NO. 84838-1-I

102738-9

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

DONALD R. PATTEE, JR.,

Appellant.

v.

GLEN AARON FISHER,

AARON FISHER, GLENN FISHER,

AND JOHN DOE

Respondents.

DONAL R. PATTEE, JR. PETITION FORE REVIEW BY THE WASHINGTON SUPREME COURT

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Washington Cases

STATE STATUTES

I. IDENTITY OF PETITIONER

The Petitioner is Donald R. Pattee, Jr. (Pattee)

II. COURT OF APPEALS DECISION

Pattee seeks review of the Court of Appeals decision filed November 6, 2023, a copy of which is attached in the Appendix Page 8. This Petition is filed timely because Appellant Pattee filed a Motion for Reconsideration on November 27, 2023. The Court of Appeals entered an order denying reconsideration on December 20, 2023. Appendix page 6.

III. ISSUES PRESENTED

ISSUE: When a co-employee brings his dog to work and that dog bites an employee, both of whom are in the course and scope of employment at the time the dog bites, may the co-employee still be held liable for the bite under RCW 16.08.04.

At a time when many employers are allowing workers to bring pets to the office, this case presents an important question as to whether the employee can still be immune under RCW 51.24.030(1) when his pet mauls another employee. RCW 16.08.04 holds dog owners strictly liable when their dog bites another. It is appellants position that under these facts, the basis of

liability is ownership of the pet, which has nothing to do with employment, and the act of biting itself is determined by many factors that have nothing to do with the work. Both employees in this case were software developers, so having the dog at work furthered no interest of the employer.

Whether a dog bites another person is decided by numerous other factors, such as whether the dog is kept leashed, when and how the dog is socialized to humans and others, and indeed the decision to bring the dog to work at all or to put a muzzle on the dog. All of these decisions are made out of the course and scope of employment. This court should take up this issue to clarify if the strict liability of RCW 16.08.04 imposed solely by ownership still applies.

Accordingly, review should be accepted pursuant to RAP 13.4 (b)(4) because this case involves an issue of substantial public interest to decide the law under the strict liability for dog bites versus immunity provided to employees who receive workers compensation benefits.

IV. Statement of the Case

A. PROCEDURAL HISTORY & SUMMARY OF FACTS

On June 15, 2019, Glenn Fisher brought his dog to work as permitted by his employer. CP 23-24. His dog bit a co-employee, Donald Pattee. *Id.* Donald Pattee received labor and industry benefits and later filed suit against Fisher for the injuries and damages sustained in the incident. CP 1-4. The parties stipulated to facts for purposes of filing cross motions for summary judgment. The court heard the cross motions and held in favor of the defendant granting summary judgment to Defendant.

The parties stipulated that the dog was brought to work under a permissive policy by their employer and both were working at the time of the bite. Pattee received workers' compensation benefits from the attack.

V. ARGUMENT

A. This court should accept review to clarify when employees are liable when their dog bites a coworker even if both are at work at the time.

When an employee brings an action against a co-employee for injuries caused at work, the burden of proof lies upon the co-employee to show that the injury was caused in the course and scope of employment when they injured their fellow work. ***Entila v. Cook***, 386 P.3d 1099, 1102 (Wash 2017)("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 the scope and course of employment.").

RCW 16.08.040 Imposes strict liability on owners for dog bites. It states:

> **Dog bites—Liability.**
>
> (1) The owner of any dog which shall bite any person while such person is in or on a public place or lawfully in or on a private place including the property of the owner of such dog, shall be liable for such damages as may be suffered by the person bitten**, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness.**

Clearly, Washington state has discarded the dangerous propensities discussions that used to dominate cases regarding dog attacks. However, the fact of how or when or why a dog bites has nothing to do with software development that the two workers were doing in this case. The liability of ownership by the defendant Fisher is based upon ownership of the dog. Owning a dog takes place outside of the confines of work. The employer, Google in this case, does not require that employees own dogs. Nor does the actions of bringing the dog to work, though permitted, the decision to bring the dog to work is done outside the confines of work.

Whether to muzzle the dog, all of these are done outside employment on a permissive case to bring the animal to work.

This court should also accept review to clarify when the dual persona doctrine discussed by this court in the case of *Evans v. Thompson*, 124 Wn.2d 435, 879 P.2d 938 (Wash. 1994). In *Evans*, the employer was held liable when they were also the landlord. *Id.* at 441-42. In so concluding, this court stated:

> *Doggett v. Patrick*, 197 Ga.App. 420, 398 S.E.2d 770 (1990) is in point. There the plaintiff was injured in the course of his employment, allegedly due to the condition of the building leased by his employer, but owned by the defendant, individually, who was the president of the corporate employer (same as here). Plaintiff received workers' compensation benefits, but sued defendant as the landowner (same as here). In reversing a summary judgment in favor of the landowner, the court cited Professor Larson's text. The court in Doggett said:
>
> **Pursuant to that doctrine, " '(a)n employer may become a third person, vulnerable to tort suit by an employee, if--and only if--he possesses a second persona so completely independent from and unrelated to his status as employer that by established standards the law recognizes it as a separate legal person.' Larson's Workmen's Compensation Law, § 72.81, Vol. 2A."**
>
> The premises were not owned in this case by the corporation-employer but by defendant Patrick in his individual capacity [same as here].... Thus, at least an issue of fact is presented concerning whether the duties imposed upon defendant as a landowner are separate from those imposed upon him as a representative of plaintiff's employer.

Id. 124 Wn.2d at 441-42.

In this case, the defendant Fisher had two personas at the time of the attack. One was an employee working drafting software. The other was as a dog owner who was strictly liable for dog bites. This court should take up review to clarify the dual persona doctrine it discussed in *Evans v. Thompson* so that employees know whether they have a claim or not when bit by a co-employee's dog. Such is a matter of public importance as people return to work after the time of Covid and more employers permit people to bring their pets to work.

III. CONCLUSION

For the reasons above, Appellant Pattee respectfully request this court grant this Petition for Review.

I certify that this brief contains 1538 words, in compliance with the RAP 18.7.

RESPECTFULLY SUBMITTED this January 19, 2024.

BROOKS LAW FIRM, INC. P.C.

Ray Brooks, WSBA#: 37768
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify under penalty and perjury that pursuant to the laws of the State of Washington that on this January 19, 2024, that I cause a true and correct copy of the foregoing document to be served in a manner consistent with the rules of civil procedure to the following counsel of record:

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By
Ray Brooks WSBA # 37768
Attorney for Plaintiff

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Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DONALD R. PATTEE, JR., Appellant, v. GLEN AARON FISHER, AARON FISHER, GLENN FISHER, AND JOHN DOE, Respondents.	No. 84838-1-I DIVISION ONE UNPUBLISHED OPINION

FELDMAN, J. — Donald R. Pattee, Jr. appeals the trial court's order denying his motion for partial summary judgment, granting Glen Aaron Fisher's motion for summary judgment, and dismissing Pattee's tort claims stemming from a workplace dog bite incident. Pattee argues the trial court erred in ruling that Fisher (Pattee's coworker at the time of the alleged tortious conduct) is immune from suit by Pattee under the Washington Industrial Insurance Act ("IIA" or the "Act"), Title 51 RCW. Because the trial court correctly interpreted and applied the IIA to the undisputed facts, we affirm.

This court reviews "summary judgment orders de novo, engaging in the same inquiry as the trial court." *Desranleau v. Hyland's, Inc.*, 10 Wn. App. 2d 837, 842, 450 P.3d 1203 (2019). "Summary judgment is warranted only when there is

no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The facts and all reasonable inferences are viewed in the light most favorable to the nonmoving party." *Id*. Statutory interpretation is also a legal issue that we review de novo. *Entila v. Cook*, 187 Wn.2d 480, 483, 386 P.3d 1099 (2017).

Under the IIA, "both employers and co-workers are immune from common law suit by an injured worker." *Daniels v. Seattle Seahawks*, 92 Wn. App. 576, 581, 968 P.2d 883 (1998). But the Act permits an injured worker to sue a coworker if the injured worker can prove that the coworker "is 'not in a worker's same employ.'" *Id.* (quoting RCW 51.24.030(1)). A coworker is in the "same employ" as the injured worker if the coworker "can show (1) he had the same employer as the injured person and (2) he was acting in the 'scope and course of his or her employment' at the time of injury." *Entila*, 187 Wn.2d at 487 (quoting *Evans v. Thompson*, 124 Wn.2d 435, 444, 879 P.2d 938 (1994)). Thus, where an alleged tortfeasor employee such as Fisher "was performing duties for his employer," the employee is immune from suit. *Id.*

The trial court here correctly dismissed Pattee's tort claims against Fisher under the IIA's immunity provisions. In the parties' joint statement of stipulated facts submitted to the trial court for purposes of deciding the parties' competing motions for summary judgment, Pattee conceded several dispositive facts: (1) the parties were coworkers employed by Google; (2) Pattee was a technical program manager, and Fisher was a software engineer; (3) the parties were at work on a Google campus at the time of the incident; (4) Google permitted Fisher to bring his

dog to work; and (5) both parties were "performing duties in the course and scope of their employment" when Fisher's dog bit and injured Pattee. Because there is no dispute that Fisher had the same employer as Pattee and was acting in the "scope and course" of employment at the time of the alleged tortious conduct, Fisher was in the "same employ" as Pattee within the meaning of RCW 51.24.030 and, thus, immune from liability under the Act.

Despite acknowledging in the trial court that Fisher was "performing duties in the course and scope of [his] employment" at the time of the alleged tortious conduct, Pattee argues that Fisher is not entitled to immunity under the IIA because Fisher's dog "had nothing to do with employment" and was not "furthering any interest of the employer." The obvious flaw in this argument is that Fisher (not his dog) is the named defendant and alleged tortfeasor, and 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). Pattee acknowledges that Fisher "brought his dog to work as was permitted by his employer" and was "performing the duties required by his employment with Google when [his] dog bit [Pattee]." On this record, Pattee's attempt to circumvent the IIA's immunity provisions by focusing on Fisher's dog rather than the alleged tortfeasor employee easily fails.

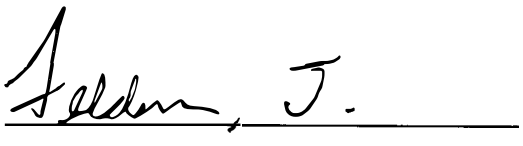
Pattee also argues that Washington's dog bite statute, RCW 16.08.040, overrides the IIA's immunity provisions by imposing strict liability on owners of dogs that bite another person. This argument fails based on the plain language of the IIA, which expressly applies "regardless of questions of fault and to the exclusion

of every other remedy, proceeding or compensation" and adds that "all civil actions and civil causes of action 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." RCW 51.04.010. Consistent with the plain language of the Act, Washington courts have "emphatically" enforced its immunity provisions where, as here, an 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 (1990). Because Fisher is immune under the IIA, Pattee may not sue him under the dog bite statute.

Lastly, citing *Evans v. Thompson*, 124 Wn.2d 435, 879 P.2d 938 (1994), Pattee argues that the "dual persona" doctrine permits him to circumvent the IIA's immunity provisions. Under the dual persona doctrine, "an employer may become a third person, vulnerable to tort suit by an employee, if—and only if—he possesses a second persona so completely independent from and unrelated to his status as an employer that by established standards the law recognizes it as a separate legal person." *Corr v. Willamette Indus., Inc.*, 105 Wn.2d 217, 220-21, 713 P.2d 92 (1986) (quoting 2A A. Larson, *Workmen's Compensation*, § 72.81 (1983)). In *Evans*, the court held that under the dual persona doctrine, a nominal corporate officer—who did not engage in any of the day-to-day operations of the business and was, therefore, not a bona fide employer or co-employee of the injured workers—could be sued in her separate and independent persona as a landowner when a defect in the premises was the alleged cause of the workers' injuries. 124 Wn.2d at 438-44. Here, in contrast, Fisher was Pattee's co-employee doing the same work for the same purpose as Pattee when Pattee was injured,

and Fisher brought his dog to work as was permitted by the parties' common employer. Just as we did in *Daniels*, "we find the facts in *Evans* and this case are worlds apart and, therefore, decline to extend *Evans* here." 92 Wn. App. at 586.

Affirmed.



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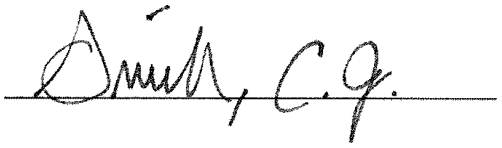

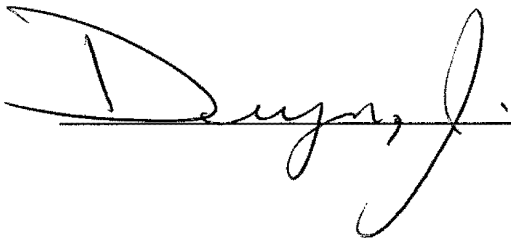

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No. 84838-1-I

ORDER DENYING MOTION
FOR RECONSIDERATION

The appellant, Donald Pattee, Jr., has filed a motion for reconsideration. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Feldman, J.
Judge

BROOKS LAW FIRM

January 19, 2024 - 2:38 PM

Transmittal Information

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