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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8 Benjamin Comejo-Ramirez, Jose D. Cortez,) **NO. CIV 99-0201-PHX-RCB**
9 Luis Ferrales, Manuel Garcia Ruiz,)
10 Alejandro Martinez-Rios, and) **DEFENDANT’S REPLY IN**
Alfredo Salas-Rodriguez,) **SUPPORT OF ITS MOTION FOR**
11) **PARTIAL SUMMARY -**
Plaintiffs,) **JUDGMENT**
12)
13 **vs.**)
14 James G. Garcia, Inc.)
15)
Defendant.)
16)

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17 Defendant James G. Garcia, Inc. (“Garcia”), by and through counsel
18 undersigned, hereby submits its Reply in Support of Its Motion for Partial Summary
19 Judgment pursuant to Rule 56, Fed. R. Civ. P., on Counts I and III. There is no genuine
20 issue of material fact with respect to these claims and the Defendant is entitled to partial
21 summary judgment as a matter of law. This motion is supported by the attached
22 Memorandum of Points and Authorities.

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **I. INTRODUCTION.**

25 The Plaintiffs to which Garcia’s Motion for Partial Summary Judgment is
26 directed allege two causes of action: (1) negligence as to Garcia based on their

1 employment with him; and (2) various violations of the AWP. No where in the
2 Plaintiffs' Complaint or Joint Case Management Plan have the Plaintiffs ever alleged
3 the theory of respondeat superior. Plaintiffs newfounded allegation that Garcia is
4 vicariously liable for their injuries because of Encamacion Salgado Gonzales' conduct
5 is improper and cannot succeed. Any allegation of respondeat superior is not before this
6 *Court* and the Plaintiffs attempt to argue same must fail.

7 **II. ARGUMENT.**

8 **A. Plaintiffs' Interpretation Of Respondeat Superior. Res Judicata. And**
9 **Collateral Estoppel Principles Are Incorrect And The Record**
10 **Demonstrates That Garcia Is Entitled To Summary Judgment As A**
11 **Matter Of Law On The Plaintiffs' Negligence Claim.**

12 The Plaintiffs argue that the Industrial Commission of Arizona's ("ICA") finding
13 that the Plaintiffs were not in the course of employment and that Plaintiff Cornejo
14 Ramirez was not an employee of Garcia (1) paves the way for their tort action, (2) does
15 not collaterally estop the negligence claim, and (3) does not bar the negligence claim
16 under res judicata. The Plaintiffs are incorrect on all counts.

17 The Arizona negligence claim in Plaintiffs' First Amended Complaint alleges
18 that Garcia used or caused to be used a vehicle for the transportation of the Plaintiffs in
19 connection with, in the course of, and arising out of the Plaintiffs' employment and that
20 Garcia owed the Plaintiffs a duty of reasonable care to transport them in a safe and
21 reasonable manner. Plaintiffs allege that Garcia breached this duty, by transporting the
22 Plaintiffs in a vehicle that contained various alleged defects. As argued *infra*, there is
23 no evidence that Garcia transported any of the Plaintiffs. In fact, the Plaintiffs'
24 negligence claim is merely an attempt on the Plaintiffs' part to relitigate their industrial
25 injury and label it as a tort. See *Stoecker v. Brush Wellman, Inc.*, 194 Ariz. 448, 984
26 P.2d 534 (1999) (cause of action in tort will be barred when the wrong alleged is within

1 workman's compensation coverage). Because the wrong alleged by the Plaintiffs in
2 their negligence claim is the same as that alleged in the ICA hearing, the negligence
3 claim must be precluded. The Plaintiffs' attempt to avoid preclusion by alleging a
4 respondeat superior theory in their Response cannot succeed. A respondeat superior
5 theory is not supported either by the complaint or by the Joint Case Management Plan.

6 The Plaintiffs clearly have not alleged that the driver of the vehicle, Encamacion
7 Salgado Gonzales, was responsible for their injuries. It is Garcia's position that the
8 Plaintiffs have no right to litigate this matter in tort because this exact same claim has
9 already been litigated in front of an administrative agency. The law of respondeat
10 superior, applicable only when an individual claims an employer is vicariously liable for
11 an employee's conduct which resulted in injury, has not been plead by the Plaintiffs.
12 Here, the Plaintiffs are essentially attempting to litigate their industrial injury a second
13 time but have labeled it as a tort.

14 1. Collateral Estoppel Is Appropriate In That The Going And Coming
15 Rule Was Decided By The ICA And Is Applicable In Both
16 Workers Compensation Cases And Tort Cases.

17 As Garcia argued in its initial motion, the Plaintiffs previously litigated the issue
18 surrounding the automobile accident in front of the ICA. The ICA specifically found
19 that the Plaintiffs were not acting within the scope of their employment when the
20 accident occurred pursuant to the "going and coming" rule.

21 The ICA's judge specifically found that as a result of the going and coming rule,
22 the Plaintiffs were not within the scope of employment when the accident occurred and
23 that none of the exceptions to the going and coming rule were applicable.

24 Clearly, the facts have not changed between the time of the ICA hearing and the
25 present cause of action. The ICA's determination with respect to the going and coming
26 rule was essential to its decision that the Plaintiffs were not entitled to workers

1 compensation for the injuries they sustained as a result of the accident. In addition, it is
2 undisputed that the vehicle transporting the Plaintiffs in this case was neither owned nor
3 controlled by Garcia and consequently, was not “employer-provided transportation.”
4 Furthermore, as evidenced from Garcia’s testimony, the potential employees were told
5 from the start that they had to find their own transportation and if they were unable to
6 do so they didn’t work. See Defendant’s Supplemental Statement of Facts, “Sup. SOF,”
7 at ¶ 1.

8 Accordingly, the Plaintiffs are collaterally estopped from bringing the negligence
9 claim in this cause of action as a result of the ICA judge making the determination,
10 essential to the Plaintiffs workman’s compensation cause of action, that the Plaintiffs
11 were not within the scope of their employment because of the going and coming rule.
12 Moreover, it is undisputed that the going and coming rule is applicable in that the record
13 unambiguously demonstrates that because Garcia did not provide either travel time
14 benefits to the Plaintiffs or provide the transportation, the employer conveyance
15 exception is inapplicable. Because the Plaintiffs have not alleged that Garcia is liable
16 pursuant to respondeat superior, it is inconsequential that the ICA judge never addressed
17 the issue of course and scope with respect to Mr. Salgado Gonzales as it was not at issue
18 there, nor is it at issue here.

19 2. Because The Plaintiffs Are Proceeding Under The Theory That
20 Garcia Is Liable Because The Plaintiffs Were Performing Job
21 Related Activities When They Were Injured. The Doctrine Of Res
22 Judicata Bars The Present Action From Being Relitigated.

23 Plaintiffs’ newfounded allegation that they are proceeding under a respondeat
24 superior theory for Salgado’s actions cannot succeed as the Plaintiffs have never
25 advanced that theory and cannot now raise it in a Motion for Summary Judgment.
26 Thus, the case of *Connors v. Parsons*, is indeed applicable in that the Plaintiffs’ have
not alleged respondeat superior. 169 Ariz. 247, 818 P.2d 232 (App. 199 1).

1 For i-es judicata to bar a suit, there must be a judgment on the merits and a prior
2 suit involving the same parties or their privies based on the same cause of action.
3 *Hawkins v. State Dept. of Economic Security*, 183 Ariz. 100, 103, 900 P.2d 1236, 1239
4 (App. 1995). In the ICA hearings, its is undisputed that the Plaintiffs requested
5 compensation for their injuries as a result of “employer-provided transportation in a
6 1970 Ford Van.” See Exhibit J attached to Defendants’ Separate Statement of Facts in
7 Support of Its Motion for Partial Summary Judgment. Likewise, here the Plaintiffs have
8 requested damages for injuries arising out of alleged employer provided transportation
9 in a 1970 Ford Van. The fact that the Plaintiffs have labeled the present cause of action
10 so that it comports with tort law rather than workers compensation law is of no
11 consequence. It is the same cause of action under res judicata principles and should be
12 precluded as a matter of law. See *Stoecker, supra*.

13 **B. Plaintiffs Have Failed To Present A Genuine Issue Of Material Fact**
14 **With Respect To Their Agricultural Worker Protection Act Causes**
15 **Of Action And Judgment Should Be Entered In Favor Of Garcia.**

- 16 1. The Plaintiffs Have Failed To Allege Any Facts Whatsoever That
17 Would Fall Within The Requisite Elements Necessary To Assert A
18 Cause Of Action Pursuant To 29 U.S.C. § 183 l(e).

19 The Plaintiffs argue that Arizona is a notice pleading state and the Complaint
20 requires only “a short and plain statement of the claim showing that the pleader is
21 entitled to relief.” Rule 8(a), Fed. R. Civ. P. What the Plaintiffs fail to acknowledge,
22 however, is that the “short and plain statement” must demonstrate that there is in fact a
23 claim under the stated provision. Here, the Plaintiffs Complaint has utterly failed to
24 state a claim, even under the relaxed pleading standard and the Plaintiffs should not be
25 allowed to amend their pleading to assert facts that do not exist.

26 Section 183 l(e)? 29 U.S.C., is very specific in what it requires of a farm labor
contractor. To wit, it specifically and unambiguously requires that no farm labor

1 contractor shall knowingly provide false or misleading information “concerning the
2 terms, conditions, or existence of agricultural employment *required to be disclosed by*
3 *Subsection (a), (b), or (c) of this section.*” (Emphasis added.) As addressed previously
4 in Garcia’s initial Motion, Subsection (a) requires that a farm labor contractor disclose
5 *in writing* various information when an offer of employment is made to a worker.
6 Subsection (b) provides that the contractor post a poster setting forth the rights and
7 protections afforded workers defined under AWPA. This section also requires that the
8 contractor provide a written statement of the information described in Subsection (a).
9 Subsection (c) requires the contractor to make, keep, and preserve records regarding
10 wages, hours, earnings, withholdings, etc., for three (3) years. Subsection (c) also
11 requires the contractor to provide each worker an itemized written statement each pay
12 period with respect to that information.

13 The Plaintiffs’ Complaint clearly does not allege any facts that would provide
14 support whatsoever of a violation under Subsections (a), (b) or (c). The Plaintiffs allege
15 that Garcia assured them he would pay for their medical treatment, but never did. None
16 of the subsections described *supra* address oral conversations regarding medical
17 treatment and Plaintiffs are clearly required to allege more than what they have as their
18 one allegation does not state a claim under § 183 1.

19 As for Plaintiffs’ request of this Court to amend the pleadings, such a request is
20 improperly brought in a Motion for Summary Judgment. Nevertheless, as demonstrated
21 by Plaintiffs’ Response and their contention that the only facts they need to allege is the
22 oral assurance Garcia allegedly gave regarding medical treatment, any amendment
23 would be futile and would not cure the deficiencies of the Plaintiffs’ First Amended
24 Complaint. Consequently, any request to amend the pleading should be denied pursuant
25 to *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L.Ed.2d 222 (1962); see
26 also *Sisseton- Wahpeton Sioux Tribe, Lake Traverse Indian Reservation, North*

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1 transportation of his employees to the fields, the Plaintiffs' claim under § 18 11 must
2 fail.

3 C. **The Plaintiffs Have Failed To Raise A Genuine Issue Of Material**
4 **Fact As To Garcia's State Of Mind And Have Consequently Failed**
5 **To State A Claim Pursuant To § 1854.**

6 The Plaintiffs have failed to demonstrate any issue of material fact with respect
7 to Garcia's state of mind. The term "intentional" under the AWPA requires a conscious
8 or deliberate act, see *Alvarez v. Longboy*, 697 F.2d 1333, 1338 (9th Cir. 1983), and is
9 not as lax as the Plaintiffs would have this Court believe.

10 The Plaintiffs argue that the facts surrounding each violation and Garcia's intent
11 are in dispute. Plaintiffs further allege that they properly brought a claim under §§
12 1841(b)(1)(C) and 1841(c) because Garcia allegedly failed to purchase a bond or
13 provide liability insurance coverage for transportation injuries. Plaintiffs argue that §
14 1841(c) applies because the workers compensation insurance Garcia carried did not
15 provide Plaintiffs with coverage as evidenced from the decision in the workman's
16 compensation proceedings. This is an incorrect interpretation of the ICA finding. The
17 mere fact that the ICA found that the Plaintiffs were not within the course and scope of
18 their employment does not necessarily make the insurance Garcia carried inapplicable.
19 As is the case with any workman's compensation claim, the employee must first be
20 found to be within the course and scope of employment before he can succeed on such a
21 claim. Just because the employee is not found within the course and scope does not
22 then make inapplicable or inappropriate the workers compensation that Garcia carried.

23 Indeed, § 1841 (c) does not provide anywhere that Garcia is required to carry
24 liability insurance, but rather provides that when the employer does provide workers
25 compensation coverage in the case of bodily injury or death as provided by such state
26 law, various adjustments in the requirements of Subsection (b)(1)(C) shall be made. In

1 fact, the plain language of § 1841(c)(1) provides that even if Garcia used or caused to be
2 used a vehicle for providing transportation for the workers, which Garcia disputes,
3 because he had workman's compensation under Arizona state law, he would not have
4 needed an additional insurance policy or liability bond as required by § 1841(b)(1)(C).

5 With respect to §§ 1841(b)(1)(A) and 1841(b)(1)(C), Plaintiffs attempt to argue
6 two things: (1) that although Garcia neither owned nor controlled the vehicle that
7 transported the Plaintiffs in this specific incident, he "used or caused to be used" that
8 vehicle through his foreman, Raul Escoto, who allegedly arranged transportation and
9 told the Plaintiffs which vehicle to take to get to the fields; and (2) that because it was in
10 Escoto's and Garcia's interest to do what was necessary to ensure that the workers
11 arrived in the fields, Garcia was responsible for the actions of its foremen and therefore
12 intentionally violated the AWPAs transportation safety provisions. The Plaintiffs
13 arguments are legally deficient.

14 First, CFR § 500.100(c) specifically provides that the term "uses or causes to be
15 used" set forth in 29 U.S.C. § 1841(b)(1) "does not include car-pooling arrangements
16 made by the workers themselves, using one of the worker's own vehicles." Although
17 that provision excepts car-pooling wherein the contractor participates, here, the record
18 unambiguously provides that Garcia did not so participate. This is supported by
19 testimony from Plaintiffs Ferrales and Garcia Ruiz. Whether Raul Escoto arranged for
20 transportation and/or told the Plaintiffs which vehicles to take to get to the field is not
21 material to the issue. There is nothing in the record to support an inference that Garcia
22 knew, directed, or participated in Escoto's alleged transportation arrangements. To the
23 contrary, the record clearly demonstrates that Garcia had no involvement in the
24 transportation or car-pooling arrangements.

25 Although unclear from the Plaintiffs' Response to Garcia's Motion for Partial
26 Summary Judgment, any attempt on the Plaintiffs' part to argue that Garcia would be

1 liable indirectly for his foremen's alleged arrangement for car-pooling is without merit.
1 Pursuant to Arizona law, an employer is not liable for the acts of an employee under a
3 ratification theory unless the employee acted on behalf of or under the authority of the
4 employer and *clear evidence* exists of the employer's approval of the wrongful conduct.
5 *Smith v. American Express Travel Related Services Co., Inc.*, 179 Ariz. 131, 137, 876
6 P.2d 1166, 1172 (App. 1994). Here, as stated above, both the record and the Plaintiffs
7 admit that Garcia had no knowledge or involvement in the travel arrangement of the
8 workers themselves. Thus, any attempt on the Plaintiffs' part to assert a ratification
9 theory of responsibility must fail as a matter of law. Accordingly, the record fails to
10 evidence any violation of § 1841 on the part of Garcia, intentional or otherwise, and
11 judgment should be granted in favor of Garcia on that cause of action. -

12 III. CONCLUSION.

13 The Plaintiffs have failed to present this Court with a genuine issue of material
14 fact as to both the state law negligence claim as well as the AWP claim. The
15 Plaintiffs' state law negligence claim is merely an attempt to disguise an industrial
16 injury in the form of tort. The ICA judge already made a final and binding
17 determination as that the Plaintiffs were not within the scope of their employment when
18 the accident occurred pursuant to the going and coming rule. Plaintiffs' attempt at
19 rewriting their Complaint to now include a respondeat superior argument with respect to
20 Encarnacion Salgado Gonzales must fail. Neither the Complaint nor the Joint Case
21 Management Plan ever presented a cause of action under a theory of respondeat
22 superior, but rather specifically allege that Garcia is liable for the Plaintiffs' injuries as a
23 result of the Plaintiffs' employment with Garcia. Further, the ICA made a binding
24 determination that Plaintiff Comejo-Ramirez was not an employee of Garcia and
25 similarly could have made the same determination with respect to Plaintiffs Ferrales and
26

1 Garcia Ruiz. Consequently, Plaintiffs are precluded from relitigating this issue pursuant
2 to the doctrines of res judicata and collateral estoppel.

3 As for the Plaintiffs' AWWPA claims, the record fails to support and the Plaintiffs
4 do not allege that Garcia failed to provide written disclosure requirements pursuant to §
5 153 l(a), failed to post requirements at the place of employment pursuant to § 183 l(b),
6 or failed to keep written records regarding the workers wage, hours, etc., pursuant to §
7 183 l(c). The Plaintiffs' Complaint fails to allege a violation of any of these three
8 sections and the Plaintiffs' Response similarly fails to allege facts that would indicate a
9 violation of any of these three sections. Therefore, the Plaintiffs' claim for violation of
10 § 183 l(e) fails as a matter of law and any amendment would be futile and would not
11 cure the deficiencies of the Complaint.

12 Plaintiffs have also failed to present this Court with a material issue of fact with
13 respect to § 1811. Assuming that no employment relationship is required to bring a
14 cause of action pursuant to § 18 11, the record nevertheless fails to demonstrate that
15 Garcia transported workers to the field. To the contrary, two of the Plaintiffs
16 themselves admitted under oath during their deposition testimony in the underlying ICA
17 action that Garcia had no involvement with the transportation of the workers to the
18 field. Because Garcia had no involvement and did not transport workers to the field, he
19 could not have violated § 18 11. Any argument by the Plaintiff that Garcia is
20 responsible for his foremen's conduct via ratification must also fail. There is no clear
21 evidence and in fact the record and testimony discloses that Garcia never approved or
22 authorized any of his employees to arrange and/or direct the workers with respect to
23 transportation. These facts also negate the Plaintiffs' alleged violation of § 184 1 in that
24 Garcia did not have the requisite mental state required pursuant to § 1854(c).

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DATED this 15th day of September, 2000.

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