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NO. ~~90299-2~~

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Appellants,

vs.

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

Respondents.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable James Cayce, Judge

BRIEF OF RESPONDENTS

REED McCLURE
By Marilee C. Erickson WSBA #16144
Attorneys for Respondents

Address:

Financial Center
1215 Fourth Avenue, Suite 1700
Seattle, WA 98161-1087
(206) 292-4900

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I. NATURE OF CASE

Mr. Entila and Mr. Cook completed their shifts at Boeing. They were involved in a pedestrian vehicle accident on Boeing property. The accident did not occur in a parking lot. Mr. Entila sued Mr. Cook for negligence. The superior court concluded the Industrial Insurance Act applied so Mr. Cook was immune from liability. The case was dismissed. This Court should affirm.

II. RESTATEMENT OF ISSUE

1. Should this Court affirm the superior court's summary judgment dismissing plaintiffs' case because Mr. Cook is immune under the Industrial Insurance Act ("IIA") Title 51 RCW?

III. STATEMENT OF CASE

Mr. Entila and Mr. Cook were Boeing employees. (CP 39-40, 168-69, 176) On February 18, 2010, they were both leaving work after completing their shifts. (CP 2, 168, 198) Mr. Cook was driving his vehicle. (CP 2, 168-9) Mr. Entila was a pedestrian. (CP 2) Mr. Cook was driving on a Boeing access road. (CP 2, 169) Entila was crossing the road. (CP 2, 169, 176) Mr. Cook's vehicle hit Mr. Entila. (CP 168-69) The accident happened on an interior road on Boeing's property. (CP 215, 376)

The interior road allows access to the interior of the plants between the buildings. (CP 374) The interior road is not part of the designated parking lot area. (CP 172, 376) No parking is allowed on the access road. (CP 377) Mr. Entila testified: "It's a road. You cannot park on the road." (CP 215)

Boeing controls the road. Boeing has posted a speed limit on the road. (CP 375) Boeing security guards ticket drivers who violate the speed limit. (CP 375) Vehicles parked on the interior road can be ticketed and/or towed. (CP 378-9) Boeing has installed a marked cross-walk area on the interior road. (CP 377) Boeing also installed stop signs. (CP 377)

Mr. Entila sued alleging Mr. Cook was negligent and proximately caused Mr. Entila's injuries. (CP 1-3) Mr. Entila alleged that Mr. Cook was commuting home and was not acting in the course and scope of employment at the time of the accident. (CP 2, Complaint ¶ 3.3) Mr. Entila also alleged that the accident occurred in an area outside of the work area. (CP 2, Complaint ¶ 3.6)

Mr. Cook answered the complaint and denied negligence. (CP 153-56) Mr. Cook admitted that he was commuting home from work at the time of the accident but specifically denied that allegation that he was not acting in the course and scope of his employment. (CP 154) Mr.

Cook also denied the allegation that the accident occurred outside the work area. (CP 153)

Mr. Entila moved for summary judgment for an order that Mr. Cook was not entitled to immunity. (CP 23-34) The motion was supported by the declaration of Bruce Lambrecht, Mr. Entila's counsel. (CP 35-152) Mr. Cook opposed the summary judgment and submitted his own declaration (CP 157-67, 168-172) and a declaration from his counsel. (CP 173-77) Mr. Entila replied submitting a brief and another declaration from Mr. Lambrecht. (CP 178-82, 183-94) The court denied the summary judgment because of a factual issue about the parking lot. (CP 195-96)

Additional discovery was conducted. (CP 199) Mr. Cook then moved for summary judgment for an order that he was immune from liability. (CP 197-209) Mr. Cook submitted additional deposition testimony and materials. (CP 210-23) Mr. Entila submitted the same materials previously filed in support of his unsuccessful motion for summary judgment. (CP 237-363) Mr. Cook prepared a reply in support of the motion (CP 364-69) and submitted additional deposition excerpts. (CP 370-79)

The superior court heard oral argument and granted Mr. Cook's motion. (CP 380-81) The court ruled that no material facts exist and Mr.

Cook is entitled to immunity. (CP 381) Mr. Entila appealed and seeks direct review from the Supreme Court. (CP 382-85)

IV. ARGUMENT

A. THIS COURT'S REVIEW IS DE NOVO.

This case comes to the Court from a summary judgment ruling. This Court's review is de novo. *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 737, 844 P.2d 1006 (1993), *cert. denied*, 510 U.S. 1047 (1994). Summary judgment is appropriate if the record demonstrates no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998).

There is no factual dispute here. The record on summary judgment establishes that Mr. Entila and Mr. Cook were both leaving work in an area controlled by their employer that was not a parking lot. When Mr. Entila was injured, he was in the course of employment. The Industrial Insurance Act applies and Mr. Cook is immune from liability in a civil action. This Court should affirm.

B. MR. COOK IS IMMUNE BECAUSE PURSUANT TO RCW 51.08.013 MR. COOK AND MR. ENTILA WERE "ACTING IN THE COURSE OF EMPLOYMENT."

The IIA applies to workers who are injured while "acting in the course of employment." RCW 51.08.013 defines that phrase to include

time spent going to and from work at times "immediate to the actual time the worker is engaged" in work "in areas controlled by the employer" **except** for parking areas.

RCW 51.08.013 defines acting the course of employment under Washington's Industrial Insurance Act. The statute provides:

> 1) "Acting in the course of employment" means the worker acting at his or her employer's direction or in the furtherance of his or her employer's business which **shall include time spent going to and from work on the jobsite, as defined in RCW 51.32.015 and 51.36.040, insofar as such time is immediate to the actual time that the worker is engaged in the work process in areas controlled by his or her employer, except parking area.** 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 or that the event is within the time limits on which industrial insurance or medical aid premiums or assessments are paid.

(Emphasis added.)

RCW 51.32.015 and RCW 51.36.040 establish the meaning of going to and from work at the job site. The statutes are nearly identical. Each statute provides:

> The benefits of Title 51 RCW shall be provided to each worker receiving an injury, as defined therein, during the course of his or her employment and also during his or her lunch period as established by the employer while on the jobsite. **The jobsite shall consist of the premises as are occupied, used or contracted for by the employer for the business of[1] work process in which the**

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[1] RCW 51.36.040 is "of" instead of "or." The "of" seems to be a typographical error. *In re Hamilton*, 77 Wn.2d 355, 358-59 & n.1, 462 P.2d 917 (1969).

> **employer is then engaged:** PROVIDED, That if a worker by reason of his or her employment leaves such jobsite under the direction, control or request of the employer and if such worker is injured during his or her lunch period while so away from the jobsite, the worker shall receive the benefits as provided herein: AND PROVIDED FURTHER, That the employer need not consider the lunch period in worker hours for the purpose of reporting to the department unless the worker is actually paid for such period of time.

(Emphasis added.)

This case fits the statutory provisions of RCW 51.08.013. Both Mr. Entila and Mr. Cook were going from the work site. The accident and injury occurred just after the completion of their shifts so it was "immediate to the actual" work time. The accident and injury occurred in an area controlled by Boeing, the employer of Mr. Entila and Mr. Cook. The accident did not occur in a parking area or parking lot. Applying these undisputed facts to the statutes – RCW 51.08.013, 51.32.015, and RCW 51.36.040—the conclusion is that Mr. Entila and Mr. Cook were acting in the course of their employment so the Industrial Insurance Act applies and creates immunity.

Mr. Entila argues that only the injured worker is entitled to the protection of the IIA because no Washington case has granted immunity to a co-worker tortfeasor based on RCW 51.08.013. (App. Br. 11) He contends, without citing to any supporting legal authority, that the purpose of RCW 51.08.013 was to "expand opportunities for injured workers

seeking benefits in workers compensation cases." *Id.* Assuming for the sake of argument that expanding an injured worker's opportunity to obtain benefits is a purpose of the statute, it does not necessarily follow that the purpose is that a negligent co-worker is not protected by the statutory immunity.

Mr. Entila quotes from *Strachan v. Kitsap County*, 27 Wn. App. 271, 616 P.2d 1251, *rev. denied*, 94 Wn.2d 1025 (1980), as support for his contention that tortfeasors are not entitled to a broad construction of RCW 51.08.013's "course of employment" definition. The *Strachan* case is distinguishable. There a Poulsbo police officer accidently shot and injured a Kitsap County deputy sheriff. The officer had completed his shift. He was assisting the deputy in performing county police duties. 27 Wn. App. at 272.

The injured deputy argued Kitsap County was liable for the officer's actions. The County argued against liability because the officer's actions were outside the scope of his policing role. In addressing the issue of the scope of the officer's role, the Court of Appeals looked at *Tilly v. Department of Labor & Indus.*, 52 Wn.2d 148, 324 P.2d 432 (1958). *Tilly* stands for the proposition that in the industrial insurance setting, minor acts of horseplay may fall within the course of employment. The *Strachan*

court concluded the *Tilly* rationale about what acts are within the course of employment, did not apply to create liability for the County.

Strachan considered whether an industrial insurance case about scope of employment could be applied to determine whether the County could be vicariously liable for the officer's conduct. The *Strachan* court did acknowledge the different policies between industrial insurance and tort law. The court did not, however, hold that the industrial insurance laws do not apply to tortfeasors.

Mr. Entila argues that Mr. Cook is not entitled to immunity because Mr. Cook was not working at the time of the accident. (App. Br. 11) The record is undisputed that both Mr. Entila and Mr. Cook had ended their work shift. (CP 2, 168, 198) In the ordinary understanding of facts, neither man was working. Yet, the statutory definitions must be applied to these facts.

Mr. Entila cites to *Evans v. Thompson*, 124 Wn.2d 435, 444, 879 P.2d 938 (1994) and *Superior Asphalt & Concrete Co. v. Department of Labor & Indus.*, 19 Wn. App. 800, 804, 578 P.2d 59, *rev. denied*, 90 Wn. 2d 1022 (1978), for the rule that a co-employee must prove he is entitled to immunity. In *Evans*, the Supreme Court considered the issue of whether officers and directors of a corporate employer were immune as co-employees when at least one of the officers and directors was not

employed by the corporation. 124 Wn.2d at 437. *Evans* did not concern the question of what the particular co-employee was doing. The question was whether the person was or was not a co-employee. Therefore, the *Evans* case does not support Mr. Entila's argument.

Superior Asphalt did address the question of whether a person was acting within his scope of employment. The person died in an automobile accident twelve hours after leaving the job. He worked in Mossyrock and on the weekends drove home to Ellensburg, typically a three- to four-hour drive. His widow sought benefits under the IIA. Benefits were denied. The court concluded he had left his course of employment and was engaged in a frolic of his own. 19 Wn. App. at 804. *Superior Asphalt* is distinctly different and does not support Mr. Entila's argument here.

Here there is no question that Mr. Cook was in the course of employment as defined by RCW 51.08.013.

C. THE PROHIBITION ON ADMITTING WORKER'S COMPENSATION BENEFITS IN A CIVIL ACTION UNDER THE COLLATERAL SOURCE RULE HAS NO BEARING ON THE LEGAL ISSUE HERE.

Mr. Entila contends that two evidentiary provisions control the question of immunity here. (App. Br. 13-15) He contends that the fact of his eligibility for industrial insurance benefits, i.e. that he was injured in the course of employment, has no bearing on the legal issue of whether Mr. Cook, his co-employee, is entitled to immunity. Both RCW

51.24.100 and the common law collateral source rule prohibit a jury from hearing evidence about an injured plaintiff's industrial insurance benefits. These evidentiary provisions do not control the question of co-employee immunity.

This case presents the legal issue of whether Mr. Entila and Mr. Cook were in the course of employment as defined in RCW 51.08.013. Both were leaving their shift, they were both in an area owned and controlled by their employer, and that area was not a parking area or parking lot. Washington's legislature determined by adopting RCW 51.08.013 that under these circumstances, a person is in the course of employment. If Mr. Entila is dissatisfied with this statute, his remedy is to seek changes from the legislature, not the courts.

Washington courts have looked to the injured employee's receipt of benefits in analyzing whether the injured employee has a right to pursue a third party action. In *Orris v. Lingley*, 172 Wn. App. 61, 288 P.3d 1159 (2012), *rev. denied*, 177 Wn.2d 1020 (2013), Orris was seriously injured in a motor vehicle accident. Orris's co-worker, Lingley, was driving the vehicle, the employer's truck. The accident occurred on their commute home. Lingley was killed in the accident. Orris sought and was given IIA benefits. Orris then sued Lingley's estate. The Lingely estate successfully moved for summary judgment on the basis that Orris's suit was precluded

by the IIA. On appeal, Orris argued there were factual issues about whether he and Lingley were acting in the course of employment. The Court of Appeals reversed finding issues of fact regarding whether Lingley was so intoxicated that he had abandoned the course of employment and whether his driving of the employer's vehicle was done in furtherance of the employer's business.

Orris also argued there were questions about whether he was acting in the course of employment. The Court of Appeals rejected the argument. The Court of Appeals concluded that Orris was estopped from both accepting benefits premised on his injury occurring in the course of his employment and then later pursuing a negligence suit against his co-employee. The Court explained:

> Orris's receipt of benefits makes worker's compensation his exclusive remedy, except where the Act specifically authorizes an alternate remedy. Our Supreme Court has recognized that an injured employee may sue a negligent coemployee when the coemployee was acting outside the course of employment. But there is no corresponding rule that an injured employee who has received benefits may sue a negligent coemployee when *the injured employee* was acting outside the course of employment.
>
> The Act's strong and unequivocal language forecloses Orris from bringing a tort suit premised on the argument that he was outside the course of employment after accepting substantial L&I benefits.
>
> . . . Orris's acceptance of industrial insurance benefits precludes all remedies except those specifically authorized . . .

172 Wn.2d at 69-71 (internal citations omitted; emphasis in original). Thus, it is clear that the injured worker's receipt of benefits is a relevant and important factor in deciding immunity.

D. THIRD PARTY ACTIONS ARE LIMITED TO THOSE WHO ARE NOT IN THE SAME EMPLOY.

Mr. Entila argues that third party actions are favored and under that general theory, Mr. Cook should not be immune from liability. Mr. Entila fails to address that the Washington legislature has specifically limited third party actions to those who are not co-employees. RCW 51.24.030(1) 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.

(Emphasis added.) The statute gives the worker the option of pursuing a third party action. And if the worker chooses to pursue a third party action, the worker must give notice to the Department of Labor & Industries or the self-insurer. RCW 51.24.030(2).

An employee injured by a coworker's negligence is limited to the remedies provided by the IIA. RCW 51.04.010. RCW 51.24.030 specifically prohibits third party actions against a worker's co-employee. *Wilson v. Boots*, 57 Wn. App. 734, 736, 790 P.2d 192, *rev. denied*, 115 Wn.2d 1015 (1990). While the IIA permits third party actions, an action

against a co-employee is not a third party action. Mr. Entila's exclusive remedies are under the IIA. Mr. Cook, his co-employee, is not a third party. Both Mr. Entila and Mr. Cook were acting in the course of employment going to and from work on the jobsite immediately after their shift in an area controlled by Boeing, their employer, and that area was not a parking area or parking lot. The IIA applies here and Mr. Entila is barred from suing Mr. Cook, his co-employee.

E. *OLSON V. STERN* IS NOT DISPOSITIVE.

Mr. Entila argues for reversal relying on *Olson v. Stern*, 65 Wn.2d 871, 400 P.2d 305 (1965). (App. Br. 16-20). While *Olson v. Stern* did involve a negligence action against co-workers, it does not control here. The *Olson* case involved a parking lot accident. That fact alone distinguishes *Olson* from the present case.

Olson involved a lawsuit for personal injuries for a motor vehicle accident. Olson was driving a three-wheeled scooter as part of his job. Stern, a co-employee, was driving his own vehicle and was headed home from work. The accident occurred in a parking area. The defendant driver, Stern, asserted he was immune from liability because the accident fit with the Industrial Insurance Act.

The Court determined the IIA did not apply. The conclusion turned on two rationales: the defendant was not performing a work related

task and the accident occurred in a parking area. The *Olson* court explained:

> Respondent Sam Stern . . . had finished his day's work; he had completed his tasks for the day, and in driving out of the *parking area* 15 minutes after leaving his office, he was neither "acting at his employer's direction" nor "in the furtherance of his employer's business" (RCW 51.08.013), nor was he en route to a jobsite. . . . As to him, the place assigned to him for parking his car could not be said to constitute a jobsite under the workmen's compensation statutes, but rather it was, as the legislature described it, a parking area and, therefore, exempt from the workmen's compensation statutes.

65 Wn.2d at 877 (emphasis in original).

The holding in *Olson* is limited to its facts. The facts were that the accident occurred in the parking lot. Because it was in a parking area, Mr. Stern did not fit the statutory definition of being in the course of employment.

Mr. Entila urges this Court to conclude that the site of the accident is not crucial. He contends that *Olson v. Stern* was not decided based on the location of the accident. (App. Br. at 19). Mr. Entila quotes from and relies upon *Taylor v. Cady*, 18 Wn. App. 204, 566 P.2d 987 (1977), and the *Taylor* court's interpretation of *Olson*. In *Taylor*, the plaintiff and defendant were co-employees. Defendant had started his car in the employee parking lot. He then returned to the office building to perform a task for the employer. While inside the office, defendant's car rolled back

and hit and injured plaintiff. Plaintiff sued defendant for negligence. The negligence case was dismissed because the defendant was immune under the IIA.

Although the accident occurred in the parking area, Division III of the Court of Appeals noted that the parking area exception of RCW 51.08.013 did not apply. The Court concluded that the defendant was engaged in performing his job. Therefore, the defendant was immune from liability under Title 51 RCW.

The *Taylor* court rejected plaintiff's argument that because the accident occurred in the parking lot, the IIA did not apply. The *Taylor* court pointed to the *Olson v. Stern* case stating that *Olson*'s holding that the co-employee was not immune "not because the negligent act occurred in a parking area, but because he was not acting in the course of his employment." 18 Wn. App. at 207.

The *Taylor* court's interpretation of *Olson* was later criticized by Division II of the Court of Appeals in *Heim v. Longview Fibre Company*, 41 Wn. App. 745, 707 P.2d 689, *rev. denied*, 104 Wn.2d 1028 (1985). *Heim* involved a motorcycle versus pickup truck accident between two employees. The motorcyclist died. His widow sought IIA benefits. IIA benefits were denied. Relying on *Olson v. Stern*, the employer argued the IIA did not apply because the employee was not "acting in the course of

employment." The *Heim* court affirmed that IIA did not apply. The *Heim* court noted, however, that the *Taylor v. Cady* court incorrectly construed the *Olson*. 41 Wn. App. at 748.

> [W]e believe that the better view of *Olson* is that the worker was not covered because the accident occurred in a "parking area," and, therefore, under the express provision of RCW 51.08.013, there was no coverage, despite the fact that he may still have been on the jobsite while leaving work. In other words, but for the express parking area exception, the worker in *Olson* would have had coverage because he was acting in the course of employment while on the employer's premises under the "going and coming" rule.

41 Wn. App. at 748.

The one sentence in *Taylor v. Cady* does not convert *Olson* into controlling authority here. Rather the *Heim* court correctly construed *Olson* as a case decided based on the location of the accident. Here Mr. Entila and Mr. Cook undisputedly were on their employer's property, in an area not a parking area or lot. The IIA is the sole remedy available and under it, Mr. Cook is immune from liability. The superior court should be affirmed.

V. CONCLUSION

The superior court correctly decided summary judgment in favor of Mr. Cook. There are no issues of material facts. Mr. Cook is statutorily immune because the Industrial Insurance Act applies. This Court should affirm.

Dated this 22nd day of December 2014.

REED McCLURE

By _____
Marilee C. Erickson WSBA #16144
Attorneys for Respondents

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