NOTE

Employer Liability Under the Third Party Provision of the Washington Industrial Insurance Act: The Dual Capacity and Dual Persona Doctrines in *Evans v. Thompson*

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I. INTRODUCTION

Most workers' compensation schemes are designed to provide a swift and sure source of benefits to injured workers by placing on employers the risks and burdens of modern industry.[1] In keeping with this policy, Washington's Industrial Insurance Act[2] (IIA) requires injured workers to relinquish the right to sue at common law for damages sustained on the job, and it requires employers to accept liability for a measure of damages set out by the statute.[3] However, if a worker's injuries are caused by the negligence of a third person who is not in the worker's same employ, the IIA's third-party provision allows the worker to pursue an independent cause of action against the third person in addition to his workers' compensation claim.[4]

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1. *See* Joseph H. King, Jr., *The Exclusiveness of An Employee's Worker's Compensation Remedy Against His Employer*, 55 TENN. L. REV. 405, 406 (1988).

2. WASH. REV. CODE § 51.24 (1994).

3. *Id.* In effect, a form of strict liability is imposed on the employer to pay for industrial accidents. *See* Flanigan v. Department of Labor and Indus., 123 Wash. 2d 418, 431, 869 P.2d 14, 20 (1994) (Madsen, J., dissenting); *see also* Kimzey v. Interpace Corp., 694 P.2d 907, 909 (Kan. Ct. App. 1985).

4. *See* WASH. REV. CODE § 51.24.030 (1994). The statute, however, then provides for a reimbursement to the state workers' compensation fund. *See id.* § 51.24.060.

This type of third-party liability provision has prompted considerable debate as to whether an injured employee may ever sue his *employer* or a *co-employee* as a third-party tortfeasor.[5] Attempts by injured workers to circumvent the exclusive remedy principle in this way have given rise to the dual capacity and dual persona doctrines,[6] under which the employer or co-employees of an injured worker may be found independently liable for the worker's injuries, regardless of whether the worker also recovered workers' compensation benefits. These doctrines are premised on the concept that when an employer or co-employee also serves in a distinct nonemployment capacity toward the employee, or has a legal persona other than that of employer or co-employee, the exclusive remedy principle will not bar the employee's common-law remedies.

The application of the dual capacity and dual persona doctrines has an enormous impact on employers, particularly employers who run small businesses or closely-held corporations. For example, many individuals who serve as the sole shareholder, director, and officer of a small, closely-held corporation also, as individuals, own the land on which the corporation is located. Under a recent judicial decision in Washington State, these small businesses, and the individuals who run them, may be subject to a new threat of liability.[7]

This Note will first explain the structure of Washington's IIA and the exclusive remedy principle. Next, it will explore the third-party provision of the IIA and the judicially-created doctrines that have made employers and co-employees vulnerable to tort suits by injured workers regardless of the exclusive remedy principle. Finally, this Note will discuss the Washington Supreme Court's recent decision in *Evans v. Thompson*[8] and argue that the court should not have allowed consideration of the dual persona doctrine on remand because the doctrine, if applied, will circumvent the exclusive remedy principle and put the landowners at unjustifiable risk of being held liable for workplace injuries.

II. WASHINGTON'S INDUSTRIAL INSURANCE ACT

This section first gives a general introduction to Washington's IIA, then describes the exclusive remedy principle and the third-party

5. *See* 2A ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 72.81 (1993).
6. *See generally id.* § 92.81. *See infra* notes 25-78 and accompanying text.
7. *See* Evans v. Thompson, 124 Wash. 2d 435, 879 P.2d 938 (1994).
8. *Id.*

provision, and finally explores the dual capacity and dual persona doctrines as two exceptions to the exclusive remedy principle.

The IIA provides for compensation to injured employees regardless of fault.[9] For example, if a worker is injured while on the job, the worker may make a claim to the state workers' compensation fund regardless of whether the worker's employer legally caused the injury. The IIA requires all employers[10] to pay into the accident fund premiums necessary to maintain "actuarial solvency of the accident and medical aid funds in accordance with recognized insurance principles."[11]

A. The Exclusive Remedy Principle

In exchange for this guaranteed right of recovery, workers lose the right to bring common-law suits against their employers for on-the-job injuries.[12] In such cases, the IIA provides the exclusive remedy.[13] As a result, the IIA bars all independent causes of action brought by employees against their employers for damages arising out of unintentional work-place injuries.[14] The IIA similarly bars all independent causes of action against an injured worker's co-employees.[15]

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9. WASH. REV. CODE § 51.04.010 (1994) provides:

> 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.

10. The IIA does not impose such responsibility on employers who are self-insured. WASH. REV. CODE § 51.14 (1994).

11. *Id.* § 51.16.035.

12. Under WASH. REV. CODE § 51.04.010 (1994), civil actions arising out of work-related injuries are abolished and replaced with the exclusive remedies and benefits under the IIA. *See, e.g.*, Thompson v. Lewis County, 92 Wash. 2d 204, 595 P.2d 541 (1979).

13. Kimball v. Millet, 52 Wash. App. 512, 513, 762 P.2d 10, 11 (1988).

14. Provost v. Puget Sound Power and Light Co., 103 Wash. 2d 750, 752, 696 P.2d 1238, 1239 (1985).

15. *Id.* at 752, 696 P.2d at 1240.

The courts have carefully construed this statutorily created quid pro quo in order to eliminate common-law claims and to further the purposes of the IIA.[16] Thus, workers who receive workers' compensation benefits under the IIA have no separate remedy for injuries except where the IIA specifically authorizes a cause of action.

B. Third-Party Suits

One such authorized cause of action arises when a third party, not in the worker's same employ, has caused the injury.[17] Wash. Rev. Code § 51.24.030 provides:

> 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.[18]

The underlying concept of these third-party suits is that, for moral and public policy reasons, "the ultimate loss from wrongdoing should fall upon the actual wrongdoer."[19] Under Washington law, the authorization for suits against third parties in Wash. Rev. Code § 51.24.030 effectuates two principal policies. First, it allows and encourages workers to seek full compensation from responsible third parties for injuries they suffer in the course of their employment. [20] Second, the

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16. *Thompson*, 92 Wash. 2d at 209, 595 P.2d at 543; *Kimball*, 52 Wash. App. at 514, 762 P.2d at 11.

17. WASH. REV. CODE § 51.24.030 (1994).

18. *Id.* § 51.24.030(1). WASH. REV. CODE § 51.08.180 (1994) defines "worker" as:

> [E]very person in this state who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment; also every person in this state who is engaged in the employment of or who is working under an independent contract, the essence of which is his or her personal labor for an employer under this title, whether by way of manual labor or otherwise, in the course of his or her employment . . . .

WASH. REV. CODE § 51.08.013 (1994) defines "acting in the course of employment" as:

> [T]he 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 . . ., 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 . . . .

WASH. REV. CODE § 51.08.070 (1994) defines "employer" as:

> [A]ny person, body of persons, corporate or otherwise, and the legal representatives of a deceased employer, all while engaged in this state in any work covered by the provisions of this title, by way of trade or business, or who contracts with one or more workers, the essence of which is the personal labor of such worker or workers.

19. 2A LARSON, *supra* note 5, § 71.10.

20. Flanigan v. Department of Labor and Indus., 123 Wash. 2d 418, 424, 869 P.2d 14, 17 (1994).

third-party statute provides workers with immediate compensation for injuries, subject to reimbursement to the workers' compensation fund if the worker later recovers from the third party.[21]

Because of the exclusive remedy principle, employers and co-employees are immune from suit under this third-party statute.[22] Yet, the language "not in a worker's same employ" has raised some difficult issues in certain contexts. For example, some cases indicate that when an employer or co-employee has two separate roles or owes two separate sets of duties to an employee, the employer or co-employee might, in the appropriate circumstances, be subject to suit under the third-party statute regardless of the exclusive remedy principle.[23]

C. *Exceptions to the Exclusive Remedy Principle: The Dual Capacity and Dual Persona Doctrines*

In certain circumstances, courts have allowed an injured employee who has already received workers' compensation benefits to bring a common-law suit against his employer or co-employee under the IIA's third-party suit provision. This situation arises when the employer or co-employee serves in several capacities, or owes a distinct legal duty to an injured worker not stemming from the employer or co-employee's status as an employer or co-employee.

In most jurisdictions, the law in this area has developed on an ad hoc basis without legislative involvement. Two related common-law theories—the dual capacity and dual persona doctrines—provide tests to determine when employers or co-employees may be considered third parties for purposes of tort suits stemming from workplace injuries.[24]

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21. *Id.*

22. *See* Duvon v. Rockwell Int'l, 116 Wash. 2d 749, 753, 807 P.2d 876, 878 (1991). Professor Larson supports the argument, adopted by Washington courts, that co-employees should be immune from suit under the third-party provision:

> The reason for the employer's immunity is the quid pro quo by which the employer gives up his normal defenses and assumes automatic liability, while the employee gives up his right to common-law verdicts. This reasoning can be extended to the tortfeasor co-employee; he, too, is involved in this compromise of rights. Perhaps . . . one of the things he is entitled to expect in return for what he has given up is freedom from common-law suits based on industrial accidents in which he is at fault.

2A LARSON, *supra* note 5, § 72.22, at 14-152. Larson states that "[t]he great majority of states . . . now exclude co-employees from the category of 'third persons.'" *Id.* § 72.21, at 14-119.

23. *See, e.g.*, Corr v. Willamette Indus., 105 Wash. 2d 217, 223, 713 P.2d 92, 96 (1986) ("[T]he court might apply the dual persona doctrine in the proper case. . . ."); Kimball v. Millet, 52 Wash. App. 512, 762 P.2d 10 (1988).

24. *See infra* notes 25-78 and accompanying text.

1. The Dual Capacity Doctrine

The dual capacity doctrine, at one time an important exception to the exclusive remedy principle, establishes a separate relationship or theory of liability between injured workers and employers. The doctrine stems from the concept that a single legal person may be said to have many "capacities."[25] For example, a single legal person may serve in one capacity as an employer, but in another as a landowner who owes common-law landowner duties to the employees who work on the land. If a worker is injured on the jobsite, the employer, in his or her capacity as an employer, would be immune from common-law suit under the exclusive remedy principle. The employer in his or her capacity as a landowner, however, would not be immune from common-law suit in tort.

A few jurisdictions at one time vigorously applied the dual capacity doctrine.[26] However, because this broad theory effectively destroys employer immunity whenever a separate relationship or theory of liability exists, many jurisdictions have rejected it altogether. These jurisdictions see the doctrine as defeating the exclusive remedy principle of workers' compensation schemes.[27]

Washington courts have similarly rejected the dual capacity doctrine: The Washington Supreme Court has recognized that the

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25. 2A LARSON, *supra* note 5, § 72.81(a).

26. The dual capacity doctrine was widely used in California and Ohio, but only for a short period of time. *See, e.g.*, Duprey v. Shane, 249 P.2d 8, 13 (Cal. 1958) (holding that a doctor who treated his own employee for a non work-related injury could be sued in his second capacity as a practicing physician); Guy v. Arthur H. Thompson Co., 378 N.E.2d 488, 492 (Ohio 1978) (allowing a tort action to proceed against an employer where the employer, a hospital, had treated the employee for workplace injuries because it had a duty of care separate and distinct from that arising out of its capacity as employer). In 1982, the California Legislature abolished the dual capacity doctrine by passing Assembly Bill 684, which amended § 3602 of the California Labor Code. *See* 2A LARSON, *supra* note 5, § 72.81(c), at 14-290.109. The Ohio Supreme Court declined to apply the doctrine in Freese v. Consolidated Rail Corp., 445 N.E.2d 1110 (Ohio 1983). *See generally* 2A LARSON, *supra* note 5, § 72.81(c), at 14-290.101.

27. *See, e.g.*, Swichtenberg v. Brimer, 828 P.2d 1218, 1225 (Ariz. Ct. App. 1991) (finding that the dual capacity doctrine conflicts with Arizona's workers' compensation statute and subverts the legislature's purpose in enacting the exclusive remedy provision); Porter v. Beloit Corp., 391 S.E.2d 430, 432 (Ga. Ct. App. 1990) (declining to apply the dual capacity doctrine insofar as it removes employer immunity in cases predicated upon a mere separate relationship or theory of liability), *cert. denied*, 1990 Ga. LEXIS 649 (Ga. Mar. 13, 1990). *See generally* 2A LARSON, *supra* note 5, § 72.81(a) ("since the term 'dual capacity' has proved to be subject to such misapplication and abuse, the only effective remedy is to jettison it altogether . . . ."); King, *supra* note 1.

dual capacity doctrine can be abused and extended such that the exclusive remedy provision becomes essentially defunct.[28]

Washington courts first considered the dual capacity doctrine in *Thompson v. Lewis County*.[29] In that case, Richard Thompson, an employee of the Lewis County Road Department, was driving a county truck in the course of his employment when a vehicle pulled onto the road in front of him and stalled.[30] In order to avoid a collision, Thompson drove the truck off the roadway and into a tree.[31] Thompson was seriously injured.[32] He made a claim under the IIA and received workers' compensation benefits.[33] Thompson then brought a suit against the County under a dual capacity theory, arguing that in one capacity the County was his employer, but in another capacity the County was a municipal corporation or governmental agency with a duty to properly construct and maintain county roads for the use and benefit of the public.[34]

The court decided that Thompson's exclusive remedy was the IIA and that he could not bring a common-law suit against the County.[35] Although the court acknowledged that the workers' compensation act should be liberally construed in favor of beneficiaries,[36] the court refused to apply the dual capacity doctrine, holding that the IIA bars all other remedies of an employee against his employer unless that employer also exists as another distinct legal entity.[37] Because Thompson's employer and the governmental entity that he alleged owed him a municipal duty were the same county department and not two distinct legal entities, Thompson could not bring suit.

In *Spencer v. Seattle*,[38] the Washington Supreme Court revisited the issue presented in *Thompson* and again rejected the dual capacity doctrine for government employees. In *Spencer*, a civil engineer for the Seattle Parks Department was run over by a truck as he stepped into a crosswalk while in the course of employment.[39] Spencer applied for

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28. *See, e.g.*, Corr v. Willamette Indus., 105 Wash. 2d 217, 713 P.2d 92 (1986); Spencer v. Seattle, 104 Wash. 2d 30, 700 P.2d 742 (1985); Thompson v. Lewis County, 92 Wash. 2d 204, 595 P.2d 541 (1979).

29. 92 Wash. 2d 204, 595 P.2d 541 (1979).

30. *Id.* at 205, 595 P.2d at 542.

31. *Id.* at 206, 595 P.2d at 542.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 208, 595 P.2d at 543.

37. *See id.* at 209, 595 P.2d at 544.

38. 104 Wash. 2d 30, 700 P.2d 742 (1985).

39. *Id.* at 31, 700 P.2d at 743.

and received industrial insurance benefits.[40] He then filed suit against the City for his injuries, alleging that they resulted from the negligent design, construction, and repair of the crosswalk.[41]

The City argued, based on the exclusive remedy principle, that Spencer could not maintain a common-law cause of action against it.[42] Spencer argued that the City could be sued under the dual capacity doctrine because the City acted in a dual capacity as (1) an employer with an obligation to provide employees with a safe place to work; and (2) a municipality with an obligation to provide members of the public with adequately designed, constructed, and maintained city streets and crosswalks.[43]

The court, however, refused to accept Spencer's invocation of the dual capacity doctrine, holding that because the third-party provision of the IIA focuses on the identity of the third person, that third person must be someone other than the employer.[44] The court found that the identity of the City as a municipality was not completely independent from and unrelated to its identity as an employer.[45] In rejecting the dual capacity doctrine, the court noted that every jurisdiction presented with the issue had also rejected the doctrine in cases involving an action by a government employee against the government.[46]

In *Corr v. Willamette Industries*,[47] the Washington Supreme Court again considered and rejected the dual capacity doctrine. In that case, Corr, an employee of Willamette Industries, was injured by defective equipment while working.[48] The defective equipment was designed and built by Corco, a corporation that was absorbed by Willamette prior to Corr's injury.[49] Pursuant to the terms of the merger agreement between Willamette and Corco, Willamette "succeeded to all Corco's liabilities and obligations."[50] Thus, in addition to filing for and receiving workers' compensation benefits for his injuries,[51] he also sued Willamette, alleging that it acted in a dual

40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 32, 700 P.2d at 743.
44. *Id.* at 33, 700 P.2d at 744.
45. *Id.*
46. *Id.*
47. 105 Wash. 2d 217, 713 P.2d 92 (1986).
48. *Id.* at 218, 713 P.2d at 93.
49. *Id.*
50. *Id.*
51. *Id.*

capacity as both an employer and a manufacturer of a product used in the workplace.[52] In reaching its holding, the court explained that "courts have rejected the dual capacity doctrine in the employer/manufacturer relationship because an employer's obligation to provide a safe workplace cannot be separated from the duty owed by an employer to his employees by reason of his manufacture of equipment with which employees must work."[53]

2. The Dual Persona Doctrine

In response to concerns that the dual capacity doctrine undermines the exclusive remedy principle, a more narrow formulation of the duality concept has developed. Professor Arthur Larson advocates abandoning the dual capacity theory and replacing it with a more narrow formulation:

> 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 employer that by established standards the law recognizes it as a separate legal persona.[54]

This reformulated concept, the dual persona doctrine, focuses on the *identity* of the third party, not the *relationship* of the third party to the injured worker.[55]

a. Dual Capacity vs. Dual Persona

Because an employer might have an additional relationship to an employee, such as landowner, products manufacturer, vendor, bailor, doctor, hospital, or safety inspector, the dual capacity doctrine, if carried too far, could effectively render the exclusive remedy principle powerless.[56] Furthermore, because in most cases the additional duties are inextricably intertwined with those of the employer,[57] the dual capacity doctrine will always circumvent the exclusive remedy principle.[58] However, the dual persona doctrine will protect employer

52. *Id.* at 218-19, 713 P.2d at 93-94.
53. *Id.* at 220, 713 P.2d at 94.
54. 2A LARSON, *supra* note 5, § 72.81, at 14-290.88.
55. *Id.* § 72.81(a).
56. *Id.*
57. *Id.* § 72.81(c).
58. *See id.* § 72.81(a).

immunity in cases where there is no separate and distinct legal persona.[59]

For example, under the dual capacity doctrine, an employer who individually owns the land upon which he runs his business will always be held liable under the third-party statute because of his separate capacity as a landowner, effectively ameliorating the exclusive remedy principle.

Under the dual persona doctrine, however, the employer will not necessarily be subject to common-law suit. Although the employer will be subject to third-party liability if his duties as a landowner are "completely independent from and unrelated to his status as employer,"[60] he will be immune from a third-party suit if his persona as a landowner is interconnected with his duties as an employer. Thus, the dual persona doctrine does not extinguish the possibility of suit under the third-party statute; it merely limits the circumstances in which such suit is possible. This doctrine protects the exclusive remedy principle, but also leaves the door open for injured employees to bring suit in cases where employers really do owe employees two separate and distinct legal duties.

b. Application of the Dual Persona Doctrine

Courts have applied the dual persona doctrine in a few contexts, most frequently in the contexts of corporate mergers and products

59. *See id.*

60. 2A LARSON, *supra* note 5, § 72.81, at 14-290.88.

liability.[61] Courts have been less willing to apply the doctrine in the landowner context.[62]

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61. *See, e.g.*, Thomas v. Valmac Indus., 812 S.W.2d 673, 674 (Ark. 1991) (finding that under the dual persona doctrine, an injured truck driver may pursue a tort claim against an alleged tortfeasor who, at the time of the accident, was not the worker's employer but who, since the accident, had become the worker's employer as the result of a corporate merger); Percy v. Falcon Fabricators, 584 So. 2d 17, 18 (Fla. Dist. Ct. App. 1991) (adopting the dual persona doctrine and holding that an injured employee may sue her employer in tort when that employer is the corporate successor of the manufacturer of the defective product that caused the injury, and the product was manufactured before the corporate merger), *review dismissed*, 595 So. 2d 556 (Fla. 1992); Robinson v. KFC Nat'l Management Co., 525 N.E.2d 1028, 1029 (Ill. App. Ct. 1988) (holding that an employee who has received workers' compensation benefits may pursue a tort action against his employer when the manufacturing corporation, by whom the employee has never been employed, merged with the employer corporation prior to the time of the employee's injuries); Kimzey v. Interpace Corp., 694 P.2d 907, 912 (Kan. Ct. App. 1985) (adopting the dual persona doctrine and allowing suit against a successor corporation when the successor corporation absorbed the third-party manufacturer and assumed the liabilities of that manufacturer). *But see* Hatch v. Lido Co. of New England, 609 A.2d 1155, 1157 (Me. 1992) (declining to adopt the dual persona doctrine in a corporate merger context when the duty owed by the employer to the injured worker—the duty to provide a safe workplace—was the same duty that the successor corporation owed to the worker: "We are unable . . . to accept the argument that when dealing with an identical duty, the legislature intended the statutory process of merger to strip the resulting corporation of the immunity conferred on it by the Worker's Compensation Act. Such a result serves no purpose other than to avoid the limitations imposed by the Act.").

62. *See, e.g.*, Landers v. Energy Sys. Management Co., 807 S.W.2d 33, 35-36 (Ark. 1991) (holding that the dual persona doctrine does not apply in the landowner context and that the employer cannot be sued as the owner or occupier of land); Vaughn v. Jernigan, 242 S.E.2d 482, 483 (Ga. Ct. App. 1978) (holding that an individual landowner could not be sued in tort for a defective condition on the premises when the individual leased the land to the corporate employer, who employed both the individual landowner and the injured worker: The landowner's "knowledge of the allegedly defective condition, as well as his authority to correct it, came to him not through his ownership of the premises but through his active involvement in the management of the employer corporation as its chief executive officer . . . . Accordingly, he cannot be labeled a 'third-party tortfeasor,' and a recovery against him is precluded . . . ."); Kontos v. Boudros, 608 N.E.2d 573, 577 (Ill. App. Ct.) (holding that the dual persona doctrine does not apply in the case where an individual is the landowner as well as the president, shareholder, and manager of the restaurant that leases the land because the duty as landowner is not different from the duty as employer to provide a safe workplace), *appeal denied*, 616 N.E.2d 335 (Ill. 1993); Senken v. Eklund, 552 N.Y.S.2d 490, 494 (Sup. Ct. 1990) (granting summary judgment in favor of the defendant, who was both the landowner and the employer, because the obligation of the landowner to provide a safe workplace was inseparable from the obligations arising in the employment relationship); Heritage v. Van Patten, 453 N.E.2d 1247, 1248 (N.Y. 1983) (holding that, regardless of his status as owner of the premises where an injury occurred, a co-employee of the injured worker is immune from suit. "To impose liability upon defendant . . . would be to disregard the express legislative prohibition . . . of the Workers' Compensation Law which makes compensation the exclusive remedy of an employee injured 'by the negligence or wrong of another in the same employ.'"). *But see* Patton v. Simone, Nos. 90C-JA-29, 90C-JL-219 Consolidated, 1992 Del. Super. LEXIS 277, at *19-20 (Del. Super. Ct. July 16, 1992) (denying defendant landowner's motion for summary judgment and stating that an individual's status as landowner and employer may give rise to separate liabilities under the dual persona doctrine, but not stating when such circumstances may arise); Doggett v. Patrick, 398 S.E.2d 770, 771-72 (Ga. Ct. App. 1990) (denying defendant landowner's motion for summary judgment and stating that

In Washington, the supreme court has considered the dual persona doctrine in both the corporate merger and the landowner contexts, but has never applied it. For example, in *Corr v. Willamette Industries*,[63] the case in which a Willamette employee was injured by equipment that was designed and built by Corco, Willamette's corporate predecessor,[64] the court considered applying the dual persona doctrine in the corporate merger context, despite having rejected the dual capacity doctrine.[65] The court, noting a rule from another jurisdiction, stated, "where, by corporate merger, the employer succeeds to the liabilities of the manufacturer of the equipment, the employer cannot avoid those liabilities merely because the workers' compensation law covered the [worker]."[66] Applying this principle to the facts of *Corr*, the court recognized that Willamette could be liable for Corr's injuries, as it succeeded to the liabilities and obligations of Corco when the two corporations merged.[67]

Nevertheless, the court found that liability could not be imposed on Willamette.[68] The court held that Willamette could be liable only if Corr could have sued Corco as a third-person tortfeasor had the corporations not merged.[69] The court then found that Corr could not have sued Corco absent the merger because Willamette would never have acquired the defective equipment, and thus Corr would not have been injured.[70] Thus, although the court entertained the dual persona concept in the corporate merger context, it decided that *Corr* was not a proper case in which to apply it.[71]

The court has also not applied the dual persona doctrine in the landowner context. In *Kimball v. Millet*,[72] the Millets, officers of a farming corporation, individually owned the land on which the farm

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the factual context may give rise to a separate legal persona to support liability when the defendant (1) individually owned the premises on which the accident occurred, and (2) leased the premises to the corporation of which he was the president); Labelle v. Crepeau, 593 A.2d 653, 655 (Me. 1991) (holding that a defendant landowner may be sued in his individual capacity as landowner regardless of his role as shareholder, president, and treasurer of the corporate employer because the corporate form gives rise to a separate legal persona).

63. 105 Wash. 2d 217, 713 P.2d 92 (1986).

64. *Id.* at 218, 713 P.2d at 93.

65. *Id.* at 220-21, 713 P.2d at 94.

66. *Id.* at 221, 713 P.2d at 95 (citing Billy v. Consolidated Mach. Tool Corp., 412 N.E. 2d 934 (N.Y. 1980)).

67. *Id.* at 222, 713 P.2d at 95.

68. *Id.* at 223-24, 713 P.2d at 96.

69. *Id.* at 222, 713 P.2d at 95.

70. *Id.*

71. *Id.* at 223, 713 P.2d at 96.

72. 52 Wash. App. 512, 762 P.2d 10 (1988).

was located, and leased the land to the corporation.[73] Kimball, an employee, was injured in the course of his employment by an aggressive bull owned by the corporation.[74] Kimball attempted to characterize the Millets not as employers or co-employees, but as landowners, invoking the dual persona doctrine.[75] The court, however, refused to apply the doctrine, stating that employees cannot easily avoid the protections afforded employers by the IIA.[76] The court held that the dual persona doctrine will not apply where the facts supporting the claim are those under which a co-employee would be immune from suit under the IIA.[77] In such cases, the employer cannot be said to have a second persona so completely separate as to be recognized as a separate person for purposes of third-party liability for an on-the-job injury.[78]

Accordingly, although the Washington Supreme Court has not applied the dual persona doctrine, the court has left the door open for its use in future cases.

III. *EVANS V. THOMPSON*

Evans v. Thompson[79] may be that case. In *Evans*, the court addressed the issue of whether employers and co-employees who are also landowners may be held liable in tort under the third-party provision of the IIA where an employee's injuries occur on that land. This section will introduce the court's decision in *Evans* and will explain both the majority and dissenting arguments.

A. Facts

In *Evans*, the widows of two deceased workers brought suit under the third-party statute against Robert and Amber Thompson, the sole shareholders, officers, and directors of Santana Trucking & Excavating, Inc. (Santana), the Washington corporation that employed the decedents.[80] The plaintiffs sued the Thompsons in their individual

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73. *Id.* at 513, 762 P.2d at 11.

74. *Id.*

75. *Id.*

76. *Id.*; *cf.* Spencer v. City of Seattle, 104 Wash. 2d 30, 700 P.2d 742 (1985); Thompson v. Lewis County, 92 Wash. 2d 204, 595 P.2d 541 (1979).

77. *See Kimball*, 52 Wash. App. at 514, 762 P.2d at 11.

78. *Id.*

79. 124 Wash. 2d 435, 879 P.2d 938 (1994).

80. *See id.* at 437, 879 P.2d at 939.

capacities as the owners of the real property on which the decedents were killed.[81]

The Thompsons had acquired title to the land for personal investment purposes.[82] Although the Thompsons as individuals owed a balance on the parcel, Santana made the payments.[83] The Thompsons did, however, show the payments as income on their personal tax returns.[84] The Thompsons obtained construction and grading permits for work on the property and allowed Santana to use the property for dumping fill materials.[85]

On the day of the accident, Santana sent the two workers, Evans and Kanning, to inspect a storm drain system on the property. During the inspection, Evans dropped a calculator into the manhole. After Evans proceeded down the manhole to retrieve his calculator and did not return, Kanning went after Evans. Both died from methane gas accumulated at the bottom of the manhole.[86]

B. Procedural History

At trial, the plaintiffs alleged a breach of the duties owed to Evans and Kanning by the Thompsons as landowners.[87] The Thompsons moved for summary judgment on the basis that the plaintiffs' claims were barred by the exclusive remedy principle because the Thompsons were in the "same employ" as Evans and Kanning.[88] In other words, the Thompsons argued that as officers, directors, and shareholders of Santana, they were co-employees of Evans and Kanning and, as such, they were immune from common-law suit based on the plain language of the third-party statute.

The trial court granted the Thompsons' summary judgment motion,[89] which the court of appeals affirmed in an unpublished opinion.[90] The court of appeals agreed that the Thompsons, as corporate officers and directors of Santana, were co-employees of the

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81. *Id.*

82. *Id.* at 438, 879 P.2d at 939.

83. *Id.*

84. *Id.*

85. *Id.* at 438-39, 879 P.2d at 939-40.

86. *Id.* at 436, 879 P.2d at 939.

87. Plaintiffs specifically alleged that "[t]he injuries and deaths . . . were proximately caused by the concealed (latent) ultrahazardous condition of Defendants' property." *Id.* at 437, 879 P.2d at 939 (citation omitted).

88. *Id.*

89. *Id.*

90. Evans v. Thompson, No. 28936-5-I (Wash. Ct. App. filed Jan. 4, 1993) (on file with the *Seattle University Law Review*).

decedents.[91] Furthermore, the court of appeals held that the co-employees' landowner status could not be used to circumvent the exclusive remedy provision of the IIA.[92]

C. Washington Supreme Court Decision

The supreme court disagreed. In a 5-4 decision, the court reversed and remanded the case for a factual determination of whether Mr. and Mrs. Thompson were co-employees of the decedents. Rather than treating this issue as a matter of law, the court treated it as a matter of fact: On remand, if the trier of fact finds that the Thompsons were not co-employees, they will be subject to liability under the third-party provision.[93]

In its decision, the majority addressed two issues: (1) When defendants are landowners and constitute a completely separate legal entity from the employer of a worker, are they immune under the IIA for breach of their duties as landowners? (2) Are the officers and directors of a corporate employer immune, as a matter of law, as co-employees, even though at least one of the officers and directors is not employed by the corporation and performs no duties for the corporation?[94]

The majority never articulated clear holdings on these issues; rather, it stated that "there are genuine issues of material fact as to whether the Defendants, particularly [Mrs. Thompson], were in fact co-employees of the decedents."[95] The court emphasized that Mrs. Thompson was not employed by the corporation, owed no duties to the corporation, performed no services for the corporation, and received no wages or any form of compensation from the corporation.[96] Furthermore, Mr. Thompson failed to provide any evidence of his actual duties for the corporation including whether he directed the day-to-day operations.[97] Thus, the court held that it could not support immunity as a matter of law.[98] However, in reversing the court of appeals' decision and remanding the case for further findings of fact,

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91. *Id.*
92. *Id.*
93. *See Evans*, 124 Wash. 2d at 445, 879 P.2d at 943.
94. *Id.* at 437, 879 P.2d at 939.
95. *Id.* at 438, 879 P.2d at 939.
96. *Id.* at 445, 879 P.2d at 943.
97. *Id.*
98. *Id.* at 444-45, 879 P.2d at 943.

the court stated that, under its decision, the plaintiffs do not necessarily recover.[99]

In support of its decision to remand the case, the court explained that the third-party provision evidences a strong policy in favor of actions against third parties.[100] Furthermore, the court stated that the purpose of the exclusive remedy provision is to grant immunity to the employer and co-employees acting in the scope and course of their employment, 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."[101] Apparently, the court did not believe, based on the factual record, that Mr. or Mrs. Thompson, as officers, directors, and shareholders, had enough of a connection with Santana's business to receive immunity under the exclusive remedy principle.

D. Dissent

Four justices vehemently disagreed with the majority, arguing that the plaintiffs' exclusive remedy lies in the IIA.[102] Instead of remanding the case on the issue of whether the defendants as officers, directors, and shareholders of Santana were in fact co-employees of the decedents, the dissent would have applied a bright-line rule and found that the Thompsons, as corporate officers, were "in the same employ" as Evans and Kanning, and were therefore immune from third-party liability under the IIA as a matter of law.[103] The dissent argued that characterizing the corporate officers as co-employees as a matter of law "would be consistent with the IIA's general policy of increasing the certainty and reducing the volume of litigation of workers' injuries. It would also provide for uniform application of workers' compensation laws in Washington and alleviate the possibility of fact finders reaching inconsistent conclusions in different cases."[104]

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99. *Id.* at 438, 879 P.2d at 939.

100. *Id.* at 437, 879 P.2d at 939.

101. *Id.* at 447, 879 P.2d at 944.

102. [The majority] misstates the issues, ignores relevant Washington case law, relies on inapposite cases from other jurisdictions, adopts a doctrine repeatedly rejected in Washington, and issues an opinion that is itself internally inconsistent. Furthermore, the majority never clearly articulates its holding, nor does it provide guidance for the trial court on remand. Moreover I cannot agree on a policy level with the majority's decision to weaken the exclusivity provisions of the IIA and broaden third party liability. Therefore, I dissent.

Id. at 448, 879 P.2d at 944 (Dolliver, J., dissenting).

103. *Id.* at 450, 879 P.2d at 945-46.

104. *Id.* at 450, 879 P.2d at 946.

The dissent clearly articulated, however, that even with this bright-line rule, a corporate officer would not be immune from suit in all cases. For instance, the dissent would not find a corporate officer immune from suit when "he or she possess [sic] a second persona 'so completely independent from and unrelated to' his or her status as a co-employee that the law recognizes it as a separate person."[105] Therefore, in certain cases, the dual persona doctrine would provide some relief to an injured worker, such as when the defendant's status as landowner is completely unrelated to his or her status as a corporate officer such that an entirely separate legal entity exists.[106]

Unlike the majority, the dissent would apply the dual persona doctrine only when the relationship between the co-employee and the injured worker is too remote to justify immunity from liability. Such a remote relationship would exist, for example, if the premises were separately owned by a distinct legal entity, such as a partnership.[107] In all other cases, the dissent would find as a matter of law that a corporate officer is a co-employee and receives immunity from common-law suit under the exclusive remedy principle. Finding otherwise, the dissent argued, would indiscriminately strip a corporate officer of immunity, leaving the officer open to liability even for a work-related injury. Additionally, finding otherwise would over-broaden the third-party provision and undermine the exclusive remedy principle.[108]

IV. CRITIQUE OF THE *EVANS* DECISION

In light of the strong disagreement between the majority and dissent in *Evans* over the applicability of the dual persona doctrine, this section will first address the general question of whether the dual persona doctrine should apply in the landowner context. It will then explain that the majority misapplied the dual persona doctrine, effectively applying the previously-rejected dual capacity formulation instead. Finally, this section will argue that the Thompsons should have been considered co-employees as a matter of law.

105. *Id.* at 451, 879 P.2d at 946 (citations omitted).
106. *Id.* at 455, 879 P.2d at 948.
107. *Id.* at 455-56, 879 P.2d at 948.
108. *Id.* at 451, 879 P.2d at 946.

A. The Dual Persona Doctrine in the Landowner Context

When an accident occurs on a jobsite and the owner of the premises is also the employer or co-employee of the injured worker, the legal personas of "landowner" and "employer or co-employee" will usually not be sufficiently separate to justify application of the dual persona doctrine. Although the landowner owes legal duties to the employee separate from those owed by the employer or co-employee, the duties are usually interrelated.

For example, although the Thompsons' landowner duties of protecting people from latent defects on the land are separate from the duties that they owe as employers and co-employees under the IIA, these duties are so intertwined that they cannot be completely separated.[109] In *Evans*, the decedents fell down a manhole on the Thompsons' personal property and died as a result of methane gas accumulations. This unfortunate accident would not have occurred, however, had Santana not ordered the decedents to work on the site. Furthermore, because Santana used the land as part of its daily business, the Thompsons were more likely to have discovered the latent defect as a result of their involvement with Santana than through their personal land ownership. Because the dual persona doctrine requires that, in order to be held liable as a third party, an employer or a co-employee possess a second legal persona "completely independent from and unrelated to his status as employer,"[110] the dual persona doctrine by definition does not apply in situations such as in *Evans*. When an employer personally owns the land on which his or her employees work, the employer's duties under the IIA and the employer's landowner duties are interconnected; thus, in most instances, the dual persona doctrine should not apply. If the doctrine were applied, it would serve only to put individual landowners at risk of being held liable for the same workplace injuries against which they have already insured by paying into the workers' compensation fund.

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109. *See, e.g.*, Royster v. Montanez, 184 Cal. Rptr. 560, 565 (Ct. App. 1982) ("By occupying land or other premises as workplace, an employer cannot be said to have undertaken some extra-employer role or to have assumed some obligation which is separate and distinct from its capacity as an employer. Occupation of land is a normal and usual incident of being an employer."), *superseded by statute* as stated in Siva v. General Tire & Rubber Co., 194 Cal. Rptr. 51 (Ct. App. 1983); Vaughn v. Jernigan, 242 S.E.2d 482, 483 (Ga. Ct. App. 1978) (holding that the employer's knowledge of an allegedly defective condition on the land came to him not through his ownership of the premises, but through his role as an officer of the employer corporation; thus, the duties were intertwined).

110. 2A LARSON, *supra* note 5, § 72.81, at 14-290.88.

This does not mean that the dual persona doctrine could not theoretically apply in some very specific landowner contexts, however. The dissent writes that under the dual persona doctrine "an injured worker may avoid the strict exclusivity provisions of the Industrial Insurance Act in a narrow group of cases in which an otherwise immune co-employee has breached a duty owed the injured worker in a completely separate and unrelated identity."[111] Such a circumstance might arise, for example, when a separate partnership or other business entity owned by the employer or co-employee, but unrelated to the business in which the injured employee was injured, owned the land on which the employee was injured. In that case, the partnership or business entity would owe a separate landowner duty to an injured employee, one totally unrelated to the employer or co-employee's duties under the IIA. Such a situation differs from the scenario in *Evans* where the Thompsons' individual duties were more closely intertwined with their duties as employers and co-employees.

A second reason the dual persona doctrine should not apply in most landowner cases is that the doctrine circumvents the exclusive remedy provision of the IIA. Most authorities oppose the use of the doctrine in the landowner context for this very reason:

> It is held with virtual unanimity than an employer cannot be sued as the owner or occupier of land . . . .
>
> Apart from the basic argument that mere ownership of land does not endow a person with a second legal persona or entity, there is an obvious practical reason requiring this result. An employer, as part of his business, will almost always own or occupy premises, and maintain them as an integral part of conducting his business. If every action and function connected with maintaining the premises could ground a tort suit, the concept of exclusiveness of remedy would be reduced to nothingness.[112]

The dissent agrees with this authority, stating that without a strict interpretation of the dual persona doctrine in landowner cases, employer and co-employee immunity will be weakened to the point of meaninglessness.[113] Rather than enjoying the statutorily-protected right to immunity from suit in tort, employers and co-employees

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111. Evans v. Thompson, 124 Wash. 2d 435, 451, 879 P.2d 938, 946 (1994) (Dolliver, J., dissenting).

112. 2A LARSON, *supra* note 5, § 72.31, at 14-245, 251.

113. *Evans*, 124 Wash. 2d at 455, 879 P.2d at 948. *Cf.* King, *supra* note 1, at 411-12 ("The delicately balanced quid pro quo imposing no-fault liability in exchange for immunity from tort claims and limits on the amount of worker's compensation liability becomes illusory without a viable exclusive remedy rule.").

would be held personally liable for accidents directly related to the operation of the business. Because many small business owners own land and individually lease that land to their business, such a broad rule would effectively deter many individuals from starting up small businesses. Accordingly, the dual persona doctrine should be applied only in very limited circumstances where its application will not circumvent the exclusive remedy principle and thwart the growth of small business.

Finally, the dual persona doctrine should not apply in the landowner context because by circumventing the exclusive remedy provision of the IIA, the dual persona doctrine effectively broadens the third-party statute and creates a new class of potential defendants. Although courts have held that the IIA should be liberally construed in favor of injured workers, the third-party provision clearly and unambiguously provides that workers' compensation is the injured employee's exclusive remedy; thus, any judicial construction that allows for suits against employers or co-employees would be a judicial broadening of the third-party statute and, as such, would be legislation.[114]

B. The Evans *Decision Effectively Applies the Defunct Dual Capacity Doctrine*

In addition to overextending the dual persona doctrine, the *Evans* court, in effect, adopted the previously-rejected dual capacity formulation. The majority opinion allows the possibility that the Thompsons will be held liable merely because they owed duties to the decedents in two capacities—as corporate directors and as individual landowners. Because the Thompsons' roles as corporate officers and directors were closely related to their roles as landowners, the court based potential liability upon the mere fact that the Thompsons acted in two capacities toward the decedent workers. This basis for liability harkens back to the previously rejected dual capacity concept.

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114. *See* Lowry v. Department of Labor and Indust., 21 Wash. 2d 538, 542, 151 P.2d 822, 824 (1944) (holding that where the language of the IIA is ambiguous and exhibits a clear and reasonable meaning, there is no room for construction), *aff'd en banc*, 23 Wash. 2d 936, 159 P.2d 622 (1945); *cf.* Seattle-First Nat'l Bank v. Shoreline Concrete Co., 91 Wash. 2d 230, 242, 588 P.2d 1308, 1316 (1978) (stating that with certain specified exceptions, the IIA abolishes judicial jurisdiction over all civil actions for workplace injuries between employees and employers: "In effect, the [IIA] 'immunizes,' from judicial jurisdiction, all tort actions which are premised upon the 'fault' of the employer vis-a-vis the employee. The determination to abolish judicial jurisdiction over such 'immunized' conduct was a legislative policy decision. The wisdom of that decision is not a proper subject of our review.").

C. The Thompsons Should Have Been Considered Co-Employees As a Matter of Law

Finally, the majority should have found, as a matter of law, that the Thompsons were co-employees of the decedents for purposes of applying the exclusive remedy principle. The Washington Legislature clearly provided that co-employees will be immune from suit in tort under the third-party statute.[115] Furthermore, the legislature did not include any limitations on the "same employ" language in that statute.[116] Had the legislature intended to limit co-employee immunity to those individuals who engage in work at the site of the injury, rather than officers and directors of the corporation, it could have done so.[117] Because the legislature did not, the court should not limit the definition of "co-employees" by excluding corporate officers and directors. Therefore, in remanding the case for a factual finding of whether the Thompsons were co-employees of the decedent, the court weakened the exclusive remedy provision without a statutory directive to do so.

V. CONCLUSION

Washington State has many closely-held corporations such as Santana.[118] The implication of the majority's decision in *Evans* is that if the Thompsons had not incorporated Santana, they would be immune from suit under the IIA; but because they did incorporate, they became a separate legal entity and thus lost their immunity.[119]

Accordingly, the dual persona doctrine should be used only in contexts where common or statutory law clearly defines separate obligations that arise out of distinct legal personas, not in contexts involving interrelated legal personas or capacities. Furthermore, the dual persona doctrine should be used only in those exceptional circumstances where the employer acts in a second persona so unrelated to his or her status as an employer that he or she owes obligations to the worker that are completely independent of the employer-employee relationship. Application of the doctrine in those limited circumstances will not frustrate or undermine the general

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115. Peterick v. State, 22 Wash. App. 163, 190, 589 P.2d 250, 267 (1977), *overruled on other grounds by* Stenberg v. Pacific Power & Light Co., 104 Wash. 2d 710, 709 P.2d 793 (1985).

116. *Id.*

117. *See id.*

118. Evans v. Thompson, 124 Wash. 2d 435, 455, 879 P.2d 938, 948 (1994).

119. *See id.* Such a holding presents a great disincentive to small, family-owned businesses to incorporate. As a result, these businesses lose out on the benefits of incorporation.

policies of the exclusive remedy principle or judicially broaden employer and co-employee liability. Finally, in situations such as in *Evans*, corporate officers and directors should be considered co-employees as a matter of law for the purposes of applying the exclusive remedy principle. Although in some circumstances the dual persona doctrine may be appropriately and correctly applied, *Evans v. Thompson* is not such a case.