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NO. 65820-4

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

DEVID MORALES-CRUZ, a single person

Appellant,

v.

PACIFIC COAST CONTAINER, INC., a Washington corporation

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

The sole question on appeal is whether the trial court properly granted Defendant-Respondent Pacific Coast Container, Inc.'s ("PCC") motion for summary judgment dismissing Plaintiff-Appellant Devid Morales-Cruz's ("Cruz") negligence claims. Given Cruz's failure to establish the existence or breach of any duty owing to him, the trial court's decision was correct and should be upheld.

The record evidence reveals Cruz's mutual agreement to an employment relationship with ("PCC"), such that a reasonable juror could not find lack of consent. Accordingly, PCC is entitled to statutory immunity under the Washington Industrial Insurance Act as Cruz's employer. Alternatively, PCC is not subject to vicarious liability for the allegedly negligent acts of Cruz's co-worker, thereby limiting Cruz's remedies to those provided by Washington's worker's compensation system. Further, PCC submitted undisputed evidence it fulfilled its duty to ensure the co-worker who struck Cruz with the forklift was properly certified on the day of the accident, requiring summary dismissal of Cruz's claim of direct negligence.

Summary judgment was proper. PCC respectfully requests this court affirm the decision of the trial court.

II. COUNTER ASSIGNMENTS OF ERROR

Cruz's single assignment of error omits any mention of the critical issues on appeal. To facilitate review, PCC suggests the following counter-statement of Cruz's assignment:

1. Whether the trial court erred in finding Cruz consented to his employment relationship with PCC, thereby affording PCC statutory immunity from Cruz's negligence claims.
2. Whether the trial court's ruling dismissing Cruz's vicarious liability claims must be affirmed on the ground an employee injured by a co-worker's negligence is limited to remedies provided by Washington's worker's compensation system.
3. Whether the trial court's ruling dismissing Cruz's direct negligence claim must be affirmed on the ground PCC submitted undisputed evidence it fulfilled its duty to ensure that the co-worker involved in the subject accident was properly certified.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

PCC offers the following Statement of Issues pertaining to its Counterstatement of the Assignments of Error.

Statement for Assignment of Error No. 1

Whether PCC offered sufficient evidence of Cruz's consent to the employment relationship with PCC, such that there is no genuine issue of fact enabling consent to be decided as a matter of law.

Statement for Assignment of Error No. 2

If Cruz's consent cannot be established as a matter of law, whether summary judgment was still proper whereas here, Cruz was injured by a fellow employee and is therefore barred from asserting a claim against a common employer?

Statement for Assignment of Error No. 3

Whether Cruz offered any evidence to dispute PCC's testimony that the individual operating the forklift was trained and competent.

IV. COUNTERSTATEMENT OF THE CASE

A. *PCC and Accord's Co-Employer Relationship.*

PCC and Accord Human Resources ("Accord") entered into a personnel-staffing agreement. CP 36. The agreement created a co-employment relationship, terming both PCC and Accord "co-employers" with respect to each covered employee. CP 36, 39-54. By its terms, the agreement granted each employer a right of direction and control over an employee as necessary to exercise their respective rights and fulfill their respective responsibilities to one another and to the employee. CP 42.

More specifically, Accord maintained the right to supervise and manage employment matters regarding compliance with employment policies, provision of health and safety consultation, payment of wages, provision of worker's compensation insurance coverage, provision of health insurance and other benefits, and preparation and filing of all applicable tax reporting forms and payment of all applicable taxes. CP 46-48. PCC, on the other hand, retained all rights, duties and obligations of an employer in the traditional employment relationship, including direct control over the day-to-day duties of the employee and of the job site(s) at which each employee performed his/her duties;

authority to discipline employee; authority to terminate employee; obligation to provide a safe workplace and keep workplace in compliance with all local, state and Federal laws and regulations applicable to the workplace and working conditions of the employee. CP 43.

B. Cruz's Employment with PCC.

Cruz completed his job application with Accord. CP 60. After he was hired, he was placed as an entry-level dock worker at PCC's Tacoma location. CP 62. With the exception of two brief periods of unemployment, Cruz worked exclusively at this site. CP 55-56. Cruz acknowledges PCC managers directed his day-to-day activities. CP 96.

C. The Accident.

On June 15, 2007, Cruz was working inside the PCC warehouse when he was struck by a forklift driven by Marco-Antonio Ramirez. CP 62, 96. Ramirez, like Cruz, had been formally hired by Accord and placed at PCC's Tacoma location. CP 56. PCC confirmed Ramirez was certified to operate a forklift on the day of the accident. CP 58.

Cruz contends that while he was walking to the common lunch area to get a drink of water, the forklift, which was being operated in reverse, "suddenly and without warning," struck him from behind and ran over his left foot. CP 3. On the other hand, PCC offered evidence that Cruz was not paying attention to his surroundings at the time of the accident. CP 62, 65. Specifically, Ramirez was backing out of a

container, with the backing beeper functioning. *Id.* When Ramirez turned to the left, he encountered Cruz who was coming around the corner. *Id.* Cruz was looking in the other direction and did not see the forklift until the last second. *Id.*

Cruz was taken to the hospital for treatment. CP 56, 62-63. He was diagnosed with a broken left ankle, as well as bruising and contusions to his left leg, thigh and abdomen area. *Id.* He was treated and released with a follow-up consult with an orthopedic. *Id.*

Immediately following the accident, an “Employer Report of Industrial Injury” was prepared for distribution to the Department of Labor and Industries. CP 57, 74-5. The second page of the document is entitled “Claim Information Reported by the Worker.” CP 75. On this page, “PCC Logistics” is identified as Cruz’s employer. *Id.* Further, there are several reports from Cruz’s orthopedist in which the doctor is discussing Cruz’s condition and his ability to return to work. CP 57, 67-72. These reports are addressed to Cruz’s employer and submitted to PCC on Cruz’s behalf. *Id.*

D. Procedural History.

Cruz filed suit against PCC alleging:

Defendant PCC’s employee operating the forklift breached his duty to exercise reasonable care for Plaintiff Morales-Cruz’s safety by failing to look while backing and was therefore negligent. Defendant PCC’s negligence also may include, but is not necessarily limited to, failing to properly train or retain the operator of its forklift and

failure to ensure the operator of its forklift was competent to operate this forklift.

CP 4.

PCC moved for summary judgment arguing it was immune from suit under the Washington Industrial Insurance Act. CP 26-34. In the alternative, PCC argued even if it could not establish itself as Cruz's employer for purposes of the Act, the allegedly negligent agent was Cruz's co-employee, which precluded suit against PCC under the common law and RCW 51.04.10. *Id.* Further, PCC provided uncontroverted testimony that it fulfilled its duty to ensure that Ramirez was properly certified, defeating Cruz's claims of direct negligence. CP 58.

The trial court granted PCC's motion. CP 119-120. Cruz appeals the decision of the trial court. CP 117.

V. ARGUMENT

A. *The Trial Court's Grant Of Summary Judgment Is Subject To De Novo Review.*

A court reviews a grant of summary judgment *de novo*, engaging in the same inquiry as the trial court. *Lallas v. Skagit County*, 167 Wn. 2d 861, 864, 225 P/3d 910 (2009). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The court considers all facts and reasonable inferences from them in the light most favorable to the non-moving party and the motion should be granted only if, from

all the evidence, a reasonable person could reach but one conclusion. *Trimble v. Wash. State University*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000).

Bare assertions that a genuine material issue exists will not defeat a summary judgment motion in the absence of actual evidence. *Id.* Similarly, in responding to a motion for summary judgment, the non-moving party cannot rely on the allegations made in its pleadings, but must instead set forth by affidavit specific facts showing that there is a genuine issue for trial. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)).

On review of an order granting a motion for summary judgment, the appellate court considers only evidence and issues called to the attention of the trial court. RAP 9.12. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed. RAP 2.5(a).

B. The Trial Court Properly Granted Summary Judgment In PCC's Favor Because PCC Is Entitled To Statutory Immunity Under The Washington Industrial Insurance Act.

Employers are immunized from civil tort actions for non-intentional workplace injuries to employees. RCW 51.04.010; *Flannagan v. Department of Labor and Industries*, 123 Wn.2d 418, 422 869 P.2d 14 (1994); *Seattle-First National Bank v. Shoreline Concrete*

Co., 91 Wn.2d 230, 242, 588 P.2d 1308 (1978). This includes suits brought as the result of a co-employee's negligence. An employee may only seek damages from a third party, if the third party causing the harm is not in the same employ as the injured employee. RCW 51.24.030. At best, any negligence claim under these conditions can only be made against the individual employee/third party, and not the employer/third party.

For industrial insurance purposes, Washington law recognizes an individual may sustain the relationship of dual employee to both the general employer who pays his wages and a special employer to whom he may be loaned and for whom he performs services. *Lunday v. Department of Labor and Industries*, 200 Wash. 620, 624, 94 P.2d 744 (1939). In order for a dual employment relationship to exist, the *Novenson* test applies, *Novenson v. Spokane Culvert*, 91 Wn.2d 550, 588 P.2d 1174 (1979). Under this ruling, both employers must have the right to control the worker's physical conduct and the worker must consent to the employer/employee relationship. See *Scott R. Soners, Inc. v. Department of Labor and Industries*, 101 Wn. App. 350, 355-56, 3 P.3d 756 (2000). Here, the parties agree PCC had the right to control Cruz's physical conduct. Accordingly, the only issue is whether Cruz consented to the co-employer relationship with PCC.

Consent is established by evidence of a mutual agreement between the employee and the employer. *Rideau v. Cort Furniture Rental*, 10 Wn. App. 301, 307, 39 P.3d 1006 (2002). Express consent is not necessary; rather, consent may be established by implication. *Fisher v. City of Seattle*, 62 Wn.2d 800, 805, 384 P.2d 852 (1963). The focus “should be on whether the employee understood he was submitting ‘to the control of a new master, not on whether the employee understood he was giving up his legal rights under workers’ compensation law.” *Jones v. Halvorson-Berg*, 69 Wn. App. 117, 122, 847 P.2d 945 (1993). “Understanding may be inferred from circumstances, but understanding there must be.” *Fisher*, 62 Wn.2d at 805.

The question of whether an individual consents to the dual employee relationship is a question of fact. *Rideau v. Cort Furniture Rental, et al.*, 110 Wn. App. 301, 302, 39 P.3d 1006 (2002). However, a court may rule as a matter of law on the issue of consent in the absence of substantial evidence upon which reasonable minds could differ. *Jones v. Halvorson-Berg*, 69 Wn. App. 17, 847 P.2d 945 (1993). In the present case, however, the evidence permits a reasonable person to reach but one conclusion – that Cruz understood he was submitting himself to the control of PCC – and therefore consented to the employee relationship.

Cruz reported to work at PCC's Tacoma location, with limited exceptions, for a period of nearly two years. CP 55-56. Cruz acknowledges when he was at the Tacoma facility, he reported only to PCC supervisors who instructed him regarding his duties. CP 96. Following the accident, an "Employer Report of Industrial Injury" was prepared for distribution to the Department of Labor and Industries. CP 74-75. On the second page of this form, "PCC Logistics" is identified as Cruz's employer. CP 75. Further, there are several reports from Cruz's orthopedist which are addressed to Cruz's employer and submitted to PCC on Cruz's behalf. CP 66-72.

Cruz argues the court's holding in *Fisher v. City of Seattle* requires proof of Cruz's positive agreement to employment with PCC. Ap. Br. at p. 10. However, *Fisher* clearly holds that express consent is not required, and can be determined by implication. *Fisher*, 62 Wn.2d at 805. The court refused to find consent in that case because there, the plaintiff employee had no actual knowledge of the identity of his employer due to a corporate management agreement between a parent company and its subsidiary.

More specifically, the plaintiff in *Fisher* was hired by a company called Standard Stations. *Id.* at 801. Standard Stations was a wholly owned subsidiary of another company, Standard Oil Company of California, which also owned a corporation called Western Operations.

Id. Unbeknown to Fisher, Standard of California entered into a management agreement whereby Western Operations assumed management of Standard Stations. *Id.* After Fisher filed a negligence action against Western Operations, among others, Western claimed immunity as Fisher's employer under the Workmen's Compensation Act. *Id.* at 802. The appellate court ultimately found that Western was not entitled to immunity because Fisher had no knowledge of Standard Stations' relations to Western, which was necessary to establish consent. *Id.* at 805. In the present case, the record evidence reveals Cruz knew he was working at, and for, PCC, therefore consent was properly determined as a matter of law.

Cruz contends that his statement "he considered Accord to be his sole employer," is sufficient in and of itself to raise a genuine issue of material fact concerning the employment relationship. Ap. Br. at p. 15. However, this statement is not set forth by affidavit as is required to demonstrate a genuine issue of fact for trial. *Young*, 112 Wn.2d at 225. Rather the affidavit simply states that Cruz "filled out the Accord application for employment," and "Accord was the only company [he] could recall being mentioned on the application." CP 95-96. Neither of these statements supports a conclusion Cruz did not understand he was under the control of PCC and treating PCC as his employer. In fact, other statements in Cruz's affidavit fly in the face of such a conclusion:

I did work at a warehouse owned by Pacific Coast Container, Inc...[and] [w]hile I was working in the warehouse, people that I believed were employed by Pacific Coast Container told me specifically what work I was supposed to be performing. I was injured on June 15, 2007 when I was working at Pacific Coast Container, Inc., doing work I was told to do by the Pacific Coast Container, Inc. managers.

CP 96.

On the facts presented, no reasonable juror could find a genuine issue of material fact with respect to whether Cruz consented to his employment relationship with PCC. The trial court properly determined PCC was Cruz's employer for purposes of the Washington Industrial Insurance Act. The trial court's order granting PCC immunity under the Act and dismissing Cruz's claims should be affirmed.

C. The Trial Court's Summary Judgment Ruling Dismissing Cruz's Vicarious Liability Claim Should Be Affirmed On The Ground That The Common Law And RCW 51.04.010 Preclude Suit Against An Employer For A Co-Employees Purported Negligence.

If this court finds material issues of fact remain with respect to Cruz's consent to the co-employer relationship with PCC, the trial court's ruling dismissing Cruz's vicarious liability claim should still be affirmed on the ground PCC is not liable to Cruz for the alleged negligence of his co-employee.

An employer is vicariously liable for injuries caused by the negligence of its employee. *Brown v. Labor Ready*, 113 Wn. App. 643, 646, 54 P.3d 116 (2002). However, vicarious liability depends upon *the*

liability of the negligent agent to the injured plaintiff. Id. (emphasis added); RCW 51.04.010. If a plaintiff is barred from suit against the negligent employee, he or she cannot sue the employer on a theory of vicarious liability. *Id.* An employee injured by a co-worker's negligence is limited to the remedies provided by Washington's workers compensation system. *Id.*; RCW 51.32.010. He or she may, however, sue a third party not in the same employ. *Brown*, 113 Wn. App. at 646; *See also* RCW 51.24.030(1).

Here, the allegedly negligent agent, Marco Antonio-Ramirez, had the same employment relationship with PCC as Cruz. More specifically, Ramirez was hired by Accord and subsequently loaned to PCC to perform work pursuant to the companies' co-employer agreement. On summary judgment, PCC argued that to the extent Cruz was successful in establishing he was not an employee of PCC for purposes of workers compensation immunity, he similarly could not establish that Ramirez was an employee of PCC. Accordingly, the two men were in the same employ, therefore, Cruz's claim against PCC was barred by RCW 51.24.030(1). The trial court agreed.

PCC acknowledges that an individual might be considered an employee for the purpose of the vicarious liability of a master to a third party while, under the same facts, he may not be an employee for purpose of workmen's compensation issues. *Brown*, 113 Wn. App. at

649, quoting *Fisher*, 62 Wn.2d at 805. Unlike the two part test for establishing borrowed servant status for worker's compensation questions, (e.g. right to control the servant's physical conduct and consent by the employee to the relationship), the proper test with regard to vicarious liability requires only proof of control. *Brown*, 113 Wn. App. at 649.

Here, both parties agree PCC had control over Cruz's physical conduct in the performance of his duties. Similarly, PCC also had the right to control Ramirez's conduct at the time of the acts giving rise to injury. Accordingly, both Cruz and Ramirez could arguably also be treated as employees of PCC for purposes of a vicarious liability analysis. Cruz could not sue Ramirez as his co-employee and Cruz is still barred from suit against PCC.

Cruz rejects this analysis, arguing that although Ramirez and Cruz are employees of Accord for purposes of industrial insurance immunity, for purposes of vicarious liability only he should be treated as an employee of Accord and Ramirez should be treated as an employee of PCC. Ap. Br. at 23. Applying this reasoning, Cruz contends the two are not in the same employ, therefore he is free to sue PCC.

None of the cases Cruz cites support treating fellow employees such as Ramirez and Cruz any differently for purposes of a vicarious liability analysis.

In *Brown v. Labor Ready*, the plaintiff, Joyce Brown, was a long-term employee of CMI Northwest and the individual who injured her, Russell Henson, was employed by a temporary agency, Labor Ready Northwest. In determining whether Labor Ready was liable to Brown, the court stated that the dispositive question was whether Henson was Brown's co-worker. *Brown*, 113 Wn. App. at 647. If Henson worked only for Labor Ready, then Labor Ready must answer to Brown under the rule of respondeat superior. *Id.* If, on the other hand, Henson was also employed by CMI as its borrowed servant, Henson was Brown's coworker, in which case the industrial insurance statutes barred a negligence action against Henson, and therefore also barred any action against Labor Ready on a theory of vicarious liability. *Id.*

D. The Trial Court's Summary Judgment Ruling Dismissing Cruz's Direct Negligence Claims Should Be Affirmed On The Ground Cruz Failed To Set Forth Specific Facts Disputing PCC's Testimony That Ramirez Was Certified To Operate The Forklift On The Day Of The Subject Accident.

Cruz contends PCC breached its duty to train Ramirez to operate the forklift and was therefore negligent. Cruz relies on provisions of WAC 296-24-23025,, which require forklift drivers to complete certified training classes and prohibits an employer from permitting the employee to operate a forklift without the training. Cruz's argument fails.

An employer may be liable for harm caused by an incompetent employee if the employer knows or should know the employee is unfit,

the employee's unfitness is a proximate cause of the harm and the harm is foreseeable. *Brown*, 113 Wn. App. 655. Here, the record is clear. Ramirez was properly trained and PCC confirmed that he was before it permitted him to operate the forklift. Cruz offered no evidence to the contrary. Accordingly, Cruz cannot demonstrate breach of any duty owing to him.

Cruz argues PCC had a duty to personally train Ramirez. There is no legal basis of this argument. Pursuant to WAC 296-21-012(6), PCC was Cruz's employer on the day of the accident. However, PCC only had a duty to ensure that he was properly certified, not to train him himself. *Brown*, 113 Wn. App. 643. For the reasons set forth above, PCC satisfied this duty and Cruz cannot demonstrate otherwise.

PCC respectfully requests this court affirm the ruling of the trial court dismissing Cruz's direct negligence claim.

VI. CONCLUSION

PCC established both that it was in control of Cruz on the day of the subject accident and that he had consented to the employment relationship. For these reasons, PCC respectfully requests this court affirm the trial court's ruling granting PCC immunity under the Washington Industrial Insurance Act. Alternatively, this court may affirm the trial court's ruling dismissing Cruz's vicarious liability claim on the ground that an employee injured by a coworker's negligence is

limited to the remedies provided by Washington's worker's compensation system. Further, this court may affirm the trial court ruling dismissing Cruz's claims of direct negligence on the ground Cruz failed to contradict evidence that PCC had satisfied its duty to ensure that Ramirez was properly certified to operate the forklift, or produce any other evidence demonstrating that he was otherwise incompetent.

DATED this 22nd day of December, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of December, 2010, I caused to be served a copy of *Respondent's Brief* on the following:

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