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No. 92581-0

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,

v.

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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RESPONDENT ENTILA'S ANSWER  
TO AMICUS CURIAE BRIEF OF WSAJ FOUNDATION

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## I. AMICUS CURIAE INTEREST

Plaintiff/Respondent Entila files this Answer in response to an Amicus Curiae brief filed in this matter by the Washington State Association for Justice Foundation. WSAJ Foundation states its interest as promoting the rights of plaintiffs under the civil justice system. In the case at hand, WSAJ Foundation filed an Amicus Curiae brief arguing for the proper interpretation and application of RCW Title 51 (Industrial Insurance Act) and common law wherein injured workers are entitled to pursue civil actions against certain third-party co-employee tortfeasors and where evidence regarding whether said injured worker received benefits as a result of said injury is disallowed.

## II. INTRODUCTION

In essence, WSAJ Foundation argues that the court should not look to RCW Title 51 (Industrial Insurance Act) for language, definitions, or standards of proof to determine the issue of co-worker *immunity*, as the sole purpose of said Act is to provide and determine injured worker *benefits*. The Foundation further argues for a new test for coworker liability that would overrule the portion of *Olson v. Stern*, 65 Wn.2d 870, 400 P.2d 305 (1965), and the subsequent line of following cases that interpret and apply RCW 51.24.030 to determine coworker immunity. Entila agrees that the Industrial Insurance Act was not intended to nor

does it in any way define immunity. Entila has argued that a determination of immunity for an at-fault coworker should be wholly divorced from a determination of benefits for an injured employee, in essence arguing that immunity is not a benefit of the statute to be granted to at-fault workers. Unlike WSAJ Foundation, Entila has not argued that such a decision necessitates overruling *Olson* and the line of cases following that ruling. Instead, Entila has asserted that the varied line of precedential cases can be harmonized with clear wording and a definitive requirement that the at-fault worker must prove that he or she was actually performing work for the common employer when the incident for which immunity is sought occurred. That being said, Entila agrees that clarity could also be achieved by a new test that does not apply the 'course of employment' language from Title 51 and that considers whether the employer would be liable for the employee's actions at common law.

With respect to the admission of evidence relating to the receipt of benefits by injured workers, the Amicus brief notes that the language of RCW 51.24.100 bars the introduction of a worker's receipt of benefits to a third-party claim, including summary judgment motions on immunity. Entila agrees with this analysis and that the language of the statute is unequivocal in barring evidence of IIA benefits for any purpose. RCW 51.24.100, combined with the common-law collateral source rule, is a

long-standing and important caveat to civil actions – that evidence of outside sources of payments such as insurance coverage and other benefits are irrelevant and disallowed, regardless of the type of hearing or matter.

## **II. ISSUES PRESENTED**

The Amicus Curiae brief focuses the following issues:

1. Under the IIA, what is the test for determining when a coworker is in the “same employ” and hence immune from third-party action brought by an injured worker under RCW 51.24.030?
2. In resolving this immunity question on a summary judgment motion, does RCW 51.24.100 allow a court to take into account the plaintiff-worker’s receipt of industrial insurance benefits?

## **III. SUMMARY OF ARGUMENT**

### **A. A Clear Test Is Necessary That Separates The “Same Employ”**

#### **Analysis From The Benefits Discussion.**

RCW 51.24.030 allows an injured worker to bring a cause of action against a third-party “not in a worker’s same employ.” WSAJ Foundation correctly argues that the statute does not define “same employ.” The “in the course of employment” language provided in Title 51 was intended for use in the analysis of whether an injured worker is entitled to benefits and not to the immunity analysis for an at-fault employee. Entila has previously noted that RCW Title 51 does not define or use the word “immunity” (with singular exception RCW 51.24.035 regarding design professionals on a construction project). The opportunity

is now presented for this Supreme Court to state clearly and unequivocally what the immunity test should be for an at-fault employee. Entila's intent is to have a clear test that distinguishes the separate nature of the immunity issue from the benefits analysis, regardless of whether this court accomplishes this by clarifying precedential cases, adopting a test relating to employer liability, or with new language specified by this Court. Doing so does not amend the statute, but acknowledges that the worker's compensation statute is intended for injured workers seeking benefits and not tortfeasors seeking immunity.

**B. The Plain Language of RCW 51.24.100 is Clear and Unambiguous And Requires No Clarification or Interpretation.**

RCW 51.24.030 states unequivocally that evidence of an injured workers receipt of benefits is not admissible for any purpose:

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. (emphasis added)

Combined with the common law collateral source rule, all evidence of payment from any source other than the tortfeasor is barred as evidence in a civil action and certainly should not be used in the determination of immunity for the tortfeasor. Entila agrees with WSAJ

Foundation maintains his position and argument that there is no definition needed to embellish or interpret the very clear language of the statute. The benefits are simply inadmissible for any purpose.

### III. ARGUMENT

#### **A. A Clear Test Based Upon The Actions of the Tortfeasor Is Necessary To Protect Injured Workers And Employers.**

The immunity analysis to whether the injured worker can seek to collect from the at-fault party should focus on the *actions* of the at-fault party that caused the harm. The test proposed by WSAJ Foundation is “whether the coworker’s conduct would subject his or her employer to vicarious liability at common law.” (Amicus Brief, pg. 4.) The Foundation goes on to suggest that the focus of this proposed test would be whether the worker was ‘within the scope of employment under the circumstances, in furtherance of the employer’s business’ (Amicus Brief, pg. 4.) It is noteworthy that the “scope of employment” language is to be distinguished from “course of employment” used in Title 51 for the benefits analysis.

In the case at issue, Defendant/Petitioner Cook was a Boeing employee who had finished his shift, negligently drove his frost-covered vehicle out of a parking area, and struck a pedestrian on Boeing property. Cook admits he was not performing work for his employer; he was

commuting home. An off-shift, negligent driver who drives unable to see out of the windshield of his personal vehicle is not coworker for whom the legislature intended immunity. A new test, separate and distinct from the IIA benefits analysis, will help ensure that immunity is applied where due and not as a matter of the mere coincidence of sharing a common employer.

Entila argues for a test wherein the focus is squarely on the actions of the at-fault party. Although Entila suggested in previous briefing that the subtle nuances between “scope” and “course” of employment were inconsequential to an interpretation of whether Cook’s reckless actions qualify him for immunity, here, however, the intent of using “scope of employment” rather than “course of employment” is purposeful to differentiate the statutory benefits analysis language for an injured worker and the common law immunity test proposed for the analysis of the at-fault party.

In previous case, the lack of distinction between the benefits and immunity analyses has led to some confusion. In *Olson*, the court discussed numerous factors in determining that defendant Stern was not immune from suit, including the timing, location, and actions of at-fault driver, which has led to later confusion about whether the immunity arose from the defendant’s actions or from the parking lot exception to Title 51.

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.

The court later clarified that the work status of the employee and not the situs of the accident was the determining factor:

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.

There is also case law that intermixes the use of scope and course:

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 v. Thompson*, 124 Wash.2d 435 (1994) 879 P.2d 938, 947.

Immunity is best determined by the actions of the tortfeasor. The Court of Appeals' *Entila* decision is in keeping with the overall intent and purpose of the IIA to protect injured workers, and in line with precedential cases that have determined it is the *actions* of the defendant that should

determine immunity and not the location of the accident. Division I correctly determined that Cook must prove he was actually doing work for Boeing before he gets immunity. The language proposed by WSAJ makes clear that the immunity test is a common law test and not derived from the statute or its terminology. Entila does not object to the purpose or oppose the language of the proposed test, as it is in keeping with the logic where the at-fault party is held responsible for the actions that caused the harm.

Entila has argued previously that there is no Washington case law in which a tortfeasor is granted immunity based on the broad “in the course of employment” language of RCW § 51.08.013, and that the tortfeasor must bear the common law burden of proving that he or she was engaged in work for the employer at the time of the negligent act. This Court has confirmed the common law burden applies to those seeking immunity in each case that has come up on appeal. Here, WSAJ Foundation has taken this argument one step further to suggest that new language is necessary that does not refer to the IIA standard and further divorces the immunity test from the benefits analysis.

Plaintiff/Respondent Entila has heavily relied on precedent like *Olson v. Stern* and the subsequent cases that followed the reasoning set forth in that case. However, Entila recognizes that the inconsistent wording in some of those prior cases adds confusion to the issue by

suggesting that the timing, location, or other factors were considered in the immunity discussion. While Entila's intent is that Cook be held responsible for his negligent actions, he acknowledges that there is merit for the greater good in a new and specific test that makes clear the separate nature of the immunity analysis and focuses only on the actions of the tortfeasor and not on semantics and terminology.

**B. The Liability Issue Must Be Determined Without Consideration of Whether the Injured Worker Received Benefits.**

It is a longstanding rule that Title 51 and its common law counterpart, the collateral source rule, do not allow evidence of benefits, insurance, or other outside sources of compensation as evidence. The receipt of outside funds of any kind should not influence the issue of immunity or fault, and is for that reason inadmissible for any purpose under RCW 51.24.100 and the common law. Here, the Court of Appeals is correct in its analysis that the injured worker's eligibility for benefits does not resolve or impact the immunity question for the at-fault coworker. Benefits and immunity are separate and distinct concepts with no relevance or bearing on the determination of the other.

**VI. CONCLUSION**

Entila agrees with WSAJ Foundation that a clear test is necessary wherein the actions of the at-fault party are the basis for determining

liability. Entila specifically argues that Gerald Cook's negligent actions should subject him to liability because he was not on the job or performing work duties. In *Olson, Evans, Orris, and Strachan*, tortfeasors were subject to civil action based upon a lack of connection between their injury-causing actions and their job duties. Although the language in those cases has varied, courts have consistently declined to give immunity to negligent coworkers not performing work duties for the common employer. Within this framework, this Court can add clarity to this important analysis, whether by explaining the precedential line of cases or using this opportunity to create a new rule that divorces the common law analysis from the worker's compensation statutes and terminology.

Finally, Entila submits that the statutory language of RCW 51.24.100 denying admission of evidence regarding an injured worker's receipt of benefits needs no interpretation or clarification. The plain meaning of the words is clear and intent is unmistakably to exclude consideration of this collateral source for any purpose in a third-party action. No change is necessary to this longstanding and important rule.

Respectfully submitted this 1<sup>st</sup> day of September 2016.

GOERTZ & LAMBRECHT PLLC

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Of Attorneys for Entila

CERTIFICATE OF SERVICE

The undersigned certifies under Washington law, that on the date indicated below, Entila's Answer to Amicus Curiae Brief, including this Certificate of Service, was served via electronic mail on the Supreme Court (supreme@courts.wa.gov) and the following:

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DATED this 1<sup>st</sup> day of September 2016 at Spokane, Washington.

/s/ Amy J. Goertz  
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Good afternoon:

Attached for filing please find Respondent Entila's Answer to Amicus Brief of WSAJ Foundation, including Certificate of Service.

Thank you,

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