plaintiffs have plead sufficient facts regarding the §183 1 (e)
2 claim.

3 Notice pleading requires a “short and plain statement of the claim showing that the
4 pleader is entitled to relief. Fed.R.Civ.P. S(a). To state a claim under §183 1(e), Plaintiffs are
5 required to allege that Defendant knowingly supplied false and misleading information
6 concerning the terms or conditions of employment included in the disclosure subsections of
7 § 183 1. Here, Plaintiffs have pled sufficient facts by alleging that following the accident,
8 Defendant assured Plaintiffs that it would pay for their medical treatment, and that it never
9 actually did. Pl. SOF ¶ 36. The information Defendant supplied to Plaintiffs was regarding
10 workers’ compensation coverage, a term of their employment.

11 Thus, Plaintiffs’ pleadings contain sufficient facts. However, if this Court finds
12 that Plaintiffs have not pled sufficient facts, Plaintiffs request leave of the court to amend the
13 pleadings on this particular claim.

- 14 2. The Plaintiffs Have Properly Alleged Violations of §18 11 Because
15 a) Liability under the AWPA Is Not Coextensive with an
16 Employment Relationship; b) Plaintiffs Are Not Precluded by Res
17 Judicata or Collateral Estoppel; and c) If the Court Analyzes the
18 Employment Relationship, It Must Do So under the AWPA’s Broad
19 Definition.

20 The Plaintiffs have properly alleged violations of § 1 8 11. First, the AWPA does
21 not require Plaintiffs to be employees in order to allege a violation of §18 11. Furthermore,
22 Defendant’s conclusion that the claim is precluded due to the ICA’s decision is incorrect
23 because Plaintiffs’ employee status is governed by the AWPA, and not by workers’
24 compensation principles.

- 25 a. The Plaintiffs properly alleged violations of §18 11 because
26 liability under the AWPA is not coextensive with an
27 employment relationship.

28 Plaintiffs properly alleged that Defendant violated §1811 of the AWPA by
engaging in transportation activities without being properly registered to do so. Defendant
contends that Plaintiffs cannot sue it for violating this section because §18 11 (b) requires that
they must be employees in order to bring suit. Def. Memo. at 10. This argument is baseless.
Section 18 1 1(b) addresses the liability of a farm labor contractor for any violations of the

1 AWPA committed by those individuals he or she hired to perform farm labor contracting
2 activities. It in no way requires that Plaintiffs be employees of Defendant in order to sue
3 Defendant for violating §1 S 11.

4 In fact, the AWPA and case law interpreting the statute clearly state that liability
5 under the AWPA is not coextensive with an employment relationship. The AWPA regulates
6 agricultural employers, agricultural associations, and farm labor contractors. 29 U.S.C. §
7 1 SO 1. The AWPA defines the term “farm labor contractor” as “any person...who. . .performs
8 any farm labor contracting activity. Id. § 1 802(7). “Farm labor contracting activity” includes
9 “recruiting soliciting, hiring, employing, furnishing, or transporting” any agricultural worker.
10 29 U.S.C. § 1 802(6). Thus, by Defendant’s transporting of Plaintiffs through its foremen and
11 employees, it has subjected itself to liability under the AWPA.

12 In a case similar to the case at bar, the Seventh Circuit Court of Appeals held that
13 liability under the AWPA is not limited only to injuries to an employee obtained during the
14 course of his or her employment. Deck v. Peter Romein’s Sons. Inc., 109 F. 3d 383, 390-91
15 (7th Cir. 1997). Rather, the court found that whether or not the defendant agricultural employer
16 was actually the plaintiffs’ employer at the time of the auto accident was immaterial for
17 purposes of determining whether AWPA provided the injured workers with a cause of action
18 against that employer. Id. The court relied on the AWPA’s broad definition of “agricultural
19 employer,” which is analogous to its broad definition of “farm labor contractor,” specifically
20 with regard to the transportation of workers. See 29 U.S.C. § 1 802(2). Thus, Defendant can
21 be held liable for violating §1 S 11 regardless of the existence of an employment relationship.

22 b. The doctrine of res judicata does not bar Plaintiffs’ §1811
23 claim.

24 If this Court determines that the AWPA requires Plaintiffs to be employees of
25 Defendant, the Court should find that the doctrine of res judicata does not bar Plaintiffs from
26 litigating their employment relationship. Defendant misapplies the doctrine of res judicata
27 in arguing that the § 1811 claim is barred. Def. Memo. at 10. Correct application of the
28 requirements of res judicata to this matter results in no preclusion of the employment
relationship issue. To bar an issue from litigation, res judicata requires 1) that the second

1 cause of action be the same as the first, 2) an identity of parties or their privies, and 3) a final
2 judgment on the merits. Hawkins v. State Dept. of Econ. Security, 900 P.2d 1236, 1239 (Ariz.
3 Ct. App. 1995). Here: the test fails on the first prong: the cause of action under §18 11 of the
4 AWP is an entirely different one than that decided in the workers' compensation action.

5 Moreover, any preclusive effect extends only to the facts and issues that were
6 advanced or could have been advanced pertaining to the same cause of action. Id. Res
7 judicata is designed to impel "parties to consolidate all closely related matters into one suit"
8 Hagee v. City of Evanston, 729 F.2d , 5 14 (7th Cir. 1954). Plaintiffs did not bring, nor could
9 they have brought, the cause of action based on the AWP in the workers' compensation
10 action. Pl. SOF ¶ 18. The ICA's jurisdiction extends only to the determination of the workers'
11 compensation claims and issues surrounding the claims, such as whether the Plaintiffs were
12 in the course or scope of employment when the accident occurred. Because the §18 11 claim
13 does not constitute the same cause of action advanced in the workers' compensation
14 proceedings, this Court must conclude that res judicata does not apply.

15 C. The doctrine of collateral estoppel does not bar Plaintiff
16 Cornejo-Ramirez' §18 11 claim.

17 Further, if this Court finds that an employee status is required, collateral estoppel
18 does not preclude Plaintiff Cornejo-Ramirez' §18 11 claim. The requirements for collateral
19 estoppel to apply are 1) the presence of issues actually litigated and determined, 2) a valid and
20 final judgment, 3) a determination that is essential to the judgment, and 4) mutuality of parties
21 or their privies. Gilbert v. Board of Med. Examiners of the State of Ariz., 155 Ariz. 169, 174,
22 745 P.2d 617, 622 (Ariz. Ct. App. 1957); Chaney Building Co. v. City of Tucson, 148 Ariz.
23 571, 573, 716 P.2d 28, 30 (Ariz. 1986). An issue is not essential to the judgment if it was not
24 necessary to the rendering of the judgment, thereby making it incidental, collateral, or
25 immaterial to the judgment. Halpern v. Schwartz, 426 F.2d 102, 105 (2d Cir. 1970). Here,
26 the determination that Plaintiff Cornejo-Ramirez was not an employee was not essential to the
27 judgment of the ICA in finding that the accident did not occur while he was acting within the
28 course or scope of employment. In fact, the ICA made this finding regarding Plaintiff
Zornejo-Ramirez after the fact in its Decision Upon Review, and not in its first Decision Upon

Hearing. Pl. SOF ¶¶ 20-21. Thus, collateral estoppel is not applicable to the Plaintiffs employment relationship with Defendant.

d. If the Court analyzes the employment relationship, it must do so using the AWPA's broad definition of "employ."

Moreover, even if the threshold requirements of res judicata and/or collateral estoppel were met, the Court would be obligated to disallow preclusion because the analysis of the employment relationship under the AWPA is different from the common law analysis used by the ICA. In examining employment relationships under the AWPA, the Court must use the broad definition of the term "employ." See 29 U.S.C. § 1802(5); Torres-Lopez v. Mav, 111 F.3d 633, 641 (9th cir. 1997). In defining employment under the AWPA, Congress expressly rejected the common law definition of employment. See Atenor v. D & S Farms, SS F.3d 925, 929 (1996). In fact, the AWPA's definition of the term "employ" is the "broadest definition that has ever been included in any one act." United States v. Rossenwasser, 323 U.S. 360, 363 n. 3, quoting S Cong. Rec. 7, 657 (1938).¹ Therefore, if this Court concludes that an employment relationship is required by the AWPA, it should apply the AWPA's broad definition of the term "employ" and refrain from precluding the issue.

In summary, Defendant's motion for summary judgment on this claim should be denied. Defendant misinterprets § 1 S 11 (b) as requiring an employment relationship when it clearly does not. Defendant attempts to apply the doctrine of res judicata to a completely different cause of action. Defendant also attempts to apply collateral estoppel to the issue of Plaintiff Cornejo-Ramirez' employment status, even though the ICA's determination of this issue was not essential to its judgment. Moreover, the proper analysis of the employer relationship for AWPA claims is under the broad interpretation of the relationship under the AWPA. Thus, summary judgment cannot properly be granted on this claim, and the Court should deny it.

¹ This quote actually refers to the Fair Labor Standards Act's (FLSA) definition of employment in 29 U.S.C. § 203(g), which is the same definition that the AWPA uses. See 29 U.S.C. §1802(5).

1 3. Plaintiffs Properly Alleged a Violation of § 1841 of the AWP
2 because the threshold for intent is low and because disputed facts
3 exist surrounding Defendant’s violation of the AWP and its intent,

4 a. The threshold for “intent” is very low.

5 Defendant claims that the record does not demonstrate that Garcia “intentionally”
6 violated the AWP provisions, as required by §1854. Def. Memo. at 11. However, Defendant
7 supports this contention merely by stating that intent under the AWP requires specific intent.
8 Id. This assumes that proving intent requires much more than it actually does. The term
9 “intentional” under the AWP merely means that the Defendant consciously committed the
10 act which violated the AWP and it does not require that the Defendant have specific intent
11 to violate the law. See Bueno v. Mattner, 829 F.2d 1380, 1385, cert. denied, 456 U.S. 1022
12 (1988), citing Alvarez v. Longboy, 697 F.2d 1333, 1335 (9th Cir. 1953). Moreover the
13 intentional requirement must be construed so as to “further the Act’s remedial purposes.” Id.
14 citing Salazar-Calderon v. Presidio Valley Farmers Ass’n, 765 F.2d 1334, 1345 (5th Cir. 1985),
15 cert. denied 475 U.S. 1035 (1986).² Therefore, Defendant’s strict interpretation of “intent” as
16 requiring specific intent is incorrect, Defendant’s interpretation is also contrary to the Act’s
17 remedial purpose. In addition, the facts surrounding Defendant’s intent are in dispute.

18 b. Genuine issues of material facts exist regarding Defendant’s
19 violations of §1841 and Defendant’s state of mind.

20 In this case, the facts surrounding each violation and Defendant’s intent are in
21 dispute. Defendant claims that it did violate §§184 1 (b)(1)(C) and (c) of the AWP because
22 it had workers’ compensation coverage, and that it did not violate §1541(b)(1)(A) because
23 Defendant did not own nor have control over the vehicle used to transport Plaintiffs. Def.
24 Memo. at 11-12. However, these claims are without merit and are not supported by
25 undisputed facts.

26 First, Plaintiffs properly brought the claim of failure to purchase a bond or provide
27 liability insurance coverage for transportation injuries under §§184 1 (b)(1)(C) and (c).

28 ² Although this case and Alvarez both interpret “intent” under the Farm Labor Contractors Registration
Act (FLCRA), the predecessor of the AWP, the legislative history of the AWP makes it clear that
the standard for “intent” is identical to that in the FLCRA. See 1982 U.S. Code Cong. & Admin.
News 4567.

1 Subsection (b)(1)(C) requires an agricultural employer or farm labor contractor to have an
2 insurance policy or a liability bond which insures them for damage “arising from the
3 ownership operation, or the causing to be operated, of any vehicle. . .” used to transport
4 agricultural workers. (emphasis added). Subsection (c) modifies the requirement if the
5 agricultural employer or farm labor contractor:

6 “provides worker’s compensation coverage for such worker in the case
7 of bodily injury or death as provided by such State law. . .(1) No
8 insurance policy or liability bond shall be required of the employer’ if
9 such workers are transported only under circumstance for which there
10 is coverage under State law. (2) An insurance policy or liability bond
11 shall be required of the employer for circumstances under which
12 coverage for the transportation of such workers is not provided under
13 such State law.”

14 Here, the second subsection clearly applies because the workers’ compensation
15 insurance Defendant carried did not provide Plaintiffs with coverage. As is evident from the
16 decisions in the workers’ compensation proceedings, Arizona law does not provide for
17 workers compensation coverage of the Plaintiffs under the circumstances in which they were
18 being transported. PI. SOF ¶¶ 20-21. Therefore, the AWPB requires Defendant to carry
19 liability insurance or carry a bond. Under the standard of intent explained above, Defendant’s
20 violation of this section was intentional because of its failure to carry a liability insurance
21 policy or purchase a bond.

22 Defendant argues that it had no obligation to ensure that the vehicle in which
23 Plaintiffs were riding met federal safety standards or that it was covered by liability insurance
24 because it neither “owned nor controlled” the vehicle. Def. Memo. at 12. The ownership and
25 control standard may have been used in the workers’ compensation action, but it is clearly not
26 the one used under the AWPB. See 29 U.S.C. §1841(b)(1). The applicable standard that calls
27 into play the provisions regarding transportation safety is “uses or causes to be used.” Id.; 29
28 C.F.R. §500.100. Essentially, the only instance in which a farm labor contractor is found not
using transportation or causing it to be used is when the workers themselves form a car pool
arrangement. Id. However, if the farm labor contractor in any way participates in the
arrangement, it is not considered a car pool. Id.

In other words: the issue of whether Defendant used transportation or caused it to be used is dispositive here, as opposed to ownership and control. Defendant claims that the facts surrounding the transportation show that it did not provide transportation to workers, that it did not know who would be driving to the fields, and that it did not know which vehicles would be utilized. Def. Memo at 12. From this, Defendant draws the conclusion that it did not intentionally violate the AWWA transportation safety provisions. Id. However, this conclusion is based wholly on disputed facts. See Plaintiffs' Statement of Disputed Facts.

Defendant, through its foreman Raul Escoto, arranged the transportation and told Plaintiffs which vehicle to take to get to the fields. Pl. SOF ¶¶ 7, 12. Escoto arranged the transportation for his crew members so that he could insure that he would have enough workers arrive at the fields so he could fill his crew. Id. ¶¶ 23, 27. The Plaintiffs did not have their own transportation, and the fields were located about 2½ hours away from their meeting point in San Luis, Arizona. Id. ¶¶ 33-34. If Escoto did not ensure that the workers arrived at the fields, he would not have a full crew, thereby failing to fulfill his responsibility as a foreman. Id. ¶ 23. Without full crews, Defendant could not harvest as much as planned for that day. Id. ¶ 24. Therefore, it was in Escoto's and Defendant's interest to do what was necessary to ensure that workers actually arrived at the fields to work. Significantly, the method Escoto used to hire and transport his crew was not an isolated incident. Defendant's foremen orchestrated such an informal system of transportation for years, at least from 1993-98, the years during which Plaintiff Ferrales worked for Defendant. Id. ¶¶ 10, 29. Moreover, Defendant's contention that it did not know who would be driving to the fields nor in which vehicles they would be driving is irrelevant. Def. Memo. at 12. Defendant is responsible for the actions of its foremen in fulfilling their work responsibilities. 29 U.S.C. § 1811(b). If Defendant itself did not have the requisite intent, its foreman Escoto certainly did. Pl. SOF ¶¶ 7, 12, 27.

Therefore, the record contains facts in dispute regarding the violation of the AWWA transportation safety provisions and whether Defendant intentionally violated them, so a finding of summary judgment on these claims is not appropriate.

COMMUNITY LEGAL SERVICES
FARMWORKER OFFICE
P.O. Box 21538 • 305 South Second Avenue
Phoenix, Arizona 85036-1538
(602) 258-3434, Ext. 6 • FAX (602) 258-4628

1 IV. CONCLUSION

2 Thus, the papers and pleadings previously filed, affidavits: depositions, and other
3 documents establish that genuine issues of fact remain in each cause of action on which
4 Defendant has moved for summary judgment.

5 WHEREFORE, Plaintiffs pray that this Court deny Defendant's Motion for Partial
6 Summary Judgment.

7 RESPECTFULLY SUBMITTED this 14 day of August, 2000.

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9 COMMUNITY LEGAL SERVICES

10
11 B y : Cheryl A Koch Martinez
Cheryl A. Koch Martinez
George H. McKay

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13 Attorneys for Plaintiffs
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COMMUNITY LEGAL SERVICES
FARMWORKER OFFICE
P.O. Box 21538 • 305 South Second Avenue
Phoenix, Arizona 85036-1538
(602) 258-3434, Ext. 6 • FAX (602) 258-4628

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum and a copy of the Plaintiffs' Statement of Facts and Disputed Facts were sent by regular U.S. Mail this 14th day of August, 2000 to:

Paul W. Holloway, Esq.
HOLLOWAY, ODEGARD, SWEENEY, & EVANS, P.C.
3 101 N. Central, Suite 1200
Phoenix, AZ 850 12-2642

Shannon M. Ivanyi, Esq.
TEILBORG, SANDERS, & PARKS, P.C.
3030 North Third St., Suite 1300
Phoenix, AZ 85012-3039

By: *Atty. Mery Salgado-Rancica*