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NO. 92581-0

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

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

Respondents,

vs.

**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**

SUPPLEMENTAL BRIEF OF PETITIONERS

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I. INTRODUCTION

Petitioner Cook offers this supplemental brief and asks this Court to reverse the Court of Appeals and reinstate the superior court's order dismissing Entila's complaint.

II. ARGUMENT

A. THE IIA PROVIDES THE EXCLUSIVE REMEDY FOR MR. ENTILA.

Washington's Industrial Insurance Act ("IIA") provides the exclusive remedy for injured workers except as provided in Title 51. RCW 51.04.010. When the legislature created the IIA in 1911, the legislature abolished all civil actions except as specifically provided in Title 51. Laws of 1911 ch. 74. The superior court's jurisdiction was eliminated over all civil causes of action except as provided in Title 51.

RCW 51.04.010 states:

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Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of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.

(Emphasis added.)

Division I's decision ignores this overarching, explicit public

policy and overstates the importance of third party actions. Title 51 does permit injured workers to bring civil actions against an employer or co-employee for deliberate, intentional injuries. RCW 51.24.020. Title 51 does permit injured workers to bring civil actions against third persons who are not co-employees. RCW 51.24.030. Beyond those two limited situations, an injured worker's remedies are limited to the IIA.

Under the guise of discerning legislative purpose, Division I concludes that co-employee immunity is narrowly construed based on a “strong policy in favor of third-party actions.” *Entila v. Cook*, 190 Wn. App. 477, 482, 360 P.3d 870 (2015), *rev. granted*, 369 P.3d 500 (2016). Division I cites to *Evans v. Thompson*, 124 Wn.2d 435, 437, 879 P.2d 938 (1994), in support of this rationale where this Court stated the “Legislature evidences a strong policy *in favor* of actions against third parties by assigning the cause of action to the Department . . .” 124 Wn.2d at 437 (emphasis in original). Yet, *Evans* involved a completely different scenario—whether officers and directors of a corporate employer are immune as a matter of law. *Evans* did not decide whether a third party action was allowed. *Evans* concluded there were issues of fact.

The better reasoning, consistent with the legislative purpose of the IIA, is found in *Wilson v. Boots*, 57 Wn. App. 734, 790 P.2d 192, *rev. denied*, 115 Wn.2d 1015 (1990). Division III of the Washington Court of

Appeals held the IIA was an injured worker's exclusive remedy for injuries caused by the alleged negligence of a co-employee. Plaintiff Wilson was a farm laborer for Corkrum & Son. Wilson and other Corkrum employees were burning stubble to prepare a field for planting. Two water trucks were part of the operation. Mr. Wilson was operating a water hose outside a water truck. Mr. Boots was driving the water truck. As Mr. Boots was backing the truck, Mr. Wilson walked behind the truck and was seriously injured.

Mr. Wilson filed a claim with the Department of Labor and Industries and received benefits. Mr. Wilson sued Mr. Boots for negligence. Mr. Boots moved for summary judgment arguing the IIA was the exclusive remedy. Division III affirmed. Mr. Wilson argued three public policy reasons justified his civil action: (1) recoupment of public funds; (2) full compensation for victims of auto accidents; and (3) the need to honor private insurance. 57 Wn. App. at 737-38. Division III noted the benefit to the general public by recoupment of funds, yet the IIA is the overriding policy. The legislature intended the IIA would be the exclusive remedy except as specifically stated in Title 51. If the legislature had intended to allow civil actions against negligent coemployees, the legislature could have specifically stated so in Title 51. Division III

concluded the injured worker's claim against the co-employee was barred by the IIA. The Court explained:

[T]he Wilsons note the general public would benefit if the Department were able to recoup funds payable by private insurance carriers in such circumstances. While this general benefit to the public is evident, an overriding public policy consideration is that a statute be interpreted to give full effect to the legislative intent. *Condit v. Lewis Refrigeration Co.*, 101 Wash.2d 106, 110, 676 P.2d 466 (1984). Had the Legislature intended to allow civil actions in negligence against co-employees, it could have specifically so provided. . . . The overall legislative intent must govern.

57 Wn. App. at 738 (footnotes omitted).

Similarly here, the overriding legislative direction of RCW 51.04.010 controls. The so called "co-employee immunity" is not narrowly construed. Rather Title 51 allows a civil action against a third person as a specific exception to the exclusive IIA remedy. Here Mr. Cook is not a third person. He is a person in the same employ as Mr. Entila. This Court should reinstate the superior court's order.

B. MR. COOK IS IMMUNE BECAUSE HE AND MR. ENTILA WERE IN THE SAME EMPLOY.

An injured worker is allowed to seek damages from a third person who is not his employer or co-worker. RCW 51.24.030 states:

(1) 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.)

It is undisputed that Entila and Cook were both employed by Boeing. (CP 39-40, 168-69, 176) It is undisputed that Entila and Cook were on the Boeing premises. (CP 2, 169, 176) It is undisputed that the accident occurred in an area other than a parking lot. (CP 215, 376)

The legislature established the IIA as the exclusive remedy for injured workers who are injured through the negligence of their employers or persons in the “same employ.” The legislature has not placed limitations on the “same employ” phrase. The legislature has had ample opportunity to do so. The legislature enacted statutes defining “employer” (RCW 51.08.070); “employee” (RCW 51.08.185); “worker” (RCW 51.08.180 and RCW 51.08.181); and exceptions to “employer” and “worker” (RCW 51.08.195). If the legislature wanted to place limitations on the “same employ” language, it could have done so.

Division I incorrectly concluded Cook was not in the same employ because he was not doing work for Boeing at the time of the accident. 190 Wn. App. at 479. This conclusion ignores the statutory definition of “acting in the course of employment.” RCW 51.08.013(1). Division I relied on this Court’s discussion in *Evans v. Thompson*, 124 Wn.2d 435, 879 P.2d 938 (1994). *Evans* does not stand for the proposition that a “person, not in a worker’s same employ” must be both acting in the scope

and course of employment. The main holding in *Evans* was that factual issues remained about whether a director and officer who also owned the property where the workers were injured was in the “same employ.”

The *Evans* Court only generally referred to “course of employment” and “scope of employment” in its analysis. The word scope is used 9 times in the majority opinion. It is used in a quote from a Florida case. 124 Wn.2d at 440. The *Evans* court says the requirement is the defendant was “acting in the scope and course of his or her employment.” 124 Wn.2d at 444. In the next paragraph, the *Evans* court interchangeably uses the phrases “in the course of” and “within the scope of.” *Id.* At least three of the references to “scope” are in the context of the scope of the defendant husband’s director duties. 124 Wn.2d at 445. One reference to “scope” is in the context of a hypothetical where the word seems to be used as a synonym for “course.” 124 Wn.2d at 447. There is no meaningful analysis or application in *Evans* of the two phrases “course of employment” and “scope of employment.”

No other Washington decisions impose the two-prong test of “scope of employment” and “course of employment” for establishing that

a person in the same employ under RCW 51.24.030(1).¹ In fact, the cases have consistently applied the singular “course of employment” test. In

¹ The phrase “scope of employment” is referenced in several post-RCW 51.08.013 cases involving IIA benefits, but none use the phrase to decide the issue of whether a defendant is a co-worker, co-employee, or “in a worker’s same employ.” *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 732, 254 P.3d 818 (2011) (scope of employment phrase used in discussing Idaho cases); *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 390, 47 P.3d 556 (2002) (court states IIA guarantees relief for employees injured “within the scope of their employment.”); *Bolin v. Kitsap County*, 114 Wn.2d 70, 75, 785 P.2d 805 (1990); *Knight v. Department of Labor and Industries*, 181 Wn. App. 788, 321 P.3d 1275 (2014); *Flavorland Industries, Inc. v. Schumacker*, 32 Wn. App. 428, 647 P.2d 1062 (1982); *N.A. Degerstrom, Inc. v. Department of Labor and Industries*, 25 Wn. App. 97, 604 P.2d 1337 (1980) (courts use “scope of” and “course of” employment phrases interchangeably in ruling whether IIA applied to injured worker.), *overruled by Westinghouse Elec. Corp. v. Department of Labor and Industries*, 94 Wn.2d 875, 621 P.2d 147 (1980); *Boeing Co. v. Fine*, 65 Wn.2d 169, 170, 396 P.2d 145 (1964) (scope of employment phrase used in statement of facts), *overruled by Longview Fibre Co. v. Weimer*, 95 Wn.2d 583, 628 P.2d 456 (1981); *Garibay v. State*, 131 Wn. App. 454, 128 P.3d 617 (2005) (uses “scope of his employment” in stating general rule that common law claims are abolished for injury claims while in the employee’s scope of employment); *Fria v. Washington State Dept. of Labor and Industries*, 125 Wn. App. 531, 534, 105 P.3d 33 (2004) (scope of employment used in stating general rule that IIA applies to injured worker); *Sillman v. Argus Services, Inc.*, 105 Wn. App. 232, 236, 19 P.3d 428 (2001) (court concludes defendant not a co-worker and uses phrase “scope of . . . employment” to state general rule that “co-workers are . . . immune from liability for job-related injuries they cause in the scope of their employment”); *Boeing Co. v. Rooney*, 102 Wn. App. 414, 425, 10 P.3d 423 (2000) (refers to employer’s argument that employee not entitled to IIA benefits because employee not in “scope of his employment.”); *Meyer ex rel. Meyer v. Burger King Corp.*, 101 Wn. App. 270, 272, 2 P.3d 1015 (2000) (scope of employment phrase used in parties’ stipulated facts); *Kirtley v. State*, 49 Wn. App. 894, 898-99, 748 P.2d 1128 (1987) (court concludes injured worker was a federal employee “acting within the scope of his federal employment” and factual issues remain whether civil action allowed); *Spencer v. City of Seattle*, 104 Wn.2d 30, 32, 700 P.2d 742 (1985) (injured worker “admittedly acting within the scope of his employment” so IIA applied and was exclusive remedy); *Lindquist v. Department of Labor & Industries*, 36 Wn. App. 646, 658, 677 P.2d 1134 (1984) (phrase “scope of their employment” used in analyzing whether Longshoreman’s Act or IIA applied to fatally injured longshoreman.); *Peterick v. State*, 22 Wn. App. 163, 174, 589 P.2d 250 (1977) quoting *Loger v. Washington Timber Prods., Inc.*, 8 Wn. App. 921, 927-928, 509 P.2d 1009 (1973) (common law actions barred for injuries to employee in the scope of his employment in extra-hazardous industry), *overruled by Stenberg v. Pacific Power & Light*, 104 Wn.2d 710, 709 P.2d 793 (1985); *Caldwell v. Yellow Cab Service, Inc.*, 2 Wn. App. 588, 589, 469 P.2d 218 (1970) (quotes affidavit which used scope of employment phrase).

Shelton v. Azar, Inc., 90 Wn. App. 923, 931-33, 954 P.2d 352 (1998), Division I addressed the issue of immunity under the IIA and said nothing about “scope of employment.”² See also *Wilson v. Boots*, 57 Wn. App. 734, 790 P.2d 192, rev. denied, 115 Wn.2d 1015 (1990).

C. OLSON V. STERN AND THE LEGISLATIVE HISTORY OF RCW 51.08.013 SHOW THAT THE IIA IS THE INJURED WORKER’S EXCLUSIVE REMEDY FOR AN ACCIDENT BETWEEN CO-WORKERS “GOING AND COMING” ON THE EMPLOYER’S PREMISES OTHER THAN A PARKING AREA.

Prior to 1961, Washington had no statutory definition of “acting in the course of employment.” In 1961, the legislature added the definition “acting in the course of employment.” The definition was originally presented in the 1961 legislature as House Bill 97. House Bill 97, 37th Legislature (1961). The bill was listed as a provision regarding the lunch hour. House Journal, 37th Legislature (1961), at 1376. The original bill stated that Title 51 applied to each workman receiving an injury during the course of employment and during the lunch period while on the jobsite. After the House passed the H.B. 97, the Senate proposed an amendment which became codified as RCW 51.08.013(1). Senate Journal, 37th Legislature (1961), at 989-90.

² The phrase “scope of employment” appears in Division I’s opinion where the court is referencing the respondent’s argument. Notably the discussion appears under the opinion’s subheading “Reed Was Acting in the Course of His Employment.”

The Senate amendment added the “acting in the course of employment” as a new section of RCW 51.08. *Id.*; Laws of 1961, ch. 107, § 3. It also added the “except parking areas”³ language. *Id.* Prior to the vote on the bill, the Senate discussed the unpredictability of determining when the IIA applied.

Senator Riley: “I would like your interpretation of what the following should be: Let’s assume there is a barracks being built at Fort Lewis and a construction man is on his way to the job where the barracks are being built. He is walking and he is injured some way on the way to the barracks job. Is he on the job site?”

Senator Gissberg: “My first reaction would be to say, ‘no, he would not be on the job site if he were walking someplace between the fence and the job site.’ The job site, I would assume could consist of the area adjacent someplace near the barracks area. In that case, there would be no coverage in that act.”

Senator Riley: “Let’s assume a man parked his car on the company furnished parking lot and he had to walk to the job site.”

Senator Gissberg: “No, he would not be on the job site if he were going across the street; that is a public street, and could not be assumed as part of the job. However, I want to assure you that all lawyers differ in their opinions and that is the reason that you have the Supreme Court interpreting the law to fit the facts. I cannot say here with absolute certainty in any of these examples that you gave me, or would give me hereafter, because it would just be an opinion.”

³ “Parking areas” is plural in the session laws. For some unknown reason, presumably a typographical error, the “s” was dropped from the statute when it was codified. See Laws of 1961, ch. 107, § 3 and RCW 51.08.013 attached as Appendix A and B respectively.

Senate Journal, 37th Legislature (1961), at 966. The Senate discussion also referred to the statewide hearings by the Legislative Council getting input from labor, management, and the Department of Labor and Industries. These hearings led to consensus and the Legislative Council proposing H.B. 97 about extending the IIA to the lunch hour. The amendment regarding “acting in the course of employment” was a result of a 1960 Supreme Court decision which overruled a substantial body of law. *Id.* at 966-67. The decision presumably is *West v. Mount Vernon Sand & Gravel, Inc.*, 56 Wn.2d 752, 355 P.2d 795 (1960), a case in which Senator Washington represented the defendant subcontractor. Senate Journal, 37th Legislature (1961), at 965, 967. In *West*, five justices of this Court held that it was appropriate to have the jury decide whether a worker who was injured before his work shift could bring a common law, civil action for negligence because the worker was not acting in the course of employment.

Prior to 1961, Washington also had no statutory enactment of the “going and coming” rule. *Hamilton v. Department of Labor & Industries*, 77 Wn.2d 355, 362-63, 462 P.2d 917 (1969). The adoption of RCW 51.08.013 in 1961 changed and expanded the scope of the IIA. *Id.*; *Miller v. St. Regis Co.*, 60 Wn.2d 484, 485-86, 374 P.2d 675 (1962).

During the Legislative Council meetings that led to 1961 H.B. 97, there was extensive discussion about whether parking lots should be included within the scope of the jobsite for purposes of the IIA. See Legislative Council, Subcommittee on Labor, Minutes of Meeting, Wenatchee, November 16, 1959.⁴ At the meeting, labor representatives discussed the advantages and disadvantages of excepting parking areas from the jobsite, i.e., that injuries in a parking area are excluded from the IIA. The members discussed the need and appropriateness to have a safe access route to a jobsite including the options of providing safety lights for crosswalks. *Id.* The following discussion took place:

Mr. Hively: . . . I'm concerned over these parking lots due to the fact that I've been in production and have had problems there and also on construction jobs. I'd like to have some clarification from Tommy [Richardson], if he would, on these parking lots. Let's take a case in point that has happened. A car is pulling out, somebody driving wrecklessly [sic] smashes into it and he injures two people in the parking lot.

Mr. Richardson: Then you get involved in your third party liability, that is already in the act.

Mr. Hively: I mean is it true that would cover that kind of thing?

Mr. Richardson: I say, you get involved in the third party. That is already in the act. If I am driving a car, I'm in a parking lot and you're in a parking lot, you are going to

⁴ Testimony offered to a committee is probative of legislature's intent. *Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 304, 149 P.3d 666 (2006).

your car and I'm in mine, and I run over you. I'm not the company. I'm not your employer, am I?

Mr. Hively: No.

Mr. Richardson: You can sue me, can't you? I better have a liability for you to do it.

Mr. Hively: That's right.

Mr. T. Richardson: And the company could get the third party.

Mr. Hively: In your previous statement, you were including parking lots in job sites because a guy might step out on an improperly graded deal and twist his ankle or break his neck. Where can we draw the line, is the point I'm making.

Mr. T. Richardson: I'd like to answer that question. If the company considers safety, as we should, and they keep a good road bed, not leaving holes in it, and not putting flags up, and all those things, very likely we'll never have a problem like this; if the safety is given consideration that we hope for it to be. But, for instance, the thing that bothers me here, if I leave, say my private home, and say one of my children leaves a tricycle, and you injure yourself. Now we've read one case after the other where the court has ruled that I'm liable because you fell over this tricycle. Now we're out here on a job and this the only way we have to get to this job, and it seems to me that the company's big object would be to try to eliminate all of these hazards that we are discussing here. For instance, you are going into a project, why couldn't it be fenced off? Why couldn't there be a roadway built in there where the trucks couldn't enter? Or if you have to cross an intersection of that pathway, there would be stop lights there. You can have those that work on batteries; we don't have to say that we have to run a line in there in order to feed this circuit. There are all types of safety precautions and measures that we can use, and these things aren't as absurd as we are trying to point out here. So I think we are talking about liability, and, if we eliminate all of those things and give just a much consideration to the employees and treat them like we'd like to be treated, or like we're

expected to treat them, we wouldn't be having this absurd illustration.

Mr. Hutchinson: Briefly, I can show you parking lots that are completely paved, with stall completely marked, with very well lighted access roads, and the people carelessly gun their car out and run somebody down. Now we've taken ever [sic] precaution as far as we possibly can, yet how are we going to take precautions against the man who doesn't drive properly in the parking lot? All you can do is fire him, and so what? I mean this is the point I want to make.

Mr. G. Richardson: But the company doesn't pay for the liability on the car highway. If I hit you, my public liability and property damage takes care of it.

Mr. Hutchinson: I'm asking if that is an industrial accident.

Mr. T. Richardson: Yes.

Mr. Hutchinson: You think it is. Well, that is just the point we wanted to make.

Mr. T. Richardson: Because, otherwise, it would be making an exception, and I'm opposed to making any exceptions because soon it becomes the rule.

Mr. Hutchinson: Mr. Chairman, Hutchinson of Seattle Chapter of AGC. As I mentioned in talking before, we feel there are certain areas which very definitely warrant coverage, yet I'm speaking for building construction for the Seattle Chapter. Frankly, I'm a little surprised and a little disappointed at Tommy Richardson when he says he wants 100% coverage with no exceptions. . . . This parking lot situation, to have a contractor have to sit out in the parking lot and police his employees is -- say the man comes back to the care and has three or four fast shots, the employer can't sit there and watch him and make sure he doesn't do that. He backs out and he hits somebody, and under the industrial insurance law, as it stands right now, if the man was covered by industrial insurance and he worked for the same employer as the man he hit, there would be no third party possibility. It would be the employer's responsibility. It think there has to be exceptions in here, Tom. I think

very many of them. I think that is why we are here to work out and try to figure out where the coverage should be and where the exceptions should be.

Mr. T. Richardson: Until I see them worked out, I would still oppose exceptions.

Legislative Council, Subcommittee on Labor, Minutes of Meeting, Wenatchee, November 16, 1959, pp. 12-14. These minutes were part of the process that led to the adoption of RCW 51.08.013, including the parking areas exception. *Miller v. St. Regis Paper Co.*, 60 Wn.2d at 485-86.

Olson v. Stern, 65 Wn.2d 871, 400 P.2d 305 (1965) was the first cases to apply RCW 51.08.013 to an accident in a parking lot. This Court allowed an injured worker to sue a co-worker because the accident occurred in a parking area. *Olson* stands for the proposition that if an accident occurs in a parking area, there is no immunity for the defendant driver because he does not fit the RCW 51.08.013 definition of "acting in the course of employment." From that decision, it follows that if an accident between co-workers who are immediately going from work on their employer's premises, in an area not a parking area, the workers are in the same employ and in the course of employment. Therefore, the IIA is the exclusive remedy and no third party action may be brought.

D. RCW 51.24.100 DOES NOT PROHIBIT A COURT FROM CONSIDERING THE INJURED WORKER'S RECEIPT OF IIA BENEFITS.

When deciding the threshold question of whether a plaintiff's action is against "a third person, not in a worker's same employ" and thus allowed by RCW 51.24.030, a court must be permitted to consider whether plaintiff received IIA benefits. RCW 51.24.100 states:

The fact that the injured worker or beneficiary is entitled to compensation under this title shall not be pleaded or admissible in evidence in any third party action under this chapter. Any challenge of the right to bring such action shall be made by supplemental pleadings only and shall be decided by the court as a matter of law.

Division I concluded that RCW 51.24.100 prohibits considering that Entila received IIA benefits. Division I's restricted interpretation of RCW 51.24.100 disregards the second sentence of the statute or, at least, renders the second sentence meaningless. Division I's interpretation of RCW 51.24.100 renders words of the statute superfluous. *State v. Fjermestad*, 114 Wn.2d 828, 835, 791 P.2d 897 (1990) (interpretation of statute requires using plain meaning of all words); *Wright v. Engum*, 124 Wn.2d 343, 352, 878 P.2d 1198 (1994) ("We do not interpret statutes so as to render any language superfluous.") (citing *Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 858 P.2d 245 (1993)). See also *City of Seattle v. McCready*, 123 Wn.2d 260, 280, 868 P.2d 134 (1994). The statutory language succinctly states the trial

court shall decide the issue as a matter of law. How else than a summary judgment proceeding is a trial court to decide the issue?

Division I noted plaintiff's receipt of IIA benefits was considered in *Orris v. Lingley*, 172 Wn. App. 61, 288 P.3d 1159 (2012), *rev. denied*, 177 Wn.2d 1020 (2013), yet concluded the receipt of IIA benefits could not be considered in deciding whether the co-employee had immunity. *Entila v. Cook*, 190 Wn. App. at 486-87. This is a distinction without a difference. The central issue in *Orris* was whether plaintiff could bring a third party action. Plaintiff's receipt of IIA benefits was acknowledged and discussed. The *Orris* court explained that. "[b]ecause Orris's acceptance of industrial insurance benefits precludes all remedies except those specifically authorized, . . . Orris is limited to the claim authorized by the Act: his third party claim premised on the argument that Lingley was acting outside the course of employment." 172 Wn. App. at 71.

Washington courts have shown no hesitation in referencing that a plaintiff is an injured worker who has received or is entitled to receive IIA benefits. In almost all of the decisions where a court has ruled on the question of whether an injured worker may bring a common law action, the courts have referenced the injured worker's receipt of IIA benefits.

- *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 47 P.3d 556 (2002) (on appeal from summary judgment, court

concludes employer is immune from suit and notes employee received IIA benefits).

- *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 932 P.2d 628 (1997), *as amended*, 945 P.2d 1119 (1997), *disapproved of by Washington Indep. Tel. Ass'n v. Washington Utilities & Transp. Comm'n*, 148 Wn.2d 887, 64 P.3d 606 (2003) (this Court concluded plaintiff's claim against employer barred and noted plaintiff's receipt of IIA benefits).
- *Spencer v. City of Seattle*, 104 Wn.2d 30, 700 P.2d 742 (1985) (on summary judgment dismissing city employee's action against city as barred by immunity noted employee had received IIA benefits).
- *Thompson v. Lewis Cty.*, 92 Wn.2d 204, 595 P.2d 541 (1979) (worker's suit against employer for 1974 injury, prior to enactment of RCW 51.24.100, dismissed on basis of immunity and court acknowledged worker's receipt of IIA benefits).
- *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d 550, 588 P.2d 1174 (1979) (in ruling that plaintiff was not an employee of defendant, this Court noted another plaintiff has received IIA benefits as employee of other entity).
- *Brame v. W. State Hosp.*, 136 Wn. App. 740, 150 P.3d 637 (2007) (trial court dismissed on summary judgment employees' lawsuit because they did not show "deliberate intention" and noted employees received IIA benefits).
- *Howland v. Grout*, 123 Wn. App. 6, 94 P.3d 332 (2004) (affirms summary judgment based on immunity and notes employee received IIA benefits), *rev. denied*, 110 P.3d 755 (2005).
- *Vallandigham v. Clover Park Sch. Dist. No. 400*, 119 Wn. App. 95, 79 P.3d 18 (2003), *aff'd*, 154 Wn.2d 16, 109 P.3d 805 (2005) (in summary judgment ruling dismissing special education instructors' suit against district, court noted plaintiffs received IIA benefits).

- *Schuchman v. Hoehn*, 119 Wn. App. 61, 79 P.3d 6 (2003) (employee's right to receive IIA benefits was central issue in case decided on summary judgment).
- *Rideau v. Cort Furniture Rental*, 110 Wn. App. 301, 39 P.3d 1006 (2002) (appellate court reversed summary judgment for employer on statutory immunity finding factual questions about whether plaintiff was loaned servant and noted plaintiff's receipt of IIA benefits).
- *Judy v. Hanford Envtl. Health Found.*, 106 Wn. App. 26, 22 P.3d 810 (2001) (court's summary judgment that immunity barred plaintiff's suit against employer, physician, and occupational health organization noted plaintiff had received IIA benefits), *rev. denied*, 144 Wn.2d 1020 (2001).
- *Shelton v. Azar, Inc.*, 90 Wn. App. 923, 954 P.2d 352 (1998) (appellate court holds suit against co-worker for contribution barred and notes plaintiff had received IIA benefits).
- *Henson v. Crisp*, 88 Wn. App. 957, 946 P.2d 1252 (1997) (in dismissing plaintiff's suit against employer for lack of proof of intentional injury, court noted plaintiff received IIA benefits), *rev. denied*, 135 Wn.2d 1010 (1998).
- *Kerr v. Olson*, 59 Wn. App. 470, 798 P.2d 819 (1990) (in summary judgment dismissing worker's suit against plant physician, court referenced plaintiff's receipt of IIA benefits), *rev. denied*, 116 Wn.2d 1011 (1991)
- *Deeter v. Safeway Stores, Inc.*, 50 Wn. App. 67, 747 P.2d 1103 (1987) (on summary judgment dismissing employee's lawsuit, court noted employee received IIA benefits), *rev. denied*, 110 Wn.2d 1016 (1988).

These cases demonstrate that the plain meaning of RCW 51.24.100 applies. A court can consider IIA benefits in deciding the legal issue of whether the IIA is the exclusive remedy or the lawsuit fits the third person exception of RCW 51.24.030.

In a summary judgment context, the trial court's consideration of the injured worker's receipt of benefits does not run afoul of this state's collateral source jurisprudence. Trial courts determine what evidence is admissible for the trier of fact. In *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 549 P.2d 483 (1976), this Court endorsed motions in limine, i.e., rulings on admissibility of evidence before presentation to the jury. 87 Wn.2d at 91. *See also* ER 104.

Division I's construction of RCW 51.24.100 runs contrary to the plain meaning of the statute. It also ignores the weight of cases and the practical realities of a court's determination of whether a civil action is a third person action allowed under RCW 51.24.030. Division I's holding should be reversed. This Court should apply the plain meaning of the statute and direct that courts, as they have for years, are allowed to consider IIA benefits in ruling on whether a civil action is allowed.

III. CONCLUSION

Washington's longstanding public policy makes the IIA the exclusive remedy for an injured worker unless Title 51 RCW expressly and explicitly provides an exception. The only possibly applicable exception here is a third person action under RCW 51.24.030. A person who is acting in the course of employment and in the same employ as the injured worker is not a third person. The court lacks subject matter

jurisdiction over Mr. Entila's lawsuit. Stated another way, Mr. Cook is immune from liability because the IIA controls. Division I's decision should be reversed and the superior court's order reinstated.

DATED this 3rd day of June, 2016.

REED McCLURE

By 
Marilee C. Erickson WSBA #16144
Attorneys for Petitioners Cook

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ous conditions or any new conditions that the board of prison terms and paroles may determine advisable. Before the board of prison terms and paroles shall nullify an order of suspension and reinstate a parole they shall have determined that the best interests of society and the individual shall best be served by such reinstatement rather than a return to a penal institution.

Passed the House March 6, 1961.

Passed the Senate March 5, 1961.

Approved by the Governor March 15, 1961.

CHAPTER 107.

[H. B. 97.]

INDUSTRIAL INSURANCE—COURSE OF EMPLOYMENT.

AN ACT relating to industrial insurance and medical aid; and adding a new section to chapter 51.32 RCW and to chapter 51.36 RCW; and amending chapter 23, Laws of 1961 and chapter 51.08 RCW.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. There is added to chapter 51.32 RCW New section. a new section to read as follows:

The benefits of Title 51 RCW shall be provided to each workman receiving an injury, as defined therein, during the course of his employment and also during his 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 or work process in which the employer is then engaged: Industrial insurance. Lunch on jobsite as course of employment. *Provided*, That if a workman by reason of his employment leaves such jobsite under the direction, control or request of the employer and if such workman is injured during his lunch period while so away from the jobsite, the workman shall receive

the benefits as provided herein: *And provided further*, That the employer need not consider the lunch period in workman hours for the purpose of reporting to the department unless the workman is actually paid for such period of time.

New section.

SEC. 2. There is added to chapter 51.36 RCW a new section to read as follows:

Medical
aid. Lunch
on jobsite as
course of
employment.

The benefits of Title 51 RCW shall be provided to each workman receiving an injury, as defined therein, during the course of his employment and also during his 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 work process in which the employer is then engaged: *Provided*, That if a workman by reason of his employment leaves such jobsite under the direction, control or request of the employer and if such workman is injured during his lunch period while so away from the jobsite, the workman shall receive the benefits as provided herein: *And provided further*, That the employer need not consider the lunch period in workman hours for the purpose of reporting to the department unless the workman is actually paid for such period of time.

New section.

SEC. 3. Chapter 23, Laws of 1961 and chapter 51.08 RCW are each amended to read as follows:

"Acting in the
course of
employment."

"Acting in the course of employment" means the workman acting at his employer's direction or in the furtherance of his employer's business which shall include time spent going to and from work on the jobsite, as defined in sections 1 and 2 of this act, insofar as such time is immediate to the actual time that the workman is engaged in the work process in areas controlled by his employer, except parking areas, and it is not necessary that at the time an injury is sustained by a workman he be doing the work on which his compensation is based or that

the event be within the time limits on which industrial insurance or medical aid premiums or assessments are paid.

Passed the House March 8, 1961.

Passed the Senate March 6, 1961.

Approved by the Governor March 15, 1961.

CHAPTER 108.

[H. B. 111.]

INDUSTRIAL INSURANCE—PENSION INCREASE.

AN ACT relating to industrial insurance; providing payments to pensioners of certain amounts in addition to pensions now payable thereunder; amending section 51.32.070, chapter 23, Laws of 1961 (House Bill No. 4) and RCW 51.32.070; repealing section 51.32.071, chapter 23, Laws of 1961 (House Bill No. 4) and RCW 51.32.071; and declaring an effective date.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. Section 51.32.070, chapter 23, Laws of 1961 (House Bill No. 4) and RCW 51.32.070 are each amended to read as follows:

RCW 51.32.070
amended.

Notwithstanding any other provision of law, every widow or invalid widower receiving a pension under this title shall, after July 1, 1961, be paid one hundred twenty-five dollars per month, and every permanently totally disabled workman receiving a pension under this title shall, after such date, be paid one hundred twenty-five dollars per month, in addition to any amount now or hereafter allowed in cases requiring the services of an attendant, if unmarried at the time his injury occurred; one hundred fifty-five dollars per month, in addition to any amount now or hereafter allowed in cases requiring the services of an attendant, if he or she has a wife or invalid husband; and seventy-five dollars per month, in addition to any amount now

Industrial
insurance.
Additional
payments
for prior
pensioners.

RCW 51.08.013**"Acting in the course of employment."**

(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.

(2) "Acting in the course of employment" does not include:

(a) Time spent going to or coming from the employer's place of business in an alternative commute mode, notwithstanding that the employer (i) paid directly or indirectly, in whole or in part, the cost of a fare, pass, or other expense associated with the alternative commute mode; (ii) promoted and encouraged employee use of one or more alternative commute modes; or (iii) otherwise participated in the provision of the alternative commute mode.

(b) An employee's participation in social activities, recreational or athletic activities, events, or competitions, and parties or picnics, whether or not the employer pays some or all of the costs thereof, unless: (i) The participation is during the employee's working hours, not including paid leave; (ii) the employee was paid monetary compensation by the employer to participate; or (iii) the employee was ordered or directed by the employer to participate or reasonably believed the employee was ordered or directed to participate.

(3) "Alternative commute mode" means (a) a carpool or vanpool arrangement whereby a group of at least two but not more than fifteen persons including passengers and driver, is transported between their places of abode or termini near those places, and their places of employment or educational or other institutions, where the driver is also on the way to or from his or her place of employment or educational or other institution; (b) a bus, ferry, or other public transportation service; or (c) a nonmotorized means of commuting such as bicycling or walking.

[1997 c 250 § 10; 1995 c 179 § 1; 1993 c 138 § 1; 1979 c 111 § 15; 1977 ex.s. c 350 § 8; 1961 c 107 § 3.]

NOTES:

Severability—1979 c 111: See note following RCW 46.74.010.

APPENDIX B

DATED this 3rd day of June, 2016.



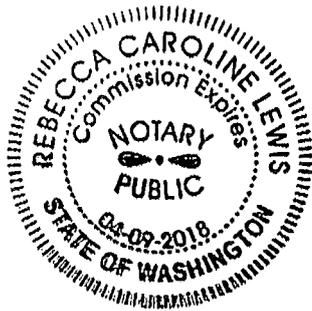
Jessica Pitre-Williams

SIGNED AND SWORN to before me on June 3, 2016, by Jessica
Pitre-Williams.



Print Name: Rebecca C. Lewis
Notary Public residing at: Lynnwood, WA
My appointment expires: 4-9-2018

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Attached for filing please find the following:

- Supplemental Brief of Petitioners
- Affidavit of Service

Marilee C. Erickson, WSBA #16144
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