No. 1027389

SUPREME COURT
OF THE STATE OF WASHINGTON

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DONALD R. PATTEE, JR.,

PETITIONER,

v.

GLENN AARON FISHER, AARON FISHER, GLENN FISHER, AND JOHN DOE,

RESPONDENT.

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# RESPONDENT GLENN AARON FISHER'S OPPOSITION TO PETITION FOR REVIEW

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## I. INTRODUCTION

This appeal involves the straightforward legal issue of whether a co-worker is immune from liability under Washington's Industrial Insurance Act ("the IIA"), Title 51 of the Revised Code of Washington ("RCW"), when (1) the alleged injured party and his co-worker were on their employer's premises and were acting in the course of scope of their employment at the time of the alleged injury, and (2) the alleged injured worker made a claim with the Department of Labor and Industries ("Department") and received benefits from the Department for the alleged injury.

Petitioner Donald Pattee, Jr. ("Petitioner") seeks Supreme Court review of Division I of the Court of Appeals' unpublished November 6, 2023, Slip Opinion ("Decision")

affirming summary judgment dismissal of Petitioner's claim against Respondent Glenn A. Fisher ("Respondent").[1]

Petitioner makes the same argument to this Court that was rejected by Division I. Specifically, Petitioner argues that the Washington's dog bite statute, RCW 16.08.040, overrides the IIA's immunity provisions by imposing strict liability on owners of dogs that bite another person. As held by Division I, Petitioner's "argument fails based on the plain language of the IIA, which expressly applies 'regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation' and adds that 'all civil actions and civil causes of action of such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished.' RCW 51.04.010." Slip. Op. at 4.

[1] Division I's unpublished Slip Opinion, as well as its December 20, 2023, Order Denying Motion for Reconsideration, are attached as appendices to the Petition for Review.

Petitioner's claims against Respondent are barred under the IIA and were properly dismissed on summary judgment by the trial court and affirmed by Division I.

Division I's Decision meticulously addressed all issues presented in this appeal – it is detailed, thorough and well-reasoned. But as an unpublished decision, it implicitly articulates no new rules of law, and the Decision may not be cited as binding precedent. GR 14.1, RCW 2.06.040. Rather, the Decision is case-specific; it simply applied well-established law to the specific, undisputed, agreed upon facts of this case. This case-specific Decision does not warrant Supreme Court review. Petitioner fails to meet the standards set forth in RAP 13.4(b)(4) and Petitioner's request for review should be denied.

## II. IDENTITY OF RESPONDENT

This Answer is submitted by Respondent, who was Petitioner's co-worker at Google at the time of the June 15, 2019, work-related injury.

## III. COUNTER STATEMENT OF FACTS

Petitioner's statement of facts omits a salient fact pertinent to his appeal: at the time of the June 15, 2019, dog bite, it is undisputed that Petitioner and Respondent "were … on Google's campus, performing duties in the course and scope of their employment." CP 23-24.

Petitioner and Respondent were coworkers employed by Google and were at work on Google's campus in Kirkland, King County, Washington at the time of the incident. CP 23. Respondent brought his dog to work, as was permitted by Google. CP 24. Both Petitioner and Respondent were performing duties in the course and scope of their employment with Google, when Respondent's dog allegedly bit Petitioner, causing Petitioner's alleged injury. CP 23 – 24.

Following the June 15, 2019, incident, Petitioner sought medical treatment and reported his alleged work injury to the Department. CP 24. Petitioner received

worker's compensation benefits from the Department for the alleged injuries that gave rise to Petitioner's lawsuit against Respondent. CP 24.

## IV. STANDARDS FOR REVIEW

Relevant to this Petition, RAP 13.4(b)(4) provides that review will only be accepted if the decision of the Court of Appeals involves an issue of substantial public interest that should be determined by the Supreme Court. Petitioner fails to meet his burden to demonstrate that review of Division I's unpublished decision warrants review, as both the Legislature and Supreme Court have already determined the issue, and Petitioner's claim was properly dismissed pursuant to Washington law.

## V. ARGUMENT

### A. Division I Correctly Concluded That Petitioner's Exclusive Remedy Is Under The IIA.

Appropriately focusing on the plain language of the IIA, Division I correctly concluded that – because

Respondent is immune under the IIA – Petitioner may not sue him under the dog bite statute.

When a worker is allegedly negligently injured by another co-worker, his exclusive remedy is under the IIA. RCW 51.04.010, "Declaration of police power – Jurisdiction of courts abolished, provides in relevant part, as follows:

> The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. 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.

(emphasis added). The IIA "embrace[s] all employments which are within" Washington's jurisdiction. RCW 51.12.010.

Benefits provided under the IIA are exclusive in nature. See RCW 51.04.010 (declaring that the IIA applies "to the exclusion of every other remedy, proceeding or compensation); Rushing v. ALCOA, 125 Wn. App. 827, 841, 105 P.3d 996 (2005) (the IIA "provides the exclusive remedy for workers injured in the course of employment"); Bankhead v. Aztec Constr. Co., 48 Wn. App. 102, 104, 737 P.2d 1291 (1987) (the IIA "provides the exclusive remedy for workers … unintentionally injured during the course of their employment.").

"A worker who receives workers' compensation benefits under the [IIA] has no separate remedy for his or

her injuries except where the [IIA] specifically authorizes a cause of action." Rushing, 125 Wn. App. At 841. The exclusive remedies of the IIA are "sweeping, comprehensive, and of the broadest, most encompassing nature." Cena v. State, 121 Wn. App. 352, 356, 88 P.3d 432 (2004) (citing Tellerday v. Delong, 68 Wn. App. 351, 356, 842 P.2d 1023 (1993)).

The guaranteed relief that the IIA provides injured workers is based on a compromise between employees and employers, wherein workers receive speedy relief, and employers and co-workers receive immunity from common law actions and civil suits. Minton v. Ralston Purina Co., 146 Wn.2d 385, 390, 47 P.2d 556 (2002).

In West v. Zeibell, 87 Wn.2d 198, 201-02, 550 P.2d 522 (1976), the plaintiffs' 16-year-old son was electrocuted while working at a laundromat. The Department accepted the parents' claim and paid a statutory burial award. Id. at 199. The Court held that the parents' claims were barred

by RCW Title 51. Id. In reaching its holding, the Court noted that the IIA "is of the broadest, most encompassing nature and the intent of the legislature to bar an action such as that brought by the plaintiffs is clear." Id. at 201. The Court noted that the IIA provides in very broad and sweeping language that the compensation received by a "workman injured in the course of his employment, or his family or dependents … shall be in lieu of any and all rights of action whatsoever against any person whomsoever." Id. (emphasis in original).

In Minton, the plaintiff attempted to sue for his workplace injury under the product liability statute, despite having brought a claim under the IIA. 146 Wn.2d at 388. The Court held that the IIA applied and that the alleged injured worker lost the right to pursue alternative tort remedies, including those provided by the product liability statute. Id. at 390-91.

The same is true here, and Petitioner's argument that Washington's dog bite statute, RCW 16.08.040, overrides the IIA's immunity provisions fails based on the plain language of the IIA. As correctly held by Division I, the IIA "expressly applies 'regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation' and adds that '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.'" RCW 51.04.010. Slip Op. at 3-4.

**B. Division I Correctly Held That Respondent Is Immune Under The IIA As A Co-Worker In The Same Employ.**

Division I correctly noted that "Washington courts have 'emphatically' enforced [the IIA's] immunity provisions where, as here, an alleged injured worker files a civil action against a coworker in the same employ as the injured worker." Wilson v. Boots, 57 Wn. App. 734, 736, 790 P.2d 192, rev. denied, 115 Wn.2d 1015 (1990). Slip Op. at 4.

The IIA applies to workers who are injured while "acting in the course of employment." RCW 51.08.013. Under the IIA, employers and co-workers are immune as a matter of law. DuVon v. Rockwell Int'l Corp., 116 Wn.2d 749, 753, 807 P.2d 876 (1991). An employee injured by a co-worker is limited to remedies provided by the IIA, and thus, the employee may not sue a co-worker for his injuries. Wilson, 57 Wn. App. at 736, 790 P.2d 192; Shelton v. Azar, Inc., 90 Wn. App. 923, 954 P.2d 352 (1998).

Immunity attaches "when the co-employee is acting in the course of his employment." Evans v. Thompson, 124 Wn.2d 435, 444, 879 P.2d 938 (1994). The IIA defines "acting in the course of employment" to mean the employee acts pursuant to their employer's direction "or in the furtherance of…[their] employer's business." RCW 51.08.013(1).

In Shelton, the Court held that because the parties were acting in the course of their employment at the time

of the motor vehicle accident, one co-worker was immune from liability to the other co-worker under the IIA. 90 Wn. App. at 928.

In this case, it is undisputed that both Petitioner and Respondent were "performing duties in the course and scope of their employment at the time of the alleged incident." CP 31. Division I correctly concluded that, "because there is no dispute that [Petitioner] had the same employer as [Respondent] and was acting in the 'scope and course' of employment at the time of the alleged tortious conduct, [Respondent] was in the 'same employ' as [Petitioner] within the meaning of RCW 51.24.030 and, thus, immune from liability under the [IIA]." Slip. Op. at 3.

### C. Division I Correctly Rejected Petitioner's Argument That Respondent Was Not Furthering The Interests Of Google.

Despite acknowledging that Respondent was "performing duties in the course and scope of his employment" at the time of the alleged dog bite, Petitioner

argues that Respondent's dog was not furthering the interest of Google. Petitioner's Br. 1 – 2. Even assuming *arguendo* that Petitioner's argument is true, Petitioner's argument is misplaced. "In order to be shielded from liability, the alleged tortfeasor employee would have to show he or she was doing work or acting at the direction of his or her employer or she was in both in the scope and course of employment." Entila v. Cook, 187 Wn.2d 480, 487-88, 386 P.3d 1099 (2017) (emphasis added). Here, it is undisputed that Respondent was both in the scope and course of employment. CP 31. Thus, Petitioner's argument that the dog was not furthering the interest of the employer is of no merit.

Additionally, as held by Division I, the obvious flaw in Petitioner's argument is that Respondent, not the dog, is the named defendant and alleged tortfeasor. Slip. Op. at 3. The coworker immunity analysis under RCW 51.24.030 focuses on whether "the alleged tortfeasor employee …

was doing work or acting at the direction of his or her employer." Entila, 187 Wn.2d at 487 (emphasis added). Petitioner agreed and stipulated that Respondent "brought his dog to work as was permitted by his employer" and was "performing the duties required by his employment with Google when [Respondent's] dog bit Petitioner." Division I correctly concluded that, "on this record, [Petitioner's] attempt to circumvent the IIA's immunity provisions by focusing [Respondent's] dog rather than the alleged tortfeasor employee easily fails." Slip Op. at 3.

### D. Division I Correctly Rejected Petitioner's Dual Persona Claim.

Division I correctly concluded that the dual persona doctrine discussed in Evans v. Thompson, 124 Wn.2d 435, 444, 879 P.2d 938 (1994) is inapplicable and does not permit Petitioner to circumvent the IIA's immunity provisions. In Evans, the Court held that it could not support a finding of immunity as a matter of law under the

IIA where the defendant: (1) was not employed by the plaintiff's corporation; (2) she had no duties to the corporation; (3) she performed no services for the corporation; and (4) she received no compensation from the corporation. 124 Wn.2d 435, 444, 879 P.2d 938 (1994) (referencing Olson v. Stern, 65 Wn.2d 871, 400 P.2d 305 (1965)). The Evans Court explained that since the Defendant "had no job and no duties, it necessarily follows that she could not be acting in the scope and course of a nonexistent employment." Evans, 124 Wn.2d at 445.

Division I correctly held that, unlike the parties in Evans, in this case, Respondent was Petitioner's "co-employee doing the same work for the same purpose as [Petitioner] when [Petitioner] was injured, and Respondent brought his dog to work as was permitted by the parties' common employer." Slip Op. at 3-4. Finally, Division I was correct in holding that the facts in Evans and the facts in this case "are worlds apart," and, therefore, holding that

Evans' dual persona doctrine does not apply to this case. Slip Op. at 4.

## VI. CONCLUSION

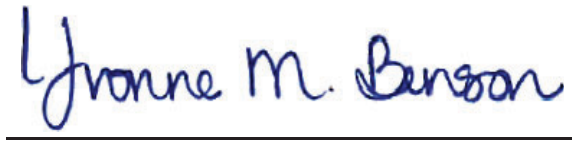
For the foregoing reasons, the Petition for Review should be denied.

*I certify that this brief contains 2335 words and is in compliance with RAP 18.17(b)(c).*

Dated this 13th day of February, 2024.

Respectfully submitted,

TANDEM LAW

By 

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## DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on this day, I caused the foregoing document to be served on the following party at the following address via the method indicated:

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Signed this 13th day of February, 2024, at King County, Washington.

Yvonne M. Benson

Yvonne M. Benson

# TANDEM LAW

## February 13, 2024 - 4:34 PM

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