NO. 85581-0

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

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

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**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.**

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**APPEAL FROM KING COUNTY SUPERIOR COURT**
**Honorable James Cayce, Judge**

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# PETITION FOR REVIEW

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## I. NATURE OF THE 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 ("IIA") applied so Mr. Cook was statutorily immune from liability. The case was dismissed. Division I concluded that Mr. Cook was required to show he was in the course and scope of employment and had not established those facts. Division I reversed. This Court should accept review and reinstate the superior court's order of dismissal.

## II. ISSUES PRESENTED FOR REVIEW

1. Should this Court accept review of Division I's decision where the case presents an issue of substantial public importance and interest regarding the abolition of personal injury actions and the IIA as the exclusive remedy where a worker is injured by a co-worker?

2. Should this Court accept review of Division I's decision where the holding that a co-worker seeking immunity from a negligence action by a co-worker must establish that he was both in the course of employment and the scope of employment conflicts with this Court's decision in *Evans v. Thompson*?

3. Should this Court accept review of Division I's decision where the holding that an accident which occurs in an area under their employer's control and not in a parking area while the co-workers are immediately coming from work conflicts with this Court's decision in *Olson v. Stern?*

4. Should this Court accept review of Division I's decision where its holding that a superior court cannot consider IIA benefits raises an issue of substantial public importance because the ruling renders the second sentence of RCW 51.24.100 meaningless?

## III. RELEVANT FACTS

Mr. Entila and Mr. Cook were Boeing employees. (CP 39-40, 168-69, 176) They were both leaving work after completing their shifts. (CP 2, 168, 198) Mr. Cook was driving his vehicle. (CP 2, 168-69) 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 365, 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 365, 377) The access road is the only means of a vehicle getting to and from the parking area. (CP 170, 172)

Boeing controls the road: it sets the speed limit (CP 365, 375); issues tickets for speeding (CP 375); issues tickets and/or tows vehicles left on road (CP 378-79); installed a marked cross-walk (CP 377); installed stop signs (CP 377), and reconfigured the road as sole means for accessing parking lot (CP 170, 172).

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 jobsite. (CP 154)

The superior court ruled that no material facts exist and Mr. Cook was entitled to immunity. (CP 380-81) Mr. Entila appealed and sought

direct review from the Supreme Court. (CP 382-85) This Court transferred the case to Division I of the Court of Appeals.

On October 5, 2015, Division I issued its decision reversing the superior court's order and remanding for "further proceedings consistent with this opinion." A copy of decision is attached as Appendix A. Division I denied Mr. Cook's motion for reconsideration on October 27, 2015. A copy of the Order Denying Motion for Reconsideration is attached as Appendix B. Mr. Cook asks this Court to grant review.

## IV. ARGUMENT

This Court will accept discretionary review if the decision of the Court of Appeals conflicts with a decision of the Supreme Court or the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(1) and (4). Division I's decision fits both categories. It conflicts with Supreme Court decisions and raises issues of substantial public importance. Mr. Cook asks this Court to accept review.

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

Division I's decision conflicts with established Washington public policy and established rules of statutory construction. Washington's Industrial Insurance Act provides the exclusive remedy for injured workers except as provided in Title 51. RCW 51.04.010.

Since 1911 when the IIA was originally created, all civil actions for a worker's personal injuries have been abolished except as provided in Title 51. Chapter 74 of Laws of 1911, Section 1, now codified at RCW 51.04.010. The legislature abolished courts' jurisdiction over worker's personal injury 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.

The exclusive remedy of the IIA is further evidenced in RCW 51.32.010. It states: "Each worker injured in the course of his or her employment . . . shall receive compensation in accordance with this chapter, and, except as in this title otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever . . ."

RCW 51.24.030 contains one of the few exceptions to IIA's exclusivity. An injured worker is allowed to seek damages from the third person who is not his employer or co-worker. The statute 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.)

Washington courts have followed the statute and prohibited an injured worker from suing his co-worker. *Wilson v. Boots*, 57 Wn. App. 734, 790 P.2d 192, *rev. denied*, 115 Wn.2d 1015 (1990). In interpreting RCW 51.24.010, the previous codification of RCW 51.24.030(1), Division I explained:

> It is implicit in the legislature's inclusion of a provision in RCW 51.24.010 allowing a workman injured in the course of his employment by the "negligence or wrong of another not in the same employ" to elect to sue that person, that the legislature intended that one *in* the "same employ" would *not* be susceptible to suit. Had the legislature desired to include provisions stating that one in the same employ might be sued . . . it could have done so. The statutory language, however, does not include qualifications to the "same employ" terminology.

*Peterick v. State*, 22 Wn. App. 163, 190, 589 P.2d 250 (1977), (emphasis in original), *rev. denied*, 90 Wn.2d 1024 (1978), *overruled on other grounds*, *Stenberg v. Pac. Power & Light Co.*, 104 Wn.2d 710, 719, 709 P.2d 793 (1985).

Courts are to determine the legislative intent from the statute's language. *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 9, 43 P.3d 4 (2002). 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.

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.

Division I's decision improperly added the phrases "scope of employment" and "course of employment" to RCW 51.24.030 while applying the legislature's express RCW 51.08.013 definition of "acting in the course of employment" to only one worker. Statutory construction cannot be used to read additional words into a statute. *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007), *citing State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997). Division I's decision undermines the legislature's century old directive that the IIA is the exclusive remedy for an injured worker. Mr. Cook asks this Court to accept review of Division I's decision and affirm the superior court's order.

## B. WASHINGTON HAS NO "CLEAR REQUIREMENT THAT AN EMPLOYEE ACTED WITHIN BOTH THE COURSE AND SCOPE OF EMPLOYMENT TO ESTABLISH IMMUNITY."

Division I concluded that Mr. Cook did not have immunity from Mr. Entila's third party action because Mr. Cook did not establish that he was in both the course of employment and the scope of employment at the time of the accident. Surprisingly, Division I based its holding on *Evans v. Thompson*, 124 Wn.2d 435, 879 P.2d 938 (1994). Division I's decision actually conflicts with *Evans v. Thompson*.

In *Evans v. Thompson*, this Court held that there were factual issues about whether directors and officers who also owned the property where the workers were injured were in the "same employ." The *Evans* Court made passing reference to "scope of employment." The Court did not, however, expressly hold that a co-employee defendant seeking immunity (i.e. that IIA is exclusive remedy) must prove he was acting in the scope and the course of employment.

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."

Division I's decision conflicts with *Evans v. Thompson.* Washington law does not require that a co-worker must establish both scope of employment and course of employment to be immune from a third party action by a co-worker. If a co-worker in the course of his employment is injured by a co-employee in the course of his employment, the injured co-worker cannot pursue a third party action. Mr. Cook was in the course of his employment under RCW 51.08.013. He was on Boeing premises in an area specifically controlled by Boeing. He was not in a parking lot. He was immediately going from work and was considered to be on the jobsite. This Court should grant review of Division I's decision.

### C. DIVISION I'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *OLSON V. STERN.*

Division I's decision conflicts with *Olson v. Stern*, 65 Wn.2d 871, 400 P.2d 305 (1965). In *Olson,* this Court decided defendant was not

entitled to immunity from plaintiff's third party action because the accident occurred in a parking lot and defendant was not in the course of his employment.

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 within the Industrial Insurance Act.

This 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).

In *Olson*, this Court stated "[u]nless, 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 [IIA]." 65 Wn.2d at 877. Because the accident occurred in the parking area and the defendant was not working, the *Olson* Court determined defendant was not entitled to immunity from the third party action.

*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. Division I's decision conflicts with *Olson v. Stern*. This Court should accept review.

### D. DIVISION I'S INTERPRETATION OF RCW 51.24.100 IGNORES THE PLAIN STATUTORY LANGUAGE.

Division I's holding that a superior court cannot consider IIA benefits raises an issue of substantial public importance because the ruling renders statutory language meaningless. 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 paraphrased Mr. Entila's argument as the trial court is barred from considering evidence of Mr. Entila's IIA benefits to determine Cook's immunity. Division I held the "statute clearly prohibits evidence that Entila received benefits." (Appendix A at 10) Division I's holding ignores the second sentence of RCW 51.24.100---that whether a co-worker has a right to bring a third party action is decided as a matter of law. The fact a co-worker received IIA benefits cannot be divorced from the "challenge of the right to bring such [an] action." A trial court deciding a legal issue must be allowed to know the context of the challenge.

Here, the superior court was deciding the legal issue of Mr. Entila's right to bring a third party action against Mr. Cook. A superior court must be allowed to decide the legal issue of immunity.

Other statutes in RCW ch. 51.24 reveal that the receipt of IIA benefits sets the very context for a third party action. The existence of the payment of IIA benefits is a fundamental requirement of RCW 51.24.030. The statute 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 a third person.
>
> . . .
>
> (3) For purposes of this chapter, "injury" shall include any physical . . . condition . . . for which compensation and benefits are paid or payable under this title.

(Emphasis added.)

When RCW 51.24.030 and 51.24.100 are considered together, it is apparent that a court deciding the legal issue of whether an injured worker has the right to bring a third party action must know about the worker's IIA benefits. Division I's erroneous decision raises an issue of substantial public interest that this Court should review.

## V. CONCLUSION

Division I's decision conflicts with this Court's decisions in *Olson v. Stern* and *Evans v. Thompson* and the petition raises issues of substantial public importance regarding the exclusive remedy of the IIA and the meaning of RCW 51.24.100. Mr. Cook respectfully requests that this Court grant review.

DATED this 24th day of November, 2015.

**REED McCLURE**

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| FRANCISCO ENTILA and ERLINDA ENTILA, husband and wife, and the marital community composed thereof,<br><br>Appellants,<br><br>v.<br><br>GERALD COOK and JANE DOE COOK, husband and wife, and the marital community composed thereof,<br><br>Respondents. | ) | No. 73116-5-I<br><br>DIVISION ONE<br><br>PUBLISHED OPINION<br><br>FILED: October 5, 2015 |



LEACH, J. — Francisco Entila appeals the trial court's summary dismissal of his tort claim against his fellow employee, Gerald Cook, and its consideration of challenged evidence. The trial court decided that RCW 51.08.013 provided Cook immunity if the alleged tort occurred on the jobsite. Because Cook must also show that he was working at the time to establish immunity, we reverse.

The trial court considered Entila's receipt of workers' compensation benefits when deciding Cook's motion to dismiss. RCW 51.24.100 and the collateral source rule bar consideration of this evidence in a third-party tort action. The trial court erred when it did so.

**APPENDIX A**

## FACTS

Just after 6:30 a.m. on February 18, 2010, Cook left his work shift at Boeing and walked to his car to go home. He drove out of the Boeing parking lot onto a Boeing access road. Cook had not cleared his frosted windshield. He did not see Entila, another Boeing employee who had just finished his shift, crossing the access road. Cook's vehicle struck and injured Entila.[1]

Allstate insured Cook. Allstate claimed coemployee immunity barred Entila's injury claim against Cook. Entila disagreed. Entila filed suit on October 11, 2012. On October 12, 2012, he filed a motion for summary judgment on the immunity issue. On February 14, 2013, the trial court denied the motion, concluding that the issue presented a disputed question of fact for the jury. After a new judge was assigned the case, Allstate filed a motion for summary judgment. This judge dismissed Entila's lawsuit, concluding that Cook had immunity.

Entila appeals.

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[1] Cook has moved to strike allegedly improper references to extraneous facts in Entila's opening brief. As we noted in O'Neill v. City of Shoreline, 183 Wn. App. 15, 24, 332 P.3d 1099 (2014), motions to strike waste everyone's time when there is an opportunity (as there was here) to include argument in the party's brief identifying the allegedly extraneous materials. We deny Cook's motion.

## STANDARD OF REVIEW

We review a trial court's summary judgment order and associated evidence rulings de novo.[2] We perform the same inquiry as the trial court, viewing all facts and drawing all inferences in favor of the nonmoving party.[3] CR 56(c) requires summary judgment when the pleadings, affidavits, depositions, and admissions on file demonstrate that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. We review issues of statutory interpretation de novo, with the goal of giving effect to the legislature's intent.[4]

## ANALYSIS

This case tests the boundary for coemployee tort immunity. Entila contends that the tortfeasor must be performing work for the employer at the time of injury to have immunity. Cook asserts that RCW 51.08.013's broader definition of "acting in the course of employment" determines if a coemployee tortfeasor has immunity. We agree with Entila.

The Industrial Insurance Act (IIA), Title 51 RCW, entitles workers injured in the course of employment to compensation "in lieu of any and all rights of action whatsoever against any person whomsoever."[5] But the act also provides that if a

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[2] Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).
[3] Folsom, 135 Wn.2d at 663.
[4] Burns v. City of Seattle, 161 Wn.2d 129, 140, 164 P.3d 475 (2007).
[5] RCW 51.32.010.

third person, not in the same employ, is liable for the worker's injury, the worker may elect to recover damages from the third person.[6] Washington courts have limited the "not in the same employ" restriction. To establish coemployee immunity, a tortfeasor must prove two things: (1) that the tortfeasor and the injured person had the same employer and (2) that the tortfeasor was acting in the scope and course of his or her employment at the time of injury.[7]

Here, the parties dispute how a court decides if a coemployee is acting in the scope and course of employment when resolving an immunity claim. Cook asserts that a court must use the RCW 51.08.013(1) definition of "acting in the course of employment." Entila contends that this definition only applies when deciding if an injured worker is entitled to compensation. He argues a worker claiming immunity must prove more—that he was performing work for the employer at the time of injury.

RCW 51.08.013(1) defines "acting in the course of employment":

> "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

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[6] RCW 51.24.030(1).

[7] Evans v. Thompson, 124 Wn.2d 435, 444, 879 P.2d 938 (1994).

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

While this definition applies to all provisions of Title 51 RCW,[8] it does not answer our question. Unfortunately for our analysis, the phrase the legislature defined does not include all words contained in the second part of the court's test—"acting in the scope and course of employment."

Neither the text nor the structure of the applicable statutes provides an answer. Therefore, we look to legislative purpose and history for guidance. Because the IIA is remedial in nature, courts liberally construe its provisions "'in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.'"[9] Additionally, the legislature has shown a strong policy in favor of third-party actions.[10] These considerations support narrow immunity for coemployees.

The Washington Supreme Court has described the purpose of RCW 51.08.013:

> It is clear that the legislature, in enacting the pertinent legislation, intended to extend coverage to employees injured while going to and from work on the employer's premises, and to exclude

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[8] RCW 51.08.010 (words used in Title 51 RCW "shall have the meaning given in this chapter").

[9] Dep't of Labor & Indus. v. Rowley, 185 Wn. App. 154, 161, 340 P.3d 929 (2014) (quoting Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 470, 745 P.2d 1295 (1987)), review granted, 183 Wn.2d 1007 (2015).

[10] Evans, 124 Wn.2d at 437 ("These legislative declarations mandate policy decisions by the courts which give appropriate recognition to the third party action.").

> from coverage injuries occurring to an employee in a parking area maintained either on or off the employer's premises.[11]

While RCW 51.08.013 eliminated the requirement that a worker be performing work for the employer when injured to qualify for compensation, nothing in the history leading to this statute's enactment[12] suggests that the legislature intended that it also expand the scope of coemployee immunity. Given the legislative policy favoring third-party actions, one would expect any expansion of immunity to be clearly stated.

Entila relies on Olson v. Stern.[13] This case also arose out of a collision in a Boeing parking lot. Olson, a worker performing his job, operated a motor scooter, and Stern, an office worker on his way home, drove his personal car. These vehicles collided in the parking lot.[14] The trial court dismissed Olson's personal injury claim against Stern on the basis of coemployee immunity.[15] The Supreme Court reversed and remanded for trial.[16]

The court identified two reasons for its decision. First, although Olson was "'acting in the course of employment'" and covered by workers' compensation, the parking lot was not Stern's jobsite and he was not covered by worker's

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[11] In re Hamilton, 77 Wn.2d 355, 362, 462 P.2d 917 (1969).
[12] See Hamilton, 77 Wn.2d at 359-62.
[13] 65 Wn.2d 871, 400 P.2d 305 (1965).
[14] Olson, 65 Wn.2d at 872.
[15] Olson, 65 Wn.2d at 874.
[16] Olson, 65 Wn.2d at 877.

compensation statutes.[17] Second, at the time of the collision, Stern was "neither 'acting at his employer's direction' nor 'in the furtherance of his employer's business.'"[18] The court concluded its opinion with the following pertinent observations:

> 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.[19]

Cook claims that the court found no immunity in Olson because the collision occurred in a parking lot. As a result, Stern could not satisfy the statutory definition of "acting in the course of employment." Entila and Cook each claim a court of appeals decision supports his reading of Olson.

Entila cites Taylor v. Cady[20] for the proposition that an employee's work status, and not the place of an accident, determines the employee's immunity. Taylor sued Cady for injuries he suffered in their common employer's parking

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[17] Olson, 65 Wn.2d at 877.
[18] Olson, 65 Wn.2d at 877.
[19] Olson, 65 Wn.2d at 877.
[20] 18 Wn. App. 204, 566 P.2d 987 (1977).

lot.[21] Taylor appealed the dismissal of his lawsuit on the basis of Cady's coemployee immunity.[22] Taylor claimed that Cady had no immunity because RCW 51.08.013 excludes a parking lot from the definition of "acting in the course of employment."[23] Division Three of this court affirmed the dismissal. In rejecting Taylor's argument, the court stated that the Olson court rejected Stern's immunity claim because he was not acting in the course of his employment, not because the collision occurred in a parking lot.[24] As a result, the court concluded that a worker causing an accident in a parking lot had coemployee immunity if he was performing work at the time of the accident.[25]

Cook responds with Heim v. Longview Fibre Co.[26] The Heim court disagreed with Division Three's reading of Olson:

> We believe that the trial court and respondent have incorrectly construed the ruling in *Olson*. There is some support for their reading of *Olson* in *Taylor v. Cady,* 18 Wn. App. 204, 566 P.2d 987 (1977), which interpreted *Olson* as restricting the definition of "course of employment." However, we 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

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[21] Taylor, 18 Wn. App. at 205.
[22] Taylor, 18 Wn. App. at 204-05.
[23] Taylor, 18 Wn. App. at 206.
[24] Taylor, 18 Wn. App. at 207.
[25] Taylor, 18 Wn. App. at 207-08.
[26] 41 Wn. App. 745, 707 P.2d 689 (1985).

> in the course of employment while on the employer's premises under the "going and coming" rule.[27]

This quotation appears to reflect some confusion about the issue in Olson. The Olson court did not resolve coverage for the injured worker, Olson, but immunity for Stern. Additionally, the Heim opinion addresses the issue of coverage for a worker injured off the jobsite and not engaged in work.

Our Supreme Court's observations about the purpose of coemployee immunity in the context of officers and directors provide more guidance than Taylor or Heim:

> 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 one whose only connection with the corporate employer's business is having his or her name on a piece of paper as an officer and/or director. 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. That would frustrate the direction of the Legislature that the Department be reimbursed from proceeds of such third party action.[28]

These observations seem equally applicable to Cook. Cook's only connections with his employer at the time were the place he parked his car and the route he chose to leave the parking lot. Like Stern in Olson, Cook was a stranger to his coemployee and the IIA. Given the purpose of coemployee

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[27] Heim, 41 Wn. App. at 748.
[28] Evans, 124 Wn.2d at 447.

immunity, our case law's clear requirement that an employee acted within both the course and scope of employment to establish immunity, the legislative preference for third-party actions, and the absence of any legislative history supporting Cook's position, we conclude that the trial court erred. To establish immunity, Cook must show that he was doing work for Boeing at the time of the accident.

Entila finally argues that RCW 51.24.100 and the common law collateral source rule barred the trial court from considering evidence of Entila's receipt of benefits to determine Cook's immunity. Cook responds that those rules do not apply when litigating coemployee immunity.

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.

This statute clearly prohibits evidence that Entila received benefits.

Additionally, the common law collateral source rule also bars admission of evidence of any payment that does not come from the tortfeasor.[29] Washington courts uniformly apply the collateral source rule in compensation claims and

[29] Johnson v. Weyerhaeuser Co., 134 Wn.2d 795, 798, 953 P.2d 800 (1998).

personal injury cases.[30] Both this rule and RCW 51.24.100 barred consideration of Entila's receipt of benefits to decide Cook's immunity. Also, as reflected in Olson, this evidence was not relevant to whether Entila could sue Cook because an injured worker's eligibility for benefits does not resolve a coemployee's immunity claim.[31]

Cook argues that Orris v. Lingley[32] allows consideration of this evidence. We disagree. As authorized by RCW 51.24.100, the Orris court considered this evidence to decide the threshold question of whether the exclusive remedy provisions of the IIA applied to Orris.[33] Because Orris had accepted benefits, he could not deny that the act applied to his third-party claim.[34] The court did not consider this evidence to resolve an issue of coemployee immunity. Entila has not made any claim that the act does not apply to his claim against Cook. Instead, he asserts that the act does not provide Cook with immunity.

CONCLUSION

Because a tortfeasor claiming coemployee immunity must show that he was doing work for the employer to establish this immunity and Cook has not

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[30] Johnson, 134 Wn.2d at 804-05.
[31] Olson, 65 Wn.2d at 877.
[32] 172 Wn. App. 61, 288 P.3d 1159 (2012).
[33] Orris, 172 Wn. App. at 69-71.
[34] The Orris opinion does not reflect that Orris objected to the court's consideration of this evidence. Thus, neither the trial court nor the reviewing court was asked to consider the application of RCW 51.24.100.

done so, we reverse and remand for further proceedings consistent with this opinion.

Leach, J.

WE CONCUR:

Schindler, J.

Cox, J.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| FRANCISCO ENTILA and ERLINDA ENTILA, husband and wife, and the marital community composed thereof,<br><br>Appellants,<br><br>v.<br><br>GERALD COOK and JANE DOE COOK, husband and wife, and the marital community composed thereof,<br><br>Respondents. | No. 73116-5-I<br><br>ORDER DENYING MOTION FOR RECONSIDERATION |

The respondent, Gerald Cook, having filed a motion for reconsideration herein, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 27th day of October, 2015.

FOR THE COURT:

Leach, J.
Judge



**APPENDIX B**