

ORIGINAL

NO. 36473-5-II

WASHINGTON STATE COURT OF APPEALS

DIVISION TWO

DEBORAH M. MCLEAN,
Plaintiff-Appellant,

vs.

FOSTER WHEEELERION, INC.,
Defendant-Appellee.

STATE OF WASHINGTON
BY: *RL*
CITATION: 36473-5-II
FILED: 10/10/10

APPEAL FROM THE SUPERIOR COURT FOR KITSAP COUNTY

THE HONORABLE M. KARLYN HABERLY, Judge

BRIEF OF APPELLANT

Randy Loun
The Law Office of Randy Loun
Attorney for Appellants

Office and Post Office Address:

509 - 4th Street, Suite 6
Bremerton, WA 98337
(360) 377-7678

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
1. ASSIGNMENT OF ERROR.....	1
2. STATEMENT OF THE CASE.....	1
A. SUBSTANTIVE FACTS.....	1
B. RELEVANT PROCEDURAL FACTS.....	3
3. ARGUMENT.....	3
A. STANDARD OF REVIEW.....	3
B. MS. MCLEAN'S COMPLAINT STATES A VALID CAUSE OF ACTION FOR NEGLIGENCE ON THE PART OF SKOOKUM.....	4
C. MS. MCLEAN'S CLAIMS AGAINST SKOOKUM ARE EXEMPT UNDER THE INDUSTRIAL INSURANCE ACT.....	5
4. CONCLUSION.....	7

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cutler v. Phillips Petroleum Co.</u> , 124 Wn. 2d 749 (1994).....	3
<u>Folsom v. Burger King</u> , 135 Wn. 2d 658 (1998).....	6
<u>Kinney v. Cook</u> , 159 Wn. 2d 837 (2007).....	3
<u>Mathis v. Ammons</u> , 84 Wn. App. 411 (Div. II, 1996)..	4
<u>Vallandingham v. Clover Park Sch. Dist.</u> , 154 2d 16 (2005).....	5
Rev. Code Wash. Ann. 51.04.010.....	5
Washington Administrative Code 296-155-515.....	4

1. **ASSIGNMENT OF ERROR.**

A. The Superior Court erred in dismissing defendant Skookum Educational Programs based upon a 12(b)(6) motion when Ms. McLean filed a well-pleaded complaint based upon the fact that Skoodum Educational Programs owed her a duty not to provide unsafe access to sanity toilet facilities.

Issue Pertaining to Assignment of Error A: Whether the plaintiff's claims against Skookum Educational Programs should be exempt from the Industrial Insurance Act, since Skookum violated state administrative codes and put Ms. McLean in danger of injury.

2. **STATEMENT OF THE CASE.**

A. **SUBSTANTIVE FACTS.**

In May of 2003, plaintiff, Deborah McLean, was employed by defendant Skookum Educational Programs ("Skookum"), and was working under the supervision of defendant Foster Wheeler Environmental Coporation ("Foster Wheeler"), as Skookum was a subcontractor of Foster Wheeler.¹

Ms. McLean was employed to pick up trash and brush at Jackson Park in Bremerton, Kitsap County, State of Washington. For the convenience of its employees, Foster Wheeler rented a

¹ Due to the fact that Defendant Skookum Educational Programs was dismissed in this cause of action through a motion based upon CR 12(b)(6), the appellant's statement of the substantive facts in this case is based solely upon her complaint against Skookum. See CP 2.

"Sani-kan," which is a portable toilet, from Skookum, for its employees to use.

This Sani-kan was delivered on a trailer, and remained on the trailer at the job site with a ramp leading to the Sani-kan which was more than a twenty degree angle, was not cleated, and was not treated with a non-skid material to prevent injury.

The ramp on the Sani-kan rented by Foster Wheeler from Skookum violated Washington Administrated Code 296-155-515, which states that all ramps shall not be inclined more than twenty degrees and shall be cleated or otherwise treated with non-skid material to prevent a slipping hazard. On May 28, 2003, after her lunch break, Ms. McLean used the Sani-kan, and, upon exiting the Sani-kan, slipped and fell on the ramp.

The slip on the ramp caused Ms. McLean to break her left leg and ankle. The injury caused to Ms. McLean by her fall on the ramp resulted in Ms. McLean losing wages. The injury caused Ms. McLean by her fall on the ramp resulted in Ms. McLean being permanently partially disabled. The injury caused to Ms. McLean by her fall on the ramp resulted in Ms. McLean severe pain and suffering. The injury caused to Ms. McLean by her fall on the ramp resulted in Ms. McLean incurring substantial medical bills.

B. RELEVANT PROCEDURAL FACTS.

Ms. McLean filed a complaint against both Skookum and Foster Wheeler in Kitsap County Superior Court on March 24, 2006. CP 2. Defendant Skookum filed a motion to dismiss based upon CR 12(b)(6) on April 24, 2006. CP 9. This motion was granted on May 5, 2006. CP 14. Due to the fact that this case was removed to Federal Court on the motion of Foster Wheeler, this appeal was not filed until June 27, 2007. CP 46.

3. ARGUMENT.

A. STANDARD OF REVIEW.

This Court reviews a Trial Court's decision to dismiss a case based upon CR 12(b)(6) de novo. Kinney v. Cook, 159 Wn. 2d 837, 842 (2007). A trial court should only grant a motion to dismiss under CR 12(b)(6) when it is apparent, beyond a reasonable doubt, that there are no facts which would result in recovery for the plaintiff. Cutler v. Phillips Petroleum Co., 124 Wn. 2d 749, 755, 881 P. 2d 216 (1994). When deciding whether to grant a motion under CR 12(b)(6), the court must presume that the allegations contained in the plaintiff's complaint are true. Id. The trial court may also consider facts which are hypothetical, and not part of the formal record. Id. Motions under 12(b)(6) "should be granted 'sparingly and with care' and

'only in the unusual case in which [the] plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.'" Id.

B. MS. MCLEAN'S COMPLAINT STATES A VALID CAUSE OF ACTION FOR NEGLIGENCE ON THE PART OF SKOOKUM.

Skookum claims that, because Ms. McLean was an employee of Skookum, Skookum is free from liability under the Washington State Industrial Insurance Act. However, Ms. McLean's claim for negligence against Skookum arises not from her employment with Skookum, but from the fact that Skookum provided a Sani-kan which did not comply with Washington State's Administrative Code (WAC 296-155-515).

The elements for a cause of action for negligence are a breach of duty which causes harm. Mathis v. Ammons, 84 Wash. App. 411, 415-416 (Div. II 1996). When a statute, or, in the instant case, an Administrative Code, imposes a duty, a duty exists. Id. p. 416.

Since WAC 296-155-515 imposes a duty regulating the use of ramps in this case, Skookum, by renting out the Sani-kan to Foster and Wheeler, breached this duty by not ensuring the ramp on the Sani-kan complied with WAC 296-155-515. The breach of this duty caused Ms. McLean harm, since she broke her leg and her ankle, and could then no longer work.

Merely because Ms. McLean happened to be working for

Skookum, under the supervision of Foster and Wheeler should not allow Skookum to breach their duty, not just to Ms. McLean, but to any person who may need to use the Sani-kan, to provide a ramp on the Sani-kan which complies with the State's Administrative Code.

In short, Ms. McLean has a valid claim for negligence under Washington State common law, and has sufficiently pleaded her claim in her complaint.

C. MS. MCLEAN'S CLAIMS AGAINST SKOOKUM ARE EXEMPT UNDER THE INDUSTRIAL INSURANCE ACT.

The trial Court dismissed Ms. McLean's well-pleaded complaint for negligence, apparently under Washington State's Industrial Insurance Act. However, even if the State's Industrial Insurance Act applied to this case, Ms. McLean has a valid claim that the exception to the employer's exemption from liability applies to her cause of action.

Washington's Industrial Insurance Act (IIA) generally immunizes employers from civil liability for workplace injuries. RCW 51.04.010. The IIA abolished most tort actions arising from on-the-job injuries and replaced them with "an exclusive workers' compensation system that provided swift and certain recovery for injured employees, regardless of fault." Vallandigham v. Clover Park Sch. Dist., 154 Wash. 2d 16, 26 (2005).

An exception to the immunity granted to employers

exists where an employee is injured by the "deliberate intention" of his or her employer. RCW 51.24.020. For this exception to apply, an employer must have knowledge that an injury is certain to occur and willfully disregards that knowledge. Folsom v. Burger King, 135 Wash. 2d 658, 667 (1998).

Since Skookum deliberately failed to comply with Washington State's Administrative Code relating to the use of ramps, it had knowledge that an injury was certain to occur and disregarded that knowledge. Skookum, by violating state laws and administrative codes caused Ms. McLean to injure herself to the point where she could no longer work.

Skookum, through its negligence, caused Ms. McLean financial loss and should be held liable to Ms. McLean for her economic loss.

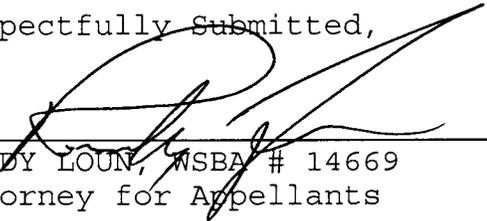
The exception in the IIA regarding the fact that Skookum had knowledge injury would occur applies in Ms. McLean's case and this Court should remand this case to the Superior Court for a jury trial on the merits of Ms. McLean's claim against Skookum.

4. CONCLUSION.

For all of the reasons stated above, the Court should reverse the trial Court's Order Dismissing Skookum Educational Programs and allow a jury to decide whether Skookum was negligent.

DATED this 31 day of October, 2007.

Respectfully Submitted,



RANDY LOUN, WSBA # 14669
Attorney for Appellants

