PHILIP VITALE, Plaintiff/Respondent, v. SHERING PLOUGH CORPORATION, XYO COMPANY(S) and RICHARD ROES (said names being fictitious), Defendants/Petitioners.	SUPREME COURT OF NEW JERSEY DOCKET NO. 078294 **CIVIL ACTION** APPELLATE DIVISION DOCKET NO. A-1156-14T-4

BRIEF OF *AMICUS CURIAE* NEW JERSEY CIVIL JUSTICE INSTITUTE

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POINT I

THE DISCLAIMER IS SUPPORTED BY PUBLIC POLICY.

American businesses are increasingly staffed by people who are employed by someone else. This phenomenon is not limited to security guards like Plaintiff. Accountants, computer programmers, and the ubiquitous "consultants" are similarly likely to find themselves employed by one company but working for someone else, somewhere else - often for weeks or months or even years at a stretch.[1]

In this three-way business relationship (among the employer, the employee, and the host company), the employee's Workers' Compensation benefits are unaffected. Indeed, the fees charged by the employer to the host company ordinarily include the cost of the employer's Workers' Compensation insurance. But the host company has lost the benefit of the Workers' Compensation bargain; the host company bears the cost of Workers' Compensation insurance yet also bears the risk of third-party tort liability. A liability waiver (of the sort signed by Plaintiff) restores the Workers' Compensation balance

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[1] *See* Miller & Miller, "The Rise of the Supertemp," Harvard Business Review (May 2012) ("Miller & Miller") (noting "the surge in outsourcing and consulting in recent years"; "Sixteen million Americans are working independently today, according to research by MBO Partners.... That figure is expected to rise to 20 million over the next two years.").

by protecting the host company from tort liability while still affording the employee the same Worker's Compensation remedies as the host company's own employees. The Appellate Division's holding upsets this equilibrium and, instead, strips Workers' Compensation of its intended benefits to the employer and the employee.

Imagine a modest construction company with a small bookkeeping department. If injured, a bookkeeper-employee would receive Workers' Compensation benefits but could not bring a tort claim against the company. Business improves, and the company needs another bookkeeper, at least temporarily, so the company contracts with a bookkeeping agency. A new, temporary bookkeeper arrives at the company's premises for an indefinite posting, with responsibilities similar to those of the company's bookkeeper-employees.[2] The new bookkeeper receives Workers'

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[2] In this scenario, we assume that the circumstances are such that the construction company would not be deemed a joint employer. *See Blessing v. T. Shriver and Co.*, 94 N.J. Super. 426 (App. Div. 1967) ("the criteria for the determination of [a joint] employee-employer relationship are not exclusive, but must be rationalized and applied so that each case may be considered and determined upon its own particular facts.") (quotations omitted).

Nonetheless, the same policy considerations that support the joint employment doctrine, which obligates a joint employer under the Workers' Compensation Act and protects the joint employer from tort liability, apply equally to the tripartite relationship among employee, employer, and third-party host company. Moreover, the disclaimer at issue applies only to the tripartite relationship described above, and precludes tort liability only as to a host company like Schering-Plough. For

Compensation benefits (from the bookkeeping agency), but unlike the construction company's bookkeeper-employees, the new bookkeeper has the right to bring a tort claim against the construction company.

From the construction company's perspective, that tort claim is an unjustifiable burden. Had the company hired the new bookkeeper as an employee, the company's cost of work-related injury to that bookkeeper would be limited to Workers' Compensation insurance. But by hiring the bookkeeper through an agency, the company adds the risk of tort liability.

From the bookkeeper's perspective, the tort claim is an unjustifiable windfall. Had the bookkeeper been hired as an employee of the construction company, any work-related injury would result only in Workers' Compensation benefits but no tort claim. But because the bookkeeper is an employee of the agency yet works at the construction company's office, the bookkeeper is entitled to both Workers' Compensation benefits (through the agency-employer) and a tort claim (against the "third-party" construction company).

Thus, two different staffers sustaining the same injury at the same location while performing the same job may be treated

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example, if Plaintiff had been injured in a motor vehicle accident on Schering-Plough's premises in the course of his duties for Allied, he would be entitled to pursue a tort claim against a negligent third-party driver.

very differently by our tort system. It therefore makes eminent sense for all parties to have the right to agree that, in such situations, the agency's bookkeeper should receive Workers' Compensation benefits but no tort recovery, just like the construction company's own bookkeepers. That agreement frees the bookkeeper, the agency, and the construction company to make rational and consensual economic choices about their employment relationship. *See Blessing*, 94 N.J. Super. at 436 (a joint employment relationship, subject to Workers' Compensation and protected from tort liability, may be shown through the employee's "deliberate and informed consent"). The disclaimer agreement, therefore, is supported by public policy, not thwarted by it.

Invoking public policy to strike down such consensual agreements will invariably lead to undesirable alternatives. A business that might otherwise be inclined to expand operations by adding a part-time staffer through an outside contractor might decide that the potential exposure to tort claims makes the proposed hiring unduly expensive. Thus, fewer job opportunities.[3]

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[3] *See* Miller & Miller ("Tom Staggs, who is now the chairman of Walt Disney Parks and Resorts, told us when he was Disney's CFO that if companies knew they could bring on talent quickly and flexibly, they'd try more things. Being able to test a new business idea with a $500,000 'get it going fast and let's see' model, rather than a fully drawn $5 million business plan with

Or the company may choose to add the staffer at its Pennsylvania or Washington, D.C. office rather than at its New Jersey office, because Pennsylvania and Washington, D.C. courts will enforce such agreements.

Or the company may require that the contractor-employer indemnify the company for any tort claims brought by the staffer against the company. *Domanoski v. Borough of Fanwood*, 237 N.J. Super. 452, 459 (App. Div. 1989) (noting that "joint employers are obviously free to negotiate an express contractual indemnity" of their Workers' Compensation obligations, and that local police departments "might well consider requiring private employers to execute such indemnifications as a condition of participation") (emphasis added). If such an indemnification agreement were signed by the employer, the risk of tort liability would then shift to the employer, who would thereby lose the benefit of the Workers' Compensation bargain. The employer would then have the expense of both Workers' Compensation insurance and tort liability. The employer would then have no incentive to remain in the Workers' Compensation system, and would promptly opt out. *See N.J.S.A.* 34:15-9 (either the employer or the employee may opt out of Article II by written notice to the other party).

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commitments to permanent staff, would ultimately enable them to find more promising opportunities.").

Thus, if the disclaimer were barred by public policy, the likely outcome is that workers like Plaintiff would be involuntarily excluded from the Workers' Compensation system. That outcome is surely disfavored by public policy. After all, the Workers' Compensation system provides a very real benefit to the employee -- swift and certain compensation for workplace injuries. *Basil v. Wolf*, 193 N.J. 38, 53-54 (2007). The staffer should be free to agree to stay within that system. *See generally Stelluti v. Casapenn Enterprises, LLC*, 203 N.J. 286, 305-306 (2010) (an exculpatory agreement may enforced if it "reflect[s] the unequivocal expression of the party giving up his or her legal rights that this decision was made voluntarily, intelligently and with the full knowledge of its legal consequences.... [T]he right to freely agree to a waiver of a right to sue ... is part and parcel of the freedom to contract").

The choice between the Workers' Compensation system and the tort system is voluntary, and should remain so. And while the Workers' Compensation statute recognizes that the employee's right to bring a tort claim against a non-employer is not extinguished by a Workers' Compensation recovery, that tort claim is not created by statute. Rather, the tort claim is a creature of the common law, and is merely preserved by the statute. *See N.J.S.A.* 34:15-40 ("the existence of a right of

compensation from the employer or insurance carrier under this statute shall not operate as a bar to [the employee's tort claim against a third person]").

The liability disclaimer at issue here does not leave the employee empty-handed. The right to Workers' Compensation is fully preserved. Indeed, the disclaimer at issue applies only when the employee is otherwise entitled to Workers' Compensation benefits. Da163 (Plaintiff waived and released his right to sue his employer's customers for claims "arising from or related to injuries which are covered under the Workers' Compensation statutes"). Thus, the disclaimer is not an exculpation agreement but rather a choice between Workers' Compensation benefits and the tort system.

Plaintiff also argues that the disclaimer is barred by public policy because it would disincentivize the host company (here, Schering-Plough) from maintaining safe premises. But Schering-Plough has its own employees, and continues to maintain the safety of its premises for their benefit. Indeed, most employees in New Jersey are covered by Workers' Compensation benefits, and have no right to sue their employer. If the absence (or waiver) of tort liability were a disincentive to maintain safe premises, and that disincentive were deemed to violate public policy, then the Workers' Compensation Act itself would violate public policy.

POINT II

THE DISCLAIMER IS CONSISTENT WITH THE WORKERS' COMPENSATION ACT.

Plaintiff argues that the disclaimer violates Section 3 of the Workers' Compensation Act. *N.J.S.A.* 34:15-3. That argument fails for two reasons.

First, Section 3 provides that a contract between an employer and a contractor does not bar the employer's liability for injuries to an employee of the contractor.[4] In other words, the agreement between Allied and Schering-Plough does not shield Schering-Plough from liability for injuries to Plaintiff (Allied's employee) caused by Schering-Plough's negligence. But the agreement between Allied and Schering-Plough is not the agreement at issue. Indeed, that agreement is not part of the record. The agreement at issue - the disclaimer - is an agreement between Schering-Plough and Plaintiff himself. Nothing in Section 3 suggests that the employee cannot voluntarily waive a negligence claim against Schering-Plough.

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[4] *N.J.S.A.* 34:15-3 ("If an employer enters into a contract, written or verbal, with an independent contractor to do part of such employer's work, or if such contractor enters into a contract, written or verbal, with a subcontractor to do all or any part of such work comprised in such contractor's contract with the employer, such contract or subcontract shall not bar the liability of the employer for injury caused to an employee of such contractor or subcontractor by any defect in the condition of the ways, works, machinery or plant if the defect arose or had not been discovered and remedied through the negligence of the employer or some one intrusted by him with the duty of seeing that they were in proper condition.").

Second, Section 3 appears in Article I of the Workers' Compensation statute and is limited, on its face, to actions arising under Article I, i.e., tort actions. *See N.J.S.A.* 34:15-3 ("this section shall apply only to actions arising under this article."). Section 3 has no bearing on claims arising under Article II. Had the Legislature intended to prohibit a waiver of liability under Article II, they could have done so easily, by including a provision similar to Section 3 within Article II. By limiting Section 3 to "actions arising under [Article I]," the Legislature clearly expressed their view that such agreements are permitted under Article II.

Indeed, the provisions of Section 39[5] (in Article II) are notable for how they differ from Section 3 (in Article I). While Section 3 expressly addresses injuries to the employees of a contractor, Section 39 does not. By that absence, the Legislature made clear that Section 39 refers to claims by an employee against an employer, and not claims by an employee against a third party like a contractor.

The Supreme Court of Pennsylvania recently addressed that very issue. It held that Section 204(a) of the Pennsylvania statute (tracking Section 39 of the New Jersey statute) "pertain[s] to the employer's obligations to the employee, not

[5] *N.J.S.A.* 34:15-39.

to the tortious liability of third parties to the employee." *Bowman v. Sunoco, Inc.*, 620 Pa. 28, 38, 65 A.3d 901, 907 (2013).

CONCLUSION

Plaintiff knowingly agreed that if he were injured due to Schering-Plough's negligence, his recovery would be limited to Workers' Compensation benefits. Thus, the disclaimer puts Plaintiff in the same position as Schering-Plough's own employees. That agreement is consistent with the Workers' Compensation statute, consistent with public policy, and promotes employment in the new economy. The disclaimer should be enforced as written.

Respectfully submitted,

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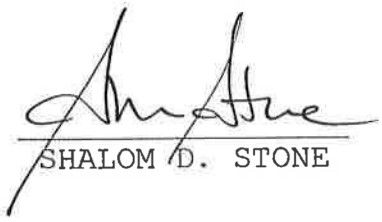
BY: 
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Dated: March 8, 2017