IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON, DIVISION III

CASE NO. 26876-III

DEBBIE ROTHWELL,

Appellant,

vs.

NINE MILE FALLS SCHOOL DISTRICT; MICHAEL GREEN,

Respondents,

and

CRAIG THAYER, STEVENS COUNTY SHERIFF; MIKE NOLANDER; JIM REED AND JOHN DOE

Defendants.

PETITION FOR DISCRETIONARY REVIEW TO THE SUPREME COURT

Michael E. McFarland, Jr. WSBA#23000
Patrick M. Risken, WSBA#14632
EVANS, CRAVEN & LACKIE, P.S.
818 West Riverside Ave., Suite 250
Spokane, WA 99201
(509) 455-5200

TABLE OF CONTENTS

A. IDENTITY OF PETITIONERS 1

B. COURT OF APPEALS DECISION 1

C. ISSUES PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 2

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED. 7

1. The Majority Decision Confuses Ms. Rothwell's Continuing Tasks And Symptoms With What Is An Easily Identifiable "Traumatic Event". 8

2. The Court of Appeals Cannot Make Factual Determinations When Reviewing A Rule 12 Motion. 17

E. CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Boeing co. vs. Key, 101 Wn.App. 629, 5 P.3d 16 (2000) 13, 14, 15, 16

Contreras vs. Crown Zellerbach Corp., 88 Wn.2d 735, 565 P.2d 1173 (1977) 18

Cooper v. Department of Labor and Industries, 49 Wn.2d 826, 307 P.2d 272 11

Dennis vs. Dep't of Labor & Industries, 109 Wn.2d 467, 470, 745 P. 2d 1295 (1987) 15

Fitzgerald vs. Hopkins, 70 Wn.2d 924, 928, 425 P.2d 920 (1967) 18

Guy F. Atkinson Co. vs. Webber, 15 Wn.2d 579, 131 P.2d 421 (1942) 9

Higgins vs. Dep't, supra at 561-562 9

In Re: Daniel Heassler, BIAA Dec., 89 2447 & 89 2448 (1990) 17

Lehtinen vs. Weyerhaeuser Company, 63 Wn.2d 456, 459, 387 P.2d 760 (1963) 12, 13

Louderback vs. Dep't of Labor & Industries, 14 Wn.App. 931, 935-936, 547 P.2d 889 (1976) 19

Northwest Metal Products vs. Dep't of Labor & Industries, 12 Wn.2d 155, 120 P.2d 855 (1942) 9

Sharpe vs. American Tel. & Tel. Co., 66 F.3d 1045 (9th Cir. 1995) 16

Snyder vs. Medical Service Corporation of Eastern Washington, 98 Wn.App. 315, 988 P.2d 1023 (1999) 13, 14, 15

Stidham vs. Dept. of Licensing, 30 Wn.App. 611, 637 P.2d 970 (1981) 19

Wheeler vs. Catholic Archdiocese of Seattle, 65 Wn.App. 552, 829 P.2d 196 (1992), *rev'd on other grounds* 124 Wn.2d 643, 880 P.2d 29 (1994)....15

Windust vs. Dep't of Labor & Industries, 52 Wn.2d 33, 39, 323 P.2d 241 (1958)....9

Statutes and Rules

RCW 51.08.100....9, 11, 12

RCW 51.12.010....15

A. IDENTITY OF PETITIONERS

Respondents Nine Mile Falls School District and Michael Green.

B. COURT OF APPEALS DECISION

The majority decision in *Debbie Rothwell, Petitioner v. Nine Mile Falls School District and Michael Green, Respondents,* Court of Appeals Division 3, Case No. 26876-40-III.

C. ISSUES PRESENTED FOR REVIEW

1. Is an "industrial injury" under the Washington Industrial Insurance Act ("IIA") limited to only those injuries which are causally related to one specific event at one specific point in time?

2. Does "traumatic event" under the IIA include an injury caused by a series of related "traumas" over a finite, limited span of time?

3. Alternatively, is the question of whether a claimed injury was the result of one specific event or a series of events capable of determination, as a matter of law, by a Court of Appeals in reversing the Trial Court's dismissal of the claimant's case under CR 12(b)(6)?

4. May a Court of Appeals make a determination, as a matter of law, that a claimed industrial injury is or is not causally related to a single event or a series of events, without any evidence to support it?

D. STATEMENT OF THE CASE

This case involves a result-oriented approach by a majority of the Court of Appeals, Division 3, to a clear set of facts. In reversing the Trial Court's dismissal under CR 12(b)(6), the majority relied upon distinguishable case law and a human condition which by name is "delayed," in order to support a finding, as a matter of law, that a person injured on her job did not in fact sustain an "industrial injury." The status of industrial injury claimants in Division 3 is now quite confused. As a result of this *Opinion*, even though a person exhibits symptoms of injury immediately after exposure to an event, if the exposure repeats even once it is not a "sudden and tangible happening." The *Opinion* does not reconcile existing precedent with the facts alleged.

Further, if the condition which results does not manifest itself immediately, this *Opinion* commands a determination that the condition is not an "industrial injury." The majority *Opinion* significantly restricts the definition of "industrial injury" and is clearly contrary to long-established case law which mandates the liberal interpretation of the IIA.

Petitioner Debbie Rothwell filed an action against Respondents Nine Mile Falls School District and Michael Green for intentional and negligent infliction of emotional distress. All of the following "facts" and quotations are as stated in the *Published Opinion* of the Court of Appeals.

Ms. Rothwell was a custodian employed by the Nine Mile Falls School District (hereinafter "NMFSD") in 2004. On December 10, 2004, she was scheduled to work a swing shift at Lakeside High School and was due to report at 4:00 p.m. after arranging to split the shift with a co-worker. But at 1:30 p.m. she was called in to work. *Complaint* ¶ 6. Ms. Rothwell did report. She then learned that a student had committed suicide in the main entrance to the school by shooting himself.

Ms. Rothwell was initially tasked by a superior to occupy the main gate to the school to prevent media and unauthorized personnel from intruding. After over an hour of that duty Ms. Rothwell was told by Mr. Green to clean up the scene of the tragedy. *Complaint* ¶¶ 8, 9. When she approached the scene she overheard the name of the deceased student. *Complaint* ¶ 10. As the Court of Appeals recognized: "After learning that the victim was a student whom she knew personally, Ms. Rothwell became very distraught and upset. She then went to her car and left the school grounds for approximately 30 minutes to compose herself." *Opinion,* p. 3; <u>see</u> *Complaint* ¶ 10. This is the key fact alleged.

She voluntarily returned to Lakeside High School later that day. For the remainder of December 4, 2004, Ms. Rothwell accompanied the LHS principal on a tour of rooms "to determine whether [the student] had left any bombs" in those rooms (*Complaint* ¶¶ 10, 11), she did in fact

clean the suicide site and she found a book bag nearby, which she picked up. She was commanded by a deputy to put the bag back where she found it, "so she dropped it on the floor." *Complaint* ¶¶ 12, 13. When the bomb squad arrived Ms. Rothwell went home, to return later that night. *Complaint* ¶ 13. When she arrived back at LHS she watched the bomb squad detonate a pipe bomb that had been found in the backpack, and she was "shocked and frightened" thereby since "there may have been a bomb in the bag when she handled it." *Id.* This all occurred on December 4.

Ms. Rothwell remained on the scene that night and into the early morning hours of December 5, 2009, cleaning the suicide scene. At 1:00 a.m. on the 5th she was ordered by Mr. Green to clean the entryway to the school where soot remained from the pipe bomb detonation. *Complaint* ¶ 15. She did that and returned to the suicide scene at 2:00 a.m. to remove tissue, blood, plastic gloves and syringes. *Complaint* ¶ 16. She finished cleaning at 4:15 a.m. on December 5th. By then she was "emotionally distraught and physically ill." *Complaint* ¶ 16.

The *Opinion* reports that Superintendent Green "ordered" Ms. Rothwell to return the morning of December 5, 2009, between 7:30 and 8:00. Ms. Rothwell assisted with coffee and cookies for students, parents and staff members seeking the assistance of grief counselors that were provided by the NMFSD. *Complaint* ¶ 17. She was also asked to "guard

the school gates." *Id.* Finally, Ms. Rothwell contends that for an undefined period of time, students brought items to the scene which she was ordered to remove. This too "was extremely emotionally disturbing to [Ms. Rothwell]." *Complaint* ¶ 18.

From the facts as stated in the *Opinion* and the *Complaint* Ms. Rothwell performed the tasks assigned to her by her superiors, all of whom were also trying to deal with a horrible event, over a period of less than 24 hours. There was no other description of Ms. Rothwell's duties for the NMFSD after December 5, 2004, other than *Complaint* ¶ 18.

Ms. Rothwell filed suit against the District and Mr. Green alleging claims for "intentional and negligent infliction of emotional distress" as a proximate result of the District's actions. The Trial Court dismissed Ms. Rothwell's claims under CR 12(b)(6) since those claims were precluded under the exclusivity provisions of Washington's Industrial Insurance Act, RCW 51.04.010. Ms. Rothwell appealed.

Ms. Rothwell admits the unsettled state of Washington law:

> Neither party cites a court decision which is directly on point or dispositive. This is a case of first impression involving unusual facts which do not fall neatly into typical IIA cases. The Washington Supreme Court has not ruled on a similar fact pattern.

Reply Brief of Appellant, p. 2. She argued that the case "closely resembles a discrimination/harassment case of supervisor conflict" (*Id.*) and followed

that line of reasoning. Yet if this argument is adopted, then only if the activity was itself outside the purview of the Act could the majority's decision be consistent with Washington law.

The majority of the Court of Appeals *agreed* with the Trial Court in that Ms. Rothwell's claimed injury did occur "within the course of her employment." *Opinion,* pp. 7-8. Respondents take no issue with that result. However, the majority's decision that Ms. Rothwell's resulting PTSD was not an "industrial injury" under the IIA is significantly flawed. Two judges of the Court of Appeals ruled that "Ms. Rothwell's PTSD is not an injury or occupational disease under the Act" because, according to those two judges, (1) the PTSD did not result from a *single* traumatic event; (2) the trauma did not *immediately result* in the PTSD (*Opinion,* p. 13). To support this erroneous finding the majority relied upon Ms. Rothwell's discrimination case citations.

Specifically, the majority ruled that Ms. Rothwell's condition "*could have* resulted from the stress of cleaning up the suicide scene, searching for bombs, or discovering that a bag she had handled might have contained an explosive device." The majority made sure it mentioned that "Ms. Rothwell also indicates that being ordered to clean up items left by students . . . each night for several days . . . was "extremely emotionally disturbing" to her. *Opinion,* p. 11; *Complaint* ¶ 18, a brief yet expansive

allegation which resulted in a safety net for the majority's *Opinion.* Arguably, the *Opinion* leaves no room for stress-related injury under any circumstances.

The District and Mr. Green respectfully submit that the Trial Court Order dismissing Ms. Rothwell's claims must be reinstated. The decision of the majority of the Court of Appeals so severely limits "traumatic *event*" that the remedial purpose of the IIA is frustrated. Ms. Rothwell's alleged PTSD is the result of a series of related tasks that she undertook in the aftermath of the tragedy of December 4, 2004. The majority's reliance upon the cumulative nature of the "tasks," performed over a period of more than one calendar day, to support a finding that Ms. Rothwell's alleged PTSD was not the result of a "traumatic event" is simply contrary to existing law. Perhaps more importantly, the holding that a series or related "tasks" performed over a short, defined period of time, cannot be an industrial injury under the IIA frustrates the entire purpose of the IIA.

The confusion of "tasks" and "a few days" with the requirement of a "sudden or tangible happening" require this Court to address the rule of this case and its potential impact on pending and future IIA claims.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED.

This case involves an issue of substantial public interest that should be determined by the Washington Supreme Court. RAP 13.4(b)(4).

The underlying case involves the reach of the remedial nature of the IIA and its exclusive jurisdiction over industrial injury claims. The majority of the Court of Appeals has significantly limited that remedial reach – the liberal construction of the Act – by proclaiming that any "event" which is not instantaneous cannot result in industrial injury.

Second, the majority's *Opinion* made definite findings of causation exceeding the role of the appellate court in a *de novo* review of an order dismissing a case under CR 12(b)(6). The actions of the majority in making those conclusive findings are in clear conflict with existing Supreme Court and Court of Appeals case law. RAP 13.4(b)(1) and (b)(2).

The majority Court of Appeals *Opinion* herein is completely inconsistent with the remedial nature of the IIA and the facts of the case as pleaded. The claimant pleaded exposure to a horrific event and immediate reaction. An exception to the exclusive jurisdiction of the IIA cannot thereafter be carved out because the exposure continued for "a few days."

1. The Majority Decision Confuses Ms. Rothwell's Continuing Tasks And Symptoms With What Is An Easily Identifiable "Traumatic Event".

For almost a century Washington law has recognized the requirement of a "traumatic" event as the first element of the industrial injury inquiry.

> The words in the act of 1927, defining injury, referring to a sudden and tangible happening of a traumatic nature, producing an immediate or prompt result . . ..

Higgins vs. Department of Labor & Industries, 27 Wn.2d 816, 820, 180 P.2d 559 (1947), denying coverage for a claimed emphysema which might have been exacerbated by working conditions while relying on coronary and other "insidious" disease cases. Early on in other cases a "sudden event" such as exertion allowed a finding that the injury complained of, being a heart attack, as an "industrial injury." See *Northwest Metal Products vs. Dep't of Labor & Industries,* 12 Wn.2d 155, 120 P.2d 855 (1942), and *Guy F. Atkinson Co. vs. Webber,* 15 Wn.2d 579, 131 P.2d 421 (1942), cited in *Higgins vs. Dep't,* supra at 561-562. This confusion was erased when *Northwest Metal Products* and *Guy F. Atkinson* among other cases were overruled in *Windust vs. Dep't of Labor & Industries,* 52 Wn.2d 33, 39, 323 P.2d 241 (1958), wherein this Court recognized the language of RCW 51.08.100 as requiring a "happening of a traumatic nature" or a "matter of notoriety." The "heart attack" cases and the cases cited by Ms. Rothwell are consistent – repeated exposure over an extended period of time. But Ms. Rothwell pleaded the required "happening" and "matter of notoriety" and that is where her claim fails the CR 12(b)(6) test.

There is no question that PTSD can be compensable under the IIA. See WAC 296-14-300(2). Mental conditions caused by exposure to a

single traumatic event are considered "injuries" under the IIA. These respondents submit that a student suicide and the initial exposure to it is shocking – in itself a single "event." There is simply no Washington case law which makes such an allowance and yet that is the overwhelming fact of this case and the very foundation of Mr. Rothwell's claims.

In order for Ms. Rothwell's claimed injury to be compensable under the Act, Washington case law requires that the trauma which is relied upon as the "sudden and tangible happening," whether physical or emotional, must be "of some notoriety, fixed as to time and susceptible of investigation." *Lehtinen vs. Weyerhaeuser Co.*, 63 Wn.2d 456, 458, 387 P.2d 760 (1963). Here the majority of the Court of Appeals reasoned:

> Her condition could have *resulted* from the stress of cleaning up the suicide scene, searching for bombs, or discovering that a bag she had handled might have contained an explosive device. Ms. Rothwell also indicates that being ordered to clean up items left by students . . . each night for several days . . . was "extremely emotionally disturbing" to her. p. 6.
>
> . . . Ms. Rothwell's mental condition was not the result of exposure to a single traumatic event or a sudden and tangible happening of a traumatic nature. Nor did the trauma produce an immediate and prompt result.

Opinion, p. 11. By focusing on the *series* of incidents, the majority apparently assumes that none of those individual incidents could constitute a "sudden event." This ignores the central fact of the entire tragedy: that a student that Ms. Rothwell knew committed suicide. She was involved in

the immediate aftermath so her initial exposure to it was the "event of some notoriety, fixed as to time and susceptible of investigation." *Lehtinen vs. Weyerhaeuser,* 63 Wn.2d at 458.

But again, it must be noted that the majority did find the activity in which she was engaged was "in the course of her employment" even though the circumstances were extraordinary. *Opinion,* pp. 7-8. It was the sequential activity that formed the basis of the majority *Opinion* and not the event of the suicide or her initial exposure to the suicide. Regardless, our Courts have recognized the "repeated trauma doctrine" for decades.

> The repeated trauma doctrine which had its origin in England [in 1340] . . . is widely accepted in this country. *Cooper v. Department of Labor and Industries,* 49 Wn.2d 826, 307 P.2d 272, is cited as reaching a contrary result. It was held therein that a series of static electrical shocks extending over an indefinite period of time did not constitute an industrial injury under RCW 51.08.100. We do not accept this case result as authority for the view that one or more electrical shocks, or other repeated traumata for that matter, occurring at a definite time and producing disability may not be a compensable industrial injury. In the first place, the indefinite period referred to in the Cooper case was almost three years in duration, thus in fact, the law of the case is encompassed by the rule that the cumulative effect of long-continued routine and customary duties does not constitute an industrial injury.
>
> . . .
>
> . . . It is accepted that a constituent part of definition includes the condition that the happening must have produced an immediate or prompt result. Although this court has had no occasion to circumscribe meaning in a case of this nature, nevertheless a prime test is that of causal relationship between a physical condition and a

> happening. It is not necessarily to be computed by punching a time clock, for fortitude and an indomitable spirit which delay the seeking of medical help are not strangers to the medical field. This, if the medical testimony established, in terms of probability, a causal relationship between appellant's back condition and the jolting he endured on October 3, 1958, then we do not hesitate to state that any resulting disability constituted an industrial injury under RCW 51.08.100.

Lehtinen vs. Weyerhaeuser Company, 63 Wn.2d 456, 459, 387 P.2d 760 (1963). As such, a series of related activities that occur within the scope of employment, over a relatively short period of time, constitute a "traumatic event." In the instant case, the *Complaint* makes it clear that Ms. Rothwell was shocked by her initial exposure to the tragedy of December 4, 2004, and that her alleged PTSD is the result of her response and a single "event."

Ms. Rothwell's *Complaint* admits that she was "distraught and upset" almost immediately after finding out that there had been a suicide and she sought the quiet of her automobile to compose herself. That alone shows that she was significantly impacted by the student's act. Within the next 12 hours she continued to be "distraught" and even experienced physical illness. *Complaint* ¶¶ 8, 10, 15, 16. There is no more clear admission of the impact of that gruesome event than the *Complaint's* description of her immediate reaction, and yet the majority hung its decision on her continued tasks "for several days thereafter." *Complaint* ¶

18. According to the majority, if the circumstances giving rise to the claim are somewhat continuing in nature that alone requires a finding, *as a matter of law,* that the claimed injury is not within the exclusive jurisdiction of the Act – regardless the immediate impact on the claimant.

The majority's reliance on *Boeing co. vs. Key,* 101 Wn.App. 629, 5 P.3d 16 (2000) and *Snyder vs. Medical Service Corporation of Eastern Washington,* 98 Wn.App. 315, 988 P.2d 1023 (1999) is misplaced. As pointed out in the dissent, those claimants had been subjected to repeated unwanted behaviors by either a co-worker or supervisor for a months-long period of time. There was no evidence that the *initial* contact was so offensive that the claimant became ill or otherwise had to seek solitude to composer herself. Here, within the first 12 hours, Ms. Rothwell became both physically and emotionally sick. Under the analysis in *Lehtinen vs. Weyerhaeuser Company,* 63 Wn.2d 456, 459, 387 P.2d 760 (1963), Ms. Rothwell's condition was compensable under the Act.

An objective reading of the *Complaint* confirms that the "sudden and tangible happening of a traumatic nature" could be only either the suicide itself and its immediate aftermath or more appropriately Ms. Rothwell's initial exposure to that suicide. After her initial exposure Ms. Rothwell became "very distraught and upset." *Complaint* ¶ 10. As the *dissent* rightly reflects, if Ms. Rothwell had merely left after the first day,

her claim would have been covered under the Act as a single, traumatic injury. *Dissent,* p. 2.

It can rightly be presented that Ms. Rothwell's reaction was objectively reasonable in the face of a tragic and gruesome situation. In *Boeing* and *Snyder* there was simply no one, singular "traumatic" event. In Ms. Rothwell's case there most certainly is, and she reacted to it almost immediately and continued to experience that reaction for the next "several days". Because the initial reaction was consistent over the next few days, the majority's approach requires us to consider the entire string of events over days, weeks or months before we are allowed to determine whether an event was "sudden" or "traumatic." If the "event" is diluted by time it loses the characteristic of being an "event" in the first place.

> Similarly here, Ms. Rothwell's PTSD did not result from a single traumatic event; rather, it resulted from a series of incidents over a period of a few days.

Opinion, p. 13. Without explanation the majority ignores Ms. Rothwell's reaction to the suicide until *all* relevant time has passed. It is only in this analysis that Ms. Rothwell's case can fit within the *facts* of *Boeing* and *Snyder.* With all respect due to the majority, the *Opinion* is not logical.

Writing a precise dissent, Judge Kulik recognized that the "[Industrial Insurance] Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all

covered employees injured in their employment." *Dissent,* p. 1; citing *Dennis vs. Dep't of Labor & Industries,* 109 Wn.2d 467, 470, 745 P. 2d 1295 (1987) and RCW 51.12.010.

In taking issue with the majority decision Judge Kulik recognized:

> Here, the mental condition resulted from cleaning up brain matter, bone, blood, and medical supplies after a student committed suicide by shooting himself in the head. Ms. Rothwell's physical and mental responses occurred suddenly, were tangible, and produced immediate results.

Dissent, p. 1. Judge Kulik likewise recognized the extraordinary circumstances that all school personnel were working under.

> Whether the school administrators asked, directed, instructed or ordered Ms. Rothwell to assist with these duties does not impact her entitlement to coverage under the Act. The school administrators were dealing with a tragic event and asked for Ms. Rothwell's assistance. Unlike cases of dysfunctional or harassing employee-employer relationships, here the administrators sought the help of Ms. Rothwell. Ms. Rothwell's complaint does not allege that she experienced post-traumatic stress disorder . . . because of harassment or discrimination by school administrators.

Dissent, p. 2. Consistent with the decisions in *Boeing Co, vs. Key,* supra, *Snyder vs. Medical Services Corp.,* supra, and *Wheeler vs. Catholic Archdiocese of Seattle,* 65 Wn.App. 552, 829 P.2d 196 (1992), *rev'd on other grounds* 124 Wn.2d 643, 880 P.2d 29 (1994) and all cited by the majority, Judge Kulik wrote:

> These cases point out that conflicts with supervisors or harassment by supervisors do not constitute an industrial injury. And Ms. Rothwell does not assert either a conflict relationship or harassment. She does not claim the kind of "rude, boorish, overbearing behavior of a supervisor" that occurred for over 10 months in *Snyder* or the harassment in *Wheeler* or *Boeing.*

Dissent, p. 4. Judge Kulik then demonstrates the appropriate analysis through Board of Industrial Insurance Appeals decisions. *Dissent,* pp. 4-6. One – *In Re Michelle D. Glen* – sp ecifically involved an employee's reaction to a suicide. "The Board concluded that *hearing* of [the deceased's] suicide was an industrial injury, a sudden and traumatic event occurring during the course of Ms. Glenn's employment." *Dissent,* p. 5. There is absolutely no distinction to be drawn here. Hearing of a suicide was an industrial injury – a "traumatic event."

The determination of what qualifies as an "industrial injury" or "occupational disease" under the IIA simply cannot be limited by the fact of a sequence of work-related tasks over a rather short period of time when there is an objectively identifiable, discernable "happening of a sudden and tangible nature." What happened after that initial exposure does not erase the "trauma" or "happening." See *Sharpe vs. American Tel. & Tel. Co.,* 66 F.3d 1045 (9th Cir. 1995), finding that the IIA included a claim based on multi-day stress. It is the event itself and then *the claimant's reaction* to the initial event that is important, and not the

Court's consideration of the exposure beginning-to-end. If the claimant reacted to a discernable event in an objectively reasonable manner then the claimed injury is covered by the IIA. See *In Re: Daniel Heassler,* BIAA Dec., 89 2447 & 89 2448 (1990).

The Court of Appeals majority has strayed from long-standing Washington law that a "single traumatic event" may in fact be a series of sequentially connected events, or "repeated traumas." There simply is no recent pronouncement which allows the application of that to a "shock" or other trauma when making a determination of "industrial injury" under the Washington Industrial Insurance Act.

2. The Court of Appeals Cannot Make Factual Determinations When Reviewing A Rule 12 Motion.

The purpose of a CR 12(b)(6) motion is to test the legal validity of the plaintiff's pleading – simply stated, has the Plaintiff pleaded herself into the exclusive jurisdiction of the IIA? The appeal of a ruling on a Rule 12(b)(6) motion is not a vehicle by which an appellate court can determine, as a matter of law, that the defense of IIA exclusivity is not available. Yet in this case the majority held:

> . . . Ms. Rothwell's PTSD *did not result* from a single traumatic event; rather, *it resulted* from a series of incidents of a period of a few days. Furthermore, the trauma *did not immediately result* in Ms. Rothwell's PTSD. Therefore, *we conclude* that Ms. Rothwell's PTSD is not an injury or occupational disease under the Act and her claims against

> the District are not barred by the Act's exclusive remedy provision.

Opinion, p 13. (italics added). This sweeping statement causally relates Ms. Rothwell's claimed injuries to the "series of incidents" without proof, and at the same time completely vaporizes the jurisdictional defense otherwise available to NMFSD and Mr. Green at trial. Such questions are properly for a jury and are not the subject of final determination in a CR 12 motion. The Superior Court is the only court authorized by the constitution to resolve this question of fact. See *Fitzgerald vs. Hopkins,* 70 Wn.2d 924, 928, 425 P.2d 920 (1967).

The only issue before the trial judge on a motion to dismiss for failure to state a claim is whether it can be said that that is no state of facts which plaintiff can prove entitling her to relief under that claim. *Contreras vs. Crown Zellerbach Corp.,* 88 Wn.2d 735, 565 P.2d 1173 (1977). Since the Court of Appeals reviews the Trial Court's decision *de novo,* it should have no greater authority than the Trial Court. The Court of Appeals must confine itself to the pleadings and if the "facts" alleged might entitle the plaintiff to relief, the complaint is sufficient and the dismissal must be reversed. *Stidham vs. Dept. of Licensing,* 30 Wn.App. 611, 637 P.2d 970 (1981). The majority *Opinion* herein specifically extinguishes any defense that could be raised regarding Ms. Rothwell's claimed PTSD and its

relation to the "traumatic event." A jury could very well be instructed on that defense. If the jury finds that the claimed injury is related to an identifiable "sudden and tangible happening" then the jurisdictional defense succeeds and the IIA is the exclusive means of remedy.

While proof of the "happening" is generally a legal fact question as opposed to a medical fact question, proof of the result requires a physician's opinion that the incident which occurred during employment, more likely than not, was a contributing factor. *Louderback vs. Dep't of Labor & Industries,* 14 Wn.App. 931, 935-936, 547 P.2d 889 (1976). The majority *Opinion* causally relates Ms. Rothwell's claimed PTSD to the so-called "series of incidents" cited by the majority. There is no room thereafter for the defense to challenge that finding. The "causation" element of Ms. Rothwell's claims has been removed from jury consideration by the Court of Appeals majority *Opinion.*

E. CONCLUSION

"The unique and disturbing facts of this case set it apart from any other cases cited." *Reply Brief of Appellant,* p. 7. Yet the *Complaint* itself alleges that Ms. Rothwell suffered an immediate reaction to the news of a terrible event, a "matter of notoriety." The majority significantly limited the remedial reach of the IIA when it reasoned that repeated tasks *after* the initial shock of an event dilute and indeed erase the "single traumatic"

nature of the event itself. Ms. Rothwell suffered an "industrial injury" on December 4, 2004, and she pleaded that in her *Complaint.* The Trial Court was correct and its decision should be reinstated.

At the very least, if one cannot discern from the pleading which one or one of several events may have caused the injury, then it is a question of fact as to whether this was an industrial injury or not. The majority went too far when it ruled that Ms. Rothwell's PTSD condition was the "result" of participating in various tasks over a few days.

For these reasons, the Respondents respectfully submit that the majority *Published Opinion* in this case should be reversed and the decision of the Trial Court should be reinstated.

DATED this 21st day of May, 2009.

EVANS, CRAVEN & LACKIE, P.S.

MICHAEL E. McFARLAND, #23000
PATRICK M. RISKEN, #14632
Attorneys for Respondents Nine Mile Falls School District and Michael Green

CERTIFICATE OF SERVICE

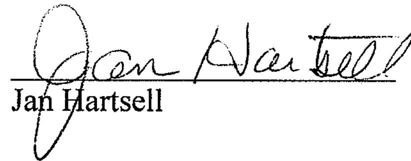
The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the below date, I mailed a true and correct copy of the following document(s):

- Petition for Discretionary Review to the Supreme Court

First-Class Mail, postage paid, to the following:

William J. Powell
Powell, Kuznetz & Parker, P.S.
Rock Point Tower
316 W. Boone Ave., Ste. 380
Spokane, WA 99201-2346

Dated this 21st day of May, 2009.



Jan Hartsell