No. 92581-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(Formerly Court of Appeals No. 73116-5-I)

FRANCISCO ENTILA and ERLINDA ENTILA, husband and wife, and the marital community composed thereof,

Respondents,

v.

GERALD COOK and JANE DOE COOK, husband and wife, and the marital community composed thereof,

Petitioners.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable James Cayce, Judge

ANSWER IN OPPOSITION TO PETITION FOR REVIEW

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I. INTRODUCTION

After completing his work shift at Boeing, Gerald Cook went to his car and, without scraping his frosted windshield, started his commute home. Unable to see through his obscured windshield, Cook struck and severely injured pedestrian Entila as Entila crossed an avenue of traffic on Boeing property. Cook tested positive for marijuana. Cook admits he was doing no work at the time of the accident but argued that he was still immune from his negligence under Title 51. Entila sued, arguing that Title 51 did not grant Cook immunity because he was not working at the time of the accident. Cook argued that since Entila received IIA benefits, then he should have immunity. The trial court granted Cook immunity.

In reversing the trial court, Division I noted that RCW 51.24.100 and the collateral source rule both prohibit consideration of Entila's benefits in determining Cook's immunity and that to gain immunity, Washington's Supreme Court required Cook to show that he was actually in the course and scope of his employment at the time he caused the injury.

Further, Cook brought a Motion to Strike portions of Entila's brief, including the fact that Cook tested positive for marijuana. Division I denied the motion, stating that such motions to strike evidence already in the record are a waste of time.

II. ISSUES PRESENTED FOR REVIEW

This Court should deny review. The Division I *Entila* opinion at issue does not change the existing law, and provides clarity and continuity in the application of the common law, case law, and statutory provisions. The *Entila* opinion is in keeping with the legislative intent of the Industrial Insurance Act and the public interest in denying immunity under Worker's Compensation laws for a tortfeasor who has finished his work shift and is negligently driving his personal vehicle on his commute home. He is not acting in the course and scope of his employment and is not a party for whom immunity under the statute was intended.

Neither of the two cited considerations governing acceptance of review under RAP 13.4(b) apply here. Cook argues under RAP 13.4(b)(1) that the *Entila* decision is in conflict with Supreme Court decisions in *Evans v. Thompson*, 124 Wash.2d 435, 879 P.2d 938 (1994) and *Olson v. Stern,* 65 Wn.2d 871, 400 P.2d 305 (1965) and under RAP 13.4(b)(4) that the decision affects an issue of substantial public interest regarding the application of the IIA and third-party lawsuits against tortfeasor employees. The *Entila* decision does not conflict with the holding in either *Olson v. Stern* or *Evans v. Thompson,* nor does it affect the long-standing rights and restrictions regarding when an injured worker can sue a third-party tortfeasor or reinterpret any portion of the IIA.

Far from conflicting with *Olson v. Stern* the *Entila* decision follows *Olson v. Stern* and provides continuity regarding the relevance of the tortfeasor's work status to determining immunity, over and above the physical location of the accident. With regard to *Evans*, *Entila* does not conflict with or distinguish the prior decision. The opinion follows *Evans*, noting the analogous "Supreme Court's observations about the purpose of co-employee immunity" to illustrate the similar lack of connection between the officers and directors with but a name on paper in that case, and at-fault negligent driver and his Boeing employment in this case. Because there is no conflict with precedent and the legislative purpose behind coworker immunity, this is not a basis on which the Court should accept review.

The *Entila* decision does not create or affect a substantial public interest. The decision neither affects the long-standing rights and restrictions regarding when an injured worker can sue a third-party tortfeasor nor does it render any portion of RCW 51.24.100 "meaningless." The decision provides clarity and consistency to prior Court of Appeals and Supreme Court decisions regarding when a tortfeasor co-employee can be defined as in the course and scope of employment, but does not create new law, apply new definitions, or conflict with the legislative interest in favoring third-party actions where

the injury is caused by a tortfeasor who is not in the course and scope of employment.

The *Entila* decision does not render any portion of RCW 51.24.100 "meaningless." The first sentence of RCW 51.24.100, along with its common law counterpart, the collateral source rule, prohibits evidence of an injured employee's receipt of benefits, stating that it is "...not to be pleaded or admissible in evidence in any third party action." The second sentence says that any challenge to the injured employee's right to bring a third party action "shall be made by supplemental pleadings only and shall be decided by the court as a matter of law," meaning that the judge and not the jury hearing the case should make the decision. Under the statute, the judge's the decision on the issue of the tortfeasor's immunity is not to be determined by considering the unrelated and separate issue of whether the injured worker received benefits. Benefits and immunity are not applied like two sides of the same coin and the worker's receipt of benefits has no bearing on whether the tortfeasor should be held responsible for causing the injuries. These two issues, like the two sentences in the statute are separate and distinct. The second sentence is not affected by nor rendered moot with the *Entila* decision.

III. STATEMENT OF THE CASE

After working the night shift, at about 6:30 a.m. on February 18, 2010, Defendant Cook clocked out and walked to his vehicle in an employee parking area on Boeing property. (CP 241.) Without removing the frost or fog from his windshield, Defendant Cook drove his personal vehicle out of the parking area and struck pedestrian Plaintiff Francisco Entila on an avenue of traffic that leads to the Boeing gate. (CP 242.) Entila was walking across the avenue of traffic toward the parking area when he was struck by Mr. Cook's vehicle. (CP 242.) Defendant Cook was commuting home. (CP 246.) Cook did not see Entila through his frosted windshield. (CP 242.) Cook tested positive for marijuana. (CP 248.) Cook did not hit the brakes before hitting Mr. Entila. (CP 250.) Cook stated that when he heard the impact he thought someone had thrown a backpack onto his car. (CP 250.) Defendant Cook was not acting in the course and scope of his employment. (CP 246.)

Cook refused mediation arguing he was immune from suit under the Industrial Insurance Act because he was a coworker. Entila filed suit and brought a Motion for Summary Judgment on the issue of immunity. The first trial judge determined there were underlying issues of fact for a jury. After a trial continuance and assignment of a different judge to the

case, Cook brought his own Motion for Summary Judgment on the issue of immunity, which was granted.

Entila sought direct review from this Supreme Court, which was declined. (CP 382-385).

The matter was transferred to Division I of the Court of Appeals. Division I unanimously reversed and remanded for further proceedings consistent with its opinion that Cook is not entitled to immunity because he cannot meet the test set forth by this Supreme Court proving that he was in the course and scope of employment at the time of the accident.

IV. SUMMARY OF ARGUMENT

A. *Entila* Decision Does Not Conflict With Evans or Olson.

The *Entila* decision does not conflict with existing case law as suggested by Cook, including *Olson v. Stern*, 65 Wn.2d 871, 400 P.2d 305 (1965) and *Evans v. Thompson*, 124 Wash.2d 435, 879 P.2d 938 (1994). *Olson* was cited extensively in Entila's briefing and ultimately relied upon by the Court of Appeals due to its strikingly similar factual scenarios and legal issues. There is no conflict, and the *Entila* decision applied the *Olson* holding that immunity only attaches to a coemployee when the coemployee is acting in furtherance of his employer's business.

Similarly, the *Entila* decision also cites and follows the reasoning in *Evans v. Thompson,* which again cited the rule of law that the defendant's action determine his liability,

> "It must be observed that the immunity attaches to the coemployee only when the coemployee is acting in the course of his employment." *Evans v. Thompson*, 124 Wash.2d 435 (1994) 879 P.2d 938, citing 2A Arthur Larson, Workmen's Compensation § 72.23, at 14-117 (1987).

And also,

> The purpose of the exclusive remedy provision of the workers' compensation law is to give immunity to the employer and coemployees acting in the scope and course of their employment. Its purpose is not to create artificial immunity.... To provide immunity as a matter of law denies the right of a third party action against the person actually responsible for the injury or death. *Evans* at 947.

Olson, Evans, and now *Entila* are not in conflict, but rather cohesively reflect the reasoning, purpose, spirit and policy behind the Industrial Insurance Act: to help injured workers and also allow them to seek redress against the party who actually injured them. It is nonsensical to suggest that a different interpretation of "scope" and "course" of employment would make Defendant Cook's reckless indifference and careless acts qualify for immunity. Cook was not working, driving his own frost-covered vehicle, and ran into his coworker because he couldn't see out of his windshield. To suggest such actions should be deemed "in furtherance

of his employer" as defined by the Act is not appropriate. Cook is not in the class of those intended to be granted immunity under the statute. Division I was correct in reversing and remanding in keeping with these important precedential cases and the underlying legislative intentions.

B. *Entila* Decision Does Not Affect Substantial Public Interest.

The Division I decision does not affect injured workers' rights regarding when they can sue a negligent coworker nor negligent coworkers' rights to immunity when they are engaged in their employer's work, and does not render any portion of RCW 51.24.100 "meaningless." Cook's assertion that the IIA provides an exclusive remedy for an injured worker is overbroad and does not reflect the significant import the legislature places on the injured worker's right to be fully compensated, including the favored right to sue a negligent third-party.

Cook misstates the Division I ruling's impact, and cites the finding in *Wilson v. Boots*, 57 Wn.App. 734, 736, 790 P.2d 192, rev. denied, 115 Wn.2d 1015 (1990). In *Wilson*, the facts were different so the result was different. In that case, the at-fault and injured coworkers were *both working* at an offsite work area when one accidently backed a company truck into the other. Both were doing the work they were employed to do. Here, there is no evidence upon which to find that Defendant Cook was performing work when, after his shift, he negligently drove his own frost-

covered vehicle into Entila who was walking to his car. Cook was not a worker for whom the protections of the IIA were intended.

The Supreme Court test and statutory interpretations used by Division I are not new or applied differently than the cited precedents. The cases cited by Cook have different facts than the case at hand and are misinterpreted or mistated. This Court should decline review.

V. ARGUMENT

A. Immunity Is Determined By The Actions of The Tortfeasor.

The *Entila* decision centers on the premise that one must be working in furtherance of his or her employer's interest in order to be entitled to immunity under the Industrial Insurance Act. This premise is in keeping with the statutory scheme and legislative intent and purpose to protect injured workers, and the decision is in line with the precedential cases decided by this Supreme Court that determined it is the actions of the defendant that should determine immunity. It is incorrect to suggest that because he is also employed by Boeing, Cook should be entitled to immunity because he was not in a parking area when he drove his frost-covered car into Entila. This is not the holding of *Olson* or *Evans*, and is certainly not the spirit and legislative intent of the IIA. Division I correctly determined that Cook should have to show he was actually doing work for his employer before being bestowed with immunity under the statute.

Nowhere in Title 51 does it provide immunity for a non-working tortfeasor who causes harm. There is no legislative intent to protect a tortfeasor simply because he or she may share a common employer with the injured person. Case law, as established by this Supreme Court, provides a test that the tortfeasor must pass: he or she must prove they were actually doing work for their employer at the time of the accident in order to be entitled to the protection of Title 51. The *Entila* decision, along with *Olson v. Stern* and *Evans v. Thompson* before it, is in keeping with the spirit, intent, and letter of the statute. The *Entila* decision aligns and clarifies the long line of cases deciding the immunity issue for tortfeasors and distinguishing those cases that decide whether workers are entitled to benefits. There is no conflict with the statute, no cases that are overturned, and no new interpretation of either that changes their application.

B. IIA Does Not Provide Immunity For A Nonworking Tortfeasor.

The language of RCW § 51.08.013 makes it clear that the intent of the statute is to ensure those injured on the job are able to obtain benefits, stating, "It is not necessary that at the time an injury is sustained by a worker he or she is doing the work on which his or her compensation is based." Thus, the statute affords the injured worker wide latitude in qualifying for benefits despite the fact that he may not be, at the time of his injury, actually engaged in work. In order to provide benefits for the

injured worker, RCW § 51.08.013 bestows artificial "acting in the course of employment" status for those coming and going on the jobsite, with the limited exception of the "parking lot rule" which in some circumstances excludes the injured worker from obtaining benefits when the injury occurs in a parking area. Nowhere in the statute is there a flip side to the benefits coin to apply artificial "acting in the course of employment" status and thus immunity to a negligent, non-injured coworker who is not actively working; he must prove that he was actively engaged in work for his employer to get immunity under common law test set forth by this Supreme Court. The only time "immunity" appears in Title 51 is in RCW § 51.24.035 with regard to design professionals on a construction project, which has no application here. A tortfeasor like Cook who has finished his shift, left his work area, and is driving his own car off the jobsite is not entitled to claim immunity under the premise of simply being a coworker at a prior time and location. The Court should deny review so that proceedings can move forward in keeping with this rule.

C. Nonworking Tortfeasor Is Not Immune Under Case Law.

There is no case law in Washington in which a tortfeasor is granted immunity based on the broad artificial "in the course of employment" language of RCW § 51.08.013 and who was not actually working at the time the injury occurred. The tortfeasor must bear the common law burden

of proving that he or she was actually engaged in work for the benefit of the employer. This Court has confirmed the common law burden applies to those seeking immunity in each case that has come up on appeal.

Cook continues to argue that benefits and immunity are like two sides of the same coin and that he should be entitled to show that the injured worker received benefits as evidence that he is entitled to immunity. Cook states that these concepts cannot be "divorced" from each other and the judge "*must know*" about the benefits to make a proper decision on immunity. It is well settled that Title 51 and its common law counterpart collateral source rule do not allow evidence of benefits, insurance, or other outside sources of coverage. Such evidence bears no impact on the issue of immunity and is inadmissible for any purpose under RCW§51.24.100 and the common law collateral source rule. Division I correctly determined that eligibility for benefits by one party does not resolve the immunity question for another. Benefits and immunity are separate and distinct concepts with no relevance or bearing on the determination of the other. This distinction is not new or different; it is a longstanding rule that such outside sources are not to be considered as evidence. Division I interpreted the statute correctly and in keeping with the statute and case law. It does not ignore or change the application of the

statute or hinder the judge's ability to determine one's right to pursue or challenge a third-party action.

Cook also argues that a worker's receipt of benefits is an exclusive remedy and restricts his ability to pursue a civil claim against a negligent coworker. Title 51 recognizes the right of an injured worker to be fully compensated, including the right to sue a negligent third-party. The right to recover fully in this way reflects the legislative intent to protect the worker. Recovery against a third-party is favored as it creates a right of subrogation in the self-insured employer or the Department of Labor and Industries.

Division I correctly reversed the trial court's decision to grant immunity to a negligent driver who was not doing any work, and, in the case at hand, under the influence of marijuana. The Court of Appeals rightly determined that the tortfeasor cannot rely on RCW § 51.08.013 to relieve him of responsibility for his own negligence when he is not doing any actual work. Granting immunity to non-working employees unjustly results in taxpayers and employers bearing the cost of negligence by employees engaged in activities unrelated to the business of the employer and leaves the employer or state with no ability to seek reimbursement/ subrogation against the at-fault party.

D. *Entila* Decision Mirrors Other Current Case Law.

The Division I decision at issue is also in keeping with the more recent case of *Orris v. Lingley*, 288 P.3d 1159 (2012) *review denied*, 304 P.3d 115 (Wash. 2013). In both *Orris* and *Entila*, (1) the plaintiffs were injured by negligent drivers who shared their employer; (2) the accidents occurred after the parties' shifts, (3) the plaintiffs received benefits under the Industrial Insurance Act; (4) the defendants argued that they were "commuting to or from the jobsite;" and (5) the defendants were allegedly impaired drivers who tested positive for marijuana after the accident. On these facts, the *Orris* court stated,

> Because Orris and Lingley were in the same employ, Orris would ordinarily be unable to bring a third party action against Lingley. However, " '[i]f both employees have a common employer but the negligent employee is not acting in the course of his employment at the time the injury occurs,' " the negligent employee is not immune from suit by the injured employee. *Evans v. Thompson,* 124 Wash.2d 435 (Wash. 1994) 879 P.2d 938 (quoting *Taylor v. Cady,* 18 Wash.App. 204, 206, 566 P.2d 987 (1977)). The Act defines " [a]cting in the course of employment" as " the worker acting at his or her employer's direction or in the furtherance of his or her employer's business...." RCW § 51.08.013. *Orris* at 1162.

The *Orris* court also held,

> The material question here is whether Lingley was acting in the course of his employment when the crash occurred. If he was not, then the Act authorizes Orris to maintain a third party action against Lingley's estate. *Id.*

> Orris contends that the THC and cannabinoids found in Lingley's body create a genuine issue of fact whether Lingley was so intoxicated that he abandoned the course of employment. Orris is correct. *Id.*
>
> Intoxication removes an employee from the course of employment if the employee becomes so intoxicated that he has abandoned his employment. *Flavorland Indus., Inc. v. Schumacker,* 32 Wash.App. 428, 434, 647 P.2d 1062 (1982). *Id.*

The *Orris* court further stated,

> Also, although the parties did not brief the issue, at oral argument, Orris argued that an employee commuting to and from work is generally acting *outside* the course of employment. Orris was correct; an employee commuting to and from work in his or her own vehicle is generally outside the course of employment. *Belnap v. Boeing Co.,* 64 Wash.App. 212, 221-22, 823 P.2d 528 (1992).

Following *Orris*, a third-party claim is authorized where the defendant has strayed from the course of employment; marijuana use raises the issue of whether the defendant driver abandoned his course of employment; and the use of his personal vehicle to commute home is, in general, outside the course of employment. In our case, Cook admits he wasn't doing any work and his marijuana use is not the basis on which Entila asserts that Cook was not in the course of his employment, although this fact supports Plaintiff Entila's position that immunity is inappropriate for Defendant Cook. This court denied review of *Orris* and should do the same here.

E. Case Law Applies Strict Definition of "Course of Employment."

RCW § 51.08.013 grants leeway to ***injured workers*** who may not be in the course of employment, stating, "It is not necessary that at the time an ***injury is sustained*** by a worker he or she is doing the work on which his or her compensation is based." Washington courts have rejected this broad construction of "course of employment" for uninjured tortfeasors seeking immunity stating,

> **To effectuate the legislative intent to provide compensation to injured workers** without regard to fault, **courts have broadly construed the statutory term "course of employment."** RCW § 51.08.013. See generally, 1A. Larson, The Law of Workmen's Compensation, Ch. 1 (1978). ***Imposition of vicarious tort liability, however, is based on common law negligence principles which do not require a broad construction of the term.*** *Strachan v. Kitsap County*, 27 Wn.App. 271, 275, 616 P.2d 1251, review denied, 94 Wash.2d 1025 (1980) (emphasis added).

The language of RCW § 51.08.013 was never intended to insulate uninjured non-working tortfeasors from liability,

> (t)he basic purpose for which the rules of vicarious liability were used at common law is different from the purpose of the rules used in compensation law." *Strachan v. Kitsap County*, 27 Wn.App. 271, 275, 616 P.2d 1251, 1254, review denied 94 Wash.2d 1025 (1980) citing *Fisher v. Seattle*, 62 Wash.2d 800, 803-804, 384 P.2d 852, 854 (1963) (emphasis added).

In *Strachan*, an off-duty city police officer accidentally shot and injured a county sheriff after completing his shift as a police officer and

while assisting the sheriff in performing county duties at the time of the accident. *Strachan* at 272. The court found the accidental shooting was outside the scope of his employment. *Strachan* at 274.

Although the *Strachan* facts are quite different than the case at hand, the outcome there also centered on the issue of whether the at-fault party was in the course of his employment. The court looked at the officer's actions to determine whether he was working at the time of the shooting and found that he was not. The case is analogous to *Olson, Evans, and now Entila,* where the court looked at the actions of the tortfeasor to determine if they are in keeping with someone who is in the course of employment and meet the common law test for being actively engaged in his employer's interest,

> The test adopted by this court for determining whether an employee is, at a given time, in the course of his employment, is whether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment, or by specific direction of his employer; or, as sometimes stated, whether he was engaged at the time in the furtherance of the employer's interest. *Strachan v. Kitsap County*, 27 Wn.App. 271, 616 P.2d 1251, review denied, 94 Wash.2d 1025 (1980) citing *Elder v. Cisco Constr. Co.*, 52 Wash.2d 241, 245, 324 P.2d 1082, 1085 (1958), quoting *Greene v. St. Paul-Mercury Indem. Co.*, 51 Wash.2d 569, 320 P.2d 311 (1958).

As set forth in *Olson, Evans, Orris, Strachan*, and *Entila,* to be in the course of employment for the purpose of establishing immunity

requires that one must meet the common law test for being actively engaged in or in furtherance of one's employer's interest. Without doing so, there is no immunity under Title 51. The *Entila* decision continues a long line of cases to this effect, and there is no conflict with the case law or statute. Review should be denied.

VI. CONCLUSION

Division I got this decision right. Immunity is inappropriate for an uninjured tortfeasor who is not doing any work, is under the influence of marijuana, and negligently drives his frost-covered vehicle into his co-worker. Granting immunity to an employee who has strayed so far from his course of employment leads to an inequitable result and is not in keeping with the plain meaning of the statute, the intent of the legislature, or the line of cases that say an employee must show he is acting in furtherance of his employer at the time of the accident in order to have immunity under Title 51.

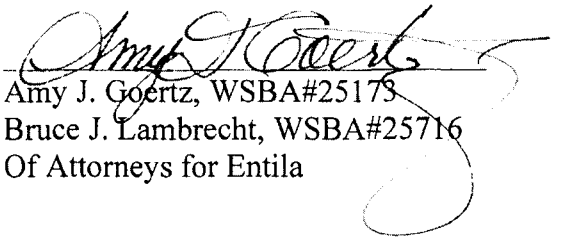
Requiring the tortfeasor to prove he is in the course of employment is in keeping with purpose of Title 51, the legislative intent to protect the injured worker, and the line of reasoning expressed in *Olson, Evans, Orris,* and *Strachan.* In each of those cases, the decision rested on the connection between the actions causing the injury and the at-fault party's course of employment. Over the past fifty years, the courts have

consistently declined to give carte blanche immunity to the negligent coworker who cannot show he was in the course of employment, whether it was the driver after his shift in *Olson,* the off-duty officer playing with his service weapon in *Strachan,* or the employee driving drunk and high in *Orris*. The determination did not rely on *where* these accidents took place but rather as it should - on the actions of the individuals causing the harm.

Entila respectfully asks this Court to deny review and allow him to pursue his claim against the negligent driver who failed to scrape his windshield and ran him down as he walked to his car.

Respectfully submitted this 23rd day of December 2015.

GOERTZ & LAMBRECHT PLLC



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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date indicated below, a true and correct copy of the attached Answer to Petition for Review was filed with the court and placed in the US mail, postage pre-paid to the following persons -

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DATED this December 23rd 2015 at Edmonds, Washington.

Amy J. Goertz, WSBA 25173

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Subject: Re: Case # 92581-0 - Francisco Entila, et ux. v. Gerald Cook, et ux.
Importance: High

Attached in PDF format is our Answer to Petition for Review.

A hard copy is going in the mail to opposing counsel. As instructed below we will not mail a hard copy to the Supreme Court as this PDF will be treated as an original.

Please let me know if we have missed something or need to do anything else.

Thanks.

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On Dec 15, 2015, at 12:55 PM, OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV> wrote:

Counsel:

Attached is a copy of the letter issued by the Clerk or Deputy Clerk on this date in the above referenced case. Please consider this as the original for your files, a copy will not be sent by regular mail. When filing documents by email with this Court, please use the main email address at supreme@courts.wa.gov

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