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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

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

An injured employee can bring a claim against a tortfeasor coworker if the tortfeasor coworker is not in the course of employment at the time of the injury. The Industrial Insurance Act (IIA or Title 51) defines acting in the course of employment as "the worker acting at his or her employer's direction or in the furtherance of his or her employer's business." The question here is simple: was the tortfeasor coworker in the course of employment at the time he caused the injury? Defendant Cook admits he was doing no work for his employer when he drove his own vehicle, under the influence of marijuana, after he failed to scrape his frosted windshield, and he never saw the plaintiff walking across the roadway before he struck him. He does not to meet the test of whether his actions were in the interest of his employer. Immunity should be denied.

II. SUMMARY OF REPLY

A. Title 51 states throughout the chapter, "The benefits of Title 51 shall be provided to ***each worker receiving an injury***." (emphasis added) The legislative intent and clear meaning of the statute is to provide help to ***those injured on the job***. There is no legislative intent, statute, or case law that supports immunity for a non-working, uninjured tortfeasor who causes the harm.

B. Defendant Cook cites irrelevant and strategically selected portions of *Orris v. Lingley*, 288 P.3d 1159 (2012) *review denied*, 304 P.3d 115 (Wash. 2013). The *Orris* case actually supports Entila's position and the full text, as cited below, proves that point.

C. Although Defendant Cook distinguishes the facts of *Strachan v. Kitsap County*, 27 Wn.App. 271, 616 P.2d 1251, *review denied*, 94 Wash.2d 1025 (1980), Cook has not and cannot deny the holding: the Industrial Insurance Act applies only to **injured workers** while tort law requires tortfeasors to prove they were actually working to gain immunity.

D. Defendant Cook has not and cannot refute the well-established rule of law the Defendant's actions determine whether he is in the course of employment as first set forth in *Olson v. Stern*, 65 Wn.2d 871, 400 P.2d 305 (1965) and upheld and follow to the present day.

III. REPLY

A. ***Title 51 Only Applies to Injured Workers.***

Defendant Cook leads his argument section with these words, "The IIA applies ***to workers who are injured*** while "acting in the course of employment." (emphasis added.) This is exactly the point of Plaintiff Entila's argument: the IIA applies to ***injured workers***. Further citations included in Cook's brief also note that Title 51 applies only to ***injured workers***, as set forth below.

RCW § 51.08.013 states, "It is not necessary at the time ***an injury is sustained by a worker*** he or she is doing the work on which his compensation is based." (emphasis added)

RCW § 51.32.015 and RCW § 51.36.040 each provide, "The benefits of Title 51 shall be provided to ***each worker receiving an injury***" (emphasis added) and "***if such worker is injured*** during his or her lunch period while so away from the jobsite, the [injured] worker shall receive the benefits as provided herein ...." (emphasis added)

There are no converse statutes providing that immunity or any other benefits will be provided to an employee who is not injured and causes harm to a fellow employee when he or she is not on the job.

The clear meaning and intent of Title 51 is to help those injured on the job. Plaintiff Entila is not seeking any change in the statute, just an application of the plain meaning as it is written: to help those suffering an injury on the job. The statute is devoid of the word 'immunity' because there was never any legislative intent to provide immunity by giving artificial "on the job" status to uninjured tortfeasors. There is certainly no public policy to be found in legislating immunity for an uninjured tortfeasor who gets high and drives his frost-covered car into his coworker as he leaves his shift.

B. The Orris *Case Fully Supports Plaintiff Entila.*

1. Receipt Of Benefits Does Not Preclude Claim.

Defendant Cook's reliance is misplaced on *Orris v. Lingley*, 288 P.3d 1159 (2012) *review denied*, 304 P.3d 115 (Wash. 2013) 177 Wn.2d 1020. In the *Orris* case, two coworkers were the driver and passenger in a company vehicle that crashed while driving from a jobsite back to the company shop, killing driver Lingley and injuring passenger Orris. To show that Orris and Lingley were "not in the same employ" in order to bring a third-party claim, Orris argued that he, the plaintiff, was not working at the time of the accident and also that Lingley, the defendant, was not working at the time of the crash. The *Orris* court did not say, as Defendant Cook asserts, that the injured coworker cannot bring a claim against his negligent co-employee. What it said was that Orris, after accepting benefits, could not bring a third-party claim by showing that *he himself* was not working; he must show that Lingley, *the defendant,* was not working:

> The material question here is whether [defendant] Lingley was acting in the course of his employment when the crash occurred. If he was not, then the Act authorizes [plaintiff] Orris to maintain a third-party action against Lingley's estate. *Orris* at 1162.

Defendant Cook's brief cites a misleading section of the *Orris* opinion in which he omits the portion allowing a third-party claim. The expanded quote shows that Orris could bring his claim if Lingley had strayed from the course of employment,

> ***Because*** Orris's acceptance of industrial insurance benefits precludes all remedies except those specifically authorized, ***Orris cannot recover from Lingley by showing that Orris himself was acting outside the course of employment. 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 his employment.*** *Orris* at 1164 (emphasis added to show omitted portion).

Similarly here, Entila's claim is one specifically authorized by the Act. As in *Orris,* he may bring his case against his negligent co-employee who was acting outside the course of employment.

2. ***Injured Worker and Tortfeasor Do Not Receive Benefits And Immunity Equally.***

Defendant Cook argues incorrectly that benefits and immunity are applied like two sides of the same coin under the statute. He argues that because he and Plaintiff Entila were in the same place and time relative to their work shifts and work areas, they should both be deemed in the course of employment. In support of his case, Defendant again cites selected portions of *Orris v. Lingley,* but an expanded view of the decision shows

that *Orris* follows the rule of law that the defendant must be in the course of employment to be immune, citing *Taylor v. Cady,* 18 Wash.App. 204, 566 P.2d 987 (1977) and *Evans v. Thompson,* 124 Wash.2d 435 (Wash. 1994) 879 P.2d 938, which follow the *Olson v. Stern* decision. The *Orris* case entirely supports Entila's position.

In *Orris* and the case at hand, (1) Both plaintiffs were injured by negligent drivers who shared their employer; (2) Both accidents occurred after the parties' shifts, (3) Both plaintiffs received benefits under the Industrial Insurance Act; (4) Both defendants argued that they were "commuting to or from the jobsite;" and (5) Both defendants were allegedly impaired drivers and tested positive for marijuana after the accident. On these facts, the *Orris* court stated,

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

The *Orris* court also held,

> The material question here is whether Lingley was acting in the course of his employment when the crash occurred. If he was not, then the Act authorizes Orris to maintain a third party action against Lingley's estate. *Id.*
>
> Orris contends that the THC and cannabinoids found in Lingley's body create a genuine issue of fact whether Lingley was so intoxicated that he abandoned the course of employment. Orris is correct. *Id.*
>
> Intoxication removes an employee from the course of employment if the employee becomes so intoxicated that he has abandoned his employment. *Flavorland Indus., Inc. v. Schumacker,* 32 Wash.App. 428, 434, 647 P.2d 1062 (1982). *Id.*

The *Orris* court further stated,

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

Following *Orris*, a third-party claim is authorized where the defendant has strayed from the course of employment; marijuana use raises the issue of whether the defendant driver abandoned his course of employment; and the use of his personal vehicle to commute home is, in general, outside the course of employment. All of this supports Plaintiff Entila's position that immunity is inappropriate for Defendant Cook.

C. *Title 51 Applies To Those On-the-Job; Tort Law Applies Those Who Are Not.*

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

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

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

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

In *Strachan*, an off-duty city police officer accidentally shot and injured a county sheriff after completing his shift as a police officer and while assisting the sheriff in performing county duties at the time of the accident. *Strachan* at 272. The court found the accidental shooting was outside the scope of his employment. *Strachan* at 274.

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

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

Defendant Cook also cites *Wilson v. Boots*, 57 Wn.App. 734, 736, 790 P.2d 192, rev. denied, 115 Wn.2d 1015 (1990). In the *Wilson* case, however, several farm workers ***were all in the course of employment*** when one worker injured another when he accidently backed a work truck into him on the job. That case has no relation to the case at hand. Here, there is no evidence in the record to support a finding that Defendant Cook was acting in the scope of his employment when he negligently drove his own frost-covered vehicle into his coworker; it cannot be said that Defendant Cook was acting in furtherance of his employer's interest.

D. Defendant's Actions Determine Liability.

The rule of law is that the defendant's actions determine liability or immunity, not the location of the accident. Plaintiff Entila has cited *Olson v. Stern*, 65 Wn.2d 871, 400 P.2d 305 (1965) for its striking factual similarity and favorable holding. 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 because he was not in the course of employment, 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.

In the fifty years since the *Olson* decision, this holding has been cited time and time again. Defendant Cook notes that one later case (*Heim v. Longview Fibre Company*, 41 Wn.App. 745, 707 P.2d 689, *rev. denied,* 104 Wn.2d 1028 (1985)) had a different interpretation of *Olson*, and asserts that this singular diversion from the chain of cases upholding and following *Olson* is controlling. No other immunity case cites *Heim*. The *Olson* holding, however, continues to be applied and the rule that immunity only attaches to the coemployee when the coemployee is acting in furtherance of his employer's business is still applicable today.

In 1977, *Taylor v. Cady* clarified the *Olson* decision 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.

In 1994, *Evans v. Thompson* again cited the rule of law that the defendant's action determine his liablility,

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

And also,

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

Interestingly, the 2012 *Orris* case, which is relied upon by Defendant Cook, cited both *Taylor* and *Evans*,

> [I]f both employees have a common employer but the negligent employee is not acting in the course of his employment at the time the injury occurs, the negligent employee is not immune from suit by the injured employee. *Evans v. Thompson*, 124 Wn.2d 435, 879 P.2d 938 reconsideration denied (1994) (quoting *Taylor v. Cady*, 18 Wash.App. 204, 206, 566 P.2d 987 (1977). The Act defines "[a]cting in the course of employment" as "the worker acting at his or her employer's direction or in the furtherance of his or her employer's business...." RCW 51.08.013. *Orris v. Lingley*, 288 P.3d 1159, 1162 (2012) *review denied*, 304 P.3d 115 (Wash. 2013) 177 Wn.2d 1020

The *Olson, Taylor, Evans*, and *Orris* cases reflect the reasoning, purpose, spirit and policy behind the Industrial Insurance Act: to help injured workers and allow them to seek redress against the party who actually injured them. Defendant Cook's reckless indifference and careless acts can in no way be deemed "in furtherance of his employer" as defined by the Act.

IV. CONCLUSION

Immunity is inappropriate for an uninjured tortfeasor not doing any work who is under the influence of marijuana and negligently operating his frost-covered vehicle when he injures his co-worker. Granting immunity to an employee who has strayed so far from his course of employment leads to an inequitable result and is not in keeping with the plain meaning of the statute or the line of cases that say an employee must show he is acting in furtherance of his employer at the time of the accident in order to have immunity under Title 51. Based on the foregoing argument and authority, Plaintiffs Entila respectfully ask the Court to reverse and vacate the superior court's summary judgment and deny immunity for Defendant Cook.

Respectfully submitted this 15th day of January 2015.

GOERTZ & LAMBRECHT PLLC

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Of Attorneys for Plaintiffs-Appellants

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

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