

No. 36473-5-II

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

DEBORAH M. McLEAN,

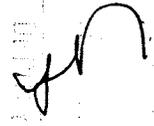
Appellant,

v.

SKOOKUM EDUCATIONAL PROGRAMS, a Washington State
Corporation,

Respondent.

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JANIS L. HARRIS
COURT OF APPEALS
DIVISION II
SEATTLE, WASHINGTON



BRIEF OF RESPONDENT SKOOKUM EDUCATIONAL PROGRAMS

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I. INTRODUCTION

The Honorable Leonard W. Costello did not at all err when he dismissed plaintiff's negligence claims against her employer, Skookum Educational Programs ("Skookum"), as being contrary to Washington's long-standing workers compensation bar. It should be undisputed (1) that Skookum was plaintiff's employer at the time of the subject accident; and (2) that plaintiff's only claims against Skookum below were negligence claims. CP 3 and 6 ("[p]laintiff Deborah M. McLean was, at all material times, employed by Skookum Educational Programs." [¶ 1.1] "...Foster Wheeler and Skookum are liable to Ms. McLean for negligence" [¶ 5.2]). Those two undisputable facts require affirmance of the decision below.

Although she tries to suggest otherwise to this Court, Ms. McLean's Complaint below did not include an RCW 51.24.020 claim for "deliberate intention of [her] employer to produce such injury." To the contrary, all of plaintiff's claims below were negligence claims. *See* CP 6-7. Negligence claims—asserted against one's own employer—are not valid claims under Washington law. *See* RCW 51.04.010 and 51.24.020, and *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 27, 109 P.3d 805 (2005).

II. STATEMENT OF THE CASE

Plaintiff Deborah McLean (“McLean”) filed her “Complaint for Negligence and Personal Injury” against Skookum (and another defendant) on March 24, 2006. CP 3-7. All of McLean’s causes of action against the defendants were listed on page four (¶¶ 5.1-5.6) of her Complaint. CP 6. As the Court can see, all of McLean’s claims against Skookum were negligence claims. For example, McLean alleged—at ¶ 5.2 of her Complaint—that “Foster Wheeler and Skookum are liable to Ms. McLean for negligence.” CP 6, lines 5-7 (emphasis added.). Similarly, at ¶¶ 5.3-5.6 of her Complaint, McLean reiterated that each element of her alleged damages claims had been caused by the “negligence of the defendants.” CP 6, lines 8-15. McLean did not assert any other claims or causes of action against Skookum.

Because McLean’s claims against Skookum were all negligence claims, The Honorable Leonard W. Costello dismissed those claims, pursuant to Skookum’s motion, on May 5, 2006. CP 25-26 and RP 8.

III. ARGUMENT

A. The Industrial Insurance Act Provides Benefits And Precludes Washington Employees From Asserting Negligence Claims Against Their Employers.

In 1911, the Washington legislature passed the Industrial Insurance Act (“the Act”). RCW 51.04.010, *et seq.* The Act created an exclusive

workers compensation system that was designed to provide swift and certain recovery for injured employees regardless of fault. *Birklid v. Boeing Co.*, 127 Wn.2d 853, 859, 904 P.2d 278 (1995). RCW 51.04.010 provides, in relevant part, as follows:

The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

Thus, nearly 100 years ago, the Washington legislature announced that employees shall receive workers compensation benefits and, in return, shall not be permitted to assert civil claims against their employers. Since the passage of the Act, Washington courts have repeatedly held that an employee may not assert negligence claims against his or her employer. *See, e.g., Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 27, 109 P.3d 805 (2005); *Birklid v. Boeing Co.*, 127 Wn.2d 853, 904 P.2d 278 (1995); *Garibay v. Advanced Silicon Materials, Inc.*, 139 Wn. App. 231, 159 P.3d 494 (2007); and *Nielson v. Wolfkill Corp.*, 47 Wn. App. 352, 355, 734 P.2d 961 (1987)("[t]he Industrial Insurance Act, RCW

51.04.010 *et seq.*, provides an exclusive remedy for injuries suffered by workers in the course of their employment”). The only exception to Washington’s workers compensation bar—the “deliberate intention” exception—is outlined at RCW 51.24.020 and (as explained below) has no application here.

B. Plaintiff’s Negligence Claims Against Skookum Were Properly Dismissed.

McLean begins her argument (on page 4 of her brief) with a statement that her “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).” This argument—that an alleged WAC violation takes a negligence claim outside the workers compensation bar—is based upon a distinction that makes no difference under Washington law. In the words of the Washington Supreme Court, “[e]ven failure to observe safety laws or procedures does not constitute specific intent to injure, nor does an act that had only *substantial* certainty of producing injury.” *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 27, 109 P.3d 805 (2005). *See also Birklid v. Boeing Co.*, 127 Wn.2d 853, 904 P.2d 278 (1995); *Garibay v. Advanced Silicon Materials, Inc.*, 139 Wn. App. 231, 159 P.3d 494 (2007); *Valencia v.*

Reardan-Edwall Sch. Dist. No. 1, 125 Wn. App. 348, 351, 104 P.3d 734 (2005) (“[s]imply exposing employees to unsafe conditions is not enough”).

McLean’s allegation that the ramp to the trailer violated WAC 296-155-515 did, in fact, appear in McLean’s Complaint below (at ¶¶ 4.4, 4.5, and 5.1). However, Washington’s appellate courts have consistently held that alleging a WAC violation does not put an employee’s claim outside the wide boundaries of the workers compensation bar. “Washington courts have consistently interpreted RCW 51.24.020 narrowly, holding that mere negligence, *even gross negligence*, does not rise to the level of deliberate intention.” *Vallandigham*, 154 Wn.2d at 27. The argument in Section B of McLean’s brief is directly contrary to long-standing Washington law.

C. Although McLean Tries To Suggest Otherwise, She Did Not Assert Any Other Claims Against Skookum.

The only other argument McLean presents here (Section C of her brief) is directed to Washington’s limited “deliberate intention” exception to the workers compensation bar. However, McLean fails to acknowledge that her Complaint below did not include an intentional tort cause of action or—for that matter—any allegations that Skookum intended her injury to occur. McLean cannot argue here—by relying upon a cause of

action she did not assert below—that Skookum’s CR 12(b)(6) motion was improperly granted. *See Fischer-McReynolds v. Quasim*, 101 Wn. App. 801, 814, 6 P.3d 30 (2000)(“[t]he purpose of a complaint is to apprise the defendant of the nature of the plaintiff’s claims and the legal grounds upon which the claims rest”); *Browne v. Cassidy*, 46 Wn. App. 267, 270, 728 P.2d 1388 (1986)(“[a] lawsuit cannot be tried on one theory and appealed on others”)(quoting, *Teratron Gen. v. Institutional Investors Trust*, 18 Wn. App. 481, 489, 569 P.2d 1198 (1977)).

The “deliberate intention” exception to Washington’s workers compensation bar is codified at RCW 51.24.020.

If injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker or beneficiary of the worker shall have the privilege to take under this title and also have cause of action against the employer as if this title had not been enacted, for any damages in excess of compensation and benefits paid or payable under this title.

(Emphasis added). Although this statute does exist, it has no application to McLean’s claims against Skookum. Again, all of McLean’s claims were negligence claims.¹ CP 6. One can read and reread McLean’s Complaint and one will find no allegations, as required by

¹ McLean confirms this in the “Conclusion” section of her brief to this Court. There (on page 6), she asks this Court to reverse “and allow a jury to decide whether Skookum was negligent.” There was and is no claim that McLean’s injury was caused by the “deliberate intention” of Skookum to cause that injury.

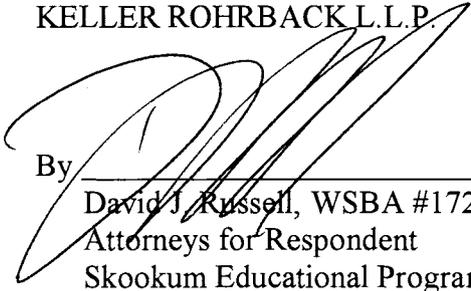
RCW 51.24.020, that McLean's injury resulted from the "deliberate intention" of Skookum to cause such injury. As outlined above, a negligence cause of action (or even a claim that the ramp to the Sani-Kan violated a WAC regulation) is not enough.

IV. CONCLUSION

Washington's workers compensation bar—codified at RCW 51.04.010—precludes an employee from bringing a negligence action against his/her employer. This is a straightforward case in which the Industrial Insurance Act—providing for workers compensation benefits, which McLean received—was McLean's exclusive remedy against Skookum. Judge Costello correctly dismissed McLean's negligence claims against her employer.

DATED this 3rd day of December, 2007.

KELLER ROHRBACK L.L.P.

By 

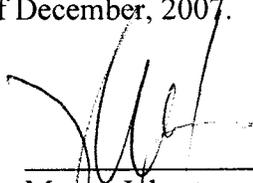
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on this 3rd day of December, 2007, the foregoing was sent via first class mail, postage prepaid, to the Clerk of the Court, Washington State Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402 for filing, and a copy of the foregoing was sent via first class mail, postage prepaid to:

Mr. Randy W. Loun
Law Office of Randy W. Loun
509 Fourth Street, Suite 6
Bremerton, WA 98337

Dated this 3rd day of December, 2007.



Megan Johnston

