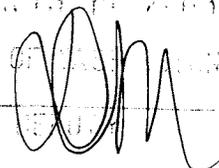


COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____



NO. 35829-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

JILL DOTY-FIELDING,

Plaintiff/Appellant.

vs.

TOWN OF SOUTH PRAIRIE,

Defendant/Respondent.

BRIEF OF APPELLANT JILL DOTY-FIELDING

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A. ASSIGNMENTS OF ERROR

Assignments of Error

The trial court erred when it granted the Town of South Prairie's (hereinafter the "Town") motion for summary judgment of dismissal on December 1, 2006.

Issues Pertaining to Assignments of Error

1. Whether the provisions of the Washington Industrial Safety and Health Act¹ (hereinafter "WISHA") include volunteer fire fighters where:

a. WISHA's purpose is to provide a safe working environment for *all* workers; and

b. RCW 49.17.020 includes volunteers within its scope?

2. Whether the Washington Administrative Code (hereinafter the "WAC") establishes the Town's duty of care to its volunteer fire fighters where the WAC imposes a non-delegable duty on an employer to provide a safe working environment for all fire fighters?

3. Whether the trial court erred when it failed to hold that it was a question of fact whether the Town breached its non-delegable duty

¹ Chapter 49.17, RCW.

to ensure that Ms. Doty-Fielding was properly trained?

4. Whether the trial court erred when it granted the Town's motion for summary judgment on the basis that it only owed Ms. Doty-Fielding the duty to avoid willful and wanton conduct where:

a. The trial court applied the duty owed to a volunteer in premises liability cases to Ms. Doty-Fielding; and

b. The definition of a volunteer under the Industrial Insurance Act² (hereinafter "IIA") is inconsistent with the definition of a volunteer under Washington premises liability common law?

B. STATEMENT OF THE CASE

1. Ms. Doty-Fielding's injury.

Ms. Doty-Fielding is a volunteer fire fighter for the Town. CP 19. On the evening of December 25, 1999, Ms. Doty-Fielding responded to a fire alarm. CP 50. At the scene of the fire, Ms. Doty-Fielding and Jason Fielding were a fire crew operating a fire hose. CP 57. Ms. Doty-Fielding operated the nozzle of the hose and Mr. Fielding backed her up by supporting the hose and standing directly behind her in order to brace her against the force of the water pressure. CP 57-58.

² Title 51 RCW.

When Ms. Doty-Fielding opened the bale³ of the nozzle to begin spraying water onto the fire, she immediately realized that the hose was over-pressurized. CP 58-59. Ms. Doty-Fielding recognized that she would not be able to control the hose. CP 59-60. In an effort to regain control of the hose, Ms. Doty-Fielding tried to shut off the flow of water by closing the bale of the nozzle. CP 64-65. During the course of closing the bale, Ms. Doty-Fielding injured her right hand, wrist, and arm. *Id.*

2. Procedural history.

Ms. Doty-Fielding is a volunteer under the IIA and, hence, not subject to the exclusive-remedy provisions of Title 51 RCW. *Doty v. Town of South Prairie*, 155 Wn.2d 527, 548-49, 120 P.3d 941 (2005). In *Doty*, the Supreme Court remanded Ms. Doty-Fielding's case to the trial court for further proceedings consistent with its decision. *Id.* On September 29, 2006, the Town filed a new motion for summary judgment on all claims. CP 1. On December 1, 2006, the trial court heard oral argument and granted the Town's motion. CP 115-16. On December 11, 2006, Ms. Doty-Fielding moved for reconsideration. CP 117. On January 5, 2007, the trial court denied Ms. Doty-Fielding's motion for reconsideration. CP 142-143.

³ A "bale" is a U-shaped metal handle used to open and close the valve of the nozzle.

C. SUMMARY OF ARGUMENT

RCW 49.17 *et seq.*, WISHA, imposes on employers a duty to provide a safe working environment to all men and women working in the state of Washington. Volunteer fire fighters are included within the scope of that chapter.

The WAC establishes the regulatory duties owed by a town or municipality to its volunteer fire fighters. Under the WAC, an employer has a non-delegable duty to provide its volunteer fire fighters with a safe work environment and ensure that they are properly trained.

The trial court erroneously granted the Town's motion on the basis that the duty owed to Ms. Doty-Fielding by the Town was to avoid willful and wanton conduct. The common law rule is only applicable to volunteers in premises liability cases and the definition of a volunteer under Title 51 RCW is inconsistent with the definition of a volunteer under Washington premises liability case law.

D. ARGUMENT

Review of a trial court's grant of a motion for summary judgment is *de novo*. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 832-33, 100 P.3d 791 (2004); *Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 351, 27 P.3d 1172 (2001); *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990).

1. **WISHA applies to all employees in Washington, including volunteer fire fighters.**

WISHA applies to all employments, voluntary or paid, in the State of Washington. This is made clear in the statute's statement of purpose, and the definitions in the statute.

a. **WISHA's purpose is to require a safe working environment for *all* workers in the state.**

RCW 49.17.010 states the legislative purpose of WISHA: to create a safer working environment for all workers in the state. The section contains no restrictions or exclusions. It does not exempt volunteers.

RCW 49.17.010 states:

The legislature finds that personal injuries and illnesses arising out of conditions of employment impose a substantial burden upon employers and employees in terms of lost production, wage loss, medical expenses, and payment of benefits under the industrial insurance act. **Therefore, in the public interest for the welfare of the people of the state of Washington and in order to assure, insofar as may reasonably be possible, safe and healthful working conditions for every man and woman working in the state of Washington,** the legislature in the exercise of its police power, and in keeping with the mandates of Article II, section 35 of the state Constitution, declares its purpose by the provisions of this chapter to create, maintain, continue, and enhance the industrial safety and health program of the state, which program shall equal or exceed the standards prescribed by the Occupational Safety and Health Act of 1970.

RCW 49.17.010 (emphasis added).

By including “every man and woman working in the state of Washington,” the legislature clearly intended the statute to cover all persons and professions; employees and volunteers alike. There is no exclusionary language in RCW 49.17.010; nothing suggests the statute makes a distinction between paid and unpaid workers.

b. RCW 49.17.020 includes volunteers within its coverage.

RCW 49.17, *et seq.* makes no distinction between paid and volunteer workers. The following definitions of “employer,” “employee,” “person” and “work place” clearly establish that a volunteer worker is included within the coverage of the statute. An “employer” is defined as:

[A]ny person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees or who contracts with one or more persons, the essence of which is the personal labor of such person or persons and includes the state, counties, cities, and all municipal corporations, public corporations, political subdivisions of the state, and charitable organizations.

RCW 49.17.020(4) (emphasis added).

“Employee” is defined by RCW 49.17.020(5), which states:

[A]n employee of an employer who is employed in the business of his employer whether by way of manual labor or otherwise and every person in this state who is engaged in the employment of . . . an employer under this chapter whether by way of manual labor or otherwise.

RCW 49.17.020(5) (emphasis added).

A “person” is defined as:

[O]ne or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.

RCW 49.17.020(6) (emphasis added).

Finally, a “workplace” is defined as:

[A]ny plant, yard, premises, room, or other place where an employee or employees are employed for the performance of labor or service **over which the employer has the right of access or control**, and includes, but is not limited to, all work places covered by industrial insurance under Title 51 RCW.

RCW 49.17.020(8) (emphasis added).

Thus, an employer includes the state, and any governmental subdivision thereof. RCW 49.17.020(4). The Town is subdivision of the state. An employee is any person employed by an employer, and a person is any individual. RCW 49.17.020(5) and (6). Ms. Doty-Fielding is an individual employed by the Town as a volunteer fire fighter. Last, a workplace can be any location to which an employer has a right of access or control. RCW 49.17.020(8). The Town has an implied right of access to any location or property within the county for the prevention and fighting of fires. CP 47. The Town provides and maintains the fire fighting equipment. CP 48. The Town is chartered to provide both

professional and volunteer fire fighters. *Id.* The definitions contained in RCW 49.17.020 are broad enough to include all persons, whether paid or unpaid, and create a duty on the part of the employer to provide a safe working environment.

The broad scope of WISHA's language, devoid of exclusions, makes it clear WISHA covers volunteer fire fighters. WISHA's definitions of "employer," "employee," "person" and "work place" show that volunteers are within the scope of those "workers" described in the statement of purpose.

2. The Washington Administrative Code describes the Town's duty to its volunteer fire fighters.

Giving effect to WISHA, the WAC describes a municipality's duty: provide all fire fighters, including volunteers, with a safe work environment and proper training.

a. The WAC requires an employer to provide a safe working environment for all fire fighters.

The Department of Labor and Industries has adopted rules requiring a safe working environment for *all* fire fighters. WAC 296.305.

Thus:

The provisions of this chapter apply to *all* fire fighters and their work places, including the fire combat scene. Although enforcement of applicable standards will result from provable violations of these standards at the fire combat scene, agents of the department will not act in any

manner that will reduce or interfere with the effectiveness of the emergency response of a fire fighting unit.

WAC 296-305-01003(2) (emphasis added).

WAC 296-305-01005 defines a “fire fighter” as:

A **member** of a fire department whose duties require the performance of essential fire fighting functions or substantially similar functions.

WAC 296-305-01005 (emphasis added).

A “member” is defined as:

A person involved in performing the duties and responsibilities of a fire department under the auspices of the organization. **A fire department member may be a full-time or part-time employee or a paid or unpaid volunteer**, may occupy any position or rank within the fire department, and engages in emergency operations.

WAC 296-305-01005 (emphasis added).

The Department of Labor and Industries is explicit about a town’s duty:

The rules of this chapter shall apply with respect to any and all activities, operations and equipment of employers and employees involved in providing fire protection services which are subject to the provisions of the Washington Industrial Safety and Health Act of 1973.

Every employer shall furnish and require the use of appropriate safety devices and safeguards. All fire fighting methods, and operations shall be so designed as to promote the safety and health of employees. **The employer shall do everything reasonably necessary to protect the safety and health of employees.**

WAC 296-305-01513(1) (emphasis added).

Thus, the Town has a duty to provide a safe working environment to all fire fighters, even with respect to the fire combat scene. WAC 296-305-01003(2). Fire fighters include all members of a fire department. WAC 296-305-01005. Members of a fire department include both paid fire fighters and unpaid volunteers. *Id.* Finally, WAC 296-305-01513(1) establishes the scope of coverage of the rule, including in its language all those entities and persons covered under WISHA. For these reasons, the WAC definitively establishes that an employer has a duty to provide a safe working environment to its volunteer fire fighters.

- b. The trial court erred when it failed to hold that it was a genuine issue of material fact whether the Town breached its non-delegable duty to ensure that Ms. Doty-Fielding was properly trained.**

The trial court erred when it failed to find that it was a question of fact whether the Town breached its duties to Ms. Doty-Fielding. The Supreme Court has held that employers have a non-delegable duty at common law and by statute: provide a safe work environment for their employees. *Kamla v. The Space Needle Corp.*, 147 Wn.2d 114, 119-123, 52 P.3d 472 (2002); *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 457, 788 P.2d 545 (1990). In *Stute*, the court stated that WAC 296.155.040 enunciates the rule that is made effective by RCW 49.17.060. *Id.* at 458. WAC 296.155.040 states:

(1) Each employer shall furnish to each of his employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his employees.

(2) Every employer shall require safety devices, furnish safeguards, and shall adopt and use practices, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe. Every employer shall do every thing reasonably necessary to protect the life and safety of employees.

WAC 296.155.040.

This rule is then codified by RCW 49.17.060 describing the twofold duty as follows:

Each employer:

(1) Shall furnish to each of his employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his employees . . . and

(2) Shall comply with the rules, regulations, and orders promulgated under this chapter.

RCW 49.17.060.

The Town breached one or both of these duties when it failed to properly train Ms. Doty-Fielding. The WAC provides:

(1) All members who engage in emergency operations shall be trained commensurate with their duties and responsibilities. Training shall be as frequent as necessary to ensure that members can perform their assigned duties in a safe and competent manner but shall not be less than the frequencies specified in this standard.

WAC 296-305-05501.

The Town's failure to properly train Ms. Doty-Fielding, a breach of the general duty under RCW 49.17.060, gives rise to Ms. Doty-Fielding's cause of action against the Town.

The WAC establishes that an employer has a duty to provide all fire fighters, including volunteer fire fighters, with a safe work environment and proper training. This duty is then made enforceable by the common law and statute.

3. The trial court erred when it granted the Town's motion, holding it owed Ms. Doty-Fielding only the duty to avoid willful and wanton conduct.

In its motion, the Town argued that since Ms. Doty-Fielding is a volunteer under the IIA, she is therefore also a volunteer under premises liability case law. CP 89. This is a *non sequitur*. The Town cites two Washington premises liability cases for this proposition. CP 6. The common law rule is only applicable to volunteers in premises liability matters, and the definition of a volunteer under the IIA is inconsistent with the definition of a volunteer under premises liability law.

a. When it applied the duty owed to a volunteer in premises liability cases to Ms. Doty-Fielding, a volunteer fire fighter, the trial court erred.

The trial court incorrectly granted the Town's motion on the basis that a volunteer under the IIA is also a volunteer as defined by premises liability law.

Premises liability law addresses the liability of landowners to persons injured while on the owners' property. *Lozan v. Fraternal Order of Eagles*, 53 Wn.2d 547, 335 P.2d 4 (1959); *Smith v. Seattle School Dist.*, 112 Wash. 64, 191 P. 858 (1920); *Geer v. Sound Transfer Co.*, 88 Wash. 1, 152 P. 691 (1915). Ms. Doty-Fielding, however, is not suing the owner of the land on which the fire occurred, but rather her employer. The duty owed to a volunteer by a property owner is inapplicable to the duty owed by the Town to Ms. Doty-Fielding as a volunteer fire fighter performing her professional duties. The trial court therefore erred when it dismissed the case because Ms. Doty-Fielding could not show that the Town's conduct was willful or wanton.

b. The definition of a volunteer under the IIA is irreconcilable with that of a volunteer under premises liability common law.

For Ms. Doty-Fielding to be a volunteer under both the IIA, and premises liability law, the rules for each test must be the same, or at least consistent. Because the definitions of a volunteer under the IIA and Washington premises liability common law are inconsistent and contradictory, the trial court erred in granting the Town's motion for summary judgment.

The definition of a volunteer under the IIA is defined by *Doty*:

In sum, [Ms. Doty-Fielding] meets the definition of volunteer drawn from RCW 51.12.035(2). The Town did not provide [Ms. Doty-Fielding] with remuneration for her volunteer fire fighting services, and she volunteered her services of her own free choice. *Id.*

Doty, 155 Wn.2d at 547.

There are four elements defining a volunteer under the IIA:

- (1) A person who performs any assigned or authorized duties for any such unit of local government;
- (2) Brought about by one's own free choice;
- (3) Receives no wages; and
- (4) Is registered and accepted as a volunteer.

Doty, 155 Wn.2d at 537-38 (citing *In re Wissink*, 118 Wn. App. 870, 875, 81 P.3d 865 (2003)); RCW 51.12.025(2).

In contrast, a volunteer under premises liability law is one who voluntarily “participates in an activity for no purpose other than curiosity or amusement.” *Schafer v. Tacoma Eastern R. Co.*, 91 Wash. 164, 166, 157 P. 485 (1916); *Geer v. Sound Transfer Co.*, 88 Wash. 1, 4, 152 P. 691 (1915) (a volunteer is one who voluntarily assists another and has no interest in the work).

Both the IIA and common law rules require that a person engage in an activity “voluntarily” to be considered a volunteer. The difference

between the two lies in the “volunteer’s” purpose in engaging in the activity. Under the IIA, a volunteer is a person performing an “assigned or authorized” duty. Under premises liability law, a volunteer is someone “without any interest” in the work who participates for “no purpose other than curiosity or amusement.” The rules defining an IIA volunteer and a common law volunteer are not merely dissimilar — they conflict. Ms. Doty-Fielding can be a volunteer as defined by RCW 51.12.035(2), or a volunteer as defined by Washington premises liability case law — but she cannot be a volunteer under both.

Applying Ms. Doty-Fielding’s case to the law demonstrates she is a volunteer only with respect to the IIA and not a volunteer under premises liability law. First, Ms. Doty-Fielding is a volunteer as defined by the IIA because the Supreme Court has so held. *Doty*, 155 Wn.2d at 547. Second, her work for the Town as a volunteer firefighter was “assigned and authorized.” The Town was responsible for Ms. Doty-Fielding’s training. WAC 296-305-05501. The Town provided the fire fighting equipment used by the volunteers. CP 47. Officials of the Town were responsible for controlling the site of the fire. WAC 296-305-05501. The Town was responsible for providing fire protection services to the county and for hiring the professional and volunteer fire fighters necessary to that task. CP 47-48. Finally, though not required to respond to an

emergency call, Ms. Doty-Fielding was authorized by the Town to perform fire fighting duties in the event she did respond to an emergency.

Id. Ms. Doty-Fielding's status as a volunteer under the IIA did not make her a volunteer under Washington premises liability case law.

Therefore, the trial court erred when it granted summary judgment for the Town on the basis that as a volunteer fire fighter, Ms. Doty-Fielding was owed the duty to merely avoid willful and wanton conduct. The common law rule is applicable only to volunteers in premises liability cases. The definition of a volunteer under the IIA is irreconcilable with the definition of a volunteer under Washington premises liability case law.

E. CONCLUSION

The State of Washington requires a safe working environment to all men and women working in the State of Washington. To this end, an employer has a non-delegable duty to provide volunteer fire fighters with a safe work environment and ensure that they are properly trained.

The trial court erred when it held that the duty owed to Ms. Doty-Fielding by the Town was merely to avoid willful and wanton conduct. The common law rule applies only to premises liability cases. Moreover,

the definition of a volunteer under the IIA is irreconcilable with that of a
volunteer under premises liability law.

RESPECTFULLY SUBMITTED this 11th day of April, 2007.

LEE, SMART, COOK, MARTIN &
PATTERSON, P.S., INC.

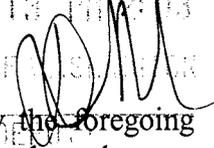
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COURT OF APPEALS
DISTRICT II

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DECLARATION OF SERVICE

STATE OF WASHINGTON
BY 

I declare that on the date below, I served a copy of the foregoing BRIEF OF APPELLANT JILL DOTY-FIELDING on each and every attorney of record herein:

VIA US MAIL AND ELECTRONIC MAIL

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12th day of April, 2007, in Seattle, Washington.

