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King County Superior Court Cause No. 12-2-33410-2 KNT

SUPREME COURT OF

THE STATE OF WASHINGTON

FRANCISCO ENTILA and ERLINDA ENTILA,

Plaintiffs/Appellants,

v.

GERALD COOK,

Defendant/Respondent

BRIEF OF APPELLANTS

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I. INTRODUCTION

Just after 6:30 a.m on February 18, 2010, Defendant Gerald Cook completed his shift at Boeing and walked to the employee parking area. Cook got in his car and, without scraping his frosted windshield, drove out of the employee parking lot with only a small unobscured area at the bottom of the windshield. Defendant Cook struck Plaintiff Entila as he walked across an avenue of traffic a few feet from the parking area. Defendant Cook states he never saw Mr. Entila. He tested positive for marijuana after the incident. Defendant Cook is an insured driver with substantial coverage from Allstate. Allstate refused to offer to settle the claim, insisting that Defendant Cook had immunity as an employee on the jobsite under RCW Title 51. Entila filed a civil suit against Cook and brought a Motion for Summary Judgment arguing that Cook was not on the job and therefore not entitled to immunity. Judge Marianne Spearman ruled that the issue was a question for the jury. After a trial continuance, Judge James Casey was assigned to the case and Defendant Cook brought his own Summary Judgment Motion. Defendant Cook argued that because he and Entila were both 'going from work on the jobsite,' RCW § 51.08.013 deemed them both "acting in the course of employment" giving Entila benefits and Cook immunity. Judge Cayce granted Defendant Cook's Motion for immunity. Plaintiff Entila filed a timely Notice of Appeal to this Supreme Court.

II. ASSIGNMENTS OF ERROR

A. The superior court erred by applying artificial "in the course of employment" status under RCW § 51.08.013 to both the injured worker seeking benefits and the tortfeasor seeking immunity when it only applies to injured workers seeking benefits. CP 380-381.

B. The superior court erred by not requiring the tortfeasor to meet the longstanding common law test of proving he was actually doing work for his employer in order to gain immunity. CP 380-381.

C. The superior court erred by considering evidence that the injured worker received benefits in the evaluation of immunity for the tortfeasor when such evidence is not only irrelevant but inadmissible under RCW § 51.24.100 and the common law collateral source rule. CP 380-381.

D. The superior court erred in denying the injured employee's constitutional and statutory right to sue the at-fault party, when such actions are encouraged under RCW § 51.24.050(1) to allow the injured employee to be made whole and for the self-insured employer and/or state to collect from the at-fault party under subrogation. CP 380-381.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Does RCW § 51.08.013 apply artificial "in the course of employment" status exclusively to the injured worker seeking benefits and not to the tortfeasor seeking immunity? (Assignment of Error #1.)

B. Does the tortfeasor bear the burden of proving under the common that he was actually doing work in the interest of his employer in order to gain immunity? (Assignment of Error #2.)

C. Is evidence as to whether the injured worker received benefits admissible for the purposes of determining immunity for the tortfeasor? (Assignment of Error #3.)

D. Does an injured worker have a constitutional and statutory right to bring a civil suit against a negligent driver who injures him on the jobsite when the tortfeasor is not on the job? (Assignment of Error #4.)

IV. STATEMENT OF THE CASE

A. Chronology of Key Events.

1. After his work shift, just after 6:30 a.m. on February 18, 2010, Defendant Cook clocked out and walked to his vehicle in an employee parking lot on Boeing property. CP 241.

2. Without removing the frost and fog from his windshield, Defendant Cook drove his personal vehicle out of the Boeing parking lot and onto a Boeing avenue of traffic, where he struck pedestrian Plaintiff Francisco Entila. CP 242.
3. Plaintiff Francisco Entila was walking across the avenue of traffic towards the parking lot when he was struck by Mr. Cook's vehicle. CP 242.
4. Cook did not see Entila through his frosted windshield. CP 242.
5. Cook did not hit the brakes before hitting Mr. Entila; he testified that when he heard the impact he thought someone had thrown a backpack onto his car. CP 250.
6. Defendant Cook was commuting home and not acting in the course and scope of his employment. CP 246
7. After the accident, Cook failed a drug test (tested positive for marijuana) and was terminated by Boeing when he refused to attend a drug and alcohol rehabilitation program. CP 248.
8. Cook is an insured driver with Allstate. CP 49-55.

B. History of the Case.

1. The parties were scheduled to attend mediation on April 4, 2012. Mr. Cook's insurer, Allstate, unilaterally cancelled the mediation proposing the theory that Defendant Cook was artificially "acting in the course of employment" under RCW § 51.08.013 and thus immune from suit. CP 49-55.

2. Allstate refused to negotiate or engage in settlement discussions unless and until the issue of immunity was heard by the court, forcing Plaintiffs to file suit on October 11, 2012, and bring a Motion for Summary Judgment on the issue, which was fully briefed by the parties and heard by Judge Marianne Spearman on February 14, 2013. CP 49-55.

3. At that time, the options before Judge Spearman were to deny immunity; grant immunity; or decide that the issue was a question of fact for the jury. Judge Spearman ruled that the issue was a question of fact for the jury. CP 195-196.

4. Neither side brought a Motion for Reconsideration or appealed the decision.

5. Allstate then brought the same motion when a new judge, James Cayce, was assigned to the case. CP 197.

6. Judge Cayce granted Defendant Cook immunity. CP 380.

V. SUMMARY OF ARGUMENT

When an employee is injured, RCW § 51.08.013 generously bestows artificial "acting in the course of employment" status for those coming and going on the jobsite in order for them to qualify for workers compensation benefits. The "parking lot rule" in RCW § 51.08.013 provides a limited exception to this general rule and in some circumstances excludes the injured worker from obtaining benefits when the injury occurs in a parking area. The language of the statute makes it clear it applies exclusively for injured workers seeking benefits and has nothing to do with immunity for uninjured tortfeasors; "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." RCW § 51.08.013. Thus, the statute affords Plaintiff Entila a wide latitude in qualifying for benefits despite the fact that he was, at the time of his injury, walking to his car and not actually engaged in work. On the contrary, the statute does not provide Defendant Cook the same broad range to gain immunity; he must prove that he was actively engaged in work for his employer.

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. The statute is inappropriate for the determination of immunity for a tortfeasor; he or she must meet the test

under the common law. In fact, 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.

To gain immunity, the at-fault worker 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. There is no case law in Washington where immunity is granted to an employee tortfeasor was not actually working at the time the injury occurs.

The trial court erred in granting immunity to tortfeasor Cook who admits that he was not actually performing any work. CP 198. The court incorrectly applied artificial "acting in the course of employment" status under RCW § Title 51.08.013 equally to the injured worker and the tortfeasor.

The superior court further erred in considering evidence that Plaintiff Entila received benefits. Such evidence bears no impact on the issue of immunity and, further, is inadmissible under Title 51 and the common law collateral source rule. RCW§51.24.100 specifically 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," which aligns with the common law theory

of the collateral source rule. The trial court accepted Defendant Cook's argument that he and Plaintiff Entila should have the same "on the job" status because both had finished their respective work shifts and were preparing to leave the jobsite, and since Entila received benefits, Cook should be entitled to immunity.

Defendant Cook also argued that Plaintiff Entila's receipt of benefits is an exclusive remedy and restricts his ability to pursue a civil claim against the negligent driver who struck him down as he walked to his car. Title 51 recognizes the right of an injured worker to be fully compensated, which includes the right to sue a negligent third-party. In fact, 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. If the injured worker does not pursue action against a third party with private counsel, the right to do so is assigned to the Department of Labor and Industries. RCW § 51.24.050(1)

The 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, leads to a grossly inequitable result. In cases like this, where the non-working tortfeasor was driving his personal vehicle, the auto insurance carrier should pay for its insured's negligence. The tortfeasor cannot rely on RCW § Title 51.08.013 to relieve him of responsibility for

his own negligence when he is not in the course of employment. Granting immunity to non-working employees unjustly results in taxpayers and employers bearing the cost of gross 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.

VI. ARGUMENT

The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. The court considers the facts and the inferences from the facts in a light most favorable to the nonmoving party. *Jones v. Allstate Ins. Co.*, 45 P.3d 1068, 146 Wn.2d 291, 301 (Wash. 2002). In the case at hand, Plaintiff Entila is the nonmoving party and is entitled to the most favorable interpretation of the facts presented.

A. RCW § 51.08.013 Applies Only To Injured Workers Seeking Benefits.

When an employee is injured, RCW § 51.08.013 generously bestows artificial "acting in the course of employment" status for those coming and going on the jobsite in order for them to qualify for workers compensation benefits. The "parking lot rule" in RCW § 51.08.013 provides a limited exception to this general rule and in some circumstances

excludes the injured worker from obtaining benefits when the injury occurs in a parking area. The language in the statute makes it clear that it applies for injured workers seeking benefits and has nothing to do with immunity for tortfeasors:

> "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." RCW § 51.08.013 (emphasis added)

B. RCW § 51.08.013 Does Not Grant Immunity To Tortfeasors.

The topic of immunity for tortfeasors causing injury to fellow employees is not discussed in Title 51 with the singular exception in RCW § 51.24.035, which applies to design professionals on a construction project, which has no application here.

Washington courts have noted that RCW § 51.08.013 was intended to broadly construe "course of employment" to assist injured workers in obtaining benefits and have rejected the broad construction of "course of employment" for 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).

There is no Washington case that has granted immunity to a tortfeasor based on the broad artificial "in the course of employment" language of RCW § 51.08.013, which was never intended to insulate tortfeasors from liability and usurp common law negligence principles. The purpose of RCW § 51.08.013 was to expand opportunities for injured workers seeking benefits in workers compensation cases, which differs from the common law applied to tortfeasors seeking immunity in tort cases, as stated,

> (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).

Here, Defendant Cook admits that he wasn't working. CP 198. He is not entitled to avail himself of the broad interpretations of Title 51 and instead must prove he is immune under the common law principles of negligence.

C. To Gain Immunity, A Tortfeasor Must Meet The Common Law Burden Of Proving He Was Actually Working At the Time Of The Accident.

Defendant Cook had the burden to prove his immunity and he did not do so. "[T]he burden is on the defendant to establish immunity as coemployees. *Evans v. Thompson*, 124 Wn.2d 435 (Wash. 1994) 879 P.2d 938 reconsideration denied 1994 citing CR8(c); *Superior Asphalt & Concrete Co. v. Department of Labor & Indus.*, 19 Wash.App. 800, 804, 578 P.2d 59, review denied, 90 Wash.2d 1022 (1978). Defendant Cook presented no evidence to show that he was entitled to immunity but instead relied on his assertion that the court was bound to grant him immunity if Plaintiff Entila received benefits. The court erred in considering the separate and distinct issues of immunity and benefits as two sides of the same coin. While the injured worker seeking benefits, Entila, is within the application of RCW § 51.08.013, Washington law requires the tortfeasor seeking immunity, Cook, to meet the common law test for being actively engaged in his employer's interest, as follows,

> 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).

In *Strachan*, an off-duty city police officer accidentally shot and injured Strachan, a county sheriff, after completing his shift as a police officer and while assisting Strachan in performing county duties at the time of the accident. *Strachan* at 272. The court denied immunity and ruled that the accidental shooting was outside the scope of his employment. *Strachan* at 274. Likewise in the case at hand, there is no evidence in the record to support a finding that Defendant Cook was acting in the scope of his employment when he was negligently driving his frost-covered vehicle. As in the *Strachan* case, when viewed in the light most favorable to the nonmoving party, Entila, it cannot be said that Defendant Cook was acting in furtherance of his employer's interest.

D. Plaintiff Entila's Receipt Of Benefits Is Irrelevant And Inadmissible.

Defendant Cook argues that since Boeing paid Plaintiff Entila benefits as a result of his injuries, Boeing must have deemed Entila as "in the course of employment" and Defendant Cook should have the same status. The superior court erred in considering Plaintiff Entila's receipt of benefits as a factor in the immunity of Defendant Cook because it is irrelevant as well as inadmissible. Whether an injured worker receives benefits bears no impact

on the issue of immunity for the tortfeasor and, further, such evidence is inadmissible under Title 51 and the common law collateral source rule. 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."

This statute aligns with the court's general exclusion of evidence that the plaintiff has received compensation from a third-party for an injury for which the defendant has liability. *Johnson v. Weyerhauser Co.*, 134 Wash.2d 795, 798, 953 P.2d 800 (1998). The rule is designed to prevent the wrongdoer from benefitting from third-party payments. *Cox v. Lewiston Grain Growers, Inc.*, 86 Wash.App 357, 375, 936 P.2d 1191 (1997).

E. Defendant Cook Cannot Introduce Entila's Benefits To Establish That Both Parties Were "In The Course Of Employment."

Boeing's payment of benefits is not a binding precedent that both parties were in the course of employment; it is a collateral source and should be disregarded by the court. The court is not bound by Boeing's decision to pay benefits while Mr. Entila pursues his claim against Cook; it merely creates a right of subrogation for Boeing. Mr. Entila's receipt of time loss or other benefits gives Boeing the right to reimbursement and by no means precludes the court from finding that a negligent driver in his personal

vehicle after work hours should face consequences for his actions. The Industrial Insurance Act provides [Boeing] with a right of reimbursement by subrogation from any third-party recoveries under RCW § 51.24.060(6). *Springstun v. Wright Schuchart, Inc.*, 851 P.2d 755, 70 Wn.App. 83 (Wash.App. Div. 1 1993).

F. Third Party Suits Are Favored.

Title 51 recognizes the right of an injured worker to be fully compensated, including the ability to sue a negligent third-party. In fact, the Courts acknowledge that "[t]he Legislature evidences a strong policy in favor of actions against third parties by assigning the cause of action to the Department of Labor and Industries if the workman elects not to bring a third party suit with private counsel. RCW § 51.24.050(1). *Evans v. Thompson*, 124 Wn.2d 435, 879 P.2d 938 reconsideration denied 1994.

Defendant Cook's reckless indifference and careless acts can in no way be deemed "in furtherance of his employer" and are by no means the type that Industrial Insurance was intended to cover. It is illogical to suggest that the legislature would have intended that the employer bear the expense of this type of accident. These types of accidents are covered by auto insurance. Here, the defendant is well-insured and has ample coverage to protect him while driving his car. The Legislature did not intend that the injured

employee would not be able to recover his full tort damages in cases where the accident was unrelated to the risk of the job duties, nor that the self-insured employer or Department of Labor and Industries would pay for injuries not part of the work processes.

G. Olson v. Stern Denied Immunity To Defendant Stern Because He Did Not Meet The Common Law Burden Of Proving He Was Actively Engaged In Work.

At the trial court in both hearings on Summary Judgment, the parties argued at length about the location of the accident and whether it fell within the parking lot exception to RCW § 51.08.013. Plaintiff Entila argued that the issue was whether the tortfeasor was on the job and not whether the accident took place in a parking area. Plaintiff Entila presented the case of *Olson v. Stern*, 65 Wn.2d 871, 874, 400 P.2d 305 (1965). Both the *Olson* accident and the one at issue took place on a Boeing jobsite in an avenue of traffic a few feet from the employee parking area. The *Olson* court denied immunity to the defendant Stern, stating that he 'derived no immunity from suit under the Work[er]'s Compensation Act because he had completed his tasks for the day. *Olson* at 874. The *Olson* court further elaborated,

> [Stern] was neither 'acting at his employer's direction' nor 'in the furtherance of his employer's business' nor was he en route to a jobsite. On the contrary, at the time of impact, he was driving home. *Olson v. Stern*, 65 Wn.2d 871, 874, 400 P.2d 305 (1965).

> That respondent Sam Stern and appellant Arthur Olson had the same employer became thus a matter of pure coincidence, a remote relationship giving rise to no legal rights and upon which no duties or immunities between them depended." *Olson* at 874.

No intervening case law overrules or modifies the holding in *Olson*. Later cases confirm and support the common law rule that immunity only attaches to the coemployee when the coemployee is acting in furtherance of his employer's business, such as in *Evans v. Thompson*, 124 Wn.2d 435, 879 P.2d 938 reconsideration denied 1994, which states it is "clear and well established" that,

> If 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, he is not immune from suit. *Olson v. Stern*, 65 Wash.2d 871, 400 P.2d 305 (1965)." *Taylor v. Cady,* 18 Wash.App. 204, 206, 566 P.2d 987 (1977).
>
> "It must be observed that the immunity attaches to the coemployee only when the coemployee is acting in the course of his employment." *Evans* at 943 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 v. Stern and the later cases deny immunity for the defendants under the common law because in each case, the defendant was not actually on the job. As in the case at hand, the *Olson* accident did not occur within the parking lot but rather just as the negligent driver left the boundaries of the parking area. The *Olson* decision created some confusion, however, by referring to the parking area exception in its analysis as follows:

> Unless, then, the parking area is a jobsite for the party claiming immunity from suit, we must accept the idea that the legislature intended to exclude accidents occurring in parking areas from the operation of the workmen's compensation statutes. Appellant Arthur Olson, being on shift, and driving a motor scooter loaded with the tools of his task as he went about his job, was, of course, then 'acting in the course of employment' in accordance with RCW 51.08.013, and the situs of the accident became as to him immaterial. He had assurance of workman's compensation.
>
> Respondent Sam Stern, however, had finished his day's work; he had completed his tasks for the day, and in driving out of the Parking area fifteen 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. On the contrary, at the time of impact, he was driving home. As to his, 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.
>
> That respondent Sam Stern and appellant Arthur Olson had the same employer became thus a matter of pure

> coincidence, a remote relationship giving rise to no legal rights and upon which no duties or immunities between them depended. Respondent Sam Stern, being at the time neither a workman in the course of his employment nor as to him in an area covered by workmen's compensation, was as a stranger both to appellant Arthur Olson and the Workmen's Compensation Act. So being, he derived no immunity from suit under the Workmen's Compensation Act. Appellants' action against him was accordingly maintainable as against a third party. *Olson* at 877.

The situs of the accident had no relevance to the issue of immunity for Defendant Stern nor did it relate to the issue of benefits for Appellant Olson. The quoted analysis referring to the situs of the accident raised the issue as to whether a non-working tortfeasor can derive immunity in an area of work normally covered by worker's compensation for injured workers, i.e., outside of the parking area. Fortunately, the Court in *Taylor v. Cady* clarified that the work status of the employee and not situs of the accident is the proper inquiry, stating,

> The key issue in determining immunity is not the situs of the accident but whether the worker seeking immunity was in the course of his employment at the time of the accident. *Taylor v. Cady*, 18 Wn.App. 204 (Wash.App. Div. 3 1977) 566 P.2d 987.

If this Court grants immunity to defendant Cook, it would be the first time a non-working tortfeasor was granted immunity purely because the accident was in an area normally covered by workers compensation for injured workers. The rationale and ruling that a tortfeasor must be working

has been upheld time and time again. See *Olson v. Stern*, 65 Wn.2d 871, P.2d 305 (1965); *Taylor v. Cady*, 18 Wn.App. 204 (Wash.App. Div. 3 1977) 566 P.2d 987, and *Evans v. Thompson*, 124 Wn.2d 435 (Wash. 1994) 879 P.2d 938 reconsideration denied 1994. These cases reflect the reasoning, purpose, spirit and policy behind the Industrial Insurance Act to protect the injured worker and allow him to seek redress against the party who injured him.

I. CONCLUSION

The court's decision to grant immunity to an uninjured tortfeasor under the influence of marijuana, not doing any work, and negligently operating his frost-covered vehicle leads to a grossly inequitable result. Granting immunity to non-working employees results in taxpayers and employers bearing the cost of gross negligence by parties engaged in activities unrelated to the business of the employer. Where the tortfeasor finished his shift and drove his personal vehicle, his auto insurance should pay for its insured's negligence and not taxpayers or employers.

Based on the foregoing argument and authority, Plaintiff-Appellants Entila respectfully ask the Court to reverse and vacate the superior court's summary judgment in favor of Defendant Cook and grant summary

judgment in favor of Plaintiff-Appellants Entila denying immunity for Defendant Cook under Title 51.

Respectfully submitted this 6th day of November 2014.

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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 Brief of Appellant was filed with the court and placed in the US mail, postage pre-paid to the following persons -

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Amy J. Goertz, WSBA 25173

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Entila v. Cook, Supreme Court Case No. 90299-2
Brief of Appellants

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