IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DEVID MORALES-CRUZ, a single person,	)	DIVISION ONE
Appellant,	)	No. 65820-4-I
v.	)	UNPUBLISHED OPINION
PACIFIC COAST CONTAINER, INC., a Washington corporation,	)	
Respondent.	)	FILED: August 15, 2011

Dwyer, C.J. — An individual must consent to an employment relationship in order for an employer to obtain immunity from suit pursuant to Washington's Industrial Insurance Act, Title 51 RCW (the Act). Furthermore, an employer's immunity, or lack thereof, to a direct negligence claim does not determine whether a plaintiff may bring a vicarious liability claim against the employer for the negligence of another. Here, material questions of fact exist regarding whether Devid Morales-Cruz consented to an employment relationship with Pacific Coast Container, Inc. (PCC). Accordingly, we reverse the trial court's summary judgment dismissal of Morales-Cruz's direct negligence claim against PCC. However, the plain language of the Act precludes Morales-Cruz from bringing a vicarious liability claim against PCC in order to recover for the

negligence of his co-employee. Thus, we affirm the trial court's summary judgment dismissal of Morales-Cruz's vicarious liability claim.

I

Accord Human Resources, Inc., an employment staffing agency, supplies temporary workers to its clients, including PCC. In 2003, Accord and PCC entered into a personnel-staffing contract, attempting to create a "co-employment relationship," in which the two companies would share the responsibilities of a traditional employer. Clerk's Papers (CP) at 27, 36-37. According to the terms of this agreement, Accord was responsible for managing employee wages, health insurance and benefits, tax reporting forms, and "provision of workers' compensation insurance coverage." CP at 37. PCC, however, retained "all rights, duties and obligations of an employer in the traditional employment relationship," including "control over the day-to-day duties of the employee and of the job site(s)," the "sole authority" to terminate the employee, and the "sole obligation to provide a safe workplace and keep [the] workplace in compliance with all local, state and Federal laws." CP at 37.

Morales-Cruz sought employment with Accord, not PCC. In 2006, he completed one job application for Accord, written in Spanish, which made no reference to PCC or any other clients of Accord. Morales-Cruz was not a party to the contract between Accord and PCC. In a declaration, Morales-Cruz stated, "I did not know of any specific agreement between Accord and Pacific Coast

Container, Inc., and my agreement to work was only with Accord." CP at 96.

In the course of his employment with Accord, Morales-Cruz worked intermittently at PCC's Tacoma facility as an entry-level dock worker. His duties included unloading freight from railroad cars and semi-tractor trailers. In June 2007, a forklift being operated in reverse struck Morales-Cruz and ran over his left foot while he was walking across PCC's premises to get a drink of water at the break area. Another temporary employee from Accord, Marco-Antonio Ramirez, was operating the forklift when it struck Morales-Cruz.

Following this incident, Morales-Cruz filed suit against PCC alleging (1) that PCC was directly liable for his injuries and (2) that PCC was vicariously liable for Ramirez's negligence in the operation of the forklift. PCC subsequently filed a motion for summary judgment, asserting that it was immune from suit pursuant to Title 51 RCW. PCC further asserted that Morales-Cruz was precluded from bringing a vicarious liability claim against PCC because, PCC contended, Morales-Cruz was precluded by RCW 51.24.030 from bringing suit against Ramirez as a co-employee.[1] The trial court granted PCC's motion for summary judgment on all claims.

Morales-Cruz appeals.

II

We review de novo a motion for summary judgment, thereby engaging in

[1] RCW 51.24.030 permits an injured worker to bring a claim against a third party where the negligent actor and the injured employee are not "in the same employ."

the same inquiry as the trial court. Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 525-26, 243 P.3d 1283 (2010). All facts and reasonable inferences therefrom are viewed in the light most favorable to the nonmoving party. Trimble v. Wash. State Univ., 140 Wn.2d 88, 93, 993 P.2d 259 (2000). Summary judgment is appropriate "if the pleadings, depositions . . . and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). Summary judgment may be granted only where there is but one conclusion that could be reached by a reasonable person. Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 349, 588 P.2d 1346 (1979).

III

Morales-Cruz contends that the trial court erred by granting summary judgment to PCC on the ground that the Act precludes Morales-Cruz from bringing a claim against his employer. Specifically, Morales-Cruz asserts that he is not an employee of PCC for industrial insurance purposes because he did not consent to an employment relationship with PCC. We agree.

The Act abolishes common law causes of action for workplace injuries.[2] RCW 51.04.010; Judy v. Hanford Envtl. Health Found., 106 Wn. App. 26, 31, 22 P.3d 810 (2001). The Act provides, in relevant part:

The State of Washington, therefore . . . declares that all phases of

[2] There are a few statutory exceptions to the Act's bar against civil suits. See Newby v. Gerry, 38 Wn. App. 812, 820-21, 690 P.2d 603 (1984) (recognizing that the Act creates causes of action for cases where an employer or co-worker intentionally harms an employee and for cases where the negligent employee is not acting within the course of his employment at the time of the injury).

> 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.

RCW 51.04.010. In lieu of private suits, the Act provides, instead, for state-funded workers' compensation to injured workers. RCW 51.04.010; Seattle-First Nat'l Bank v. Shoreline Concrete Co., 91 Wn.2d 230, 241, 588 P.2d 1308 (1978). However, the Act creates an exception, "permitting those workmen injured by the negligence of one 'not in the same employ' to elect to seek a remedy against the tortfeasor." Novenson v. Spokane Culvert & Fabricating Co., 91 Wn.2d 550, 552, 588 P.2d 1174 (1979). Thus, where a defendant in a common law negligence action claims immunity as an employer under the Act, the proper inquiry in determining whether a claim is barred is whether the plaintiff is an employee of the defendant within the context of the statute. See Novenson, 91 Wn.2d at 552.

For the purposes of workers' compensation, "an employment relationship exists only when: (1) the employer has the right to control the servant's physical conduct in the performance of his duties, and (2) there is consent by the employee to this relationship." Novenson, 91 Wn.2d at 553; see also Marsland v. Bullitt Co., 71 Wn.2d 343, 345, 428 P.2d 586 (1967); Fisher v. City of Seattle, 62 Wn.2d 800, 804, 384 P.2d 852 (1963). "Whether a situation satisfies both

prongs is a question of fact." Rideau v. Cort Furniture Rental, 110 Wn. App. 301, 302, 39 P.3d 1006 (2002). Only where the facts are undisputed does the issue of consent become a question of law. Pichler v. Pac. Mech. Constructors, 1 Wn. App. 447, 450, 462 P.2d 960 (1969). Moreover, consent is a determinative factor where the existence of an employment relationship affects an employee's right to bring a claim for a workplace injury:

> "Since the rights to be adjusted are reciprocal rights between employer and employee, it is not only logical but mandatory to resort to the agreement between them to discover their relationship. To thrust upon a worker an employee status to which he has never consented would not ordinarily harm him in a vicarious liability suit by a stranger against his employer, but it might well deprive him of valuable rights under the compensation act, notably the right to sue his own employer for common law damages."

Fisher, 62 Wn.2d at 804-05 (quoting 1 Arthur Larson, Workmen's Compensation Law § 47.10 (1951)).

Here, PCC clearly satisfies the control prong of the employer-employee relationship test. The contract between PCC and Accord granted PCC control over the daily duties of the temporary workers sent to PCC. PCC exclusively managed the facility's premises and supervised the on-site machinery. PCC provided the equipment that Morales-Cruz needed to perform his tasks. PCC employees supervised Morales-Cruz and the other temporary workers at the facility. While Morales-Cruz was working on PCC's premises, PCC retained "the sole authority to discipline Cruz, as well as the authority to terminate him." CP at

57. With regard to PCC's control of his actions on the job site, Morales-Cruz stated: "While I was working in the warehouse, people that I believed were employed by [PCC] told me specifically what work I was supposed to be performing." CP at 113.

However, in order to avail itself of the immunity granted by the Act, PCC must also demonstrate that Morales-Cruz consented to an employment relationship. Rideau, 110 Wn. App. at 303-04. The consent prong of the test requires "clear evidence" of an agreement between the employee and the employer. Rideau, 110 Wn. App. at 302. It is not sufficient to show that such an arrangement was thrust upon the employee. Novenson, 91 Wn.2d at 554. Nevertheless, the understanding that one is entering into an employment relationship "'may be inferred from circumstances.'" Fisher, 62 Wn.2d at 806 (quoting Murray v. Union R. Co. of New York City, 229 NY 110, 127 N.E. 907 (1920)). Even so, "'understanding there must be. Common-law rights and remedies are not lost by stumbling unawares into a new contractual relation.'" Fisher, 62 Wn.2d at 806 (quoting Murray, 229 NY 110).

Consent to an employment relationship cannot be imputed to the plaintiff as a matter of law. See Novenson, 91 Wn.2d at 555. "It is only if the evidence is undisputed that the nature of the relationship existing presents a question of law." Pichler, 1 Wn. App. at 450. Where the existence of an employment relationship results "in the destruction of valuable common law rights to the

injured workman," inferring consent on the part of the temporary laborer gives the employer

> the best of two worlds—minimum wage laborers not on its payroll, and also protection under the workmen's compensation act as though such laborers were its own employees. Having chosen to garner the benefits of conducting business in this manner, it is not unreasonable to require [the defendant employer] to assume the burdens.

Novenson, 91 Wn.2d at 555.

Here, PCC contends that Morales-Cruz consented to an employment relationship by working on PCC's premises for several months. However, this fact alone is not enough to establish *as a matter of law* that Morales-Cruz consented to an employment relationship with PCC. In Novenson, our Supreme Court held that a temporary worker's direct requests to be placed with a specific company were insufficient to constitute his consent for workers' compensation purposes. 91 Wn.2d at 552. Similarly, the fact that Morales-Cruz repeatedly showed up to work at PCC's facility at the direction of Accord also fails to establish consent to an employment relationship.

PCC further asserts that Morales-Cruz's consent can be implied from certain documents submitted to the trial court, which suggest that Morales-Cruz on several occasions identified PCC as his employer.[3] This argument is unavailing. Morales-Cruz did not complete or sign any of these documents.

[3] Specifically, PCC offered into evidence: (1) a workplace injury report that was sent to the Department of Labor and Industries wherein the "business name of employer" was listed as "PCC Logistics" and (2) several medical reports that were scanned and emailed to PCC on Morales-Cruz's behalf from a third-party healthcare provider. CP at 75.

PCC offered no evidence that Morales-Cruz ever saw these forms. One document was completed and signed by a PCC employee, not Morales-Cruz. Moreover, all of these documents are written in English and not in Spanish.[4] There is no evidence in the record to suggest that these documents were not sent to Accord as well as to PCC. The fact that a few documents list Morales-Cruz's employer as PCC does not establish as a matter of law the inference that he consented to an employment relationship with PCC. Rather, "[t]he trier of fact at trial is the one to draw any inferences as to [the plaintiff's] understanding and consent vis-à-vis an employment relationship." Novenson, 91 Wn.2d at 555.

Furthermore, we have held that "[a]n employee's subjective belief as to the existence of an employer-employee relationship is material to the issue of consent." Rideau, 110 Wn. App. at 307; see also Fisher, 62 Wn.2d at 806; Jackson v. Harvey, 72 Wn. App. 507, 519, 864 P.2d 975 (1994). In contrast to PCC's assertions, Morales-Cruz stated in a declaration, "I did not know of any specific agreement between Accord and Pacific Coast Container, Inc., and my agreement to work was only with Accord." CP at 96. A plaintiff worker's assertion of a subjective belief regarding his or her employment status is enough to raise a question of fact as to whether that worker consented to a mutual employment relationship. Rideau, 110 Wn. App. at 307-08. Thus, Morales-Cruz's assertion herein sufficiently raises a question of material fact as to

[4] It appears from the record that Morales-Cruz's primary language is Spanish, and there is no evidence as to his comprehension of the English language.

whether Morales-Cruz consented to an employment relationship with PCC.

Considering all of the evidence presented, we conclude that a genuine issue of material fact exists as to whether Morales-Cruz consented to an employment relationship with PCC and, therefore, whether he may be considered an employee of PCC for industrial insurance purposes. Thus, the trial court erred by granting summary judgment to PCC on the ground that the Act precludes Morales-Cruz from bringing a common law claim against PCC.

IV

Morales-Cruz further contends that summary judgment of his direct negligence claim was improper because a genuine issue of material fact exists as to whether PCC breached a duty of reasonable care owed to Morales-Cruz. We agree.

In his complaint, Morales-Cruz asserts that PCC's negligence includes "failing to properly train or retrain the operator of its forklift and failure to ensure the operator of its forklift was competent to operate this forklift." CP at 4. As an employer, PCC has a duty to exercise reasonable care to provide all of its workers with a safe workplace environment. Greenleaf v. Puget Sound Bridge & Dredging Co., 58 Wn.2d 647, 650, 364 P.2d 796 (1961). This duty includes compliance with Washington Workplace Industrial Safety and Health Regulations, including all regulations related to forklift operation and training. WAC 296-863-60005. Pursuant to RCW 5.40.050, a violation of Washington

Administrative Code safety regulations may constitute evidence of negligence.[5] Thus, such a violation presents an issue of material fact sufficient to preclude summary judgment on the issue of PCC's duty or breach.

Operators of forklifts and other power industrial trucks must be properly trained before operating such machinery on a worksite. WAC 296-863-600. Before operating a forklift, employees must successfully complete an "operator training program" under the direct supervision of someone with the knowledge, training, and experience necessary to provide formal instruction, practical training, and an accurate evaluation of the trainee's competence. WAC 296-863-60005.

Morales-Cruz contends that PCC breached its duty of reasonable care by failing to properly train or retrain Ramirez in the operation of the forklift and by failing to ensure that Ramirez was competent in forklift operation, thus violating particular WAC provisions. PCC contends, however, that it fulfilled its duty of reasonable care when it "confirmed Ramirez was trained and certified before it allowed him to operate the forklift that struck Cruz." CP at 34, 58. In fact, PCC asserts that it did not have a duty to train Ramirez in proper forklift operation because Accord was "solely responsible for training and certifying the laborers it leased to PCC." CP at 34. However, the staffing contract between Accord and PCC indicates otherwise. The contract clearly states that "Accord shall have no

[5] RCW 5.40.050 provides, in relevant part: "A breach of duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence."

obligation or liability to [PCC] with respect to the suitability of any Covered Employee for his or her job responsibilities." CP at 43.

Because the record presents conflicting evidence as to whether PCC or Accord had the duty to train Ramirez in proper forklift operation, we hold that a question of material fact exists as to whether PCC breached its duty of reasonable care to Morales-Cruz. Accordingly, we reverse the trial court's dismissal of Morales-Cruz's direct negligence claim against PCC. [6]

V

Finally, Morales-Cruz contends that a genuine issue of material fact exists as to whether he and Ramirez are "workers in the same employ," such that a vicarious liability claim against PCC is precluded by RCW 51.04.010 and RCW 51.24.030. We disagree.

RCW 51.04.010 abolishes "all civil actions and civil causes of action" for workplace injuries except as provided elsewhere in Title 51 RCW. One such exception provides:

> 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.

[6] At oral argument, the issue was raised that Morales-Cruz's direct negligence claim is barred because the WAC provisions relied upon by Morales-Cruz as evidence of PCC's direct negligence in his complaint apply only to "employers" and "employees" within the context of the Act. However, this issue was not raised below by either party and was not properly briefed on appeal. We express no view on the merits of this contention. Nothing in this opinion precludes either party from litigating this issue on remand. Additionally, nothing in this opinion precludes the parties from litigating the effect, if any, of the Accord-PCC contract on the apportionment of such duties as between those contracting parties. And, of course, nothing in this opinion precludes a party from amending a pleading, so long as such amendment is done in conformance with Civil Rule 15.

RCW 51.24.030(1) (emphasis added). The statute allows a cause of action where a worker's injury results from negligent conduct of a third party because "'the compensation system was not designed to extend immunity to strangers.'" Manor v. Nestle Food Co., 131 Wn.2d 439, 450, 932 P.2d 628, 945 P.2d 1119 (1997) (quoting 2A Arthur Larson, Workmen's Compensation Law § 71.00, at 14-1 (1993)).

Where an individual is subject to suit pursuant to RCW 51.24.030, his or her employer may also be liable for damages. This is because, under the theory of respondeat superior, an employer is vicariously liable for the negligence of his or her employees. Brown v. Labor Ready Nw. Inc., 113 Wn. App 643, 646, 54 P.3d 166 (2002). The principle of respondeat superior rests upon the premise that an employer is in the best position to control the actions of his or her workers and to compensate injured parties. Rahman v. State, 170 Wn.2d 810, 818-19, 246 P.3d 182 (2011). To apply the doctrine of respondeat superior, there must be an employer-employee relationship and the negligent act must be completed within the scope of the worker's employment duties and in furtherance of the employer's interests. Breedlove v. Stout, 104 Wn. App. 67, 70, 14 P.3d 897 (2001). For vicarious liability purposes, the proper test to determine whether an employer-employee relationship exists requires proof only of the employer's control over the employee who caused the injury.[7] Brown, 113

[7] We apply different tests to determine employment status for vicarious liability purposes and for workers' compensation purposes. Fisher, 62 Wn.2d at 804. In the test for the former, consent of

Wn. App. at 649. Vicarious liability, however, is derivative and "depends upon the liability of the negligent agent to the injured plaintiff; if a plaintiff is barred from suit against the negligent employee, [he or] she cannot sue the employer on a theory of vicarious liability." Brown, 113 Wn. App. at 646-47.

Although an injured worker may sue a third party who is not in the same employ, RCW 51.24.030(1), the legislature intended that one who is "in the same employ" will not be susceptible to suit. Peterick v. State, 22 Wn. App. 163, 190, 589 P.2d 250 (1977). However, the Act does not define the phrase "in the same employ." Peterick, 22 Wn. App. at 190. Thus, a fact-specific inquiry is required in order to determine whether RCW 51.24.030 authorizes a statutory negligence claim. See Evans v. Thompson, 124 Wn.2d 435, 440-43, 879 P.2d 938 (1994) (citing cases so holding). In determining whether two workers are "in the same employ" within the meaning of the Act, we must consider the underlying purpose of RCW 51.24.030, which is to prevent "'extend[ing] immunity to strangers.'" Manor, 131 Wn.2d at 450 (quoting Larson, supra § 71.00, at 14-1); see also Hildahl v. Bringolf, 101 Wn. App. 634, 643, 5 P.3d 38 (2000).

We interpret the phrase "a third person, not in a worker's same employ" to mean another person who is "not a fellow servant of the same employer, as defined in the [A]ct." Marsland, 71 Wn.2d at 346; see also Hildahl, 101 Wn.

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the negligent employee is irrelevant where the employer has sufficient control over the actions of the employee, as the employer has a "unilateral liability" to the injured stranger. Fisher, 62 Wn.2d at 804.

App. at 642 n.9 ("The phrase, 'third person, not in a worker's same employ,' RCW 51.24.030(1) excludes 'fellow servant[s] of the same employer.'"). The totality of the circumstances must be examined in order to determine whether two workers are "fellow servant[s] of the same employer." Marsland, 71 Wn.2d at 346.

Here, the evidence presented leaves no question that Ramirez and Morales-Cruz were "fellow servants" of the same employer. Both Ramirez and Morales-Cruz were Accord employees, who were sent by Accord to PCC. Pursuant to PCC's contract with Accord, PCC was responsible for supervising the job site and controlling the daily tasks of its workers, including Morales-Cruz and Ramirez. The only evidence provided by the parties indicates that Morales-Cruz moved freight for PCC and that Ramirez worked in the same warehouse as Morales-Cruz and moved items with a forklift. Morales-Cruz provided no evidence that Ramirez worked in a different location or that Ramirez worked under the direction of supervisors who were not PCC employees.[8] An employee of PCC declared that Ramirez "was also a co-employee of Accord and PCC." CP at 56.

Even taking all of the evidence presented in the light most favorable to Morales-Cruz, the only possible inference is that Morales-Cruz and Ramirez were "in the same employ," as opposed to being "strangers." As such, Morales-

[8] As the plaintiff, Morales-Cruz had the burden of producing evidence sufficient to create a genuine issue of fact. Boguch v. Landover Corp., 153 Wn. App. 595, 610, 224 P.3d 795 (2009).

Cruz does not have a cause of action against Ramirez. See RCW 51.24.030(1). Because Morales-Cruz is precluded from asserting a direct negligence claim against Ramirez, he cannot bring a vicarious liability claim against PCC premised on Ramirez's negligence. RCW 51.04.010; RCW 51.24.030.

The purpose of RCW 51.24.030(1) is to create a right of action against a "stranger"—that is, a negligent third party. However, Ramirez is not a "stranger" to Morales-Cruz such that Morales-Cruz can benefit from the exception, provided by RCW 51.24.030, to the general bar against private law suits for workplace injuries. Hildahl, 101 Wn. App. at 643. Accordingly, we affirm the trial court's dismissal of Morales-Cruz's vicarious liability claim.

Affirmed in part. Reversed and remanded in part.

Dwyer, C. J.

We concur:

Leach, A. C. J.

Grau, J.