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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 321771

**COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON**

VIRGINIA BURNETT,

Appellant,

vs.

**STATE OF WASHINGTON, DEPARTMENT OF
CORRECTIONS,**

Respondents.

APPELLANT'S REPLY BRIEF

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I.

UNDISPUTED FACTS

The following facts are not in dispute.

1. The subject accident happened on March 9, 2009 at the Washington State Penitentiary in Walla Walla. CP 2, 36.

2. At the time of the accident, Virginia Burnett was employed by the Walla Walla Community College. CP 2, 36.

3. At the time of the accident, Ms. Burnett had a Professional Personal Contract with Walla Walla Community College. CP 54-55.

4. The Professional Personal Contract said, in relevant part:

Employee agrees to perform the assigned professional services and to comply with all duties and responsibilities as enumerated in the Contract between the Board of Trustees of Community College District No. 20 and the Walla Walla Community College Association for Higher Education and the **Interagency Agreement between the State of Washington Department of Corrections and State Board for Community and Technical Colleges** as they now exist or hereafter amended and which by this reference are incorporated into this Contract as required by RCW 28B.50.855 as now existing or hereafter amended.

CP 55 (emphasis added).

5. The Interagency Agreement between the State of Washington Department of Corrections and the State Board for Community and Technical Colleges (hereafter "Agreement"), CP 57-72, was executed in June 2008 between the Department of Corrections ("Department") and the State Board for Community and Technical Colleges ("Board").

6. The Agreement was "for the period of July 1, 2008, through June 30, 2009." CP 57. The subject accident happened during the effective period of the Agreement.

7. Ms. Burnett taught classes at the prison in Walla Walla. While walking through a metal door at the prison, a guard negligently closed the door on her, injuring her shoulder and upper torso. CP 3, 36.

Also not in dispute is the following language from the Agreement:

5.5 INDEPENDENT CAPACITY: The employees and agents of each party who are engaged in the performance of this Agreement shall continue to be employees or agents of that party and shall not be considered for any purpose to be employees or agents of the other party.

5.6 AGENT OF THE OTHER PARTY: Neither party shall represent itself as an agent of the other party or hold itself out to be vested with any power or right to contractually bind or act on behalf of the other party.

Agreement, §§ 5.5 and 5.6, CP 68.

II.

ISSUES

So what are the issues? Ms. Burnett has sued the Department of Corrections. The Department claims that Ms. Burnett may not sue the Department because she is an employee of the State of Washington and the Department is an agency of the State. As such, RCW 51.04.010 applies and Ms. Burnett is or should be barred from bringing the action.

But for the Agreement, specifically sections 5.5 and 5.6, the Department's argument may carry the day. But the Agreement says what it says and Ms. Burnett's employment by Walla Walla Community College and her work at the prison were subject to the terms of the Agreement.

According to the Department of Corrections: "The Court need not analyze the Interagency Agreement to decide this case." Brief of Respondent, page 9. Which is a peculiar statement for the Department to make given that in its Brief the Department spent multiple pages discussing and analyzing the Agreement.

Assuming that this Court does not agree with the Department and refuses to sweep the Agreement under the rug, an issue, with respect to the L&I bar, RCW 51.04.010, is: do sections 5.5 and 5.6 of the Agreement apply?

If the two sections apply, what do they mean relative to Ms. Burnett suing the Department of Corrections? Ms. Burnett, an employee of Walla Walla Community College, per the express language in the Agreement, "shall not be considered for any purpose to be [an employee or agent of the Department of Corrections]." Agreement, § 5.5. What does this language mean relative to RCW 51.24.030(1), which states:

If a third person, not in a worker's same employ, is or may become liable to pay damages on account of a worker's injury for which benefits and compensation are provided under this title, the injured worker or beneficiary may elect to seek damages from the third person.

Is not the Department of Corrections, per the express language of section 5.5 of the Agreement, a "third person" relative to Virginia Burnett? Ms. Burnett is not in the "same employ" of the Department. Consequently, she should, per RCW 51.24.030(1), be allowed to continue with her action against the Department.

III.

ARGUMENT

The Department argues that Virginia Burnett may not sue the Department since both the Department and the Community College are agencies of the State of Washington. While that is factually correct, the argument totally ignores section 5.5 of the Agreement.

The approach that Ms. Burnett believes this Court should take (and that the trial court should have taken) is as follows:

1. Does the Agreement apply?
2. If the Agreement applies, what does section 5.5 mean relative to Ms. Burnett suing the Department?

There are three possible responses/answers to the second question. First, the Agreement means what it says and Ms. Burnett may sue the Department since she and the Department are not in the same employ (per the express terms of section 5.5). Second, the language and/or intent of section 5.5 of the Agreement is vague or ambiguous. In which case, this being an appeal from a motion for summary judgment in which all inferences are to be made in favor of the nonmoving party, and in which the motion should be denied if there are genuine issues of material fact, the case should

be remanded to the trial court for further discovery regarding the meaning of the language and/or intent of the parties. Third, whatever section 5.5 of the Agreement means or was intended by the parties, it does not matter. That is, regardless of the language or intent of section 5.5 of the Agreement, since both the Department and the Community College are agencies of the State, the L&I bar applies and Ms. Burnett may not sue the Department.

If this Court selects option number three, it will be saying that contracts and agreements between parties are not to be considered or given effect or that this specific Agreement, at least section 5.5 thereof, is void as against public policy. That decision, Virginia Burnett believes, would be an error.

The Department spends considerable time in its Brief, pages 15-20, discussing cases from other jurisdictions which “have declined to distinguish one department of state government from the other for purposes of the exclusive remedy provision.” Brief of Respondent, page 15. But none of the cases from other jurisdictions discussed by the Department had anything that said:

The employees or agents of each party who are engaged in the performance of this Agreement shall continue to be employees or agents of that part and shall not be considered for any purpose to be employees or agents of the other party.

Agreement, § 5.5. CP 68.

Moreover,

[b]efore discussing cases from other states it should be mentioned that the statutes in other states are different than ours. In 1916 we said in *Stertz v. Industrial Ins. Comm'n*, 91 Wash. 588, 604, 158 P. 256 (1916) “[t]o seek authority in the decisions of other states is useless, for other statutes have resemblance to ours.” Our statute has always been one of the most stringent in the elimination of causes of action against employers.

Thompson v. Lewis County, 92 Wn.2d 204, 208-209, 595 P.2d 541 (1979).

“[S]hall not be considered for any purpose to be employees or agents of the other party” must mean something. Clearly the Department and the Community College had something in mind with regard to this language. Assuming the parties meant what they said, and Virginia Burnett is not to be considered “for any purpose” to be an employee or agent of the Department, does that not overcome, breach or negate the L&I bar? The Department claims that it does not. The Department claims that this Court should not even consider the Agreement. The Department makes this argument because, in its opinion, irrespective of the Agreement, both the Department and the Community College are

agencies of the State of Washington. That, according to the Department, should trump everything else.

A problem with the Department's argument is that, as the Department itself admitted: "No Washington case has directly addressed the question of whether the exclusive remedy provision bars a negligence claim of an employee of one department of state government against a different department of state government." Brief of Respondent, page 12. And the two cases cited by the Department, *Thompson v. Lewis County*, 92 Wn.2d 204, 595 P.2d 541 (1979) and *Spencer v. Seattle*, 104 Wn.2d 30, 700 P.2d 742 (1985), do not answer the question. These two cases were discussed by Ms. Burnett in her Brief at pages 14-19. In both cases, an employee of a specific governmental entity sued that governmental entity. In both cases, the employee plaintiff argued "dual capacity" as a way to get around the L&I bar. Ms. Burnett is not making that argument. Ms. Burnett is not suing the Community College.

The elephant in the room in this case is section 5.5 of the Agreement. What does it mean? What was the intent of the parties with respect to this language? Why did they include it in the Agreement? These are issues that must be addressed in order to

decide this case. Despite the Department's "The Court need not analyze the Interagency Agreement to decide this case" language, there is only one way to avoid having to come to grips with section 5.5. That is, this Court has to rule, as a matter of law, that irrespective of the language in the Agreement and the obvious intent of the parties, the fact that both the Department of Corrections and Community College are agencies of the State trumps all else and under no circumstances may an employee of one state agency sue another state agency for an on-the-job accident. That may be the law, but by including § 5.5 in the Agreement the parties appear to want to avoid or circumvent the application of said law.

CONCLUSION

The Agreement between the Department and the Board of Community and Technical Colleges is very clear: "The employees of each party . . . shall continue to be employees or agents of that party and shall not be considered for any purpose to be employees or agents of the other." Ms. Burnett was an employee of Walla Walla Community College; she was not an employee of the Department of Corrections. Therefore, Ms. Burnett may sue the Department. The L&I bar does not apply. If the Agreement is not

clear on this point, then there is a genuine issue of fact as to what is meant.

In either of the above situations (i.e., the Agreement at § 5.5 means what it says or it is ambiguous), the motion for summary judgment filed by the Department should not have been granted and this case should continue.

The *Order Granting Defendant's Motion for Summary Judgment* should be reversed and the case sent back to the trial court for further proceedings.

DATED this 2 day of July, 2014.

MINNICK-HAYNER

By: 

Tom Scribner, WSBA #11285
Of Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 2 day of July, 2014, I caused to be served a true and correct copy of **APPELLANT'S REPLY BRIEF** by the method indicated below, and addressed to the following:

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U.S. Mail, Postage Prepaid



JUDY LIMBURG
Signed this 2 day of July 2014
at Walla Walla, Walla Walla County, WA