

No. 36972-9-II

**IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON**

CATHERINE BAYLOR, individually,
Appellant,

vs.

LESLIE BEAN, individually and JOHN DOE BEAN, and the marital
community composed thereof, and ABSOLUTELY CLEAN
CLEANING SERVICE, LLC,
Respondents.

OPENING BRIEF OF APPELLANT CATHERINE BAYLOR

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I. ASSIGNMENT OF ERROR

No. 1. The trial court erred in granting summary judgment dismissal of Baylor's claims.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

No. 1. The trial court erred in finding that Baylor's L&I claim was her "exclusive remedy." (Assignment of Error No. 1)

No. 2. The trial court erred in granting summary judgment because there are genuine issues of material fact regarding whether Hohbein was acting within the course of her employment. (Assignment of Error No. 1)

III. STATEMENT OF THE CASE

On February 18, 2005, Appellant Catherine Baylor ("Baylor") was a front-seat passenger in a vehicle driven by co-worker Leslie Hohbein ("Hohbein").¹ CP 263 (May Deposition at 10:6-18). Baylor and Hohbein were **on their lunch break**² and had just purchased food at McDonald's. CP 268-69 (Hohbein Deposition at 7:24 – 8:5). While they were eating, they received a call from their employer, Respondent Absolutely Clean Cleaning Service ("ACCS"), and were instructed to return to the office to pick up a co-worker. CP 270-71 (*Id.* at 9:25 – 10:7). Once the co-worker, JoAnn May ("May"), was in the car, she asked to return to McDonald's to

¹ During oral argument before the trial court, Hohbein was inadvertently referred to as "Ms. Bean." *See, e.g.*, RP 3:7.

² As employees of ACCS, Baylor and her fellow co-workers **did not get paid for time spent at lunch**. CP 265 (May Deposition at 17:8-23); CP 281 (Baylor Deposition at 86:5-7).

get lunch for herself. CP 275 (Baylor Deposition at 20:1-25).

While driving to McDonald's the second time, Hohbein ran a red light and was involved in a motor vehicle collision on Highway 16 near Gig Harbor. CP 272 (Hohbein Deposition at 11:19-22); CP 276 (Baylor Deposition at 23:4-12). At the time of the collision, **both Hohbein and Baylor were still eating.** CP 262 and 263-64 (May Deposition, at 8:10-20 and 10:21 – 11:4); CP 276-77 (Baylor Deposition at 23:25 – 24:6).

Baylor testified that the collision occurred over her lunch break, not on the way to a jobsite:

Q Exhibit No. 1, Section 18, where it states car accident with company car on the way to next job, I want to ask you, at the time of the collision, were you actually on the way to a next job?

A No.

Q Where were you going at the time of this collision?

A **To finish our lunch, our lunchtime period.**

Q And you were still on your lunch break?

A **Yes.**

CP 280 (Baylor Deposition at 85:17-25) (emphasis added).

A (cont.) So you keep asking me over and over again, was I at work, and then I say I was at work and then I say I was not at work, all that means to me, no matter how many different ways you ask me, frankly, is, I was working for Absolutely Clean when it happened. When the accident occurred

itself, **I was on lunch duty.** The accident itself. You know what I'm saying? **But to me, my interpretation and my mind, I was still at work.** You understand what I'm saying?

Q I'm asking the question because you have indicated in your Complaint that you filed in this lawsuit that you were not on the job at the time. And the forms that I'm showing you indicate that this was an on-the-job injury.

A Okay, so now I see what you're saying. Okay. When I filed this lawsuit and I said I wasn't on the job this time, when I said I wasn't on a job, I meant I wasn't cleaning a house. That's what on the job means.

Q Okay. That's fair. I'm just trying to get an understanding.

A And I'm trying to let you know my clarification. When I filed this claim, I'm trying to let him know I wasn't cleaning a house, I wasn't scrubbing a floor, I wasn't doing a light fixture. **I was on my lunch break,** eating my McDonald's, and this girl ran a red light.

CP 278-59 (Baylor Deposition at 58:5 – 59:5) (emphasis added).

The collision caused Baylor to suffer serious physical injuries, including a strained lower back, upper back, and shoulder. CP 48.

Although Baylor initially filed an L&I claim to cover medical treatment for her injuries and wage loss, on May 25, 2006, she submitted a Third Party Election Form to the Department of Labor and Industries through her attorney. CP 282 (Baylor Deposition at Deposition Exhibit 9).

The Respondents never disputed that the Department received Ms. Baylor's election form. The Department of Labor & Industries later filed a notice of statutory interest in recovery, but declined to intervene in the subject action.³ CP 309.

On October 16, 2007, the Respondents moved for summary judgment dismissal of Baylor's claims, arguing that ACCS was immune from suit under Washington's Industrial Insurance Act ("IIA") and that the suit was barred by the doctrine of judicial estoppel.⁴ CP 197-205. Baylor responded on November 5, 2007, arguing that there were genuine issues of material fact regarding whether Hohbein was acting within the course of her employment when Baylor was injured, that Baylor was permitted under the IIA to bring a third-party claim against Hohbein, and that the doctrine of judicial estoppel did not apply. CP 248-55.

A hearing was held on the Respondents' motion on November 8, 2007. During the hearing, **counsel for the Respondents conceded that**

³ The trial court struck correspondence with the Department confirming its declination and ordered that the documents be removed from the court's file. RP 24:1 – 30:16; CP 306; CP 283-84. If the Respondents choose to dispute the Department's knowledge of Baylor's third-party action or the Department's declination to intervene, Baylor reserves the right to assign error to the trial court's decision to strike the documents, and to request that the clerk's papers be supplemented with the documents stricken by the trial court.

⁴ The Respondents' summary judgment motion also included a claim that the Department of Labor & Industries was not given notice of Baylor's third-party action, but the Respondents did not address the issue at the November 8, 2007 hearing. RP 3:20 – 14:12.

there was conflicting testimony regarding whether Hohbein was acting within the course of her employment. RP 21:14-15. After hearing oral argument from both parties, the trial court ruled:

[THE COURT] The Defendant's [sic] Motion for Summary Judgment is granted. **I find that there are no genuine issues of material fact that exist.** The Plaintiff applied for and received L&I benefits for 18 months, 52.12, 52.32, 51.24. **It's an exclusive remedy.**

RP 23:12-18 (emphasis added). *See also* CP 307-08.

The trial court went on to discuss the Respondents' motion to strike portions of Baylor's evidence. The trial court struck L&I's correspondence stating that it did not wish to intervene in Baylor's third-party action, and L&I's telephone log documenting phone calls from ACCS regarding Baylor's lawsuit. RP 24:1 – 30:16; CP 306; CP 283-84.

Baylor now appeals the trial court's grant of summary judgment.

IV. ARGUMENT

A. **THIS COURT MUST REVIEW THE TRIAL COURT'S DECISION DE NOVO, VIEWING THE FACTS IN A LIGHT MOST FAVORABLE TO BAYLOR.**

This Court is required to review the trial court's decision on summary judgment *de novo*, and must perform the same inquiry as the trial court. *Owen v. Burlington Northern and Santa Fe Railroad Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005). The Court must examine the

pleadings, affidavits, and depositions before the trial court and “take the position of the trial court and assume facts [and reasonable inferences] most favorable to the nonmoving party.” *Id.*

B. THE TRIAL COURT ERRED IN FINDING THAT BAYLOR’S L&I CLAIM WAS HER “EXCLUSIVE REMEDY.”

RCW 51.24.030 specifically allows an injured worker to “elect” to seek damages from a third party when that third party becomes liable for the worker’s injuries. RCW 51.24.030(1). There is strong public policy favoring third-party actions, which allow the Department of Labor and Industries to obtain reimbursement of any benefits paid on the injured worker’s claim. *Evans v. Thompson*, 124 Wn.2d 435, 437, 879 P.2d 938 (1994). Consequently, a worker is authorized to both make a claim for worker’s compensation benefits **and** bring a third-party claim:

The injured worker or beneficiary shall be **entitled to the full compensation and benefits** provided by this title **regardless of any election** or recovery made under this chapter.

RCW 51.24.040 (emphasis added).

If a worker elects to pursue a third-party claim and simultaneously accepts workers’ compensation benefits, **the only consequence is that the worker must reimburse the Department from any third-party recovery:**

- (1) If the injured worker or beneficiary elects to seek damages from the third person, any recovery made shall be distributed as follows: . . .
 - (b) The injured worker or beneficiary shall be paid twenty-five percent of the balance of the award . . .
 - (c) The department . . . shall be paid the balance of the recovery made, but only to the extent necessary to reimburse the department . . . for benefits paid . . .
 - (d) Any remaining balance shall be paid to the injured worker or beneficiary . . .

RCW 51.24.060. *See also Washington Ins. Guaranty Assoc. v. Dept. of Labor and Industries*, 122 Wn.2d 527, 530-31, 859 P.2d 592 (1993) (if a worker elects to sue, the Department is entitled to a lien against any recovery).

An injured worker is permitted to bring a third-party action against a negligent co-worker when the negligent co-worker **is not acting “in the course of his employment at the time the injury occurs.”** *Evans*, 124 Wn.2d at 444. Whether a co-worker is acting within the scope of employment is usually **a question for the jury.** *Id.*

In the present case, Baylor elected to bring a third-party action against her negligent co-worker, Hohbein, as permitted under RCW 51.24.030(1). CP 282. Baylor acknowledges that the Department of Labor & Industries has a right of reimbursement from any verdict or settlement in her case. Thus, if Hohbein was not acting within the course

of her employment when Baylor was injured, then Washington law does **not** limit Baylor's remedy to worker's compensation benefits, and the trial court should not have dismissed Baylor's third-party action. *See Evans*, 124 Wn.2d at 444. *See also* Part C, *infra*.

Baylor was injured while she and Hohbein ate lunch in a vehicle off their jobsite. Baylor and Hohbein were not on their way to a jobsite, but to McDonald's to get another co-worker lunch. At the time Baylor was injured, Hohbein was **still eating—literally putting food into her mouth at the moment of impact**. CP 262 and 263-64 (May Deposition, at 8:10-20 and 10:21 – 11:4); CP 276-77 (Baylor Deposition at 23:25 – 24:6). ACCS did **not** compensate its employees for their lunch breaks. To the extent that witness testimony regarding Hohbein's activities at the time of the collision differed, there were credibility issues present which the trial court could not have determined on summary judgment. *See Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963). Viewing the facts in a light most favorable to Baylor, there was a genuine issue of material fact present regarding whether Hohbein was acting in the course of her employment when Baylor was injured.

Because a material issue of fact was present, the trial court should have concluded that Baylor's third-party claim could not be barred as a matter of law under the IIA. The trial court should have reserved ruling

until the jury had made factual findings regarding Hohbein's course of employment, rather than dismiss Baylor's claims outright. The trial court erred when it found that worker's compensation benefits provided Baylor's "exclusive remedy." The trial court's November 8, 2007 decision must be reversed and Baylor's claims reinstated for further consideration by the jury.

C. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACT REGARDING WHETHER HOHBEIN WAS ACTING WITHIN THE COURSE OF HER EMPLOYMENT.

Generally, the "going and coming" rule denies industrial insurance coverage to workers who are injured while commuting to and from work. *Belnap v. Boeing*, 64 Wn. App. 212, 221, 823 P.2d 528 (1992). In Washington, when an employee has a definite place and time of work, and the time of work does not include the lunch hour, the same exceptions apply to the employee's lunch-time injuries as in other "going and coming" cases. *Bergsma v. Dept. of Labor & Industries*, 33 Wn. App. 609, 616, 656 P.2d 1109 (1983). Thus, an employee who is injured while eating lunch in a vehicle off-premises is generally **not** within the scope of her employment. *Id.* See also RCW 51.32.015 (benefits provided during lunch only if injury occurs while on the jobsite and in the course of employment); RCW 51.36.040 (benefits provided during lunch only if

injury occurs while on the jobsite and in the course of employment).

In the present case, Baylor was injured while she and Hohbein ate lunch in a vehicle as they traveled to McDonald's to buy another co-worker lunch. ACCS did not compensate its employees for their lunch breaks. At the time Baylor was injured, Hohbein was **still eating**. Significantly, at oral argument on the Respondents' motion for summary judgment, defense counsel conceded that there was **conflicting testimony** regarding Hohbein's activities at the time of the collision. RP 21:14-15. Under these circumstances, the trial court should have viewed the facts in a light most favorable to Baylor and found that there was a genuine issue regarding whether Ms. Hohbein was acting within the scope of her employment. Because the trial court found to the contrary, even resolving credibility issues **against** Baylor, the trial court erred. The trial court's November 8, 2007 grant of summary judgment must be reversed and Baylor's claims reinstated for proper consideration by the jury.

V. CONCLUSION

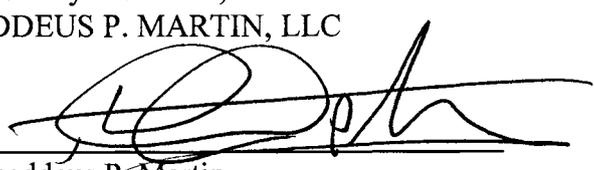
The trial court erred because it failed to view facts in a light most favorable to Baylor, the nonmoving party, and because it resolved credibility issues against her. The trial court made factual determinations that should have been left for the jury. The trial court also came to erroneous legal conclusions based on its improper factual findings.

Appellant Catherine Baylor respectfully requests that the Court reverse the trial court's November 8, 2007, order and remand her case for trial.

Dated this 4 day of February, 2008.

Respectfully submitted,
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By



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CERTIFICATE OF SERVICE

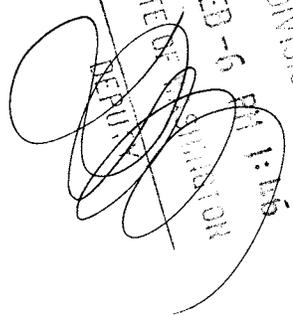
I HEREBY CERTIFY THAT I AM NOT A PARTY TO THIS ACTION AND
THAT I PLACED FOR SERVICE ON COUNSEL OF RECORD THE FOREGOING

DOCUMENT VIA LEGAL MESSENGER ON THE 5th DAY OF ~~DECEMBER,~~
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~~2007~~

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