

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

PETITIONERS' ANSWER TO AMICUS CURIAE WSAJF BRIEF

REED McCLURE

By Marilee C. Erickson WSBA #16144
Attorneys for Petitioners

Address:

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

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I. INTRODUCTION

Petitioner Gerald Cook (“Mr. Cook”) offers this answer to Brief of Amicus Curiae Washington State Association for Justice Foundation.

II. SUMMARY OF ARGUMENT

This case presents this Court with a choice of whether to follow the established rules of statutory construction or to move away from the Legislature’s directive by applying common law principles to statutory language. This Court should follow the established rules of statutory construction and abide by the express provisions of RCW 51.04.010 that all common law principles for injured workers are “abolished, except as in this title provided” and that RCW ch. 51.08 statutory definitions apply throughout Title 51. RCW 51.08.010.

Title 51 allows only a civil action for personal injuries against a third party not in the same employ. RCW 51.24.030. If a coworker injures another worker while acting in the course of employment, the coworker is in the same employ and not a third party. Amicus argues the RCW 51.08.013 “acting in the course of employment” definition applies only to an injured worker. Yet, the statute does not contain any such limitation. And RCW 51.08.010 states: “[u]nless the context indicates otherwise, words used in this title shall have the meaning given in this chapter.” Therefore, the RCW 51.08.013 statutory definition of “acting in

the course of employment” applies throughout Title 51 RCW, not just to the injured worker.

Alternatively, if the RCW 51.08.013 definition does not apply, the ordinary dictionary meaning of the phrase “same employ” applies. *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 528, 243 P.3d 1283 (2010). “Same” means “resembling in every way.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY at 2007 (1993). “Employ” means “the state of being employed esp. for wages or a salary by someone or something.” *Id.* at 743. Using these ordinary meanings, there is no dispute that Mr. Entila and Mr. Cook were employed by Boeing.

III. ARGUMENT

A. THE LEGISLATIVE’S INTENT, EXPLICIT PUBLIC POLICY, AND FUNDAMENTAL RULES OF STATUTORY CONSTRUCTION ESTABLISH THE IIA IS MR. ENTILA’S EXCLUSIVE REMEDY.

Amicus WSAJF proposes that this Court apply common law concepts to the purely statutory scheme of worker’s compensation. (Amicus at 4) Amicus asks this Court to use a common law test to determine whether a coworker is immune under RCW 51.24.030. *Id.* Amicus suggests the test for immunity should be whether a coworker’s conduct makes the employer vicariously liable. In other words, using common law principles, if the coworker’s conduct was in furtherance of

the employer's business then the coworker is immune from a third-party action.

Amicus argues that in the absence of a statutory definition for the phrase "same employ," this Court should apply a common law test. (Amicus at 5-6) The argument ignores Washington's established rules of statutory construction. This Court should not ignore a fundamental principle of statutory construction: if the Legislature had wanted to limit co-employee immunity to only those injuries occurring while the co-employee was acting in the course and scope of employment, the Legislature could have included the provision in the statute. *State v. Delgado*, 148 Wn.2d 723, 727-28, 63 P.3d 792 (2003); *State v. Slatum*, 173 Wn. App. 640, 655, 295 P.3d 788, *rev. denied*, 178 Wn.2d 1010 (2013).

A court has the duty to effectuate the Legislature's intent in enacting a statute. The court must apply the language as the Legislature wrote it, not amend the statute by judicial construction. *Salts v. Estes*, 133 Wn.2d 160, 170, 934 P.2d 275 (1997). "Courts do not amend statutes by judicial construction, nor rewrite statutes 'to avoid difficulties in construing and applying them.'" *Millay v. Cam*, 135 Wn.2d 193, 203, 955 P.2d 791 (1998) (citation omitted).

RCW 51.04.010 succinctly states the Legislative intent and explicit public policy:

The common law system governing the remedy of workers against employers for injuries receive in employment is inconsistent with modern industrial conditions. . . The state of Washington . . . 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.)

This Court has consistently held that the IIA eliminated civil remedies and abolished the court's jurisdiction of common law actions, except as specifically provided in Title 51 RCW. *Cowlitz Stud. Co v. Clevenger*, 157 Wn.2d 569, 572, 141 P.3d 1 (2006); *Cox v. Spangler*, 141 Wn.2d 431, 446, n.5, 5 P.3d 1265 (2000).

RCW 51.24.030 contains one of the few exceptions to IIA's exclusivity. An injured worker is allowed to seek damages from a third person who is not his employer or coworker. 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.) Amicus asks this Court to rewrite RCW 51.24.030 to add the phrase “and not acting in furtherance of the employer’s business.” Those words are not in the statute “We cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language. We assume the legislature ‘means exactly what it says.’” *Delgado*, 148 Wn.2d at 727-28. The Legislature has not done so. This Court should not under the guise of interpreting the statute rewrite the statute.

This Court should apply the definition in Title 51. RCW 51.08.010 states: “[u]nless the context indicates otherwise, words used in this title shall have the meaning given in this chapter.” RCW 51.08.013 defines acting the course of employment under Washington’s Industrial Insurance Act.¹ The statute provides:

1) "Acting in the course of employment" means the worker acting at his or her employer's direction or in the furtherance of his or her employer's business which shall include time spent going to and from work on the jobsite, as defined in RCW 51.32.015 and 51.36.040, insofar as such time is immediate to the actual time that the worker is engaged in the work process in areas

¹ “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.

controlled by his or her employer, except parking area.
It is not necessary that at the time an injury is sustained by a worker he or she is doing the work on which his or her compensation is based or that the event is within the time limits on which industrial insurance or medical aid premiums or assessments are paid.

(Emphasis added.) Here, it is undisputed that Mr. Cook was going from work immediately after his shift and the accident was on Boeing's access road, not in a parking area. Therefore, under RCW 51.08.013(1), he was acting in the course of his employment and cannot be sued for negligence.

Mr. Entila and Amicus argue RCW 51.08.013(1) only applies to the injured worker. Yet, they cite no case authority to support this argument. They offer no legal authority for their argument, so this Court should disregard it. RAP 10.3(a)(6); *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989). Moreover, there is no language in RCW 51.08.013(1) that limits it to the injured worker.

B. NOTHING IN *MICHAELS V. CH2M HILL, INC.*, JUSTIFIES DISREGARDING THE CLEAR LANGUAGE OF RCW 51.24.030.

Amicus cites *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 598-99, 257 P.3d 532 (2011), for the proposition that a worker's third party action is a valuable right and any doubts about a third party action should be resolved against an entity that did not contribute to the IIA. (Amicus at 7-8) At pages 598-99 in *Michaels*, this Court cited two 1923 cases which dealt with the early version of the IIA and completely different issues and

context than this case. *Burns v. Johns*, 125 Wash. 387, 392-93, 216 P. 2 (1923); *Matthewson v. Olmstead*, 126 Wash. 269, 273, 218 P. 226 (1923). Both *Burns* and *Matthewson* involved workers performing work on public streets. The workers were injured by passing motorists. The workers elected under the existing IIA to sue the motorist instead of obtain IIA benefits. The motorists argued the IIA was the exclusive remedy. In rejecting those arguments, the *Burns* and *Matthewson* courts relied on the fact that the workers were not in a place controlled by their employers. In this case, however, it is undisputed that the accident occurred on a Boeing access road, an area expressly controlled by Boeing, the employer of Entila and Cook.

Moreover, *Michaels* did not involve RCW 51.24.030 or the immunity of a coworker/coemployee. It involved a separate statute specifically providing for immunity of design professionals: RCW 51.24.035. This Court analyzed the meaning of the statutory phrases “construction project” and “site of the construction project.” Because there was no statutory definition of the phrases, this Court applied an ordinary dictionary definition. If this Court concludes the RCW 51.08.013(1) definition does not apply to Mr. Cook, then this Court should apply the plain meaning rule and conclude Mr. Cook was “in the same

employ.” *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

C. *EVANS V. THOMPSON* IS NOT DISPOSITIVE.

In *Evans v. Thompson*, 124 Wn.2d 435, 445, 879 P.2d 938 (1994), this Court was sharply divided: five justice majority and four justice dissent. The issue was whether corporate officers who owned property where workers died were in the “same employ” and entitled to immunity from a negligence action. The majority opinion did not decide whether the corporate officers were in the same employ. The majority concluded genuine issues of material fact remained about the defendant husband’s duties. A summary judgment dismissing the negligence suit was reversed.

Amicus selectively quotes a phrase from page 444 of *Evans v. Thompson*, that a defendant seeking immunity must show he “was acting in the scope of his or her employment.” (Amicus at 8) Twice on the same page, the *Evans* court stated that immunity attaches to a coemployee when the coemployee is acting in the course of his employment. 124 Wn.2d at 444. The “scope of employment” phrase is not a holding in *Evans*.

Amicus argues immunity is conceptually different than IIA eligibility. (Amicus at 8-9) In support of this argument, Amicus cites *Strachan v. Kitsap County*, 27 Wn. App. 271, 616 P.2d 1251, *rev. denied*, 94 Wn.2d 1025 (1980), and *Fisher v. City of Seattle*, 62 Wn.2d 800, 384

P.2d 852 (1963). Neither case stands for the rule that a coworker employed by the same company is a third party under RCW 51.24.030. *Strachan* was a tort case. *Strachan* considered whether an industrial insurance case about scope of employment could be applied to determine whether the County could be vicariously liable for the officer's conduct. The *Strachan* court acknowledged the different policies between industrial insurance and tort law. The court did not, however, hold that the industrial insurance laws do not apply to tortfeasors.

Fisher concerned whether an employee must consent to employment, or is the employee bound by operation of others' agreement. In *Fisher*, plaintiff worked for Standard Stations. Defendants argued plaintiff was their employee because they had entered into a series of agreements which resulted in Standard Stations reporting to the defendants. Plaintiff said he knew nothing about those agreements. As far as he was concerned, he was employed by the station. The *Fisher* case is inapposite.

The cases of *Elder v. Cisco Construct. Co.*, 52 Wn.2d 241, 324 P.2d 1082 (1958) and *Brazier v. Betts*, 8 Wn.2d 549, 113 P.2d 34 (1941) involved whether a defendant was acting within the scope of his employment. These cases are examples of when a person is not acting in the scope of employment. *Elder* determined a construction company

employee was not working when he collided with another motorist on a public road more than three hours after his shift. *Brazier* determined a rolling rink manager who shot at some teenage boys who were stealing his firewood in the middle of the night was not acting for his employer. The cases neither advance Amicus's argument nor undermine Mr. Cook's position.

The common law concept of scope of employment or in the furtherance of the employer's business is not included in RCW 51.24.030 actions. The common law concept should not be read into the statute. Mr. Cook was acting in the course of his employment and was in the same employ so he is not a third party. Mr. Entila cannot bring a negligence action against Mr. Cook. The superior court's summary judgment order should be reinstated.

D. *OLSON V. STERN* NEED NOT BE OVERRULED.

Amicus argues *Olson v. Stern*, 65 Wn.2d 871, 400 P.2d 305 (1965), should be overruled because it fits the "incorrect and harmful" test for overruling precedent. (Amicus at 9-10) *Olson* is neither incorrect nor harmful. Amicus contends *Olson* is incorrect because it applies the RCW 51.08.013(1) definition of "acting in the course of employment" to determine whether a coworker is immune and neither the statute nor the legislative history suggests RCW 51.08.013(1) has any bearing on

immunity. *Id.* *Olson* correctly relied on RCW 51.08.013(1). As explained above, RCW 51.08.010 specifically states that the definitions in Title 51.08 RCW apply in the Title.

Amicus argues *Olson's* allegedly expansive definition of RCW 51.08.013(1) is harmful because it restricts third party recovery, undermines full compensation, and undermines reimbursement of the industrial insurance fund. These three supposed "harms" are actually just a disagreement with the overriding public policy pronounced in RCW 51.04.010: that Title 51 is an injured worker's exclusive remedy. If Amicus wishes to change the IIA to reflect its views, Amicus should address its concerns to the Legislature.

E. AMICUS'S INTERPRETATION OF RCW 51.24.100 IS UNWORKABLE AND IGNORES THE STATUTORY LANGUAGE.

Amicus WSAJF states "the superior court considered Entila's receipt of industrial insurance benefits, presumably because it believed his eligibility for benefits also had a bearing on Cook's immunity." (Amicus at 2) The record is silent about whether or not Entila's receipt of IIA benefits was a rationale for the superior court's summary judgment order. Regardless, the only reasonable and practical construction of RCW 51.24.100 allows a court to know about IIA benefits when deciding whether a worker may bring a RCW 51.24.030 third party action.

Amicus argues RCW 51.24.100 is so broadly stated that the prohibition of mentioning an injured worker's receipt of IIA benefits extends to a superior court's rulings on issues of law. (Amicus at 11) Amicus offers no solution on how a court is to determine whether an injured worker is allowed to pursue a negligence suit against a coworker. Of necessity, a party challenging the right to bring a third party action will cite to RCW 51.24.030. Under Amicus's rationale, a party who mentions RCW 51.24.030 would be violating RCW 51.24.100 because the party would be invoking the injured plaintiff's receipt of IIA benefits. The Court of Appeals and Amicus's interpretation of RCW 51.24.100 is unworkable and unreasonable. Statutes are to be given a reasonable construction to avoid absurd consequences. *Bellevue Fire Fighters Local 1604, Int'l Ass'n of Fire Fighters, AFL-CIO, CLC v. City of Bellevue*, 100 Wn.2d 748, 754, 675 P.2d 592 (1984). Mr. Cook asks this Court to hold a trial court may consider the fact of IIA benefits in deciding the legal question of whether or not the worker may bring a third party action.

IV. 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. No exception applies here. Division I's decision should be reversed and the superior court's order reinstated.

DATED this 1st day of September, 2016.

REED McCLURE

By



Marilee C. Erickson WSBA #16144
Attorneys for Petitioners

060349.099441/653465.docx

Valerie Mcomie
4549 NW Aspen Street
Camas, WA 98607-8302

Daniel Huntington
Richter-Wimberley, P.S.
422 W. Riverside Avenue, Ste 1300
Spokane, WA 99201-0305

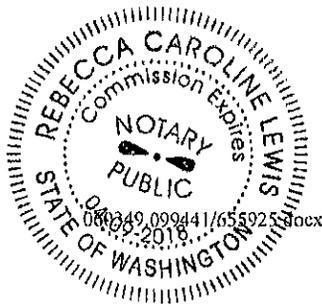
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Jessica Pitre-Williams

SIGNED AND SWORN to before me on September 1, 2016, by

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- Petitioners' Answer to Amicus Curiae WSAJF Brief
- Affidavit of Service

Marilee C. Erickson, WSBA No. 16144
email: merickson@rmlaw.com

Jessica Pitre-Williams
Assistant to Marilee C. Erickson, Pamela A. Okano, and Jason E. Vacha
Reed McClure Attorneys at Law
1215 Fourth Avenue, Suite 1700
Seattle, WA 98161-1087
(206) 386-7066
jpitre-williams@rmlaw.com

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